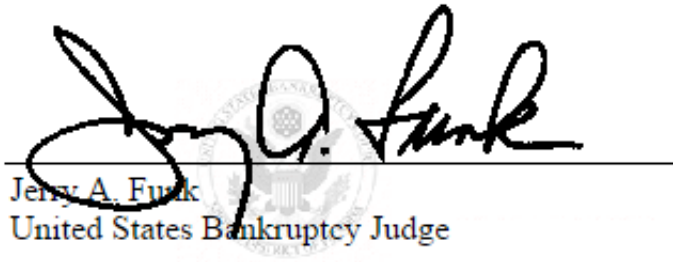
ORDERED.

Dated: February 01, 2019



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

MAS GLOBAL, INC.,

Debtor.
_____/

Involuntary Chapter 7
Case No. 3:12-bk-6289-JAF

MARIA YIP, as Trustee for the Bankruptcy Estate of MAS GLOBAL, INC.,

Plaintiff,

v.

JAMES SMITH, *et al.*,

Defendants.
_____/

Adv. Pro. No. 3:14-ap-0134-JAF

ORDER ON TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS CHP ENERGY SYSTEMS, LLC AND RICHARD DALTON

This proceeding is before the Court on the motion for summary judgment filed on November 2, 2018, by Plaintiff MARIA YIP, as Trustee for the Bankruptcy Estate of MAS GLOBAL, INC. (the "Trustee"). (Doc. 261). The Trustee seeks summary judgment as to Count 3 (fraudulent transfer avoidance) and Count 16 (subsequent-transferee liability).

PROCEDURAL BACKGROUND

On September 25, 2012, certain creditors of Debtor MAS GLOBAL, INC. (the "Debtor") initiated the main bankruptcy case by filing an involuntary petition against Debtor, under Chapter 7 of the Bankruptcy Code. The Debtor was in the construction business, focusing on designing and building on-site energy production and heating/chilling units.

On April 24, 2014, the Trustee filed a sixteen-count complaint (the "Complaint") initiating this adversary proceeding against, among other parties, Defendant JAMES SMITH ("Smith"), Defendant CHP ENERGY SYSTEMS, LLC ("CHP Energy"), and Defendant RICHARD DALTON ("Dalton"). Only Counts 3 and 16 are at issue in this Order.

Count 3 seeks to avoid, pursuant to 11 U.S.C. § 548, the transfer of $207,000 (the "Transferred Sum") from the Debtor to CHP Energy. Count 16 seeks to recover from Dalton, pursuant to § 550(a)(2), a portion of the Transferred Sum totaling $58,272 (the "Dalton Transfers"). Dalton filed a response to the Trustee's motion (Doc. 264), to which the Trustee filed a reply (Doc. 265). The following facts are undisputed.

UNDISPUTED FACTS

In May 2012, the Debtor executed a promissory note in the principal amount of $200,000 in favor of Smith. Prior to this, Smith advanced $158,156 to the Debtor as an "initial investment" in the Debtor. To secure the Debtor's obligation to repay Smith, the Debtor executed a security agreement in favor of Smith. Smith attests that he made this "initial investment" in the Debtor based on representations made by Michael A. Solms ("Solms"), the president of the Debtor and whose initials represent the "MAS" in the Debtor's name. (Doc. 261-3 at 41) (the "Smith Affidavit"). Solms solely controlled the Debtor at all material times.

In August 2012, Smith declared the Debtor in default under the promissory note for failing to make timely regular payments. By written notice, Smith advised the Debtor that he would exercise his rights under the security agreement to take possession of the Debtor's property that served as collateral for the loan. Smith used his own company, CHP Energy, to take possession of the collateral. Smith solely controlled CHP Energy at all material times.

Among other property, CHP Energy took control of one of the Debtor's bank accounts at BB&T Bank. Dalton's deposition testimony and affidavit indicate that Smith and Solms negotiated and agreed to this transfer. At the time, Dalton was an employee of the Debtor and had personal knowledge of the Debtor's financial affairs. Smith enlisted the help of Dalton, with the consent of Solms, to assist CHP Energy in taking possession of the Debtor's bank account. Following Smith's instructions, Dalton moved the Transferred Sum from the Debtor's bank account to CHP Energy's bank account, at the same bank. After receipt of the Transferred Sum, CHP Energy made several cash transfers to various persons and entities, including Smith and Dalton. At issue here are several cash transfers to Dalton from CHP Energy's bank account, totaling $58,272—i.e., the Dalton Transfers. The Trustee argues she is entitled to summary judgment on the issues of: i) whether the Transferred Sum is avoidable under § 548(a)(1)(B) and ii) whether the amount of the Dalton Transfers is recoverable from Dalton under § 550(a)(2).

STANDARD FOR SUMMARY JUDGMENT

The chief question at summary judgment is whether there is sufficient conflicting evidence to warrant a trial. Summary judgment is appropriate if the pleadings and discovery show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. The court must view the evidence in a light favorable to the nonmovant and draw all inferences in favor of the nonmovant. In re Delco Oil,

Inc., 599 F.3d 1255, 1257 (11th Cir. 2010). The movant bears the initial burden of demonstrating the absence of a triable issue. Id. Once the movant meets the initial burden, the burden of production shifts to the nonmovant to produce evidence, beyond its pleadings, demonstrating that a disputed fact-question exists. Id.

ANALYSIS

As stated, the two issues are the voidability of the Transferred Sum under Count 3 and Dalton's subsequent-transferee liability under Count 16. The Transferred Sum must be avoided before Dalton may be held liable for recovery. See IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs.), 408 F.3d 689, 706-07 (11th Cir. 2005) (holding that a trustee may bring an avoidance action and recovery action in the same adversary proceeding but that the trustee must first prove the transfer is avoidable before there may be any recovery against a subsequent transferee). If the transfer is not avoidable, there can be no liability for recovery against a subsequent transferee.

I. Count 3 – Constructive fraud under § 548(a)(1)(B).

Although Count 3 includes actual and constructive fraud, the Trustee's instant motion relies on a constructive-fraud theory of avoidance. (Doc. 261 at 17-18). In order to avoid a transfer as constructively fraudulent under § 548(a)(1)(B), "the Trustee must show that: (i) there was a transfer of an interest of the Debtor in property; (ii) the transfer occurred within two years preceding the petition date; (iii) the Debtor received less than reasonably equivalent value in exchange for the transfer; and (iv) the Debtor was either insolvent on the date of the transfer or became insolvent as a result of the transfer." Menotte v. Leonard (In re Leonard), 418 B.R. 477, 482 (Bankr. S.D. Fla. 2009).

A. Insolvency at the time of the transfer.

The Court is precluded from granting summary judgment on the element of insolvency. The Transferred Sum was transferred roughly one month before the involuntary petition was filed. (Doc. 261 at 6, ¶ 18). The Trustee's only evidence supporting insolvency are the Debtor's amended schedules[1] and the claims register in the main bankruptcy case. The Trustee contends these items show the Debtor was insolvent at the time of the transfer in light of the short period between the transfer and the filing of the petition. (Doc. 261 at 14).

The Trustee apparently seeks to employ the retrojection theory for proving insolvency, though she never specifically raises the theory. See, e.g., Leonard, 418 B.R. at 486 ("An attempt to demonstrate a debtor's financial condition at a prior date by reference to the debtor's financial condition as presented in his bankruptcy schedules has been referred to as the theory of 'retrojection.'"). A retrojection argument, however, creates only an inference of insolvency—not a presumption. See id. An inference drawn from the movant's evidence may carry the day at trial; however, an inference in favor of the movant will not typically satisfy the summary-judgment standard unless the movant's inference is the *only* "reasonable inference" that could be drawn from the evidence. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000) ("[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."); *Summary Judgment: Federal Law and Practice* § 6:5 ("This 'inference favoritism' toward the nonmovant should occur only after a court [ ] has found that a clear 'choice of inferences' actually exists."). In contrast, evidence creating a mere inference in favor of the *non*movant will almost always create a genuine dispute of fact and, therefore, defeat a motion for summary judgment.

[1] (Doc. 88 in case no. 3:12-bk-6289).

As to the nonmovant's evidence, Dalton provided an affidavit (the "Dalton Affidavit") attesting that he "believed" the Debtor was solvent at the time of the transfer, citing his knowledge and understanding of the Debtor's assets and liabilities at the time. (Doc. 264-1 ¶¶ 16-19). Dalton has not offered documentary or expert evidence concerning insolvency, and it is not clear on what he bases his beliefs. Likewise, the movant Trustee has not offered any evidence or argument concerning the Debtor's financial condition at the time of the transfer or any evidence from which the Court may find that the Debtor's financial condition was the same on the date of the transfer as it was on the petition date, as set forth in the Debtor's amended schedules.

The Trustee bears the initial burden as the movant. As a result of the failure to meet this initial burden, the Court cannot grant summary judgment as to insolvency, under Count 3.

B. Receipt of reasonably equivalent value.

The Court is likewise precluded from granting summary judgment on the "reasonably equivalent value"[2] element of Count 3. "Whether the debtor received 'reasonably equivalent value' for the alleged fraudulent transfer is ordinarily a question of fact." Harrison v. N.J. Cmty. Bank (In re Jesup & Lamont, Inc.), 507 B.R. 452, 470 (Bankr. S.D.N.Y. 2014). "Where, however, a debtor receives no value for an alleged conveyance, a court may find that the transfer was fraudulent, as a matter of law, as long as the other elements in § 548 are satisfied." Id.

Further, under the appropriate factual circumstances, a transfer that results in a dollar-for-dollar reduction in a debtor's liability may constitute receipt of reasonably equivalent value. See, e.g., Marshack v. Wells Fargo Bank (In re Walters), 163 B.R. 575, 581 (Bankr. C.D. Cal. 1994) (holding that a transfer from debtor to partnership that resulted in a dollar-for-dollar reduction of

[2] The term "reasonably equivalent value" is not defined in the Bankruptcy Code; however, for purposes of § 548, "value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A) (2012).

debtor's liability under a personal guarantee of the partnership's debts qualified as receipt of reasonably equivalent value for purposes of § 548).

Here, both the Smith Affidavit (Doc. 261-3 at 40) and the Dalton Affidavit (Doc. 264-1) present evidence that the Transferred Sum was used to pay debts of the Debtor. According to Dalton, the Transferred Sum was to be used as follows: a) $17,000 would go to CHP Energy for Smith to pay the Debtor's federal tax debt; b) $10,000 would go to CHP Energy for Smith and Dalton, each, ($20,000 total) for services they provided to the Debtor; c) $12,000 would go to Solms for him to pay vendor-creditors of the Debtor that CHP Energy would no longer be using; d) $25,000 would go to CHP Energy for Smith to pay the Debtor's outstanding overhead, insurance, and office expenses; e) $20,000 to would go to CHP Energy for Smith to pay Fox Manufacturing (a vendor-creditor of the Debtor); f) $25,000 would go to CHP Energy for Smith to pay the Debtor's other vendor-creditors that CHP Energy would continue to use in the future; and g) the remainder would be used by CHP Energy in its operations on a separate construction project. (Doc. 264-1 at 3-4).

Paragraph 6 of the Smith Affidavit provides that the payments were actually made:

> 6. In the second half of 2012, CHP made $259,501.07 in "CHP Payments" to [the Debtor]'s creditors and employees. In 2012, I had become deeply distrustful of Michael Solms, who was the president of [the Debtor]. . . . The Transferred Sum allowed CHP to pay creditors and employees of [the Debtor] at a time when [the Debtor] was not paying them. CHP gave consideration to [the Debtor] by paying [the Debtor]'s debts.

(Doc. 261-3 at 41-42).

If it is ultimately proven that the Transferred Sum was used to pay the Debtor's debts, the Debtor would have received reasonably equivalent value to the same extent the Debtor received a reduction in its outstanding debt. See Walters, 163 B.R. at 581. The key disputed fact question

on this element is whether and to what extent the Transferred Sum was used to pay debts owed by the Debtor. In light of Smith's and Dalton's affidavits, the Court cannot grant summary judgment on this element of Count 3.

II. Count 16 – Dalton's good-faith affirmative defense.

Finally, Count 16 alleges subsequent-transferee liability against Dalton, under § 550(a)(2). The Court cannot grant summary judgment in favor of the Trustee because fact disputes remain as to Dalton's good-faith defense under § 550(b)(1).

Section 550(b)(1) provides that a trustee may not recover proceeds of an avoided transfer from a subsequent transferee who "takes [the property] for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. § 550(b)(1) (2012).[3] When analyzing a good-faith defense under § 550(b)(1), "a court must consider whether the transferee had actual knowledge of the debtor's fraudulent purpose in making the transfers or had knowledge of facts or circumstances that would have induced an ordinarily prudent person to make inquiry and [whether] the inquiry, if made with reasonable diligence, would have led to the discovery of the debtor's fraudulent purpose." Welch v. Regions Bank (In re Mongelluzzi), 587 B.R. 392, 411 (Bankr. M.D. Fla. 2018).

Here, paragraphs 22-23 of the Dalton Affidavit state:

> 22. I earned all of the payments that I received from CHP, which I believe totaled $58,272.25 [i.e., the Dalton Transfers]. The $10,000 I received in August 2012 was an advance for future work (which I did), and the remaining payments were either salary or expense reimbursement. I had no reason to believe that any of those payments were subject to being "clawed back," as the [Trustee] is trying to claim.

[3] Section 550(b)(1) does not use the phrase "reasonably equivalent value" but, instead, uses simply the word "value."

> 23. At all times [I was] with [the Debtor] and CHP, I conducted myself in a professional manner and in good faith, and I had no reason to believe that there was anything wrong with the payments I received. When I gave my deposition in the case I may not have understood the questions about "affirmative defenses" [ ] but I know that I earned all of those payments for work I did for CHP.

(Doc. 264-1 at 5) (bracketing added).

These attestations, together with the whole of the Dalton Affidavit, constitute sufficient evidence to create a triable issue on Dalton's good-faith defense to Count 16. The affidavit provides evidence that Dalton received the Dalton Transfers in satisfaction of a debt for services he rendered to the Debtor and to CHP Energy, and that he did so with no knowledge (or reason to know) of the (alleged) voidability of the Transferred Sum. A trial is necessary to decide the full merits of Dalton's good-faith defense.

In light of the above, it is hereby ORDERED that the Trustee's motion for summary judgment is DENIED.