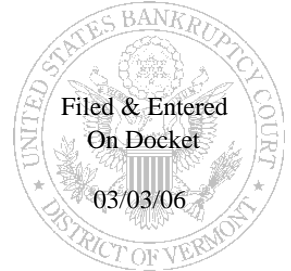


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

ROME FAMILY CORPORATON,
Debtor.

Chapter 7 Case
02-11771



JOHN R. CANNEY, III,
Chapter 7 Trustee of the Estate of
ROME FAMILY CORPORATION,
Plaintiff,

Adversary Proceeding
03-1023

v.
ENGELBERTH CONSTRUCTION, INC.,
Defendant.

Appearances: *John J Kennelly, Esq.*
 Pratt Vreeland Kennelly Martin & White
 Rutland, Vt.
 For the Plaintiff

Shireen Hart, Esq.
Eggleston & Cramer, Ltd.
Burlington, Vt.
For the Defendant

MEMORANDUM OF DECISION
GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

John R. Canney, III (the “Trustee”), on behalf of Rome Family Corporation (“Rome”), seeks to avoid, as a preference under 11 U.S.C. § 547 the judgment lien of Engelberth Construction Inc. (“Engelberth” and collectively with the Trustee and Rome the “Parties”) on certain properties owned by Rome. The Trustee has filed a motion for summary judgment on Count IV of the complaint (doc. # 88) (the “Motion”). Engelberth has not interposed any opposition to the Motion.

For the reasons set forth below, the Court finds summary judgment is proper, finds that the Trustee has met his burden of proof, and grants the Trustee’s motion for summary judgment on Count IV.

JURISDICTION

The Court has jurisdiction over this adversary proceeding, and the Trustee’s Motion, under 28 U.S.C. § 157(b)(2)(F).

BACKGROUND FACTS

The Parties submitted a Stipulated Statement of Undisputed Facts (doc. # 10) and a Supplemental Stipulated Statement of Undisputed Facts (doc. # 75) which, pursuant to the District of Vermont Local Bankruptcy Rules are deemed admitted. See Vt. LBR 7056-1(a)(3). The undisputed facts are as follows.

On or about April 14, 2000, Rome and Engelberth entered into an agreement under which Engelberth was to build a satellite campus for Rome on Rome's real property in Killington, Vermont (the "Campus Property"). It was Rome's intent to lease the Campus Property to Green Mountain College (doc. # 10, ¶ 3). Rome breached the terms of the construction agreement with Engelberth and failed to cure its breach (doc. # 10, ¶ 4). As a result, Engelberth filed a Notice of Lien pursuant to 9 V.S.A. § 1921 in the Town of Killington Land Records (Id.). On December 18, 2001, Engelberth filed a recovery action in Rutland Superior Court (doc. # 10, ¶ 5).

On January 7, 2002, Engelberth recorded a Writ of Attachment in the Town of Killington Land Records to perfect its notice of lien.¹ The Writ contained a blanket reference to all of Rome's property located within the Town of Killington. Thereafter, Engelberth obtained a Revised Writ of Attachment and recorded it in the Town of Killington Land Records on January 10, 2002.² The Revised Writ contained a description of only the parcels of property that were being attached to satisfy Engelberth's lien.

Through mediation, the Parties reached a full settlement of all claims, the terms of which were memorialized in a settlement agreement dated March 29, 2002 (doc. # 10, ¶ 7). On September 5, 2002, the Rutland Superior Court entered a final judgment, in the form the Parties had agreed to in the settlement agreement, awarding Engelberth \$2,004,079, together with interest and costs (doc. # 10, ¶¶ 8,12). Rome did not appeal the final judgment, and on October 18, 2002, Engelberth filed a certified copy of the final judgment in the Town of Killington Land Records (the "Judicial Lien") (doc. # 10, ¶ 15). On December 6, 2002, Engelberth commenced a foreclosure action based on the Judicial Lien (doc. # 10, ¶ 16). In response, on December 16, 2002, Rome filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code (doc. # 10, ¶ 17). The Debtor's chapter 11 case was converted to a chapter 7 case on March 11, 2004 (doc. # 75, ¶¶ 1, 5).

In March of 2003, Engelberth filed a proof of claim in the amount of \$2,122,677 (doc. # 75, ¶ 2). The Trustee filed a complaint initiating the instant adversary proceeding on April 11, 2003 seeking to avoid Engelberth's Judicial Lien (doc. #1). The Parties filed cross-motions for summary judgment on the issue of the validity of Engelberth's lien, which the Court decided in favor of Engelberth on March 7, 2005 (the "March Decision") (doc. # 75, ¶¶ 4, 13). In that decision, the Court found that Engelberth held a valid lien against Rome's property in the Town of Killington, and that the lien was properly perfected on October 18, 2002 (doc. # 65).

¹ The information regarding the Writ and the Revised Writ of Attachment was provided in Engelberth's Opposition to Rome's Cross-Motion for Summary Judgment (doc. #32) and supported by the supplemental affidavit of Pierre LeBlanc (attach. #1 to doc. #32). Finding no objection to the "Additional Background" or the corresponding Supplemental Affidavit, the Court considers the facts about the Original Writ and the Revised Writ as undisputed and, therefore, deems them admitted. See Vt. LBR 7056-1(a)(3) (2005).

² Supra, note 1.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. A genuine issue exists only when “the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant’s favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992). In making its determination, the court’s sole function is to determine whether there is any material dispute of fact that requires a trial. See Anderson, 477 U.S. at 249; see also Palmieri v. Lynch, 392 F.3d 73, 82 (2d Cir. 2004); Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990), cert. denied, 500 U.S. 928 (1991).

DISCUSSION

In the March Decision, this Court found that Engelberth had taken the steps necessary to create a properly perfected contractor’s lien on Rome’s property (doc. # 65). According to Vermont law, a contractor lien will attach to “all of the land owned by or held by the owner and used or designated for use in connection with such improvements, but such lien shall not extend to other adjacent lands used for purpose of profit.” 9 V.S.A. § 1921(e). Following the requirements of Vermont’s contractor lien law, this Court held that Engelberth’s lien only attached to Rome’s real property on which Engelberth made improvements (doc. # 65, FN. 6), i.e., the Campus Property. The Trustee does not dispute, or seek to avoid, Engelberth’s contractor lien. The issue before the Court is whether the Trustee can avoid, as a preference, the Judicial Lien Engelberth perfected on October 18, 2002 that encumbers all of Rome’s real property in the Town of Killington.

Under § 547(b) of the Bankruptcy Code, a trustee is authorized to avoid pre-bankruptcy transfers of the debtor’s property that would result in preferential treatment of a creditor. “Involuntary transfers of the debtor’s property including judicial liens fall within this provision.” In re Ortho-O-Vision, Inc., 49 B.R. 943, 944 (Bankr. E.D.N.Y. 1985). In order to avoid a preferential transfer under § 547, the Trustee must establish that the transfer was: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before the subject transfer was made; (3) made while the debtor was insolvent; (4) within 90 days of the filing of the petition; and (5) the transfer allowed the creditor to receive more than he or she would have received in a chapter 7 case if the transfer had not been made. 11 U.S.C. § 547 (2005); see In re 360 Networks Inc., 327 B.R. 187, 190 (Bankr. S.D.N.Y. 2005).

Preferential transfer relief was established to “discourage creditors from racing to dismember a debtor sliding into bankruptcy and to promote equality of distribution to creditors in bankruptcy.” In re Dorholt Inc., 224 F.3d 871, 873 (8th Cir. 2001); citing In re Jones Truck Lines Inc., 130 F.3d 323, 326 (8th Cir. 1997).

The Trustee bears the burden of proving each element of § 547(b) by a preponderance of the evidence. After reviewing the record, it is clear that the first and second elements of a preferential transfer have been met. Engelberth was a creditor at the time of the transfer. Engelberth was entitled specifically because there was an antecedent debt. (Engelberth was able to obtain a lien on all of Rome’s real property specifically because Rome had not paid it for the improvements Engelberth had made to Rome’s property, under 9 V.S.A. § 1921(e).) By filing the Judicial Lien on all of Rome’s property, Engelberth was able to elevate itself to the status of a secured creditor for the full amount it was owed by Rome, thereby gaining a benefit that was not available under Vermont’s contractor lien law. Additionally, whether the debt arose at the time Engelberth commenced construction, at the time Rome failed to make payment, or at the time the Judicial Lien was perfected, it was an antecedent debt. The latest of these three events, the perfection of the judgment lien, took place on October 18, 2002, which was 59 days prior to the date the bankruptcy petition was filed. The third element of a preference is that the transfer took place while the debtor was insolvent. The Court finds that Engelberth has not rebutted the presumption of insolvency found in § 547(f). See In re Roblin Industries Inc., 78 F.3d 30, 34 (2d Cir. 1996). Pursuant to the definitions established by the Bankruptcy Code, the attachment of a lien, whether voluntary or involuntary, constitutes a “transfer” of a debtor’s property. See 11 U.S.C. § 101(54). Thus, since the Judicial Lien was perfected on October 18, 2002, within the 90 day preference period, the fourth element of § 547(b) is also satisfied.

The final element of a preferential transfer is that the transfer resulted in Engelberth receiving a greater dividend from Rome’s estate than it would have otherwise received under a hypothetical liquidation. See 11 U.S.C. § 547(b)(5). Pursuant to § 547(b)(5), the Court must determine the extent to which the disputed transfer enabled the creditor to receive more than the creditor would have received if the transfer had not occurred. If Engelberth’s Judicial Lien is not avoided, its claim of \$2,122,677 will be secured to the extent of approximately \$348,075,³ and unsecured to the extent of \$1,774,602.⁴ The total unsecured claims, including Engelberth’s, are approximately \$7,500,000. Engelberth would therefore be entitled to 23.66% of the assets available for distribution to unsecured creditors. Based on the latest operating report of the Trustee (doc. # 281) and a deduction of the administrative expenses, it appears the

³ The sale of Rome’s real estate produced proceeds in excess of the mortgage claims in the amount of \$348,075 (doc. # 75, Exhibit A), but there were not remaining proceeds from the sale of the Campus Property.

⁴ All numbers relied on came from the Supplemental Stipulated Statement of Facts (doc. # 75) and the Trustee’s Motion for Summary Judgment (doc. # 88). As this motion is unopposed, these numbers are deemed reliable.

estate will have assets worth approximately \$2,000,000 available for distribution to unsecured creditors. If Engelberth's claim is paid as secured however, the estate's asset have a value of only \$1,651,925 available for distribution. Engelberth's *pro rata* share of these funds would be \$390,845 (23.66% of \$1,651,925). Thus, if the lien is unavoids, the transfer will enable Engelberth to receive a total distribution of \$738,920 (\$348,075 as a secured claim plus \$390,845 as an unsecured claim).


If Engelberth's Judicial Lien is avoided, Engelberth's claim of \$2,122,677 will be unsecured *in toto*. Engelberth would be entitled to 28.3% of the assets available for distribution to unsecured creditors. Thus, Engelberth's *pro rata* share of the remaining funds would be \$566,000 (28.3% of \$2,000,000). Accordingly, if Engelberth were permitted to retain its Judicial Lien, it would receive approximately \$172,920 more than it would receive if it had no Judicial Lien. Leaving the Judicial Lien intact would therefore result in Engelberth receiving a greater dividend from Rome's estate than it would otherwise receive. The Court therefore finds that the Trustee has presented a record that demonstrates the facts necessary to prove the fifth element of § 547(b).

CONCLUSION

The Court finds there are no material facts in dispute and therefore summary Judgment is proper. The Court further finds that the Trustee has met his burden of proof and demonstrated that Engelberth's Judicial Lien is avoidable as a preferential transfer under § 547(b). Accordingly, the Trustee's motion for summary judgment on Count IV of the complaint is granted, and Engelberth's Judicial Lien against Rome's lands is avoided.

This constitutes the Court's findings of facts and conclusions of law.

March 3, 2006
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge