

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

IN RE:)	
)	
CORONADO ENGINEERING, INC.,)	Case No. 01-14295
)	Chapter 7
)	
Debtors.)	
_____)	
)	
J. MICHAEL MORRIS, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 02-5119
)	
ADVANCED COMPOSITES,)	
TECHNOLOGIES, L.L.C.; KASA)	
INDUSTRIAL CONTROLS, INC.;)	
EXTRUSION SPECIALITY)	
PRODUCTS, L.L.C.; BIMETALIX;)	
and SUNFLOWER BANK,)	
)	
Defendants.)	
_____)	

**ORDER DENYING TRUSTEE’S MOTION
TO AMEND COMPLAINT**

Plaintiff J. Michael Morris, trustee of the bankruptcy estate of Coronado Engineering, Inc., seeks leave to amend his complaint to include a new claim that the alleged mechanics liens of Extrusion Specialty Products, Inc. (ESP) and Bimetalix (BM) should be avoided as preferential transfers under 11 U.S.C. § 547(b).¹ ESP and BM object, asserting that their liens are statutory liens unavoidable under § 545 and that, pursuant to § 547(c)(6), such liens are not avoidable as preferences

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, unless otherwise cited.

under § 547. Plaintiff's motion came on for hearing on May 8, 2003, and, after hearing argument, the court took the matter under advisement.

This chapter 11 bankruptcy case was filed on September 5, 2001. The Court converted the case to chapter 7 and appointed Mr. Morris trustee on December 13, 2001. He filed this adversary on April 22, 2002. In the complaint, the trustee alleges that ESP and BM assert mechanics liens in an extruder, a certain item of equipment or machinery that was manufactured by the debtor and sold and delivered prepetition to defendant Advanced Composite Technologies, L.L.C. (ACT).² The trustee commenced this adversary with the original aim of collecting the purchase price of the extruder from ACT for Coronado's estate. According to the final pretrial conference order filed in this proceeding on April 3, 2003, that portion of the complaint has now settled, funds have been paid to Sunflower Bank, Coronado's principal lender, and all that remains is to determine the degree and extent of the competing parties' interests in the proceeds of the extruder.³

In the trustee's complaint, he sought only the determination of the parties' relative rights in the extruder or its proceeds. He did not expressly assert that the liens of ESP and BM were avoidable statutory liens or avoidable preferences. Similarly, ESP's and BM's answers to the complaint only seek a determination of their rights in the proceeds.⁴ Only in ACT's cross claim filed against ESP and BM were the liens challenged as not complying with the requirements of KAN. STAT. ANN. § 58-201 (1994), the source of Kansas personal property artisans' liens.⁵

² Dkt. 1.

³ Dkt. 45.

⁴ Dkt. 9 and 10.

⁵ Dkt. 17.

In the final pretrial conference order, the trustee requests leave to amend his original complaint to add preference claims against ESP and BM.⁶ Both defendants object, stating that if their liens cannot be avoided as statutory liens under § 545, the liens are excepted from the preference statute and, as such, allowing the trustee to include this cause of action would be futile.⁷

Fed. R. Bankr. P. 7015 makes Fed. R. Civ. P. 15 applicable in adversary proceedings. Rule 15(a) provides, in part, that –

. . . [A] party may amend the party’s pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*

[Emphasis added]. The Supreme Court has held that where the underlying facts and circumstances relied on by plaintiff may be a proper subject for relief, the plaintiff should be afforded the opportunity to test its theory on the merits absent an apparent or declared reason such as bad faith, undue delay, undue prejudice, or futility.⁸ This does not, however, open the door to every proposed amendment. “If the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend.”⁹ It is also clear that “[i]f a proposed amendment is

⁶ The trustee also filed a motion to amend complaint on April 18, 2003. *See* Dkt. 50.

⁷ ESP and BM filed their written objection to the motion, asserting that the proposed amendment was “pointless.” *See* Dkt. 52.

⁸ *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L. Ed. 2d 222 (1962). *See also, Bauchman for Bauchman v. West High School*, 132 F.3d 542, 562 (10th Cir. 1997) (A court may properly deny motion for leave to amend as futile where the proposed amended complaint would be subject to dismissal for any reason.); *Schepp v. Fremont County, Wyo.*, 900 F.2d 1448, 1451 (10th Cir. 1990) (An amendment is futile where party defendant has absolute immunity from suit).

⁹ *See* 6 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE, §1487 (2d ed. 1990), citing numerous cases.

not clearly futile, then denial of leave to amend is improper.”¹⁰ Here, the Court concludes that the trustee’s purported preference claim is legally insufficient and thus, the amendment is futile.

Section 545(2) permits the avoiding of a statutory lien if it is not enforceable against a bona fide purchaser purchasing the encumbered property at the time of the commencement of the case, whether or not such a bona fide purchaser exists. The issue in a § 545(2) avoidance proceeding will be whether the lien legally attached and/or was perfected as a matter of state law at or before the time of filing. As the pretrial order suggests at page 7 (with regard to BM) and at page 8 (with regard to ESP), the trustee challenges the legal sufficiency of the defendants’ liens because among other reasons, they allegedly did not timely file their lien statement within the 90 day period provided by KAN. STAT. ANN. § 58-201 (1994). If these liens cannot be avoided under § 545(2), they will not be avoidable as preferences under § 547 because § 547(c)(6) excepts non-avoidable statutory liens from the preference law.

The validity of these liens is regulated under Code § 545. The effect and intent of Code § 547(c)(6) is to defer preference issues to that more specific section of the Code. The exclusion conveyed in Code § 547(c)(6) applies only to the creation and validity of the statutory lien itself.¹¹

Collier’s agrees with this analysis, stating that “[as] a further example . . . a mechanic’s lienor that perfects its lien within the 90-day period preceding the debtor’s filing of the petition will not have received a preference because this type of lien is not voidable under section 545.”¹²

¹⁰ *Id.*

¹¹ See WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE, § 57:26 (2d ed. 2003).

¹² See 5 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, ¶ 547.04[6] (15th ed. rev. 2003), citing *Klein v. Civale & Trovato, Inc. (In re Lionel Corp.)*, 29 F. 3d 88, 95 (2d Cir. 1994).

In this case, the trustee could prevail in demonstrating that the liens of BM and ESP are not enforceable against a bona fide purchaser and are therefore avoidable under § 545(2). If he does not, however, the non-avoidable liens are expressly excluded from the ambit of § 547 by § 547(c)(6). Thus, there can be no legal basis for the trustee's preference theory.

Leave to amend is therefore DENIED. The pretrial order, at pages 6-9, contains contentions relating to the date of attachment and the nature of the transfer evidenced by the liens. To the extent those contentions assert claims for relief under § 547, they shall be deemed of no effect.

IT IS SO ORDERED this ____ day of May, 2003.

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the ORDER DENYING TRUSTEE'S MOTION TO AMEND COMPLAINT were deposited in the United States mail, postage prepaid on this 30th day of May, 2003, to the following:

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