

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

In re:	)	Chapter 7
	)	
ULTIMATE ACQUISITION	)	
PARTNERS LLP, et al.	)	Case No. 11-10245 (MFW)
	)	
Debtors.	)	Jointly Administered
	)	
<hr/>		
ALFRED T. GIULIANO,	)	
CHAPTER 7 TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 11-52633 (MFW)
	)	
INNOVATIVE NATIONWIDE	)	
BUILDERS, INC.	)	
	)	
Defendant.	)	
	)	
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**MEMORANDUM OPINION**<sup>1</sup>

Before the Court is the Motion of Innovative Nationwide Builders, Inc. ("INB") for Summary Judgment on the preference Complaint filed by Alfred T. Giuliano, as chapter 7 trustee (the "Trustee") of the Debtors.<sup>2</sup> In its Motion for Summary Judgment, INB asserts an objective ordinary course of business defense, a subsequent new value defense, and a contemporaneous new value defense. The Trustee's response to the Motion disputes certain facts and argues that the lack of formal discovery makes the

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<sup>1</sup> This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

<sup>2</sup> The Debtors are Ultimate Acquisition Partners, LLP and CC Retail, LLC.

Defendant's Motion premature. Because there are material issues of fact in dispute, the Court will deny INB's Motion.

I. BACKGROUND

The Debtors were specialty retailers of high-end home entertainment and consumer electronics, operating under the name Ultimate Electronics. The Debtors operated forty-six stores in a dozen states. INB is a construction company, which has performed construction contracts for several national retail chains, including the Debtors.

One of the Debtors, CC Retail, entered into a lease on January 26, 2010, for retail space in Cheektowaga, NY (the "Cheektowaga Property"). Under the lease, CC Retail was entitled to make improvements to the property, which the landlord agreed to reimburse up to \$1,161,650 once a certificate of completion and lien release were provided to the landlord and CC Retail opened for business. If the landlord failed to reimburse CC Retail within thirty days of completion, CC Retail was entitled to deduct the improvement costs from its rent until it was fully reimbursed.

INB and CC Retail entered into a construction contract providing for \$801,461 in renovations. CC Retail requested additional work under the contract through change orders in the amount of \$156,383.62. The Debtors made various payments for the

improvements throughout 2010. The work was completed and a final lien release was delivered to CC Retail on December 14, 2010, after INB received a final check on December 10, 2010, for the cost of the improvements.

On January 26, 2011 (the "Petition Date"), the Debtors each commenced a case under chapter 11 of the Bankruptcy Code. The cases were subsequently converted to chapter 7, and on May 4, 2011, Alfred T. Giuliano was appointed as the Trustee.

The Trustee commenced an adversary proceeding against INB on July 19, 2011, seeking to avoid and recover three transfers made within 90 days of the Petition Date totaling \$199,361.84. Two of these payments are at issue in this Motion: a payment of \$115,833.44 by check dated November 18, 2010, which satisfied an October 26 invoice, and a payment of \$80,778.40 by check dated December 10, 2010, which satisfied a December 1 invoice.

## II. JURISDICTION

The Court has jurisdiction over this core proceeding. 28 U.S.C. § 1334(b) & § 157(b).

## III. DISCUSSION

### A. Standard of Review

The Court should grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and

any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).<sup>3</sup>

In considering a motion for summary judgment under Rule 56, the Court must view the inferences from the record in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Hollinger v. Magner Mining Equip. Co., 667 F.2d 402, 405 (3d Cir. 1981). If there does not appear to be a genuine issue as to any material fact and on such facts the movant is entitled to judgment as a matter of law, the Court must enter judgment in the movant's favor. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 413 (3d Cir. 1990).

The movant bears the burden of establishing that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1985); Integrated Water Res., Inc. v. Shaw Env'tl., Inc. (In re IT Grp., Inc.), 377 B.R. 471, 475 (Bankr. D. Del. 2007). A fact is material when it could "affect the outcome of the suit." Anderson, 477 U.S. at 248.

Once the moving party has established its prima facie case, the party opposing summary judgment must go beyond the pleadings

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<sup>3</sup> Rule 7056 of the Federal Rules of Bankruptcy Procedure incorporates Rule 56 of the Federal Rules of Civil Procedure in adversary proceedings.

and point to specific facts showing there is a genuine issue of fact for trial. See, e.g., id. at 252; Matsushita, 475 U.S. at 585-86; Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000); Robeson Indus. Corp. v. Hartford Accident & Indem. Co., 178 F.3d 160, 164 (3d Cir. 1999). If the moving party offers only speculation and conclusory allegations in support of its motion, its burden of proof is not satisfied. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999).

B. New Value Defenses

INB asserts both subsequent and contemporaneous new value defenses based on its delivery of lien releases, which resulted in CC Retail's entitlement to a rent offset from the Landlord.

INB has the burden of proof on its subsequent new value defense and must show that: (1) unsecured new value was provided after the allegedly preferential transfers were made; and (2) the new value was not "repaid with an otherwise unavoidable transfer." Wahowski v. Am. & Efrid, Inc. (In re Pillowtex Corp.), 416 B.R. 123, 129 (Bankr. D. Del. 2009). New value includes, for the purposes of section 547, "money or money's worth in goods, services, or new credit . . . ." 11 U.S.C. § 547(a)(2).

INB submitted as evidence of the new value it provided: a copy of CC Retail's lease on the Cheektowaga Property, checks paid by the Debtors to INB, and the lien releases issued by INB

to CC Retail. INB's evidence shows that: (1) the Debtors made a progress payment of \$115,833.44 by check dated November 18, 2010; (2) the Debtors made their final payment of \$80,778.40 by check dated December 10, 2010, and received by INB on December 12, 2010; (3) the final lien release was dated December 13, 2010, and delivered by INB to the Debtors on December 14, 2010; and (4) the final lien release was a requirement under CC Retail's lease for reimbursement by the landlord for the construction expenses. Although INB provided a number of lien releases to CC Retail as it received progress payments, CC Retail was not entitled to any reimbursement from the landlord until the landlord received the final and unconditional lien release dated December 13, 2010.

The Trustee presents three arguments against summary judgment on INB's new value defenses. First, with respect to the December 10 transfer, the Trustee argues that it is unsettled in the Third Circuit whether the receipt or clearing date of a check controls for the purpose of a section 547(c) defense. The Trustee asserts that, using the December 14, 2010, clearing date for the transfer, INB has not proven that it gave new value after that date because the final lien release was dated December 13.

The Third Circuit has noted that the proposition that the "date of transfer of a currently dated check is the date that check is delivered to the creditor" for the purposes of the new value defense is not a settled issue of law. In re New York City

Shoes, Inc., 880 F.2d 679, 683 (3d Cir. 1989). New York City Shoes, however, dealt with post-dated checks. Id. Its discussion of currently dated transfers, while mere dicta, is nonetheless persuasive. The Third Circuit noted:

[A]llowing creditors to rely on the receipt of a check and ship new merchandise, rather than requiring them to wait until the check is honored by the bank, serves the purposes of section 547(c)(4) because it allows the debtor to continue to conduct its business in an ordinary manner. In contrast, if the time of transfer of a currently dated check were deemed to be the date that the check cleared the bank, shaky companies may be pressured because creditors might wait longer before shipping them goods.

Id.

This Court has been unable to locate any Third Circuit case addressing whether the clearing date or the delivery date is the relevant date for a section 547(c)(4) defense where the check is not back-dated. Several bankruptcy courts within the Third Circuit, however, have held that the relevant date is the delivery date. See In re Contempri Homes, Inc., 269 B.R. 124, 130 (Bankr. M.D. Pa. 2001) (holding that "the date of transfer within the context of Section 547(c)(4) occurs on the date that a payment by check is received by the creditor"); Kellman v. P.S.E.&G. (In re Jolly N, Inc.), 122 B.R. 897, 908 (Bankr. D.N.J. 1991) (measuring the date of a transfer for purposes of section 547(c)(4) as the date the creditor receives the check); Begier v. Krain Outdoor Advertising, Inc. (In re Am. Int'l Airways, Inc.),

68 B.R. 326, 336 (Bankr. E.D. Pa. 1986) aff'd, In re Am. Int'l Airways, Inc., CIV. A. 87-1287, 1987 WL 54484, at \*1 (E.D. Pa. May 12, 1987) (holding that "for the purposes of 547(c)(4), the date of delivery of a check constitutes payment"). Additionally, "[t]hose Courts of Appeals to have considered the issue are unanimous in concluding that a 'date of delivery' rule should apply to check payments for purposes of § 547(c)." Barnhill v. Johnson, 503 U.S. 393, 402 n.9 (1992).

Based on the foregoing, the Court finds that the controlling date for a currently dated check for the purposes of a section 547(c)(4) defense is the date of delivery. It is undisputed that INB delivered the lien releases to CC Retail (on December 14, 2010) subsequent to INB's receipt of the December 10 check (on December 12, 2010). Therefore, the Court concludes that INB has satisfied the first element of section 547(c)(4) (that new value be provided after the allegedly preferential transfer).

Next, the Trustee argues that the lien release does not fall within the definition of "new value" under section 547(a)(2) because it effectuated a release of liens on property owned by the landlord, rather than by the Debtors. See Lubman v. C.A. Guard Masonry Contractor, Inc. (In re Gem Const. Corp. Of Virginia), 262 B.R. 638, 647 (Bankr. E.D. Va. 2000) (noting that a lien release gives new value only to the extent that the lien was "secured by estate assets"); Cocolat, Inc. v. Fisher Dev. (In

re Cocolat, Inc.), 176 B.R. 540, 546 (Bankr. N.D. Cal. 1995) (holding that lien rights in real property given up by a creditor did not provide new value to a debtor where the debtor did not own the underlying real property). While it is true that the release of a lien gives value to the owner of the encumbered property, in this case the lien release also gave value to CC Retail because it enabled CC Retail to obtain reimbursement or a credit against rent due to the landlord. Therefore, the Court concludes that INB has established that the Debtors received subsequent new value.

Finally, the Trustee argues that section 547(c)(4) requires that the "new value" be provided by the creditor who received the transfer in question. See In re Musicland Holding Corp., 462 B.R. 66, 74 (Bankr. S.D.N.Y. 2011) (holding that new value provided by an affiliate of a creditor could not be used by the creditor in a section 547(c)(4) defense). This argument ignores the fact that INB itself provided value to CC Retail. The final lien release was provided by INB to CC Retail, and the lien release itself had value because it entitled CC Retail to reimbursement or a rent credit for costs expended in renovating the property. In contrast, in Musicland Holding Corp., the creditor provided nothing of value to the debtor subsequent to the transfer at issue. Rather, following the debtor's payment of its debt to the creditor, an affiliate provided services to the

debtor. Id. at 73. INB does not rely on goods or services later provided to the Debtors by a third party: INB itself provided something of value to the Debtors. The final lien release entitled the Debtors to receive reimbursement of the actual costs of the renovations to the Cheektowaga Property, up to \$1,161,650. The Court finds that the final lien release itself constitutes new value.

Although the Court finds that INB provided new value to the Debtors, a material issue of fact remains as to the amount of that new value. The value of the lien release to the Debtors is only the amount of reimbursement or rent reduction actually received by them from the landlord. No evidence has been presented as to that value.<sup>4</sup> Therefore, the Court will deny INB's motion for partial summary judgment on the subsequent new value defense because there is a material issue of disputed fact.<sup>5</sup>

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<sup>4</sup> A review of the Debtors' bankruptcy case reveals that the Debtors rejected the Cheektowaga Property lease effective April 11, 2011. (D.I. 668) There is no evidence before the Court, however, of what, if any, reimbursement or rent credits were received by the Debtors between the receipt of the lien release on December 14, 2010, and the rejection of the lease on April 11, 2011.

<sup>5</sup> INB's contemporaneous new value defense is premised on the same facts as its subsequent new value defense. Because the Court finds that INB provided new value subsequent to each of the subject transfers (although not the amount of that value), it is unnecessary to consider whether INB has satisfied the requirements of its contemporaneous new value defense under section 547(c)(1).

C. Ordinary Course of Business Defense

INB asserts that the November 18 transfer was made according to ordinary business terms, thus satisfying the "objective" ordinary course of business defense under section 547(c)(2)(B).

Section 547(c)(2) provides a defense if "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,"<sup>6</sup> and such transfer was (A) "made in the ordinary course of business or financial affairs of the debtor and the transferee," or (B) made according to "ordinary business terms" in the industry. 11 U.S.C. § 547(c)(2).

INB claims an objective ordinary course of business defense under the second prong of section 547(c)(2). In order to succeed on that defense, INB must show that the November 18 transfer was made "in harmony with the range of terms prevailing as some industry's norm." Fiber Lite Corp. v. Molded Acoustical Prods., Inc. (In re Molded Acoustical Prods., 18 F.3d 217, 236 (3d Cir. 1994)). Although INB need not "prove rigorous definitions of either the industry or the credit standards within that industry," it must establish a relevant industry and a range of terms used within that industry. Sass v. Vector Consulting, Inc. (In re American Home Mortg. Holdings, Inc.), 476 B.R. 124, 141

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<sup>6</sup> The Trustee does not dispute that the payments to INB were on account of a debt incurred in the ordinary course of business.

(Bankr. D. Del. 2012).

INB claims that its industry is a niche construction industry of contract construction for national retail chains. INB presented evidence in the form of two affidavits, one from INB's president, Lawrence Keefer, and one from the Debtors' former Construction Contracts Manager, Marcus Wilcher. Both have worked in that construction industry for many years. Both Keefer and Wilcher state that 30 days net payment terms are typical in contracts they have seen in that industry.

The Trustee, on the other hand, claims that the relevant industry is the Commercial and Industrial Building Construction industry described by NCAIS Code 236220 as "construction (including new work, additions, alterations, maintenance, and repairs) of commercial and institutional buildings and related structures." The Trustee relies on the affidavit of Matthew Tomlin, a CPA, who states that he has reviewed Risk Management Association data with respect to that industry, which shows a normal payment range of 34 to 75 days, with a mean of 53 days.

The Court finds that the evidence presented creates material issues of fact as to both the relevant industry and the payment terms for that industry. The parties submit conflicting affidavits such that the credibility of the witnesses must be assessed by the Court prior to a determination of the facts. Cf. In re Global Tissue L.L.C., 106 F. App'x 99, 103 (3d Cir. 2004)

(holding that testimony from employees of a party could be sufficient to establish an industry standard "as long as the court determines that the employees are credible") (emphasis added); In re Cherrydale Farms, Inc., No. 99-597 (PJW), 2001 WL 1820323, at \*5 (Bankr. D. Del. Feb. 20, 2001) (holding that an affidavit from a defendant's CFO was sufficient to establish ordinary business terms where the plaintiff "offered no contrary evidence") (emphasis added).

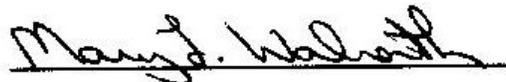
### III. CONCLUSION

For the reasons stated above, INB's Motion for Summary Judgment will be denied.

An appropriate Order is attached.

Dated: January 31, 2014

BY THE COURT:



Mary F. Walrath  
United States Bankruptcy Judge

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

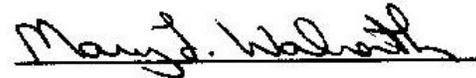
In re:	)	Chapter 7
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ULTIMATE ACQUISITION	)	Case No. 11-10245 (MFW)
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	)	
Debtors.	)	Jointly Administered
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ALFRED T. GIULIANO,	)	
CHAPTER 7 TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 11-52633 (MFW)
	)	
INNOVATIVE NATIONWIDE	)	
BUILDERS, INC.	)	
	)	
Defendant.	)	
	)	
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**O R D E R**

**AND NOW**, this **31st** day of **January, 2014**, after consideration of the Motion of Innovative Nationwide Builders, Inc. for Summary Judgment on the Trustee's complaint against it and the Trustee's opposition thereto, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that the Motion for Summary Judgment is **DENIED**.

BY THE COURT:



Mary F. Walrath  
United States Bankruptcy Judge

cc: Bradford J. Sandler, Esquire<sup>1</sup>

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<sup>1</sup> Counsel is to serve a copy of this Order and the accompanying Memorandum Opinion on all interested parties and file a Certificate of Service with the Court.

**SERVICE LIST**

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