

On December 19, 2006, Phenizie Burr, Jr., (“Plaintiff” or “Debtor”) commenced this adversary proceeding seeking to avoid the IRS’s tax lien on Debtor’s property as a preference pursuant to 11 U.S.C. § 547. Debtor’s complaint states that the IRS has a priority tax claim against Debtor for tax year 2005 and general unsecured claims against Debtor for tax years 1996 through 2001. Debtor alleges that on October 18, 2006, the IRS filed a Notice of Federal Tax Lien in the real estate records of Cobb County, Georgia based on income taxes, interest, and penalties owed by Debtor for tax years 1996 through 2001 and that such lien attached to

property of the estate. Specifically, Debtor alleges that the filing of the lien by the IRS violates § 547 in that it constitutes a transfer of interest in Debtor's property (1) for the benefit of a creditor (2) on account of an antecedent debt owed by Debtor (3) while Debtor was insolvent (4) within 90 days of the petition date (5) that allowed the IRS to receive more than it would have had the transfer not occurred. The IRS filed its answer on January 12, 2007, admitting the existence of the IRS's claims against Debtor and the filing of the subject lien within 90 days of the petition date, but denying that the filing of the lien constitutes a preference in violation of § 547. The IRS filed its Motion for Summary Judgment on January 23, 2007. Debtor has not filed a response to the motion for summary judgment and as a result, the motion is deemed to be unopposed.

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the non-moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). "The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going through the pleadings, that there exist genuine issues of material fact." *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other

evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

Though the IRS did not file a separate statement of material facts as required by the local rules, in its Answer to Debtor's Complaint, the IRS admitted to Debtor's allegations of fact surrounding the filing of the federal tax lien. The material facts are not in dispute and summary judgment is therefore appropriate.

Section 547 of the Bankruptcy Code states that a party "may not avoid [as a preference] under this section a transfer that is the fixing of a statutory lien that is not avoidable under section 545 of this title." 11 U.S.C. § 547(c)(6). Thus, a statutory lien must be avoidable under § 545 to be avoided as a preference under § 547. Pursuant to § 545 of the Code:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien--

(1) first becomes effective against the debtor--

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent.

Here, Debtor does not allege why the IRS's federal tax lien is avoidable under § 545; Debtor simply argues that the IRS's lien is avoidable as a preference under § 547.

Regardless, the subject lien does not fall within any of the circumstances in which a


statutory lien may be avoided as set forth in § 545. Though Debtor did allege that the lien was filed while Debtor was insolvent, a federal tax lien may not be avoided under § 545(1)(D) on the basis that the lien was filed *during* a debtor's insolvency. *In re Swafford*, 160 B.R. 246 (Bankr. N.D. Ga. 1993) (Bihary, J.); *Gillenwater v. I.R.S. (In re Gillenwater)*, 1996 Bankr. LEXIS 428 (Bankr. W.D. Va. 1996).¹ In *Swafford*, the debtor argued that an IRS tax lien was avoidable under § 545 because the lien attached while the debtor was insolvent. The court rejected the debtor's argument and held that § 545(1) was not to be interpreted so broadly and was intended only to render avoidable 'springing liens' that do not become effective *until* the debtor becomes insolvent. *Id.* at 248.

Even when construing the admitted facts in the light most favorable to Debtor, the Court concludes that the subject lien is not avoidable pursuant to § 545 and thus cannot be avoided as a preference pursuant to § 547. Summary judgment in favor of the IRS is therefore appropriate. Based on the foregoing, it is

ORDERED that Defendant's Motion for Summary Judgment is hereby
GRANTED. Judgment for Defendant shall be entered by separate order.

The Clerk is directed to serve a copy of this Order upon Plaintiff, counsel for Plaintiff, Defendant, counsel for Defendant, and the Chapter 13 Trustee.

IT IS SO ORDERED this the 9th day of April, 2007.


MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

¹ The IRS cites these cases on page 2 of its Motion.