IT IS ORDERED as set forth below:

James E. Massey

Date: August 6, 2013

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 10-63241
Park at Briarcliff, Inc.,	CHAPTER 7
Debtor.	JUDGE MASSEY
Jason L. Pettie, Trustee,	
Plaintiff,	
v.	ADVERSARY NO. 12-5069
Clarence Hamilton,	
Defendant.	

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In his initial complaint in this adversary proceeding, Plaintiff Jason L. Pettie, in his capacity as Chapter 7 Trustee in the case of Park at Briarcliff, Inc. (hereafter the "Debtor"), sought to avoid pursuant to sections 547 and 549 of the Bankruptcy Code transfers allegedly

made by the Debtor to the then Defendant Diamond Contracting and Roofing LLC and to recover the amounts of avoided transfers.

On February 7, 2012, Plaintiff filed the first amended complaint, which eliminated certain transfers identified in the initial complaint and added new ones, resulting in a reduction of the total claim from $18,548.09 to $15,380. Like the initial complaint, Plaintiff's first amended complaint (in which Diamond Contracting and Roofing LLC was also the only named defendant) was served on Mrs. Barbara Hamilton as the agent for service of process for Diamond.

On February 8, 2012, Clarence Hamilton and Barbara Hamilton filed a response to the initial complaint, which the Court has treated as Mr. Hamilton's answer. The Hamiltons pointed out what Plaintiff should have discovered from the website of the Georgia Secretary of State, which was that Diamond was dissolved in 2007. Mr. Hamilton admitted that he was the real party in interest but asserted that he had dealt only with the Housing Authority of DeKalb County, Georgia. He further moved to dismiss this adversary proceeding for failure to state a claim upon which relief could be granted. The Court denied his motion in an order entered on March 29, 2012, which explained the nature of Plaintiff's claims and the possibility of an affirmative defense.

Thereafter, with court approval, Plaintiff filed a second amended complaint to formally add Mr. Hamilton as a defendant. It included as exhibits copies of the fronts and backs of checks alleged to be voidable transfers, which matched a list of those checks attached to the first amended complaint. It also added a few allegations about the role of the Housing Authority, which, though not essential to the claims made, may have been useful in explaining to Mr.

Hamilton its role in managing the Debtor's business. Mr. Hamilton did not respond to the second amended complaint.

On April 30, 2013, Plaintiff filed and served on Mr. Hamilton a motion for summary judgment along with a brief and a Statement of Material Facts Not in Dispute. In the motion Plaintiff asserts that he is entitled to a judgment in the amount of $21,480, plus prejudgment interest from the date of filing the complaint and plus all postjudgment interest as allowed by law from the date of entry of the judgment. That demand is not correct because the Trustee double-counted a check for $6,100 issued by the Debtor and cashed by Mr. Hamilton after Debtor filed bankruptcy. Debtor's maximum claim is for $15,380. Plaintiff's Statement of Material Facts Not in Dispute and his brief contain nothing to show why he is entitled to prejudgment interest.

On May 17, 2013, the Clerk through the Bankruptcy Noticing Center served on Defendant Hamilton an Order and Notice entered on May 15, 2013 explaining to him what he had to do in order to oppose the motion for summary judgment and to contest Plaintiff's statement of undisputed facts. Mr. Hamilton has not filed a response to the motion.

On July 31, 2013, Plaintiff filed a motion to dismiss Diamond as a defendant, and the Court granted that motion in an order entered on August 2, 2013.

A. Facts.

The following facts are not disputed.

Clarence Hamilton had an interest in a limited liability company called Diamond Contracting and Roofing, LLC. It was dissolved in 2007 and thereafter he operated his contracting business as a sole proprietorship using the name "Diamond Contracting." In 2009 and early 2010, Mr. Hamilton provided repair services at an apartment complex owned by the

Debtor and located in DeKalb County, Georgia, for which he delivered invoices to the Housing Authority for payment. As reflected in his answer, payment on those invoices was invariably late, and he had to contact the Housing Authority to prompt payment. Defendant's Answer, Doc. No. 6, p. 3.

On February 2, 2010, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The case was converted to a Chapter 7 case on August 25, 2010. Jason L. Pettie was appointed as trustee on August 26, 2010.

During the ninety-day period prior to February 2, 2010, Debtor issued five checks payable to Diamond Contracting, which Mr. Hamilton endorsed and deposited as shown in the table below, for work performed on Debtor's apartment complex.

Check Date	Check No.	Honor Date	Amount
Oct. 23, 2009	1383	Nov. 6, 2009	$260.00
Oct. 29, 2009	1403	Nov. 4, 2009	$4,500.00
Nov. 20, 2009	1449	Dec. 8, 2009	$225.00
Dec. 16, 2009	1518	Dec. 28, 2009	$800.00
Jan. 22, 2010	1575	Jan. 28, 2010	$3,495.00
Total			$9,280.00

Each check issued in 2009 paid debts owed by the Debtor to Mr. Hamilton for work he performed at the Debtor's apartment complex prior to the date of the check and prior to the due date on invoices he had submitted for payment.

Similarly, Debtor issued check no.1672 dated February 17, 2010, which was payable to Diamond Contracting and which Mr. Hamilton endorsed and deposited on February 22, 2010. Check no. 1672 paid invoices for work performed prior to February 2, 2010, the date on which

Debtor filed its bankruptcy petition. This Court did not authorize the Debtor to make that payment.

Mr. Hamilton may have thought that he was dealing with the Housing Authority and may have provided invoices to the Housing Authority, though neither side produced copies. But he has made no showing that he contracted with the Housing Authority other than, perhaps, as an agent for the Debtor.

In his affidavit attached to his brief in support of his motion for summary judgment, Plaintiff stated that the anticipated distribution in the case "will not be 100% of claims." Affidavit of Jason L. Pettie, p. 2, attached to Plaintiff's Brief in Support of Summary Judgment, Doc.34, p. 18. Thus, the unsecured claims filed in Debtor's case will not be paid in full.

B. Summary Judgment.

Pursuant to Fed. R. Civ. P. 56, made applicable by Fed. R. Bankr. P. 7056, a party's motion for summary judgment shall be granted by the court if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant must show that there are no "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The movant bears the burden of establishing that no genuine issue of material fact exists or showing an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. In addition, Bankruptcy Local Rule 7007-1(c) provides in part that "[f]ailure to file a response shall indicate no opposition to the motion." As indicated above, there is no undisputed material fact concerning Plaintiff’s claims.

C. Preference Claims.

In *In re Tanner Family, LLC,* 556 F.3d 1194, 1196-1197 (11th Cir. 2009), the Court of Appeals explained as follows the statutory basis for avoiding as preferences transfers of property made by a debtor.

> Section 547(b) of the Bankruptcy Code allows a bankruptcy trustee to "avoid any transfer of an interest of the debtor in property" that: (1) is "to or for the benefit of a creditor"; (2) is "for or on account of an antecedent debt owed by the debtor before such transfer was made"; (3) is "made while the debtor was insolvent"; (4) is made "on or within 90 days before the date of the filing of the petition"; and (5) "enables such creditor to receive more than such creditor would receive if the transfer had not been made." 11 U.S.C. § 547(b). The trustee must prove each element in order to show that a transfer is avoidable as a preference under § 547(b). See id. § 547(g); *In re Flooring Am., Inc*., 302 B.R. 394, 398 (Bankr.N.D.Ga.2003). . . .

Id. at 1196.[1]

(1) The transfers at issue were to, or for benefit of, Mr. Hamilton. He performed work on Debtor's property prior to February 2, 2010, giving rise to his claims against the Debtor for payment. The checks were drawn on Debtor's operating account, were made payable to Diamond Contracting, and were endorsed and cashed by Mr. Hamilton.

(2) The transfers were for antecedent debts.

> A debt is "antecedent" to the transfer sought to be avoided under § 547(b) if it is pre-existing or is incurred before the transfer. See In re Bridge Information Sys., Inc., 474 F.3d 1063, 1066-67 (8th Cir.2007); Matter of Cavalier Homes of Georgia, Inc., 102 B.R. 878, 886 (Bankr.M.D.Ga.1989); In re Western World Funding, Inc., 54 B.R. 470, 476 (Bankr.D.Nev.1985). Whether a debt is antecedent to the transfer at issue thus depends upon when the debt is incurred. See *In re MarkAir, Inc.*, 240 B.R. 581, 590 (Bankr.D.Alaska 1999) (" '[W]hen the debt was incurred' is the central question under § 547(b)(2)."). . . .

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[1] The initials "U.S.C." in the citation to the applicable statute (11 U.S.C. § 547(b)) stand for "United States Code."

> The Code does not expressly define when a debtor "incurs" a debt, however, the definitions of "debt" and "claim" are instructive. Under the Code, a "debt" is a "liability on a claim." 11 U.S.C. § 101(12). A "claim," in turn, is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. § 101(5)(A). By making the terms "debt" and "claim" coextensive, Congress has "adopt[ed] [ ] the broadest possible definition of 'debt.' " *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558, 564, 110 S.Ct. 2126, 2130, 2133, 109 L.Ed.2d 588 (1990), superseded on other grounds by Criminal Victims Protection Act of 1990, Pub.L. No. 101-581, § 3, 104 Stat. 2865 (quotation marks and citation omitted); see also *In re Chase & Sanborn Corp*., 904 F.2d 588, 595 (11th Cir.1990) ("It is established that 'debt' is to be given a broad and expansive reading for purposes of the Bankruptcy Code."). Accordingly, a debtor incurs a debt to a creditor when the creditor has a claim against the debtor, even if the claim is unliquidated, unmatured, unfixed, or contingent. See *In re Flooring Am.*, 302 B.R. at 400; see also *In re Mazzeo*, 131 F.3d 295, 302 (2d Cir.1997) ("[T]he term 'debt' is sufficiently broad to cover any possible obligation to make payment." (quotation marks and citation omitted)).

Id. at 1196-1197.

Mr. Hamilton doing business as Diamond Contracting had a right to payment from the Debtor each time he completed a repair job, task or project that it (directly or through the Housing Authority) employed him to do, even though the payment may have been due by agreement at a later date. Each such right to payment was a debt owed by the Debtor to Mr. Hamilton. As Mr. Hamilton conceded, the checks were delivered to him well after the due dates on his invoices, and he had to call the DeKalb Housing Authority to prompt payment. Mr. Hamilton argued, however, that "Pursuant to 11 U.S.C. § 547(c)(2)(A) Where the debt does not arise until after the payment is made, there is no antecedent debt to justify a preference action." Defendant's Answer, Doc. 6, p. 3. This argument is without merit. Section 547(c)(2)(A) is not concerned with the question of when a debt arises. The balance of the argument would be correct only if the debtor paid for work in advance, but in such a circumstance, there could be no preference as to the amount of the prepayment. Hence, the checks paid antecedent debts.

(3) The transfers were made while the Debtor was insolvent. Section 547(f) states "[f]or the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." 11 U.S.C. § 547(f). "The presumption requires the party against whom the presumption exists to come forward with some evidence to rebut the presumption, but the burden of proof remains on the party in whose favor the presumption exists." *Clay v. Traders Bank*, 708 F.2d 1347, 1351 (8th Cir. 1983) (quoting committee notes to section 547). Mr. Hamilton has not offered any evidence to rebut the presumption of insolvency.

(4) The transfers occurred during the preference period. The Debtor filed for Chapter 11 bankruptcy on February 2, 2010. Although this bankruptcy case was later converted to Chapter 7 on August 25, 2010, the preference period is measured from February 2, 2010, which is the date on which the petition under Chapter 11 was filed. *Vogel v. Russel Transfer, Inc*., 852 F.2d 797, 798-99 (4th Cir. 1988) (applying 11 U.S.C. §§ 547(b)(4), 348(a)). Mr. Hamilton cashed check no. 1403 on November 4, 2009, which falls within the preference period. The other checks were cashed afterwards, but prior to February 2, 2010.

The transfers were made at the points in time when Mr. Hamilton's bank honored each of the five checks identified in the table above, not the dates of the checks themselves or the dates of delivery to him. See e.g. *In re All American of Ashburn, Inc*., 95 B.R. 251, 252–53 (Bankr.N.D.Ga.1989); *In re Georgia Steel, Inc*., 38 B.R. 829, 832–34 (Bankr.M.D.Ga.1984). Thus, the prepetition transfers were made within the ninety-day preference period.

(5) Each transfer enabled Mr. Hamilton to receive more than he would have received if the transfer had not been made. To satisfy this element, Plaintiff had to show that Mr. Hamilton

received a greater amount than other creditors of his class would receive in a hypothetical Chapter 7 distribution.

> In determining the amount that an alleged preferential transfer 'enables [the] creditor to receive,' the creditor must be charged with the value of what was transferred plus any additional amount that he would be entitled to receive from a chapter 7 liquidation. The net result is that, as long as the distribution in bankruptcy is less than one-hundred percent, any payment 'on account' to an unsecured creditor during the preference period will enable that creditor to receive more than he would have received in liquidation had the payment not been made.

Elliot v. Frontier Properties, 778 F.2d 1416 (9th Cir. 1985). See also *Palmer Clay Prods. Co. v. Brown*, 297 U.S. 227, 229 (1936).

The primary purpose of the preference statute is to ensure equality of distribution among creditors. Mr. Hamilton received payment in full on those invoices covered by each of the checks listed in the table above. By contrast, other unsecured creditors of the Debtor that have filed proofs of claim will not be paid in full. Hence, Mr. Hamilton received more with respect to the debts paid by the checks at issue than he would have received if he had not been paid and instead had received payment on a proof of claim in a Chapter 7 case.

The only statutory defense that Mr. Hamilton appears to have attempted to raise was under section 547(c)(2)(A), which he mentioned in his answer, as discussed above. Section 547(c)(2)(A) provides:

> (c) The trustee may not avoid under this section a transfer– . . .
>
> > (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--
> >
> > > (A) made in the ordinary course of business or financial affairs of the debtor and the transferee[.]

The defense under this section is subjective – that is, it focuses on the prior dealings between the parties as opposed to industry standards.

> The creditor must establish a "baseline of dealings" between the parties in order to "enable the court to compare the payment practices during the preference period with the prior course of dealing." *In re Fabrikant & Sons, Inc*., 2010 WL 4622449, at *3; *Cassirer v. Herskowitz (In re Schick)*, 234 B.R. 337, 348 (Bankr.S.D.N.Y.1999). The creditor must "demonstrate some consistency with other business transactions between the debtor and the creditor." *In re Fabrikant & Sons, Inc*., 2010 WL 4622449, at *3. "The starting point—and often ending point—involves consideration of the average time of payment after the issuance of the invoice during the pre-preference and post-preference periods, the so-called 'average lateness' computation theory." *Id.* "To determine whether a late payment may still be considered ordinary between the parties, a court will normally compare the degree of lateness of each of the alleged preferences with the pattern of payments before the preference period to see if the alleged preferences fall within that pattern." 5 COLLIER ¶ 504.04[2][ii], at 547–55. Generally, this involves a comparison of the average number of days between the invoice and payment dates during the pre-preference and preference periods. See *In re Fabrikant & Sons, Inc*., 2010 WL 4622449, at *4; *Hassett v. Altai, Inc. (In re CIS Corp.)*, 214 B.R. 108, 120 (Bankr.S.D.N.Y.1997).

In re Quebecor World (USA), Inc., 491 B.R. 379, 386 (Bankr.S.D.N.Y. 2013).

Mr. Hamilton asserted in his answer that during the preference period the Debtor always paid late. He has not shown, however, that the time between the due date on an invoice and the date of payment of that invoice for all invoices paid before the preference period remained relatively constant for invoices paid during the preference period. In fact, his answer appears to show that the lapse of time between due date and payment on the invoices paid during the preference period varied widely. For this reason, his asserted defense under section 547(c)(2)(A) fails.

Mr. Hamilton's frustration with being sued based on his lack of knowledge that the Debtor was in financial difficulty, while entirely understandable, is not a defense. Nor is his mistaken belief that he was dealing with the DeKalb Housing Authority only.

For these reasons, the transfers totaling $15,380 are voidable as preferences.

D. Unauthorized Postpetition Transfer.

Section 549(a) of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--
>
> (1) that occurs after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

The exceptions in subsections (b) and (c) are inapplicable to the circumstances here.

This Court did not authorize the Debtor during the Chapter 11 case to pay any prepetition unsecured claim. The question under section 549(a) is whether the Bankruptcy Code authorized the Debtor to pay the prepetition debt in the amount of $6,100 owed to Mr. Hamilton.

The Debtor filed this case under Chapter 11 of the Bankruptcy Code and became a "debtor in possession," which is the term used to describe a Chapter 11 debtor in a case in which there is no trustee. As debtor in possession, it had the powers and duties of a trustee to continue to operate its business postpetition. 11 U.S.C. §§ 1107 and 1108. Under section 363 of the Bankruptcy Code a debtor in possession or trustee in a Chapter 11 case may use property, including money in its checking accounts, without first obtaining court approval, only if such use would be in the ordinary course of the debtor's business.

It is never in the ordinary course of debtor's business, however, to pay some prepetition unsecured claims but not all others. *In re Napa Valley Physicians Plan*, 2003 WL 22945648, 1 (Bankr.N.D.Cal. 2003) ("The payment of a prepetition debt by a trustee or debtor in possession is *ipso facto* out of the ordinary course of business.") Indeed, the Bankruptcy Code contains no

provision explicitly permitting a trustee or debtor in possession to prefer some creditors by paying their prepetition unsecured claims without paying all other prepetition unsecured claims. See *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (holding that the bankruptcy court erred in permitting payment of prepetition unsecured claims of so-called "critical vendors," at least without a showing that there is no alternative to such payment that would induce those vendors to continue to do business with the debtor and that non-favored creditors would benefit from such preferential treatment.).

Because neither the Court nor the Bankruptcy Code authorized the Debtor to pay prepetition debts owed to Mr. Hamilton, the transfer of the Debtor's property that occurred when check no. 1672 was honored by Mr. Hamilton's bank is avoidable under section 549(a).

3. Recovery under Section 550.

Section 550(a)(1) of the Bankruptcy Code provides:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made[.]

Mr. Hamilton was the initial and only transferee of the transfers avoided under sections 547 and 549. Hence, pursuant to this statute, Plaintiff is entitled to a judgment against Mr. Hamilton for $15,380, which is the aggregate amount of the avoided preferences and the unauthorized postpetition transfer.

For these reasons, Plaintiff's motion for summary judgment is GRANTED in part and DENIED in part. Plaintiff is entitled to a judgment against Defendant Hamilton in the amount of

$15,380. Plaintiff is not entitled a judgment for an additional $6,100 as demanded in the motion and is not entitled to a judgment for prejudgment interest. The Court will enter a separate judgment. The Clerk is directed to serve a copy of this order on counsel for Plaintiff and on Mr. Hamilton at1342 Jefferson Avenue, East Point, GA 30344.

END OF ORDER