FILED IN UNITED STATES DISTRICT
COURT DISTRICT OF UTAH

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PAUL L. BADGER
Clerk

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

STEPHEN W. RUPP, Trustee,

Appellant,

-vs-

GRAYBAR ELECTRIC COMPANY, INC.,

Respondent.

MEMORANDUM DECISION AND ORDER

Civil No: 86-C-0379W

Adv. Proc. No. 85 PA-0096

This matter is before the court on appeal from the United States Bankruptcy Court for the District of Utah. The court heard oral argument on September 26, 1986. Scott C. Pierce appeared on behalf of the trustee, Stephen W. Rupp. Glen E. Davies appeared on behalf of the appellant, Graybar Electric Co. ("Graybar"). Following argument, the court took the matter under advisement. After reviewing the record, the arguments of the parties and the pertinent authorities, the court now enters the following decision and order.

Background

The Bankruptcy Court found certain payments made by the debtor to Graybar to be preferential transfers under 11 U.S.C.

§ 547(b). Graybar contends that the Trustee cannot avoid these transfers because Graybar released mechanics' lien rights and other claims against the debtor which constitute new value under § 547(c)(1). The Bankrutpcy Court held for the Trustee, deciding the issue based on stipulated facts.

The debtor, L & M Electrical Contractors, Inc., is an electrical contractor. It filed for bankruptcy on February 7, 1983. The debtor maintained an open account with Graybar from which it purchased electrical supplies. Graybar admits receiving $27,926.26 from the debtor within the 90 day preference period. The Trustee filed this action to recover these funds on February 5, 1985.

All of the $27,926.26, except for $382.27, was credited against two projects of the debtor. The first project was the remodeling of the Internal Revenue Service Center in Ogden, Utah, on which the debtor acted as the electrical contractor. This project was bonded by Fireman's Fund Insurance Company. ("Fireman's Fund") Pursuant to that bond, Graybar received $28,642.33 from Fireman's Fund on May 5, 1983, 87 days after the debtor filed its petition in bankruptcy. This sum represented the balance due Graybar on the project, after crediting Graybar for all funds received from the debtor, including the funds the Trustee is now attempting to recover. In exchange for the money received from Fireman's Fund, Graybar signed a release and assignment of claim which released Graybar's claims under the bond and assigned to Fireman's Fund all of Graybar's claims against the debtor.

The second project was the Chambers Landing Project, in Tahoe City, California. On June 1, 1983, 114 days after the bankruptcy petition was filed, Graybar issued a final lien waiver against that project.

Discussion

Graybar asserts § 547(c)(1) as a defense to the Trustee's action to recoup these transfers. That section allows preferential transfers to be avoided to the extent that "new value" is "given to the debtor".[1]

Graybar contends that the release of its claims to Fireman's Fund and its signing of a lien waiver on the Chambers Landing Project constitute new value under §547(c)(1). Some courts concur with Graybar, holding that similar releases of lien

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1 This code section also requires an intent element and a contemporaneous exchange. Section 547(c)(1) states:

> The trustee may not avoid under this section a transfer to the extent that such transfer was (a) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (b) in fact a substantially contemporaneous exchange.

rights constitute new value. LaRose v. Crosby & Son Towing, Inc. (In re Dick Henley, Inc.), 38 Bankr. 210 (Bankr. N.D. La. 1984); Cooley v. General Elevator Corp. (In re Advanced Contractors), 34 Bankr. 239 (Bankr. N.D. Fla. 1984). At least one court disagrees with Graybar's position. Tidwell v. Bethlehem Steel Corp. (In re Georgia Steel, Inc., 56 Bankr. 509, 522 (Bankr. N.D. Ga. 1985).

This court does not agree with Graybar. Section 547(a)(2) defines "new value" as:

> Money or monies worth in goods, services, or new credit, or release by transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

The legislative history indicates that new value was defined by Congress in its "ordinary sense to avoid confusion and uncertainty." 4 Collier on Bankruptcy ¶ 547.05 (15th Ed. 1985).

Graybar argues that new value was furnished to the debtor on the Ogden, Utah, job because the release and waiver which Graybar signed reduces the claim Fireman's Fund may make against the debtor by the amount of the preferences which the Trustee will recoup from Graybar. Graybar's argument with respect to the Chambers Landing Project is similar. Graybar argues that since it released its lien rights on the project, the claim that Graybar would have had against the owner of the

Chambers Landing Project has been released. This in turn means that the owner of the project will not assert that claim against the debtor, thereby increasing the debtor's estate. These arguments, however, are without merit. With respect to both claims, no value is added to the bankruptcy estate. If Graybar had been able to recoup these preferences from Fireman's Fund or the owner of the Chambers Landing Project, both of those entities would have had claims to assert against the bankruptcy estate. Since Graybar was unsuccessul in obtaining funds from those sources, Graybar, instead of Fireman's Fund or the Chambers Landing owners, will assert a claim against the bankruptcy estate. The only thing that would have changed had Graybar been able to obtain these funds from other sources is a change in the entity asserting a claim against the debtor. This does not constitute new value as defined by § 547(a)(2)

Even if Graybar's release of lien rights did constitute new value, Graybar cannot show how this new value was "given to the debtor" as required by § 547(a)(1). The value given, if any, is to Fireman's Fund and the Chambers Landing owners. The debtor's estate receives no new value.

This court notes, as did the court in Tidwell, that this decision represents a substantial hardship on the construction industry. Tidwell, 56 Bankr. at 522. However, this court cannot amend the plain meaning of a statute.

Graybar's remedy lies with Congress and not with this court.

The decision of the Bankrutpcy Court is AFFIRMED.

Dated this 2nd day of October, 1986.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 2nd day of October, 1986.

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