

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

In re:	Chapter 11
Welded Construction, L.P., <i>et al.</i> ,	Case No. 18-12378 (LSS)
Debtors. ¹	(Jointly Administered)
Welded Construction, L.P.,	
Plaintiff,	
vs.	Adv. No. 20-50932
Industrial Fabrics, Inc.,	Re: Adv. Docket No. 57, 60
Defendant.	

**NOTICE OF FILING OF PROPOSED REDACTED VERSION OF
PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO
PLAINTIFF'S CLAIMS AGAINST DEFENDANT INDUSTRIAL FABRICS, INC.**

PLEASE TAKE NOTICE that, pursuant to Rule 9018-1(d)(ii) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, Plaintiff Welded Construction, L.P. hereby files with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801, the proposed redacted version of *Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment with Respect to Plaintiff's Claims Against Defendant Industrial Fabrics, Inc.* previously filed under seal.

¹ The debtors in these chapter 11 cases (the "Debtors"), along with the last four digits of each Debtor's federal tax identification number, are: Welded Construction, L.P (5008) and Welded Construction Michigan, LLC (9830).



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Dated: May 27, 2022

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In re:	Chapter 11
Welded Construction, L.P., <i>et al.</i> ,	Case No. 18-12378 (LSS)
Debtors. ¹	(Jointly Administered)
<hr/>	
Welded Construction, L.P.,	
Plaintiff,	
vs.	Adv. No. 20-50932
Industrial Fabrics, Inc.,	Re: Adv. Dkt. No. 42
Defendant.	

**PLAINTIFF'S REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO
PLAINTIFF'S CLAIMS AGAINST DEFENDANT INDUSTRIAL FABRICS, INC.**

Dated: May 24, 2022

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Pursuant to Federal Rule of Civil Procedure 56, as made applicable herein by Federal Rule of Bankruptcy Procedure 7056, Welded Construction, L.P. (the “Plaintiff” or “Debtor”), by and through counsel, respectfully submits this *Reply in Support of Plaintiff’s Motion for Summary Judgment With Respect to Plaintiff’s Claims Against Defendant Industrial Fabrics, Inc.* [Adv. P. Dkt. No. 42] (the “Motion”).

I. SUMMARY OF ARGUMENT

Plaintiff has demonstrated by supporting admissible evidence that it is entitled to relief as a matter of law on its *prima facie* case. There is no colorable basis for Defendant to dispute that the Transfers took place and are subject to avoidance under Section 547(b). Moreover, Defendant has failed to produce a genuine issue of fact that it did not receive more than it would have in a hypothetical chapter 7 case, because any lien rights were against a third party and not property of the estate.

Defendant has failed to introduce sufficient evidence in support of its affirmative defenses under Sections 547(c)(1) and (c)(2). Defendant has failed to offer any evidence of the parties’ intent, which is a prerequisite for the contemporaneous exchange for new value defense. Plaintiff maintains that at least \$197,520.00 in Transfers are outside the ordinary course of business because, among other reasons, they were paid later than any previous payment. At the very least, Defendant has failed to offer any factual or legal basis for finding that the final payment of \$98,760.00 was made in the ordinary course.

Because Defendant has not demonstrated a genuine issue of material fact as to Plaintiff’s entitlement to relief under Section 547(b), the Plaintiff’s Motion should be granted. Based on Defendant’s failure to offer sufficient evidence in support of its affirmative defenses under Section 547(c)(1) and (c)(2), summary judgment on these affirmative defenses should similarly be granted in favor of Plaintiff.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff incorporates fully as if set forth herein the *Statement of Undisputed Material Facts* appearing in *Plaintiff's Memorandum of Law in Support of Motion of Summary Judgment* [Adv. P. Dkt. No. 43] and *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment* [Adv. P. Dkt. No. 47].

III. ARGUMENT

A. There is No Genuine Issue of Material Fact Precluding Plaintiff from Relief under Section 547(b).

1. Plaintiff's Prima Facie Case is Supported by Admissible Evidence, Including the Krzysztofik Declaration and Defendant's Discovery Responses.

In its response, Defendant questions the evidentiary impact of the Krzysztofik Declaration. Rule 56(c) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7056, sets forth evidentiary rules for motions for summary judgment. As instructed by Rule 56(c)(1):

A party asserting that a fact cannot be or is genuinely disputed *must* support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1) (emphasis added). Defendant has not produced any evidence that the Transfers were not made in the manner and time established by Plaintiff. Instead, Defendant attempts to argue that Plaintiff cannot produce admissible evidence to support the occurrence and timing of payments. Yet Defendant fails to show why the information contained in the Debtor's books and records, together with copies of checks and invoices, should be inadmissible.

Rule 56(c)(4) allows for declarations in support of summary judgment when they are "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The Krzysztofik

Declaration satisfies Rule 56(c)(4). Ms. Krzysztofik has firsthand knowledge of the Debtor's books and records, operations and vendor relationships as a result of her employment with the Debtor prior to bankruptcy and her continued role as a consultant for the Debtor post-petition. App., pp. A001-2 (Krzysztofik Decl), at ¶¶ 2-3. In addition to her statements, she provided documentary support for the transfers at issue in the form of electronic records, check copies and invoice copies. App., pp. A001-4 (Krzysztofik Decl), at ¶¶ 4-11, 13-15; A005-27 (Exhibits A - F).

Curiously, Defendant takes issue with Ms. Krzysztofik's statements about payment dates. There is no basis for questioning the veracity of check and invoice copies in support of payments dates which are attached to the Krzysztofik Declaration. In addition, the Krzysztofik Declaration includes lists of invoices paid historically and during the preference period, which lists were compiled from information in the Debtors' books and records. App., p. A003 (Krzysztofik Decl), at ¶ 15; A005, 9-10 (Exhibits A, C, D).

In addition to the Krzysztofik Declaration, Plaintiff relies on the Defendant's Responses to Requests for Admission. App., pp. A028-33. Among other things, Defendant admits that (i) it received the Transfers identified in the Complaint; (ii) it was a creditor of the Debtor for whose benefit the Transfers were made; (iii) the Transfers were made on account of an antecedent debt; and (iv) the Transfers were made during the Preference Period.

Between the invoice and check copies, the information obtained from the Debtor's books and records, and the Defendant's own admissions, Plaintiff has put forward more than enough admissible evidence in support of its claim to avoid the Transfers under section 547(b).

Even if the statements by Ms. Krzysztofik concerning the occurrence and timing of payments were inadmissible, which Plaintiff denies, the same information is substantiated by Defendant's own evidence. *See Memorandum of Law in Support of Industrial Fabrics, Inc.'s Motion for Summary Judgment*, Appx. F, G [Adv. P. Dkt. No. 40-1] (confirming amount and date of preference period and historical payments). Thus, there is no basis for disputing that the Transfers and historical payments

occurred in the manner set forth in the Krzysztofik Declaration. Plaintiff has satisfied the evidentiary requirements for summary judgment under Rule 56(c).

2. The Transfers Allowed Defendant to Receive More than it Would Have in a Hypothetical Chapter 7 Case under Section 547(b)(5) Because the Defendant Did Not Hold a Security Interest in Property of the Estate.

Defendant's right to assert a lien in the event of nonpayment, to the extent it was entitled to a lien under applicable nonbankruptcy law, does not create a security interest in property of the estate. The Defendant's lien rights could only attach to the project itself, which consisted of property owned by a third party project owner rather than the Debtor. Thus, even in the hypothetical scenario where the Transfers were not made, the debtor filed chapter 7, *and* Defendant held lien rights tantamount to a security interest in property, the Defendant would not be a secured creditor in the Debtor's case and would not receive payment in full. *See, e.g., In re Pameco Corp.*, 356 B.R. 327, 337 (Bankr. S.D.N.Y. 2006).

For the foregoing reasons and as set out in Plaintiff's initial Memorandum, Plaintiff is entitled to summary judgment as a matter of law on its claims under Section 547(b).

B. A Subcontractor's Receipt of Payment Does Not Automatically Give Rise to a Contemporaneous Exchange for New Value under Section 547(c)(1).

Defendant argues that, even if Plaintiff has established a *prima facie* case for relief under Section 547(b), it should be immune from avoidance because it gave contemporaneous new value in exchange for each Transfer. In response to this argument, Plaintiff incorporates by reference section III.A of *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment* [Adv. P. Dkt. No. 40].

It is Defendant's burden to establish that a contemporaneous exchange for new value occurred. 11 U.S.C. § 547(g). Defendant has failed to demonstrate that its receipt of payment corresponded with a contemporaneous exchange for new value in favor of the Debtor.

_____ The record evidence confirms that

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Absent actual evidence linking the Transfers to a corresponding and equivalent benefit to the Debtor, and further absent evidence demonstrating an intent on the part of both parties to make a contemporaneous exchange, Defendant cannot establish an affirmative defense under section 547(c)(1).

C. The Transfers Were Not Ordinary as Between the Debtor and Defendant.

In opposition to Defendant's ordinary course of business defense, Plaintiff incorporates by reference herein section III.B and C of *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment* [Adv. P. Dkt. No. 40].

By way of further reply, Defendant has failed to produce any evidence or legal argument in support of the ordinary course defense as to the final payment of \$98,760.00, made 88 days after the invoice date. While Plaintiff contends that each of the Transfers are subject to avoidance, and especially those Transfers made later than any previous payment, Plaintiff is entitled, at the very least, to judgment as a matter of law as to the final \$98,760.00.

WHEREFORE, Plaintiff respectfully requests that its Motion be granted such that judgment in favor of Plaintiff be entered.

Dated: May 24, 2022

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