IT IS ORDERED as set forth below:

James E. Massey

Date: December 19, 2012

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 11-86382
Georgetown Square II LLC,	CHAPTER 11
Debtor.	JUDGE MASSEY

ORDER DENYING DEBTOR'S MOTION FOR AUTHORIZATION FOR DEBTOR'S COUNSEL TO APPLY RETAINERS TO PREVIOUSLY AWARDED FEES AND EXPENSES

The Debtor, Georgetown Square II LLC, moves for authorization to permit its counsel to apply to previously awarded fees retainers funded by checks delivered to counsel prior to the filing of the petition but paid postpetition. Ameris Bank, a creditor secured by the Debtor's real property and by rents constituting cash collateral, opposes the motion. It contends that the presentments of the checks constituted unauthorized postpetition transfers of property of the Debtor's estate. The Debtor contends that the prepetition delivery of the checks was the only relevant transfer.

The facts are not disputed. On December 21, 2011, Georgetown Square II LLC delivered three checks to attorney David Bisbee, two of which were payable to The Law Office of David Bisbee for $15,000 and for $1,046, and one of which for $10,000 was payable to The Spears Robl Law Firm. On that same date, subsequent to the delivery of the checks, Georgetown Square II LLC filed this Chapter 11 case. The law firms deposited the checks, which cleared the Debtor's bank account on December 23, 2011. The law firms were subsequently approved as counsel for Georgetown Square II LLC as debtor in possession.

The source of the funds in the Debtor's bank account at the time the checks cleared were rents in which Ameris held a perfected security interest under an assignment of rents and a security deed, as the Debtor conceded in applying to use funds in that account to operate its business.

Ameris contends that the transfer of funds out of the Debtor's bank account on December 23 was an unauthorized postpetition transfer based primarily on *Barnhill v. Johnson*, 503 U.S. 393 (1992) in which the Supreme Court held that for purposes of determining whether a trustee had proved a preferential transfer under 11 U.S.C. § 547(b), a transfer made by a check occurs when the drawee bank honors the check.

In response, the Debtor points out that the Supreme Court was careful to limit its ruling in *Barnhill* to section 547(b). It contends that the question of when a transfer occurred is an issue of state law. And it argues that under Ga. Code Ann. §§ 11-3-203 and 11-4-201, the Debtor "transferred" the checks by delivering them to the law firms, that the bank on which the checks were drawn became the agent of the law firms and had no right to refuse to honor them and that this somehow effected a transfer of the property of Georgetown in the funds in its bank account.

Finally, Debtor cites *Quinn Wholesale, Inc. v. Northen*, 100 B.R. 271 (M.D.N.C. 1988), aff'd 873F.2d 77 (4th Cir. 1989) as support for the proposition that a prepetition delivery of a check for future services is not a postpetition transfer.

The Debtor's arguments are without merit. The property transferred that is at issue here is not the checks but rather the funds in the Debtor's bank account used to honor the checks. Those transfers took place postpetition. Ga. Code Ann. § 11-3-203, dealing with the transfer of an instrument, which includes a check, is inapposite because subsection (a) defines a transfer as delivery by a person other than the "issuer." The term "issuer" is defined in Ga. Code Ann. § 11-3-105(c) to mean "a maker or drawer of an instrument." The issuer of the check was Georgetown and therefore delivery of the checks to the law firms was not a transfer for purposes of section 3-203 of the Uniform Commercial Code. Furthermore, even if the law firms had obtained by transfer or negotiation checks issued by the Debtor to a third party, the only right they would have obtained under this section is the right to enforce the instrument.

It may be true that had the law firms presented the checks to the bank immediately after delivery, the bank would have had a legal obligation to pay them (assuming there were sufficient funds in the account to pay them - more on that later). Such an obligation would not have created, however, a lien in favor of the holders on, or otherwise caused a transfer of the funds in, the account of the Debtor or the funds in that account. Ga. Code Ann. § 11-3-408 ("A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.").

The *Quinn* case is likewise inapposite. It involved the delivery of goods to a debtor immediately prior to the filing of a bankruptcy petition in exchange for a check in the amount of $72,444.62. The check cleared postpetition. The trustee sued to avoid the payment of the check as an authorized postpetition transfer. The bankruptcy court ruled for the trustee, but the district court reversed. While the trustee had put forth "valid and persuasive arguments," the district court reasoned that "policy and equitable considerations" outweighed those arguments and that the interests of the estate and the underlying policies of the Bankruptcy Code would not be upset by construing the transfer as having taken place upon delivery of the check. *Quinn Wholesale*, 100 B.R. at 275. Further, "treating the debtor's checks as transfers comports with the commercial reality, and is consistent with the expectations of those trade creditors, like Quinn, whose willingness to continue doing business provides the debtor an opportunity to avoid bankruptcy." *Id.* The Fourth Circuit affirmed on the basis of the district court's decision.

All the *Quinn* case stands for is that delivering a check for over $72,000 to a vendor contemporaneously with accepting delivery of goods from the vendor and then filing bankruptcy very shortly thereafter before the check could clear was so unfair that Congress could not have intended that the transfer did not occur at the point of the exchange of the goods for the check. Nothing more, nothing less. The *Quinn* court did not have the benefit of the decision in *Barnhill*, and it seems unlikely that it would have reached the same result if the check had been written to the debtor's bankruptcy lawyer to pay for services yet to be rendered.

The underlying rational of *Barnhill* applies here, even though this is not an action to recover a preference:

> . . . receipt of a check gives the recipient no right in the funds held by the bank on the drawer's account. Myriad events can intervene between delivery and presentment of the

> check that would result in the check being dishonored. The drawer could choose to close the account. A third party could obtain a lien against the account by garnishment or other proceedings. The bank might mistakenly refuse to honor the check

Barnhill, 503 U.S. at 399. In other words, the mere delivery of a check by its issuer to a payee of that check is not a transfer of an interest in property of the issuer other than as to the paper or other object on which the check was written, because the delivery of the check, apart from any intrinsic value it might have, does not reduce the issuer's net worth or give the holder of the check any claim on the property of the issuer other than the right to enforce the check. But if a check, whenever delivered, is honored when the issuer is a debtor in bankruptcy, the payment of the check is, in the parlance of section 549, a "transfer of property of the estate."

This result is hardly unfair because the attorneys could have easily had the checks certified if there were sufficient funds in Georgetown's account to cover them. If there were insufficient funds as of the time of delivery, Debtor's argument would fall apart factually as well as legally. Its first operating report (Doc. No. 38) includes the December 2011 bank statement, which shows a deposit of $19,642.28 on December 21 and a balance of $28,541.28 at the end of the day, but there is no evidence to show that the two larger checks would have been honored had they been presented at the time they were delivered or thereafter prior to the filing of the petition at 4:31 pm on December 21, 2011.

Finally, Debtor's argument, if adopted, could encourage persons or companies about to file a Chapter 11 bankruptcy to make last minute prepayments for goods to be delivered or services to be performed postpetition and thereby finesse what would otherwise have been a possible issue with respect to use of cash collateral. Such gamesmanship would likely create

unnecessary controversy and could call into question the fitness of a debtor to be a debtor in possession, adding additional indirect if not direct costs to the estate.

For these reasons, Debtor's motion for an order permitting its counsel to apply the funds they received from cashing the checks at issue is DENIED.

In its response to the motion, Ameris requests a turnover of the retainers to it or the Debtor. The Debtor did not respond to this request. It and the law firms are directed to file a response within fourteen days of entry this order and show why the court should not order that the funds be paid directly to Ameris. In the meantime, the attorneys for the Debtor are directed to continue to hold the retainer funds in their respective trust accounts pending further direction from the court, provided that so long as the Debtor does not object, either or both firms may voluntarily turn over to Ameris the funds at issue, in which event the court should be notified of the status of this portion of the dispute.

The Clerk is directed to serve a copy of this order on David Bisbee, Michael Robl, counsel for Ameris Bank and the U.S. Trustee.

END OF ORDER