SO ORDERED.

SIGNED this 27th day of June, 2018.

Dale L. Somers
Dale L. Somers
United States Chief Bankruptcy Judge

Designated for online publication only
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
WB SERVICES, LLC,	**CASE NO. 16-10759**
	CHAPTER 7
DEBTOR.	
CARL B. DAVIS, Trustee,	
PLAINTIFF,	
v.	**ADV. NO. 17-5105**
BORN, INC.,	
DEFENDANT.	

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this proceeding, Carl B. Davis, the Chapter 7 Trustee, seeks to recover as a preference a payment Debtor WB Services, LLC (WB), made to defendant Born, Inc. (Born), pursuant to a contract for the manufacture of heaters to be utilized by Debtor in

the construction of a renewable diesel facility. Born moves for summary judgment. The Trustee appears by Kenneth H. Jack of Davis & Jack, L.L.C. Born appears by Martin R. Ufford of the Hinkle Law Firm LLC. The Court has jurisdiction.[1]

THE UNCONTROVERTED FACTS.

When moving for summary judgment, Born set forth statements of uncontroverted fact in separately numbered paragraphs. When responding, the Trustee admitted those facts for purposes of summary judgment. They are as follows.

On or about September 26, 2014, Born submitted a Proposal to sell Debtor two direct fired heaters (the Heaters). The "Commercial Section" of the Proposal states in part: "Title will pass on payment of milestones. Risk will pass on delivery to the delivery point. Full title will pass when full obligations and payments are met by your good selves." Born and Debtor entered into a Purchase Order dated September 29, 2014, and revised as of February 2, 2015, in which Born agreed to sell two Heaters to Debtor for $377,708.98. Debtor was to utilize the Heaters in the construction of a renewable diesel facility in Phillipsburg, Kansas, with Prairie Horizon Advance Fuels, LLC, as the ultimate end user of the Heaters. In a section entitled "PO Comments," the Purchase

[1] This Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §§ 157(a) and 1334(a) and (b), and the Amended Standing Order of Reference of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order No. 13-1, *printed in* D. Kan. LBR at 193 (March 2018). Furthermore, this Court may hear and finally adjudicate this matter because it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F). There is no objection to venue or jurisdiction over the parties.

Order states in part: "PO issued per attached Born Inc. proposal . . . dated 9/26/14." Thus, the Proposal and its terms were made a part of the Purchase Order.

On or about February 23, 2016, Debtor issued a check in the amount of $69,001.35 to Born. Born applied the check toward the balance due for Debtor's purchase of the Heaters. On the day before the payment was received, Debtor owed Born $75,501.34. Immediately after the check was applied, Debtor owed Born $6,499.99 for the Heaters. On the date Born received and negotiated the payment, the Heaters were located at Born's place of business in Tulsa, Oklahoma, and the value of the Heaters was $377,708.98.

THE TRUSTEE FAILED TO STATE ADDITIONAL UNCONTROVERTED FACTS

In his responsive pleading, the Trustee attempted to present additional facts by stating "See Appendix A attached,"[2] but did not include any statement of facts in his memorandum. Appendix A is a copy of an unverified letter, with attachments. This approach does not comply with D. Kan. L. Bankr. R. 7056.1(b)(2), which provides in part: "If the party opposing summary judgment relies on any facts not contained in movant's memorandum, that party must include each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a)."[3] Subsection (a) requires a memorandum or brief in support of summary judgment to begin with a section containing a concise statement of material facts. For the

[2] Doc. 18.

[3] Because of the Trustee's failure to follow the rules, Born did not attempt to respond to his "additional facts."

purpose of ruling on Born's motion for summary judgment, the Court therefore disregards any additional facts stated in the Trustee's Appendix A.

ANALYSIS

The Trustee seeks to avoid as preferential under 11 U.S.C. § 547(b) the payment Debtor made to Born by the check issued on February 23, 2016, within 90 days preceding Debtor's filing of its petition under the Bankruptcy Code on April 28, 2016. When moving for summary judgment, Born contends that the transfer cannot be avoided because the Trustee will not be able to prove that § 547(b)(5) is satisfied. That subsection requires as an element of a preferential transfer that the Trustee establish that the transfer enabled the creditor to receive more than such creditor would receive if (a) the case were a case under Chapter 7, (b) the transfer had not been made, and (c) such creditor received payment of such debt to the extent provided by the provisions of the Bankruptcy Code. Under this section, "[g]enerally, payments to a fully secured creditor will not be considered preferential because the creditor would not receive more than in a chapter 7 liquidation."[4]

Born contends that under article 2 of the Uniform Commercial Code, it had a perfected security interest in the Heaters at the time the payment was received and that the security interest was released upon payment. The provision Born relies on is the

[4] 5 *Collier on Bankruptcy*, ¶ 547.03[7] at 547-40 (Richard Levin & Henry J. Sommer, eds.-in-chief, 16th ed. 2018).

second sentence of K.S.A. 2017 Supp. 84-2-401(1).[5] It provides: "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." K.S.A. 2017 Supp. 84-9-110 provides that a security interest arising under K.S.A. 84-2-401 is subject to article 9, which governs security interests.[6]

The problem with Born's argument is that at the time of the transfer, the Heaters were in Born's possession. After the payment, Debtor was not entitled possession of the Heaters since it still owed Born $6,499.99 for the Heaters. The security interest recognized by K.S.A. 2017 Supp. 84-2-401 applies to "goods shipped or delivered to the buyer." Since the undisputed facts do not establish that the Heaters were shipped or delivered to Debtor, the conditions for the creation of a security interest under K.S.A. 2017 Supp. 84-2-401 are not satisfied.[7]

The Court also declines to find that Born is entitled to summary judgment based on

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[5] The Purchase Order states: "This Agreement shall be governed by the Uniform Commercial Code and construed and governed in accordance with the laws of the State of Kansas, United States of America."

[6] K.S.A. 2017 Supp. 84-9-110 further provides: "[U]ntil the debtor obtains possession of the goods, (1) [t]he security interest is enforceable, even if K.S.A. 2017 Supp. 84-9-203(b)(3) . . . has not been satisfied, (2) filing is not required to perfect the security interest; (3) the rights of the secured party after default by the debtor are governed by article 2 or 2a; (4) and the security interest has priority over a conflicting security interest created by the debtor."

[7] There are sections of article 2 in addition to K.S.A. 2017 Supp. 84-2-401 that give rise to security interests, but none of them are cited by Born or applicable under the facts of this case. K.S.A. 2017 Supp. 84-2-505 addresses a seller's shipment under reservation, and K.S.A. 84-2-711(3) addresses a buyer's security interest in rejected goods. Other provisions give the seller rights similar to the retention of a lien, such as the right under K.S.A. 84-2-703(a) to withhold delivery from a defaulting buyer and the right under K.S.A. 84-2-702(1) to withhold delivery on discovery of the buyer's insolvency, but they also do not apply here.

Phoenix Steel,[8] the case relied on by Born. In that case, the debtor Phoenix purchased equipment from Rittenhouse pursuant to a purchase order that required three payments, after which the debtor could remove the equipment from the seller's bailee. Less than 90 days before it filed for Chapter 11 relief, the debtor made the last payment and removed the equipment. Later, the debtor attempted to recover that payment as a preference. The court found that Rittenhouse intended to retain title to and possession of the equipment until it received full payment, and by doing so, created a security interest in its favor, which, because it arose under article 2, was perfected without filing a financing statement. "Thus, Rittenhouse maintained a security interest in the equipment subject to the final payment and did not receive more than it would have received in a liquidation proceeding."[9]

Phoenix is factually distinguishable. In this case, Debtor was not entitled to delivery upon Born's receipt of the payment that the Trustee seeks to recover, and possession of the Heaters remained with Born both before and after Debtor made the payment. The Court therefore rejects Born's argument that the Trustee has not satisfied § 547(b)(5) because Born had an article 2 security interest in the Heaters. Also, the facts as presented do not support the creation of a perfected security interest under any other

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[8] *Phoenix Steel Corp. v. Rittenhouse Org. (In re Phoenix Steel Corp.)*, 76 B.R. 373 (Bankr. D. Del. 1987).

[9] *Id*. at 376. In addition, the court found that the § 547(c)(1) defense was satisfied because the release of Rittenhouse's lien right in exchange for the payment was a contemporaneous exchange for new value. *Id*.

authority, such as an article 9 security agreement and perfection.

Further, § 547(b)(5) also would not be satisfied if the payment had been on a contract that was later assumed by Debtor. This is because in that circumstance, if the seller had not received the payment prepetition, it would instead have received the payment after the bankruptcy court approved the debtor's assumption of the contract.[10] However, partial payments under a contact for purchase made by a debtor within 90 days prepetition are preferential when the contract is not assumed.[11]

CONCLUSION

For the foregoing reasons, the Court denies Born's motion for summary judgment based on the contention that § 547(b)(5) is not satisfied because the transfer by Debtor WB to Defendant Born resulted in the release of a perfected security interest arising under K.S.A. 2017 Supp. 84-2-401.

IT IS SO ORDERED.

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[10] *Guiliano v. Almond Invest. Co. (In re Carolina Fluid Handling Intermediate Holding Corp.)*, 467 B.R. 743, 750-51 (Bankr. D. Del. 2012) (citing *Kimmelman v. Port Authority of New York and New Jersey (In re Kiwi Intern'l Air Lines, Inc.)*, 344 F.3d 311, 321 (3rd Cir. 2003)).

[11] *In re ABC-Naco, Inc.*, 483 F.3d 470, 474-75 (7th Cir. 2007).