IT IS ORDERED as set forth below:

Date: July 26, 2013

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	CASE NUMBER
	:	
VATSA K. KAUSHIK,	:	**09-89157-MGD**
	:	
Debtor.	:	CHAPTER 7
_____:		
	:	
PAUL ANDERSON, JR., as Chapter 7 Trustee,	:	**ADVERSARY PROCEEDING NO. 12-05276**
	:	
Plaintiff,	:	
v.	:	
	:	
WILLIAM KINZER,	:	
	:	
Defendant.	:	
_____:		

ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO AMEND

This matter is before the Court on Cross Motions for Summary Judgment and Defendant's Motion

for Leave to Amend Answer.[1] (Docket Nos. 17, 19, and 28). This is a core proceeding under 28 U.S.C. § 157(b)(2), and jurisdiction and venue are proper. For the reasons set forth below, there are material disputes of fact and both Motions for Summary Judgment are **DENIED**. Defendant's Motion to Amend is **GRANTED**.

Chapter 7 Trustee, Paul Anderson, Jr. ("Trustee"), commenced this adversary proceeding by filing a complaint seeking to avoid an alleged 11 U.S.C. § 547(b) preferential transfer. Trustee later filed a Motion for Summary Judgment ("Trustee's Motion"). (Docket No. 19). Defendant timely filed a response to Trustee's Motion and moved for Summary Judgment on his own ("Defendant's Motion"). (Docket No. 28). Trustee filed a reply to Defendant's response and a response to Defendant's Motion. (Docket Nos. 36 & 37). Defendant also has a pending Motion for Leave to Amend Answer ("Motion to Amend"). (Docket No. 17).

I. Facts

The parties agree to certain facts which give structure to this proceeding. In October of 2005, William Kinzer ("Defendant") loaned $211,500 to Vasta Kaushik ("Debtor"), which was secured by certain stock certificates originally belonging to Debtor. Plaintiff's Statement of Material Facts ("PSOF"), ¶ 4; Defendant's Statement of Material Facts ("DSOF") ¶¶ 3-5. In June of 2008, Debtor and Defendant opened a joint securities account with SunTrust Investment Services ("SunTrust Account") for the purpose of liquidating the stock certificates to pay off the debt to Defendant. PSOF at ¶ 5; DSOF at ¶ 6. On August 27, 2009, Defendant received a payment from the joint securities account of $161,274.32, which

[1] Also pending on this docket is a Motion to Extend Time to File Summary Judgment. (Docket No. 18). Because both parties have already filed these motions, this motion is moot.

settled the loan between Defendant and Debtor. PSOF at ¶ 9; DSOF at ¶ 9. Finally, Debtor filed bankruptcy on November 2, 2009.

The following are the relevant and material facts regarding the delivery of the stock certificates to SunTrust. Trustee states that Debtor had possession of the stock certificates and delivered the securities to SunTrust. PSOF at ¶ 8. Defendant admitted in his answer that Debtor delivered the stock certificates to SunTrust. *Id.* However, Defendant seeks leave to amend his answer as to this admission based on a purported scrivener's error. The record also includes two declarations in support of Debtor's delivery of the stock certificates. (Docket Nos. 25 & 26).[2] The sworn statements by Paul Jones, Trustee's financial forensic investigator, states that he believed from his investigation that certain securities were not held by Defendant at the time of the transfer based on Mr. Jones' review of the documents, including a securities receipt. Declaration of Paul A. Jones, ¶¶ 5-8; Exhibit C. Trustee's own declaration states that he relies on the conclusions of Mr. Jones that Debtor had possession of the certificates. Declaration of Paul Anderson, ¶ 5. Trustee's declaration also references an email response from Defendant's attorney that included her assumption that Debtor "likely" delivered the securities. *Id.* at ¶ 6.

In addition to seeking leave to amend his answer regarding the admission discussed above, Defendant states that the pledged certificates were held by Defendant until Defendant delivered the

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[2] The affidavits of Trustee and Paul Jones were submitted by the Trustee in support of Trustee's opposition to Defendant's motion to amend. In deciding motions for summary judgment, courts have discretion to consider any relevant material in the case record. FED. R. CIV. P. 56(c)(3); *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir.1980) (explaining that Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention when ruling on summary judgment).

securities to SunTrust. DSOF, ¶ 5. Defendant supports this statement with affidavits of Debtor and Defendant. Docket No. 32 ("Defendant Affidavit"), ¶ 5; Docket No. 35 ("Debtor Affidavit"), ¶ 5.

The particulars of the SunTrust Account and management are also relevant facts. The SunTrust Account Agreement states that an account holder "has authority, acting individually and without notice to the other Account Holder, to deal with [SunTrust] as fully and completely as if each is the sole Account Holder, including the authority to ... receive, deposit, and withdraw money, securities, annuities, and other property." SunTrust Investment Services, Inc. ("STIS") Deposition; Exhibit 1. Tonya Lee Willis, an investment adviser at SunTrust, served as the designated representative and testified on behalf of SunTrust. STIS Deposition. Ms. Willis testified that she handled the account in question. STIS Deposition, p. 9. Ms. Willis also testified that she received a letter from Defendant that was delivered with the stock certificates. DSOF, ¶ 7; STIS Deposition, p. 15; Defendant Affidavit, ¶ 7. Although Ms. Willis testified that she was not personally aware of who physically delivered the certificates, she states she assumed they were delivered with the letter from Defendant. STIS Deposition, p. 15-20. The letter from Defendant to Ms. Willis stated in full:

> Here are the stock certificates to be placed in joint account # G1D135666 for Vatsa Kaushik and William Kinzer. Two have been endorsed. These shares have been pledged as collateral for a loan from Kinzer to Kaushik. Attached is a recent summary.
>
> Please advise if a letter of instruction/authorization is needed, but basically the first order of business is to sell enough shares to pay off the loan. The payoff amount will need to be paid or credited to Kinzer individually in order to release Kaushik from the loan.
>
> When Kinzer has received proceeds sufficient to pay off the loan his name will be removed from the joint account and Kaushik will use the account as he wants.

STIS Deposition, Exhibit 2.

Ms. Willis also testified that because the account was in the name of both parties, if either party

attempted to obtain a disbursement made out only to one party, the other party had to agree to such a disbursement. STIS Deposition, p. 31.

II. Motions for Summary Judgment

According to Rule 7056 of the Federal Rules of Bankruptcy Procedure, which incorporates Federal Rule of Civil Procedure 56, the Court will only grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982). Furthermore, the moving party has the burden to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985).

At the summary judgment stage, the court may not make credibility determinations or weigh evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The only task at this stage is to assess whether "a genuine issue of material fact" remains for resolution at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 322–23.

Here, Trustee seeks avoidance of a preferential transfer. There are five elements of a preferential

transfer, which the Trustee must prove to satisfy 11 U.S.C. § 547(b).[3] Defendant and Trustee agree that the first four elements have been satisfied by the evidence in the record and pleadings. The fifth element – whether the Defendant received more from the transfer than he would have if the transfer had not occurred and he had been paid through a Chapter 7 distribution – is disputed by the parties. To make this determination, the Court looks to the application of Georgia law concerning the perfection of security interests in certificated securities.

Under Georgia law, a "secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Code Section 11-8-301." O.C.G.A. § 11-9-313(a). Further, § 301 provides, in part, that delivery of certificated security can occur through physical possession. *Id*. at § 301. Once perfection of a security interest is achieved through physical possession, the security interest holder retains his perfection only while he retains possession. O.C.G.A. § 11-9-313(d).

The parties each present evidence in support of their respective positions as to whether Debtor or Defendant had possession and delivered the securities to SunTrust. There is conflicting evidence in the

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[3] (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made--
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if--
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.
11 U.S.C. § 547.

record, regardless of Defendant's Motion to Amend. Trustee relies upon Defendant's admission in his answer that Debtor delivered the securities to SunTrust, yet there are opposing affidavits by Debtor and Defendant that state Defendant had continuous possession of the securities and delivered them to SunTrust. The declarations by Mr. Jones and Trustee and the testimony by Ms. Willis are not definitive as to whom had possession of the certificates upon delivery to SunTrust. This is a material, factual dispute and makes summary judgment inappropriate. To make a determination as to whether Defendant had a properly perfected security interest under Georgia law in order to conclude that he received more than in a liquidation, the Court would have to weigh the evidence in the record and infer facts. Assessing the credibility of the evidence is improper for motions for summary judgment. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012).

The disputed facts regarding the SunTrust Account are also material in the secured status analysis. Under Georgia law, § 11-9-313(h) provides a way for a secured creditor to give up possession of a stock certificate to someone other than the debtor but still retain his secured status:

> (h) *Secured party's delivery to person other than debtor.* A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:
>
> (1) To hold possession of the collateral for the secured party's benefit; or
>
> (2) To redeliver the collateral to the secured party.

O.C.G.A. § 11-9-313(h).

Each party asserts a legal theory regarding the effect of depositing the securities into the SunTrust Account. Trustee asserts that even if Defendant did have possession before delivery to SunTrust, he gave

possession back over to Debtor when he deposited the stock certificates in the joint SunTrust Account. Trustee argues that the terms of the joint SunTrust Account do not satisfy the requirements under O.C.G.A. 11-9-§ 313(h). As a result, Defendant lost of possession and his security interest, upon the deposit into the joint account. Under the Trustee's theory, Defendant's receipt of the $161,274.32 payment on an unperfected, unsecured debt represents more than Defendant would have in a Chapter 7 distribution. Trustee points to the SunTrust Account Agreement that gave Debtor the authority to "receive, deposit, and withdraw money, securities, annuities, and other property" from the account to demonstrate that Debtor had gained (or regained) possession of the certificated securities, thereby defeating Defendant's secured claim.

Defendant also put forth evidence to support his legal theory that the joint SunTrust Account complies with O.C.G.A. § 11-9-313(h)'s requirements, so his secured status was not destroyed. In support of this theory, Defendant presents a factual record that includes deposition testimony from SunTrust's designated representative, Ms. Willis. Ms. Willis testimony includes that Debtor could not withdraw or disburse funds without authority from Defendant. Defendant also relies upon the letter from him to Ms. Willis that was purportedly delivered with the stock certificates. Defendant's letter to Ms. Willis seems to indicate that he intended that the SunTrust account only hold the securities for his benefit.

Again, there is a material dispute of fact regarding the circumstances surrounding the terms of the SunTrust Account. In fact, Ms. Willis' deposition testimony, which is relied upon by Defendant, seems to directly contradict the SunTrust Account Agreement, which Trustee asserts to substantiate his position. "Summary judgment is not an appropriate resolution when a fundamental factual event is genuinely in issue." *Matter of Melton*, 39 B.R. 762, 764 (Bankr. N.D. Ga. 1984). In *Melton*, the court denied cross motions

for summary judgment when evidence submitted by the defendant concerning a material fact was contradicted by facts stated in a deposition taken during discovery. *Id.* The present proceeding is subject to a similar situation, and it is therefore equally appropriate to deny both motions for summary judgment. To make the required determination as to whether Defendant had a properly perfected and secured claim, the facts in evidence would have to be weighed. The summary judgment standard does not allow the Court to make any determinations as to the credibility of the evidence or to infer any facts. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d at 1154.

Because there are two material facts in dispute: (1) who had physical possession of the stock certificates from the time of the loan to their delivery to SunTrust and (2) whether Debtor had authority on his own to withdraw funds from the joint SunTrust Account, neither party has met its burden and both motions for summary judgment are denied.

III. Motion to Amend

Defendant's motion for leave to amend the answer is also before the Court. (Docket No. 17). Defendant moves for leave to amend his answer under Rule 15(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure. Rule 15 provides a liberal and permissive standard for amending a complaint. "The court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). If a party's underlying claim is a proper subject of relief, then he "ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178 (1962). Additionally, a court cannot deny a motion to amend merely on its own discretion; a "substantial reason" must exist for a court to deny leave to amend. *See Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989). Prejudice to the opposing party is the most important

consideration in deciding whether to grant or deny leave to amend. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971).

Defendant asserts that his admission of the fact that Debtor was the one who delivered the stock certificates to SunTrust was a scrivener's error. This admission goes to the heart of a material, disputed fact for the reasons explained above. It is also noteworthy that Defendant filed a motion to extend the time to file dispositive motions along with the motion to amend (Docket No. 18).

Trustee opposes the motion based on the timing of the motion – after the close of discovery and within a few days before the dispositive motions' deadline, as provided by the most recent scheduling order (Docket No. 15). Trustee also asserts that he will suffer prejudice if leave is granted.

The admission for which Defendant seeks leave to amend goes to the merits of the case and, based on the policy of determining controversies on the merits and the expansive standard for leave to amend, there is no basis to deny Defendant's motion. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (citing *Zenith Radio v. Hazeltine Research*, 401 U.S. at 330). The facts presented here do not rise to the level of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d at 598 (citing *Foman v. David*, 371 U.S. at 182).

The cases cited by Trustee are inapplicable to these facts and circumstances. The Trustee cites to *Local 472, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Ind. v. Georgia Power Company,* 684 F.2d 721, 724 (11th Cir. 1982), to support his opposition. In *Local 472,* the Eleventh Circuit determined that the trial court had not abused its discretion when the plaintiff's motion to amend the complaint was denied. *Id.* The court determined that there had been undue delay

when the motion was made more than 2 years after the complaint was originally filed, after the close of discovery, and after a motion for summary judgment had been filed. *Id.* at 724-25. The court noted that the motion to amend appeared to be a tactic to avoid an adverse result in the pending summary judgment motion. *Id.* Here, although discovery has closed, there is no evidence of undue delay. Additionally, based on the ruling on the parties' motions for summary judgment, there is little prejudice to Trustee in allowing the amendment to Defendant's answer.

Trustee also asserts that Defendant's request for leave to amend the admission in his answer is analogous to a "sham affidavit" put forward to defeat summary judgment. The Eleventh Circuit in *Faulk v. Volunteers of America, North Alabama, Inc.*, 444 Fed. Appx. 316, 2011 U.S. App. LEXIS 17796 (11th Cir. Aug. 24, 2011) explained that "[w]hen a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Id.* (citing *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)). Here, the summary judgment ruling more thoroughly explains that there were disputes in the factual record regarding who possessed the securities without retracting the admission in Defendant's answer. The record does not demonstrate a clear answer to the question of possession.

Although it is clear that Trustee relied on Defendant's admission to support his motion for summary judgment, the current posture of the case and these facts provide no "substantial reason" to deny Defendant's motion for leave to amend. *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d at 407. Accordingly, it is

ORDERED that both Trustee's and Defendant's Motions for Summary Judgment are **DENIED.**

It is **FURTHER ORDERED** that Defendant's motion for leave to amend his answer is **GRANTED.** Defendant is directed to serve and file his amended answer within 14 days of entry of this Order.

It is **FURTHER ORDERED** that the parties submit a proposed consolidated pre-trial order within 30 days of entry of this Order.

The Clerk is directed to mail a copy of this Order to Plaintiff, Defendant, and their respective counsel.

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