

**SO ORDERED.**

**SIGNED this 16th day of January, 2018.**



*Dale L. Somers*

Dale L. Somers  
United States Bankruptcy Judge

**For online publication  
IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**WB SERVICES, LLC,**

**DEBTOR.**

**CASE NO. 16-10759  
CHAPTER 7**

**CARL B. DAVIS, Trustee,**

**PLAINTIFF,**

**v.**

**ADV. NO. 17-5106**

**TRIPLETT WOOLF GARRETSON,  
LLC,**

**DEFENDANT.**

**MEMORANDUM OPINION  
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding was filed by Carl B. Davis, the Chapter 7 Trustee, to

recover \$110,273.35 from defendant Triplett Woolf Garretson, LLC (TWG) as a preferential transfer. TWG has moved for summary judgment, and the Trustee opposes the motion. TWG appears by Jeffrey D. Leonard, and the Trustee appears by Kenneth H. Jack. The Court has jurisdiction.<sup>1</sup> For the following reasons, the motion is granted.

## **FINDINGS OF FACT**

The facts material to the motion for summary judgment are uncontroverted.<sup>2</sup> TWG is a law firm that provided legal services to Debtor from 2009 through 2016. These legal services included the prosecution of a law suit Debtor filed in the United States District Court for the District of Kansas against Gulf Process Gases, LLC (the Lawsuit). The Lawsuit was settled, and on January 29, 2016, \$120,000 of the settlement proceeds (the Settlement Funds) was wire-transferred by Gulf Process Gases' insurance carrier to TWG's trust account. On January 29, 2016, Debtor owed TWG \$113,873.35 for legal services in various matters, including the Lawsuit. Debtor was aware of the balance due TWG and agreed that it would be paid from the Settlement Funds. With Debtor's knowledge and consent, on the date the funds were deposited, TWG discounted its fees by \$3,600.00, disbursed to itself \$110,273.35 (by two checks), and remitted the balance

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<sup>1</sup> 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. Rules of Practice and Procedure at 168 (March 2016). 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.

<sup>2</sup> Docs. 20 and 21.

of \$9,726.65 to Debtor by check. The checks to TWG were presented to a bank for payment on February 2, 2016, and the check to Debtor was presented for payment on February 3, 2016.<sup>3</sup>

On April 28, 2016, 90 days after the wire-transfer deposit to TWG's trust account, Debtor filed its voluntary petition under Chapter 7. Carl B. Davis was appointed as the Trustee for Debtor's bankruptcy estate. On August 9, 2017, the Trustee filed this adversary proceeding against TWG, seeking to avoid the deposit of the Settlement Funds into TWG's trust account and the payment to the firm of the \$110,273.35 as preferential transfers under 11 U.S.C. § 547(b), and to recover the same for the benefit of the estate under 11 U.S.C. § 550.<sup>4</sup>

TWG moves for summary judgment. It argues that the Trustee's complaint fails because the deposit into TWG's trust account gave rise to a statutory retaining lien under K.S.A. 7-108, the Kansas attorney lien statute, and is therefore excluded from avoidance as a preferential transfer by § 547(c)(6). Further, the transfer from the trust account to TWG's account was in satisfaction of a nonpreferential, fully secured claim. The Trustee responds that the deposit to the trust account was the satisfaction of a "payment intangible" as defined by Article 9 of the Kansas Uniform Commercial Code,<sup>5</sup> that the

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<sup>3</sup> Doc. 20-1, 2.

<sup>4</sup> Future references to title 11 of the United States Code in the text shall be to the section number only.

<sup>5</sup> K.S.A. 2016 Supp. 84-9-102(a)(42) (defining "general intangible" to include "payment intangible") and K.S.A. 2016 Supp. 84-9-102(a)(61) (defining "payment intangible").

deposit can be avoided under § 547, and that no attorney lien attached to the funds in the trust account.

## **ANALYSIS**

“In general, a ‘preference’ exists when a debtor makes payment or other transfer to a certain creditor or creditors, and not to others.”<sup>6</sup> Section 547(b) defines the elements which must be satisfied for the Trustee to avoid a transfer as preferential. Under the facts of this case, there are two potentially avoidable preferential transfers: (1) The transfer of \$120,000 of the Settlement Funds owed to Debtor into the TWG trust account on January 29, 2016; and (2) the subsequent disbursement of \$110,273.35 from the TWG trust account to TWG.

### **A. The deposit of the Settlement Funds into the TWG trust account was not an avoidable preference.**

With respect to the deposit of funds into the trust account, TWG does not address the presence of the elements of a preferential transfer as stated in § 547(b) but rather focuses on the exception found in § 547(c)(6). It provides that a trustee may not avoid an otherwise preferential transfer “that is the fixing of a statutory lien that is not avoidable under section 545 of this title.” TWG contends that the deposit of the Settlement Funds gave rise to a retaining lien under the Kansas attorney lien statute, and that the retaining lien constituted a statutory lien that is not avoidable under § 545.

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<sup>6</sup> *Kenan v. Fort Worth Pipe Co. (In re George Rodman, Inc.)*, 792 F. 2d 125, 127 (10th Cir. 1986).

The validity of an attorney's lien is determined by state law.<sup>7</sup> The Kansas attorney lien statute, K.S.A. 7-108, provides:

An attorney has a lien for a general balance of compensation upon any papers of his or her client which have come into the attorney's possession in the course of his or her professional employment, upon money in the attorney's hands belonging to the client, and upon money due to the client and in the hands of the adverse party, in any matter, action or proceeding in which the attorney was employed, from the time of giving notice of the lien to the party; such notice must be in writing, and may be served in the same manner as a summons, and upon any person, officer or agent upon whom a summons under the laws of this state may be served, and may also be served upon a regularly employed salaried attorney of the party.

The Kansas Supreme Court has construed this statute to concern two distinct kinds of liens, charging liens and retaining liens.<sup>8</sup> A charging lien is the right of an attorney to have fees and costs due for the attorney's services secured by a judgment against a third party that the attorney obtained for the client.<sup>9</sup> As against third parties, a charging lien generally is not perfected until notice of the lien has been given to the obligor against whom the lien is asserted.<sup>10</sup> The second kind of attorney lien, a retaining lien, is "an attorney's right to retain possession of all papers and money of his client coming into his

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<sup>7</sup> See *Butner v. United States*, 440 U.S. 48, 54-55 (1979).

<sup>8</sup> *Ahalt v. Gatewood*, 109 Kan. 328, 331, 198 P. 970, 971 (1921).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citing 6 *Corpus Juris*. 772, § 370).

hands professionally until a general balance due him for services is paid.”<sup>11</sup> Such a lien is automatic; it is “complete and effective without notice to any one.”<sup>12</sup>

The uncontroverted facts establish that the Settlement Funds were deposited into the TWG trust account when Debtor owed TWG fees and expenses in the amount of \$113,873.35. Under K.S.A. 7-108, the transfer of the Settlement Funds to the TWG trust account gave rise to a retaining lien in the Settlement Funds in favor of TWG.<sup>13</sup> The lien was automatically perfected without notice.

The Court must next determine if the retaining lien was (1) a statutory lien that is (2) unavoidable under § 545. The term “statutory lien” is defined by § 101(53) to mean a “lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent . . . , but does not include security interest or judicial lien.” Such liens are “not based on an agreement to give a lien or on judicial action.”<sup>14</sup> Examples of statutory liens include mechanics’, materialmen’s, warehousemen’s, and tax liens.<sup>15</sup> A mechanic’s lien valid under Kansas law is a statutory lien.<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting 6 *Corpus Juris*. 772, §370).

<sup>13</sup> See *In re Hodes*, 239 B.R. 239, 243 (Bankr. D. Kan. 1999), *rev’d in part on other grounds* 289 B.R. 5, 15-17 (D. Kan. 2003) (debtors’ counsel had valid retaining lien against retainers paid to them prepetition).

<sup>14</sup> 5 *Collier on Bankruptcy*, ¶ 545.01 at 545-3 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 16th ed. 2017).

<sup>15</sup> *Id.*

<sup>16</sup> *Morris v. Advanced Composites, Techs. (In re Coronado Eng’g, Inc.)*, 2003 WL 23777743 at \*2 (Bankr. D. Kan. May 30, 2003).

Although the Court has not located any case holding that a Kansas attorney's retaining lien is a statutory lien, other courts have held that attorneys' retaining liens are statutory liens.<sup>17</sup> The Colorado cases<sup>18</sup> are highly persuasive because the relevant portion of the Colorado attorney lien statute is substantially similar to the Kansas statute.<sup>19</sup> The plain language of the Kansas attorney lien statute comports with the definition of a statutory lien — in Kansas an attorney's retaining lien in funds of the client in the possession of the attorney is automatic (arising solely by force of K.S.A. 7-108) under the condition that the attorney have possession of client funds (the specified circumstances or conditions), and is not a security interest created by agreement or a judicial lien. The Court therefore concludes that a statutory lien arose when Debtor's funds were deposited into the TWG trust account on January 29, 2016.

The Court determines that the statutory attorney's retaining lien is not avoidable under § 545. Section 545 states an exclusive list of four categories of statutory liens

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<sup>17</sup> *Pan Am. World Airways, Inc. v. Law Firm of Malcolm A Hoffman (In re Pan Am Corp.)*, 1995 WL 606283 at \*4 (S.D.N.Y. Oct. 13, 1995) (New York law); *In re Life Imaging Corp.*, 31 B.R. 101, 102 (Bankr. D. Colo. 1983) (Colorado law); *Mosier v. Perry (In re Ball)*, 2006 WL 4847274 at \*2-4 (Bankr. D. Utah May 4, 2006) (Utah law).

<sup>18</sup> *In re Life Imaging Corp.*, 31 B.R. at 102 (attorney's retaining lien under Colorado law is statutory lien); *Ranes v. Molen (In re Raney)*, 31 B.R. 70, 72-73 (Bankr. D. Colo. 1983) (attorney's charging lien under Colorado law is statutory lien).

<sup>19</sup> See *In re Life Imaging Corp.*, 31 B.R. at 101, quoting Colo. Rev. Stat. § 12-5-120 as follows:

An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment and upon money due to his client in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

which are avoidable.<sup>20</sup> Highly summarized, they are liens: (1) That first become effective when the debtor is in financial distress; (2) that are not perfected against a bona fide purchaser at the time of the commencement of the case; (3) for rent; or (4) of distress for rent. An attorney's retaining lien under Kansas law is not within any of these categories and is therefore not avoidable. Because § 547(c)(6) excepts an otherwise avoidable preferential transfer from avoidance if the transfer is the fixing of a statutory lien that is not avoidable under § 545, the Court concludes that the deposit of the Settlement Funds into the TWG trust account was not an avoidable preference.

The Trustee's arguments against this conclusion are not convincing. He asserts that Debtor's entitlement to the Settlement Funds was a payment intangible and the payment of \$120,000 was a transfer that extinguished that payment intangible. According to the Trustee, the extinguishment of the payment intangible was an avoidable preferential transfer, "the \$113,873.35 constitutes proceeds of that property and 'downstream' transfers (such as TWG's receipt of \$120,000.00) have no effect upon the Trustee's ability to avoid the transfer of the [payment] intangible."<sup>21</sup> The only cases the Trustee cites<sup>22</sup> address the transfer of intangible rights in contexts that have no similarity to this case. In an apparent attempt to answer the effect of established Kansas law that a

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<sup>20</sup> 5 *Collier on Bankruptcy*, ¶ 545.01 at 545-3 to 545-4.

<sup>21</sup> Doc. 21 at 13.

<sup>22</sup> *Wallach v. Nowak (In re Sherlock Homes of W.N.Y. Inc.)*, 246 B.R. 19 (Bankr. W.D.N.Y. 2000) (transfers of real estate listing contracts); *Tarbox v. Zeman (In re Zeman)*, 60 B.R. 764 (Bankr. N. D. Iowa 1986) (transfer of real property by quitclaim deed).



retaining lien arises automatically when an attorney to whom a fee is owed comes into possession of client funds, the Trustee also argues that the TWG trust account was a “dry, passive and purposeless” trust, that title to the \$113,873.35 vested in TWG immediately upon the deposit of the Settlement Funds into its trust account, and a Kansas attorney’s retaining lien cannot operate to encumber an attorney’s own property. The Trustee does not explain why an attorney trust account is a dry or passive trust. The only case cited in support construes a now-repealed Kansas statute that addressed the conveyance or devise of lands to a trustee,<sup>23</sup> not attorney trust accounts.

For the foregoing reasons, the Court finds that the transfer of the Settlement Funds to the TWG trust account on January 29, 2016, was not preferential because the transfer gave rise to an attorney’s retaining lien under K.S.A. 7-108, and that transfer constituted the fixing of a statutory lien covered by the §547(c)(6) exception to the avoidability of a preferential transfer.

**B. The transfer of \$110,273.35 from the TWG trust account to TWG was not preferential.**

The disbursement of \$110,273.35 from the TWG trust account to TWG was not preferential. One of the elements of a preferential transfer is that the transfer enable the creditor to receive more than such creditor would receive in a hypothetical Chapter 7 liquidation.<sup>24</sup> Because of this element, “[g]enerally, payments to a fully secured creditor

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<sup>23</sup> *Johnson v. Coolbaugh*, 109 Kan. 597, 598-99, 201 P. 59 (1921) (citing and quoting § 11686, Gen. Stat. 1915).

<sup>24</sup> 11 U.S.C. § 547(b)(5).

will not be considered preferential because the creditor would not receive more than in a chapter 7 liquidation.”<sup>25</sup> In this case, TWG’s claim against Debtor for fees and expenses was fully secured by the retaining lien which arose under K.S.A. 7-108 when the Settlement Funds were transferred to the TWG trust account. The withdrawal of a portion of the Settlement Funds and the honoring of the checks payable to TWG therefore were not preferential, because TWG did not receive more than it would have received in a hypothetical Chapter 7 case.

## **CONCLUSION**

For the foregoing reasons, the Court grants TWG’s motion for summary judgment. The facts are undisputed. Under those facts, as a matter of law, a retaining lien in the Settlement Funds arose when the Settlement Funds were transferred into the TWG trust account. The fixing of that attorney’s retaining lien in accord with Kansas law was the fixing of a statutory lien, and was therefore a preferential transfer that was made nonavoidable by § 547(c)(6). Further, because TWG’s claim against Debtor that was satisfied by the transfer out of the TWG trust account was fully secured by the retaining lien, the transfer of the \$110,273.35 from the TWG trust account to TWG’s own account was not preferential.

**IT IS SO ORDERED.**

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<sup>25</sup> 5 *Collier on Bankruptcy*, ¶ 547.03[7] at 547-40.