



**IT IS ORDERED as set forth below:**

**Date: September 16, 2014**

**W. Homer Drake  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBERS</b>
	:	
ATLROOF.COM AND	:	BANKRUPTCY CASE
CONSTRUCTION, INC.,	:	12-10538-WHD
	:	
Debtor.	:	
_____	:	
	:	
GRIFFIN HOWELL, III,	:	ADVERSARY PROCEEDING
Chapter 7 Trustee,	:	NO. 14-1008
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CUMBERLAND FINANCIAL	:	IN PROCEEDINGS UNDER
SOLUTIONS, INC.,	:	CHAPTER 7 OF THE
	:	BANKRUPTCY CODE
Defendant.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion for Summary Judgment, filed by Griffin Howell, III (hereinafter the "Trustee") in his capacity as the trustee of the Chapter 7 bankruptcy estate

of ATLRoof.com and Construction, Inc. (hereinafter the "Debtor"). The Motion arises in connection with a complaint (hereinafter the "Complaint") to avoid and recover allegedly preferential transfers from Cumberland Financial Solutions, Inc. (hereinafter the "Defendant"). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. See 28 U.S.C. § 157(b)(2)(F); § 1334.

#### **PROCEDURAL HISTORY**

On February 24, 2012 (hereinafter the "Petition Date"), the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Subsequently, the Trustee filed the Complaint against the Defendant, seeking to avoid the Debtor's transfer of \$36,580.05 to Defendant and to recover such funds for the benefit of the Debtor's estate. The Defendant filed an answer to the Complaint on March 26, 2014. On July 24, 2014, the Trustee filed the instant motion for summary judgment. The Defendant has not responded to the Motion, which indicates that the Defendant does not oppose the relief requested. See BLR 7007-1(c).

#### **FINDINGS OF FACT<sup>1</sup>**

During the period of December 02, 2011 through January 3, 2012, which was not more than ninety days prior to the Petition Date, the Debtor made certain transfers of its property to the Defendant (hereinafter the "Transfers"). Trustee's Statement of Undisputed

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<sup>1</sup> The Trustee filed a statement of undisputed facts, to which the Defendant did not respond. Accordingly, the facts stated therein are deemed admitted. See BLR 7056-1(a)(2). Further, the Defendant failed to respond to the Plaintiffs' First Request for Admissions, see Affidavit of John A. Christy, ¶ 12, and, therefore, the matters regarding facts and the application of law to facts contained therein have been admitted and are conclusively established, see FED. R. BANKR. P. 7036 (incorporating FED. R. CIV. P. 36).

Facts (hereinafter "SUF"), ¶¶ 1-4, 8; Plaintiff's First Request for Admissions to Defendant (hereinafter "FRA"), ¶¶ 4-5, 7. The Transfers totaled \$36,580.05. SUF, ¶ 2. At the time of the Transfer, the Debtor owed the Defendant a debt, and the Transfers were made on account of that debt. *Id.* ¶¶ 5, 7; FRA, ¶ 2.

### CONCLUSIONS OF LAW

The Trustee seeks to avoid the Transfers as preferential transfers, pursuant to section 547 of the United States Bankruptcy Code (hereinafter the "Bankruptcy Code"). Upon avoidance, the Trustee seeks to recover the "value" of the transfers for the benefit of the Debtor's bankruptcy estate under section 550(a) of the Bankruptcy Code. The Trustee asserts that there remain no undisputed facts and that the Trustee is entitled to judgment as a matter of law.

#### A. *Summary Judgment Standard*

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy proceedings under Rule 7056 of the Federal Rules of Bankruptcy Procedure), this Court will grant summary judgment only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Hairston v. Gainesville Sun Publ'shg Co.*, 9 F.3d 913, 918-19 (11th Cir. 1993). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). 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), and the Court will read the opposing party's pleadings liberally, *Anderson*, 477 U.S. at 249.

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). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a *prima facie* showing that it is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact that precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

B. *11 U.S.C. § 547*

Subject to certain exceptions not relevant here, the Trustee "may avoid any transfer of an interest of the debtor in property," which is made: (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) while the debtor was insolvent; (4) within 90 days of the filing of the petition; and (5) enabling such creditor to receive more than such creditor would receive if the

transfer had not been accomplished, and the creditor received payment only to such extent as authorized by the provisions of Chapter 7 of the Bankruptcy Code. 11 U.S.C. § 547(b). The Trustee has the burden of proving these elements have been satisfied.<sup>2</sup> *Id.* § 547(g); *see also Goodman v. S. Horizon Bank (In re Norsworthy)*, 373 B.R. 194, 198 (Bankr. N.D. Ga. 2007) (Drake, J.). The Defendant has the burden of proving any defenses that it has raised under section 547(c). 11 U.S.C. § 547(g).

Having considered the admitted facts and all evidence submitted by the Trustee, the Court concludes that the Trustee has not satisfied his burden of establishing the Transfers were preferential and subject to avoidance. Specifically, the Court has before it no admitted facts to support the conclusion that the Transfers enabled the Defendant to receive more than it would have received if the Transfers had not been made and the Defendant received only payment authorized by the Chapter 7 distribution scheme. Neither the Trustee's Statement of Undisputed Facts nor the Plaintiff's First Request for Admissions contain any facts that support such a conclusion. The only reference regarding this element of section 547(b) is found in the Complaint, and the Defendant specifically denied that allegation in its answer. *See* Defendant's Answer, ¶ 16. The Trustee has otherwise introduced no evidence that would establish the value of the assets in the Debtor's bankruptcy estate, the amount of the claims against the Debtor's assets, and the amount of the total debt owed to

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<sup>2</sup> However, for purposes of satisfying the third element, as to transfers made during the ninety days prior to the bankruptcy filing, the Trustee is entitled to a presumption that the debtor was insolvent. *See* 11 U.S.C. § 547(f).

the Defendant.

Without such facts, the Court cannot determine whether the Defendant received more than it would have if the Transfers had not been made. The Court cannot simply assume that the Debtor's unsecured creditors will not be paid in full or that the amount of the dividend paid in the Debtor's bankruptcy case will be so low that the Defendant would not have received the amount it did receive. *See In re Houston Steel Fabricators, Inc.*, 357 B.R. 680, 682 (Bankr. M.D. Ga. 2006) (denying an uncontested motion for summary judgment because the trustee "failed to state facts necessary for the Court to find' that the fifth element of a preference was satisfied" and stating that, at a minimum, the court must find "facts which establish Debtor's total assets and liabilities") (quoting *Kelley v. Chevy Chase Bank (In re Smith)*, 231 B.R. 130 (Bankr. M.D. Ga. 1999)). Accordingly, the Court cannot grant summary judgment in favor of the Trustee at this time.

#### **CONCLUSION**

For the reasons stated above, the Court finds that the Trustee's Motion for Summary Judgment cannot be granted at this time. The Court will not, however, deny the Motion and will allow the Trustee thirty (30) days from the date of the entry of this Order to supplement the Motion with additional evidence.

**END OF DOCUMENT**