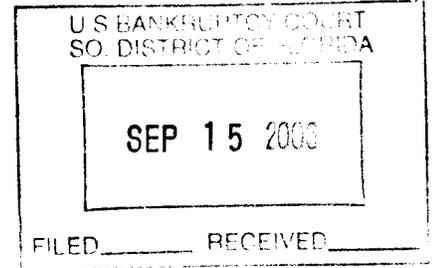


ORDERED in the Southern District of Florida on

Sept. 15, 2006
Laurel Myerson Isicoff



Laurel Myerson Isicoff, Judge
United States Bankruptcy Court



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:
RX CARDIOVASCULAR SPECIALTIES,
INC.,

CASE NO. 04-11248-BKC-LMI
Chapter 7

Debtor.

BARRY E. MUKAMAL, Chapter 7
Trustee of the Estate of RX
Cardiovascular Specialties, Inc.,

ADV. CASE NO. 06-1094-BKC-LMI

Plaintiff,

vs.

ERLINDA B. ENRIQUEZ, M.D., P.A., a
Florida corporation,

Defendant.

**MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court on the Plaintiff's Motion for Partial Summary Judgment on Count II of the Amended Adversary Complaint and Incorporated Memorandum of Law (CP #31) filed by the Plaintiff, Barry Mukamal. The Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 1334(b) and

157(a) and (b). This is a core proceeding which the Court may hear and determine pursuant to 28 U.S.C. §157(b)(2)(A).

BACKGROUND

The material facts in this case are undisputed. On February 16, 2004, Rx Cardiovascular Specialties, Inc. (the "Debtor") issued a check in the amount of eleven thousand nine hundred and ninety five dollars and fifty cents (\$11,995.50) (the "Payment") to Erlinda Enriquez, M.D., P.A. (the "Defendant"). The Payment was made in order to satisfy charges for pre-petition radiology and diagnostic test review and analysis services. On February 17, 2004 (the "Petition Date"), the Debtor petitioned for relief under Chapter 11 of the United States Bankruptcy Code. The Payment was honored by the Debtor's bank on February 18, 2004.

Barry Mukamal (the "Plaintiff"), was later appointed as the Chapter 11 Trustee, and when the case was converted to a case under Chapter 7 of the United States Bankruptcy Code, the Plaintiff was appointed as the Chapter 7 Trustee. On January 24, 2006, the Trustee filed this Adversary Complaint (CP #1) seeking to recover the Payment and other transfers as preferences pursuant to 11 U.S.C. §§ 547 and 550. The Defendant's Answer and Affirmative Defenses to Adversary Complaint (the "Answer")(CP #8), filed on February 17, 2006, asserted that the Payment is immune from recovery as a contemporaneous exchange for new value under 11 U.S.C. §547(c)(1) and as an ordinary course payment under 11 U.S.C. §547(c)(2).

On March 29, 2006, the Plaintiff filed an Amended Adversary Complaint (CP #19) (the "Amended Complaint"). Count II of the Amended Complaint seeks

avoidance and recovery of the Payment as an unauthorized post-petition transfer pursuant to 11 U.S.C. §549. The Plaintiff's Motion for Partial Summary Judgment on Count II of the Amended Adversary Complaint and Incorporated Memorandum of Law (CP #31) was filed on June 20, 2006. No answer to the Amended Complaint or response to the Plaintiff's Motion for Partial Summary Judgment was filed.

DISCUSSION AND ANALYSIS

A. Defendant Received A Post-Petition Transfer

11 U.S.C. §549 provides, subject to two exceptions not applicable here, that a trustee "may avoid a transfer of property of the estate – (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or (B) that is not authorized under this title or by the court." Based on the material undisputed facts, then, the issues for this Court are first, whether the Payment was a post-petition transfer, and second, if so, whether such post-petition transfer was authorized pursuant to the Bankruptcy Code.

The first issue turns on whether the transfer to the Defendant is deemed to have occurred when the Debtor delivered the check to the Defendant, which occurred pre-petition, or when the bank honored the check, which occurred post-petition. The United States Supreme Court has settled this issue in the case *Barnhill v. Johnson*, 503 U.S. 393, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992). In the *Barnhill* case, the Supreme Court held that when determining when a payment by check constitutes a transfer, a transfer within the meaning of 11 U.S.C. §101(54)

occurs when the check is honored by the bank, not when the check is delivered by the debtor to the payee.

Although *Barnhill* examined an alleged preferential transfer, *Barnhill's* interpretation of section 101(54) was not based on 11 U.S.C. §547. Since the definition of transfer in section 101(54) applies equally to 11 U.S.C. §549, see *Wittman v. State Farm Life Ins. Co. (In re Mills)*, 176 B.R. 924 (D. Kan. 1994), this Court is bound by the Supreme Court's ruling. Therefore, by virtue of the fact that the check was honored after the Petition Date, the Defendant did receive a post-petition transfer.

The second issue then, is whether the post-petition transfer was authorized by the Bankruptcy Code, since it is undisputed that the payment was not authorized by the Court. The Defendant's only defenses (albeit raised to the original complaint which did not include a count under section 549¹) were that the check was given contemporaneously with new value, and that the Payment was made in the ordinary course of business.

B. Defenses To Post-Petition Transfers

Citing several cases, the Plaintiff argues that the defenses of 11 U.S.C. §547(c) are not available as defenses to an action under 11 U.S.C. §549 and thus, Plaintiff is entitled to summary judgment on Count II of the Amended Complaint. *Lawrence v. Bonadio, Insero & Co., et al. (In re Interco Systems, Inc.)*, 202 B.R. 188 (Bankr. W.D. N.Y. 1996)(finding section 549 does not contain

¹ Through inadvertence or otherwise, Defendant did not file an answer or affirmative defenses to the Amended Complaint. Plaintiff argues that, while the Plaintiff does not seek a default against the Defendant, the Defendant should not now be allowed to raise new or different affirmative defenses than those raised in the Answer (i.e. contemporaneous exchange for new value and ordinary course payment).

an exception for ordinary course of business payments); *Dubuque Packing Co. v. Stonitsch (In re Isis Food)*, 37 B.R. 334 (W.D. Mo. 1984)(finding section 547(c)(2) ordinary course of business exception inapplicable to section 549 avoidance action because there is no debtor's business once a petition has been filed creating an estate under section 541 and a new entity, the debtor-in-possession, to manage that estate); *Celendenen v. Van Dyk Oil Co., Inc. (In re By-Rite Distributing, Inc.)*, 89 B.R. 906 (D. Utah 1988)(finding the contemporaneous exchange defense to preference action inapplicable in defense of a section 549 post-petition transfer). Indeed, there does not appear to be any case in which a court found that defenses available under 11 U.S.C. §547 are available to an action to avoid a transfer pursuant to 11 U.S.C. §549. "Congress, by enacting the ordinary course of business exception to an avoidable preference in Section 547(c)(2), has demonstrated that it is aware of and capable of enacting such an exception when it feels that it is appropriate. However, Congress has elected not to enact such an exception with respect to post-petition transfers" *In re Interco Systems, Inc.*, 202 B.R. at 192.

Courts do recognize an ordinary course defense to payments made by a debtor-in-possession post-petition. Those are payments that would fall under the purview of 11 U.S.C. §363 and 11 U.S.C. §§ 1107 – 1108, and are made in the ordinary course of the debtor-in-possession's business post-petition. *U.S. v. Hansen*, 262 F.3d 1217, 1238 (11th Cir. 2001); *Moore v. Brewer (In re HMH Motor Services, Inc.)*, 259 B.R. 440, 449 (Bankr. S.D. Ga. 2000).

Thus, we are presented with what appears, at first blush, to be an anomaly under the Bankruptcy Code. Had the Debtor's check been honored on the day prior to the filing, then the Defendant would have available the opportunity to prove the defenses available under 11 U.S.C. §547(c)². Had the Defendant provided services to the Debtor on the day following bankruptcy and received payment for those services, the Defendant would have had the opportunity to prove that the service and Payment were in the ordinary course of the debtor-in-possession's business. However, by the pure happenstance of timing, the Defendant was issued a check pre-petition for services rendered pre-petition, but actual payment occurred post-petition, leaving the Defendant with no opportunity to present defenses in the absence of a court order, and there was no such order.

While this result appears inequitable, it is consistent with the overriding purpose of the Bankruptcy Code - to divide the debtor's existence into pre-petition and post-petition. Post-petition, pre-petition obligations cannot be paid in the absence of a court order. The fortuity of the "straddle" and the consequences flowing from the timing are no more inequitable than that circumstance in which a creditor provides a service for which payment is not yet due, and prior to the payment date the debtor files bankruptcy.

CONCLUSION

In bankruptcy, timing is everything. The Court concludes that the payment in this case occurred post-petition for purposes of 11 U.S.C. §549. Accordingly,

² The *Barnhill* court held that for purposes of analyzing the defenses under 11 U.S.C. §547(c), the operative date is the date of delivery, not the date of transfer.

the Plaintiff's Motion for Partial Summary Judgment On Count II of the Amended Adversary Complaint is granted. This opinion constitutes the Court's conclusions of law under Fed. R. Bankr. P. 7052. A separate Partial Summary Judgment shall be entered in accordance with Fed. R. Bankr. P. 9021.

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Copies furnished to:
Leyza Blanco, Esq.

Attorney Blanco shall serve a conformed copy of this order upon all parties in interest and shall file a Certificate of Service of same with the Clerk of the Court.