IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
The IT Group, Inc., *et al.*,	:	Case No. 02-10118 (MFW)
Debtors.	:	Jointly Administered
Official Committee of Unsecured Creditors of the IT Group, *et al.*, on behalf of the Estate of the IT Group, Inc., *et al.*,	:	Adversary Proceeding No.
Plaintiff,	:	A 04-50534 (PBL)
v.	:	
ETI Services, Inc.,	:	Related Documents: 31, 36, 37, 39
Defendant.	:	

OPINION[1]

The motion before the Court is the Motion for Summary Judgment (hereafter referred to as the "Motion"), filed by the defendant, ETI Services, Inc. (hereafter referred to as the "Defendant") on March 15, 2005. Briefing on Defendant's motion is complete and the matter is therefore ripe for determination by the Court. For the reasons set forth below, the Motion will be granted.

[1] This opinion will constitute the findings of fact and conclusions of law of the Court required by Federal Rule of Bankruptcy Procedure 7052.

I. Background

The Debtors, The IT Group, Inc., *et al.,* (hereafter referred to as "Debtors"), each filed their respective petitions under Chapter 11 of the Bankruptcy Code[2] on January 16, 2002. The Debtors and The Shaw Group, Inc. (hereafter referred to as "Shaw") entered into an Asset Purchase Agreement, whereby Shaw would acquire substantially all of the Debtors' assets and assume certain of the Debtors' liabilities. The transaction was approved by Order of this Court dated April 25, 2002.

The Official Committee of Unsecured Creditors[3] (hereafter referred to as "Plaintiff") was granted standing and authority by Order dated November 6, 2003 to prosecute the Debtors' avoidance actions arising under Chapter 5 of the Bankruptcy Code. Plaintiff, filed this adversary proceeding on January 9, 2004, for the avoidance and recovery of two allegedly preferential transfers in the aggregate amount of $493,600.05, pursuant to §§ 547 and 550. Defendant answered the Complaint on May 26, 2004 asserting a number of affirmative defenses.

II. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(1), and it is a core proceeding under 28 U.S.C. § 157(b)(2), (A), (B), (F) and (O). Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1409.

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[2] 11 U.S.C. §§ 101 et seq. References herein to statutory provisions by section number only will be to the Bankruptcy Code unless the contrary clearly appears.

[3] The IT Litigation Trust, is the successor to The IT Group, Inc. and its affiliated debtors and The Official Committee of Unsecured Creditors.

III. Standard for Summary Judgment

Defendant moves under Federal Rule of Civil Procedure 56(c), made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056, which provides that summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of establishing that no material fact exits. *Celotex*, 477 U.S. at 323. In deciding a motion for summary judgment, all factual inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–588 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248 (1986) (emphasis in original). After sufficient proof has been presented to support the motion, the burden shifts to the nonmoving party to show that genuine issues of material fact still exist and that summary judgment is not appropriate. *Matsushita*, 475 U.S. at 587. A genuine issue of material fact is present when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The non-moving party "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

IV. Discussion and Decision

A. Facts

On August 13, 2001, Defendant entered into a contract with the IT Corporation, a debtor affiliate, to perform certain environmental remediation work in relation to Debtors' Prime Contract (No. DACA45-98-D-003) with the United States Army Corps of Engineers. The IT Corporation had subcontracted with Defendant to plug and abandon nineteen "orphan" oil and gas wells in northern Louisiana. Defendant completed the work from August 2001 through October 2001, pursuant to three separate purchase orders totaling $915,545.09.

According to the demand letter sent to Defendant by Plaintiff prior to the filing of the Complaint, and the Complaint itself, Debtor made two payments to Defendant during the preference period, as follows:

Date	Payment No.	Payment Amount
12/04/2001	4094367	$382,427.40
01/08/2002	1004657	$111,173.65

Defendant contacted Plaintiff several times, through written correspondence, telephone calls, and electronic mail, both prior to and after the Complaint had been filed, informing Plaintiff that the amounts alleged were incorrect. Defendant concedes that it received a $100,000.00 wire transfer from Debtor on January 4, 2002, which was during the preference period.

During the course of discovery, Defendant served its First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents on Plaintiff. In its responses to Defendant's Requests for Admissions, Plaintiff admitted that Defendant did not receive either payment alleged in the Complaint. (Plaintiff's Objections and Responses to Defendants's First

Set of Discovery Requests, at 11-12) Plaintiff merely stated that the amounts alleged were incorrect. The Court here also notes that Plaintiff has at no time during the pendency of this proceeding moved to amend the Complaint in any way.

B. The Parties' Contentions

Defendant proposes several arguments in support of its Motion for Summary Judgment. Defendant first asserts what is commonly known as the "Kiwi defense," based upon *Kimmelman v. Port Authority of New York and New Jersey* (*In re Kiwi International Air Lines, Inc.)*, 344 F.3d 311 (3d Cir. 2003). It is contended that Defendant's subcontract was assumed and assigned to The Shaw Group, Inc. (hereafter referred to as "Shaw"). In that event, under *Kiwi*, no preference action could be maintained against Defendant. Such an assumption would effectively transform Defendant from a general unsecured creditor to a priority administrative claimant, and Plaintiff would be unable to satisfy § 547(b)(5), under which, the transferee/creditor must have received more than it would have received in a Chapter 7 case.

Defendant also asserts a variation of the Kiwi defense, and contends that the cure payments made by Shaw to Defendant post-petition would have been made regardless of whether the subcontract was in fact assumed and assigned to Shaw. Many of the prime contracts assumed were government contracts. Defendant contends that under § 356, Debtors were required to cure all defaults under the subcontracts before the prime contracts could be assumed. Therefore, Defendant asserts, even if the pre-petition payments had not been made, Defendant would have been paid those amounts post-petition.

This Court has recently issued several rulings in this and other Adversary Proceedings in this case in which the Kiwi defense and variations upon it were asserted. Based upon those

rulings, the arguments asserted by Defendant would not support the entry of summary judgment in favor of Defendant on the Kiwi defense. It is therefore, not necessary for the Court to address those issues herein.

Defendant's primary argument is that Plaintiff has conclusively admitted that the transfers alleged in the Complaint never occurred. Therefore, the Complaint fails to state a claim upon which relief can be granted, in that, Plaintiff is unable to prove the elements of a preferential transfer as to the two payments and cannot establish a prima facie case.[4] Further, Defendant argues that the two-year statute of limitations provided by § 546(a) has expired, thereby rendering it impossible for Plaintiff to refile this action against Defendant, and that any attempt by Plaintiff to amend the Complaint to include the $100,000.00 wire transfer at this time would be futile because the wire transfer would not relate back to the Complaint under Fed. R. Civ. P. 15.

Plaintiff does not dispute that the payments were not received by Defendant. Rather,

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[4] Section 547(b) provides as follows:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made —
>> (A) on or within 90 days before the date of the filing of the petition; or
>> (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if —
>> (A) the case were a case under chapter 7 of this title;
>> (B) the transfer had not been made; and
>> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Plaintiff's theory is simply that the amounts listed in the Complaint are incorrect. (Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, at 2, fn.1) Regardless of this fact, Plaintiff attempts to postulate that because Defendant admitted to receiving a $100,000.00 wire transfer during the preference period, and because the Complaint alleged that Defendant received property "in an aggregate amount of not less than $493,600.05," the wire transfer is included in the Complaint. Presumably, Plaintiff does not believe that amendment of the Complaint is necessary to include the wire transfer. Plaintiff argues that under Rule 8(a), all that is required is a short plain statement to give Defendant notice of the claims against it. Despite the incorrect amounts listed on Exhibit A, Plaintiff maintains that the Complaint satisfies Rule 8(a) and puts Defendant on notice of Plaintiff's allegations that no less than $100,000.00 was transferred to Defendant during the preference period and that amount is recoverable by Plaintiff as a preference. Plaintiff is mistaken.

C. Discussion

By its Complaint, Plaintiff is seeking to recover *some* amount pursuant to § 547(b). In order to do so, Plaintiff must prove by a preponderance of the evidence each of the statutory elements.

It is axiomatic that in order to avoid a transfer pursuant to § 547(b), a transfer must have occurred. Plaintiff has admitted in its discovery responses that neither payment described in the Complaint cleared Debtors' bank accounts. (Plaintiff's Responses to Discovery Requests, at 11-12) Plaintiff further admitted that the $382,427.40 payment with a clear date of December 4, 2001, was void and not recoverable. (Id.) As to the second payment of $111,173.65 with a clearance date of January 8, 2002, Plaintiff states, without further explanation, that "[p]ayment

number 1004367, as listed on Exhibit A of the Complaint in the amount of $111,173.65, is correctly identified on the attached wire transfer copy in the amount of $100,00.00." (Id.) Plaintiff in effect admits that its Complaint is incorrect but contends that the $100,000.00 which Defendant received during the preference period, not the $493,600.05 as alleged, should be covered by the Complaint, even though no effort has been made to amend the Complaint in order to make it accurately reflect the facts.

As to this payment, Defendant makes the obvious and irrefutable argument that the check for payment number 1004657, with a clear date of January 8, 2002, in the amount of $111,173.65, is not the same as the $100,000.00 wire transfer made on January 4, 2002.

While Plaintiff's Complaint specifically alleges that Defendant received transfers in the amount of "not less than $493,600.05," Plaintiff now asserts, with no support whatever, that the Complaint seeks to avoid transfers in the amount of "at least $100,000.00."

Defendant characterizes Plaintiff's position herein as "we may [have] done sloppy work, ignored documentation of the actual transfer, and alleged Transfers in the Complaint that did not occur, but we want any other transfer out there, even if we did not allege it in the Complaint." (Defendant's Reply Brief, at 4) Plaintiff's position and attitude in this aspect of this proceeding are unexplained, and to this Court, inexplicable, and the foregoing characterization is entirely accurate. This case has been on file for almost 22 months, and Plaintiff has known, and has conceded for almost that entire period, that a vital portion of its petition is in error and therefore unsustainable. Plaintiff seems to think that because Defendant admits to having received a transfer during the preference period, that transfer is recoverable whether or not Plaintiff's petition contains any reference to it whatsoever, generally or specifically. Such simply is not the

case.

Based upon the foregoing, Defendant's Motion for Summary Judgment will be **GRANTED**. Judgment in favor of Defendant will be entered by separate instrument of even date herewith.

DATED this **17th** day of **November, 2005.**

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

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FOR THE DISTRICT OF DELAWARE

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Defendant.	:	

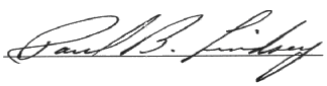
SUMMARY JUDGMENT

For the reasons set forth in the Opinion of even date herewith, it is hereby Ordered that the Motion of ETI Services, Inc., for Summary Judgment is **GRANTED**. Defendant is entitled to judgment in its favor and against Plaintiff, and Plaintiff shall take nothing by reason of its complaint.

This adversary proceeding is hereby dismissed.

DATED: November 17, 2005

BY THE COURT:



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE