

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re	:	Chapter 7
	:	
CONEX HOLDINGS, LLC	:	Case No. 11-10501(CSS)
	:	
Debtors.	:	
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	:	
CHARLES A. STANZIALE, JR., in his	:	
Capacity as the Chapter 7 Trustee of	:	
Conex International, LLC, formerly	:	
known as Conex International	:	
Corporation,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	Adv. Pro. No. 12-51132 (CSS)
CAR-BER TESTING, INC.,	:	
	:	
Defendant.	:	Re: Docket No. 34

MEMORANDUM ORDER

Upon consideration of the Motion for Summary Judgment of Car-Ber Testing, Inc., [D.I. 34] filed on October 22, 2013 (the “Motion for Summary Judgment”); the Court having reviewed the Motion for Summary Judgment and the Opposition thereto; the Court finding that (1) the Court has jurisdiction over these matters, pursuant to 28 U.S.C. § 1334; (2) this is a core proceeding, pursuant to 28 U.S.C. § 157(b); (3) this Court has the judicial power to enter a final order; and (4) notice of the Motion for Summary Judgment was adequate under the circumstances;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

Trustee sued defendant for avoidance of a preference under section 547 of the Bankruptcy Code. Trustee's expert has opined that, after application of all available affirmative defenses, defendant is liable for \$82,229.27. Notwithstanding section 547(c)(2)(B) of the Bankruptcy Code, Trustee's expert does not reduce defendant's preference exposure for defendant's provision of subsequent new value that remained unpaid as of the petition date. This conclusion is based on the fact that defendant was ultimately paid in full by a third party for all its pre-petition invoices. Defendant asserts that after application of all its invoices that remained unpaid as of the petition date it has a complete defense to trustee's preference action.

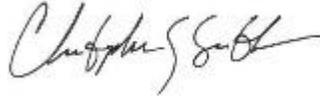
The debtor in this case was a general mechanical contracting and industrial services firm. Among the debtor's clients was Motiva Enterprises, LLC for which the debtor provided services at a refinery. In operating its business the debtor used numerous subcontractors. The defendant in this case was a subcontractor at the Motiva refinery. The defendant filed a mechanics lien against the refinery for its unpaid invoices, including those for which it asserts an affirmative defense to the preference action. Ultimately, defendant was paid in full for its pre-petition invoices by Motiva in exchange for release of the mechanics lien.

This Court has previously held that the filing of the bankruptcy "fixes" the preference analysis as of the petition date and the post-petition payment of unpaid, pre-petition new value does not affect the preference calculation. *Friedman's Inc. v. Roth Staffing Co., L.P. (In re Friedman's, Inc.)*, 2011 WL 5975283 (Bankr. D. Del. Nov. 30, 2011)

(“*Friedman’s I*”). Nonetheless, trustee argues that *Friedman’s I* is either wrongly decided or not controlling. However, the Third Circuit recently affirmed the holding in *Friedman’s I. Friedman’s Liquidating Trust v. Roth Staffing Companies LLC (In re Friedman’s Inc.)*, Case No. 13-1712, Rendell, J. (3d Cir. Dec. 24, 2013) (“*Friedman’s II*”). As such, trustee’s argument that this Court’s holding in *Friedman’s I* was wrongly decided is without merit.

Trustee’s attempt to distinguish *Friedman’s I* by limiting its scope to wage orders is equally unavailing. Trustee argues that *Friedman’s I* is not controlling because while that case involved a debtor’s post-petition payment of outstanding pre-petition invoices under a critical trade vendor order this case involves payment by a third party. In *Friedman’s II*, however, the Third Circuit broadly held that where “an otherwise unavoidable transfer” is made after the filing of a bankruptcy petition, it does not affect the new value defense. In so ruling, the Third Circuit noted one exception and reserved judgment as to another. First, the court reiterated its holding in *Kiwi Air*, 344 F.3d 311 (3d Cir. 2003) in which it held that the post-petition assumption of an executory contract under § 365 and a stipulated order under § 1110, which both require a trustee to cure certain defaults, preclude a trustee from bringing a preference action to recover pre-petition payments made pursuant to the contract. *Friedman’s II*, slip op. at 32-33. Second, the Court withheld judgment as to whether post-petition payments under a reclamation claim would reduce the new value defense. *Id.* at 31 n. 9. Neither of these situations is applicable to the purportedly preferential transfers in this case.

Viewing all factual inferences in a light most favorable to trustee, the Court finds that there is no genuine issue of material fact and that defendant is entitled to judgment in its favor as a matter of law. Thus, defendant's Motion for Summary Judgment is GRANTED.



Christopher S. Sontchi
United States Bankruptcy Judge

Dated: December 27, 2013