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 04-50217 (PBL)
v.	:	
Kittelson & Associates,	:	Related Documents: 29, 30, 45, 48
Defendant.	:	

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART MOTION OF DEFENDANT FOR SUMMARY JUDGMENT[1]

Plaintiff, The IT Litigation Trustee, as the successor to The IT Group, Inc. and its affiliated debtors and The Official Committee of Unsecured Creditors (hereinafter, "Plaintiff"), brought this action to avoid and recover $66,283.68 in allegedly preferential transfers pursuant to §§ 547(b) and 550 of the Bankruptcy Code.[2] An answer to the Complaint was filed on May 28,

[1] This Memorandum shall constitute the findings of fact and conclusions of law of the Court, as required by Federal Rule of Civil Procedure 52, made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7052.

[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.

2004 by the defendant, Kittelson & Associates (hereinafter, "Defendant"). Trial in this adversary proceeding, was scheduled for June 14, 2005 but was adjourned due to the filing and pendency of this dispositive motion.[3]

Defendant is an engineering firm that provided transportation engineering services to W&H Pacific, Inc., a debtor affiliate (hereinafter, "W&H"). Defendant and W&H transacted business beginning in 1994. Prior to Debtors' bankruptcy, Defendant and W&H entered into several subcontracts. In most instances, W&H was the prime contractor under a contract with a state or municipal government or agency. (Affidavit of Patricia K. Thomas, at 4)

Defendant filed its Motion for Summary Judgment (hereinafter, the "Motion") on May 2, 2005. Plaintiff was authorized to file an omnibus response to the motions of numerous defendants, and filed its objection to the Motion on May 31, 2005. Defendant filed its Reply on June 10, 2005 and thereafter Defendant submitted the pleadings, under a Notice of Completion of Briefing, for decision by the Court.

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). A genuine issue of material fact is present when "the evidence is such that a reasonable

[3] 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.

jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). 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).

Defendant offers several contentions in support of its Motion.[4]

A. State Statutory Trust

Defendant first argues that Plaintiff cannot satisfy the requisite elements to avoid a preferential transfer under § 547(b).[5] Specifically, Defendant asserts that the payments were not transfers of an interest of W&H because certain provisions under the Oregon statute required W&H to make payment directly to any subcontractor under a public contract. Defendant purportedly argues that payments it received were subject to a constructive trust and therefore,

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[4] Defendant attempts to join *all* of the motions for summary judgment that were filed by the Shaw or Kiwi defendants which includes well over 100 docket entries in the main bankruptcy case. Defendant also attempts to join The Shaw Group, Inc.'s *amicus curiae* brief that provides a detailed discussion of the sale transaction between Debtors and The Shaw Group, Inc., as well as, Shaw's argument in support of the Kiwi defense. By Defendant's joinder, while unnecessarily excessive and by no means permitted by the Rules, it has asserted a defense under the Kiwi doctrine. However, in light of the Court's recent rulings on the various arguments related to the Kiwi defense, it is not necessary to discuss those issues herein.

[5] Under § 547(b), the trustee may seek to avoid, as a preference,
". . . 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."

were not property of Debtors' estate under § 541. Defendant states, "With the exception of a single transfer of $12,440.36 on project number 4919, each of the Challenged Payments was made after the Debtor's receipt of payment on a public project subject to ORS §§ 279.312, 279.314, 279.445." (Defendant's Memorandum of Law in Support of the Motion for Summary Judgment, at 7)

Plaintiff argues that Defendant has not established sufficient facts to assert a claim under the Oregon statute. From its Brief, it appears that Plaintiff does not contest that a constructive trust arises under the Oregon statute but rather, Plaintiff disputes that Defendant has carried its burden in conclusively showing that the contracts were with public agencies as required by the statutory provision. Plaintiff notes that Defendant has stated that "[i]n most instances Debtor was a prime contractor under an Oregon public contact." (Plaintiff's Omnibus Brief in Opposition to Defendants' Motions for Summary Judgment, at 49) Plaintiff argues that based upon Defendant's ambiguous language, a genuine issue of material fact exists with respect to Defendant's subcontracts.

On the facts as presented on this issue, the Court finds that a genuine issue of material fact exists as to whether the transfers were, in fact, property of Debtors' estate.

B. Ordinary Course of Business

Defendant also argues that the transfers were made in the ordinary course of business between Debtors' and Defendant, and Defendant has a complete defense to avoidance pursuant to § 547(c)(2). To avoid recovery by Plaintiff, Defendant has the burden of proving that the transfers were "(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business

or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms." 11 U.S.C. § 547(c)(2). Defendant has submitted its analysis of the payment history between the parties from April 1999 to January 2002, wherein it attempts to show that pre-petition transfers ranged from 12 to 336 days from invoice, while preference period transfers ranged from 49 to 177 days from invoice. Defendant has also submitted the affidavit of Patricia K. Thomas, Defendant's Chief Financial Officer. Ms. Thomas states in her affidavit that the "pay-when-paid" provision of the subcontracts is ordinary in the construction industry, as is the practice of "batching" invoices from different construction projects into one check and remitting payment only once or twice a month. (Thomas Affidavit, at 3)

Plaintiff has submitted a competing affidavit of Todd B. Brents, to the effect that the payments made from Debtor to Defendant during the preference period were significantly higher in amount than were made during the pre-preference period.

Given the highly fact-intensive nature of the ordinary course of business defense, and the facts presented by Defendant, this Court finds that there remains a genuine issue of material fact whether the payments at issue were made in the ordinary course of business pursuant to § 547(c)(2).

C. New Value

Finally, Defendant argues that some of the transfers at issue in this proceeding are protected by the new value defense under § 547(c)(4). Section 547(c)(4) provides that the trustee may not avoid a transfer that was "to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor – (A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did

not make an otherwise unavoidable transfer to or for the benefit of such creditor." 11 U.S.C. § 547(c)(4). Defendant has submitted as an exhibit to its Motion, a detailed analysis of the subsequent new value Defendant provided to W&H.

Plaintiff devoted a section of its Omnibus Brief to a discussion of the new value defense in relation to other defendants' motions but at no point did it address Defendant's assertions herein. Having not addressed this issue, Plaintiff has certainly not refuted it, but rather has conceded it. Therefore, the Court finds that Defendant has sustained its burden of showing that no genuine issue of material fact exists as to the new value that Defendant provided to Plaintiff in the amount of $20,656.17, and the same is unrecoverable as a preferential transfer pursuant to § 547(c)(4). Defendant is entitled to judgment in its favor to that extent on its new value defense. Based upon the forgoing,

IT IS THEREFORE ORDERED that the Motion of Kittelson & Associates for Summary Judgment is **GRANTED** in part, as to its new value defense in the amount of $20,656.17; and

IT IS FURTHER ORDERED that the Motion of Kittelson & Associates for Summary Judgment is in all other respects, **DENIED**.

Dated: November 17, 2005
Wilmington, DE

BY THE COURT:

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE