IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	
SUNPOINT SECURITIES, INC.	§	Adversary No. 99-6073
	§	
	§	A Liquidation Proceeding Under the
Debtor	§	Securities Investor Protection Act
	§	(15 U.S.C. 78aaa, et seq.)
	§	

ROBERT G. RICHARDSON, TRUSTEE	§	
OF THE ESTATE OF	§	
SUNPOINT SECURITIES, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 01-6009
	§	
JET AVIATION TEXAS, INC., D/B/A	§	
JET EAST AVIATION	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION[1]

This matter is before the Court upon the "Trustee's Original Complaint" to set aside the transfer of approximately $54,000.00 as a fraudulent transfer or, in the alternative, as a preferential transfer. Trial was conducted as to this matter on February 21, 2002, upon stipulated evidence and the presentation of oral argument. At the conclusion of the hearing, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[2]

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[1]This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

[2] This Court has jurisdiction to consider the complaint pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final judgment in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (F), (H) and (O).

Factual Background

The Debtor, Sunpoint Securities, Inc. ("Sunpoint"), operated a certain 1977 Cessna CE-501 Registration No. 506TF Aircraft (the "Aircraft").[3] Though the Aircraft was undoubtedly utilized by Van Lewis at his discretion, the only credible evidence before the Court reveals that the utilization of the Aircraft was almost exclusively devoted to Sunpoint. Sunpoint began to suffer certain mechanical and pressurization problems with the Aircraft in mid-1999. As a result, Stephen Skains, the chief pilot for Sunpoint, flew the Aircraft to the business premises of Jet Aviation Texas, Inc., doing business as Jet East Aviation (the "Defendant"), on August 3, 1999. Mr. Skains, acting as an authorized agent of Sunpoint with primary responsibility for the continued safety, maintenance and continued airworthiness of the Aircraft,[4] asked the Defendant to perform certain mechanical repairs upon the Aircraft. Mr. Skains selected the Defendant to perform these repairs because of the high degree of confidence he had in the skills of the Defendant.[5]

This began a series of repairs which were performed upon the Aircraft by the Defendant over several months in the fall of 1999. The Defendant engaged in these repairs solely at the direct request and upon the apparent authority of Sunpoint's authorized agent.[6] All invoices for

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[3] It was stipulated by the parties that Sunpoint was leasing the plane from the registered owner, and its "sister" corporation, Van Lewis, Inc., for a monthly rental payment of $14,445.00. However, no lease agreement was introduced into evidence.

[4] *See* Appendix to Joint Trial Exhibits, Exhibit 16 — Oral Deposition of Stephen Skains, App. at pp. 00109, lines 21-25.

[5] *Id.* at p. 00131, lines 24-25 and p. 00132, lines 1-3.

[6] As the Trustee acknowledged when he recognized the validity of the Defendant's lien upon the sale of the Aircraft, the Defendant had the constructive consent of the true owner to perform the work on the Aircraft and to thereafter secure the lien upon the Aircraft, thus placing this scenario outside that described in *Astraea Aviation Svcs., Inc. v. Nations Air, Inc.*, 172 F.3d 390 (5th Cir. 1999).

services were directed to Sunpoint Securities, Inc. and they were actually reviewed and approved by Sunpoint's chief pilot before they were submitted to Sunpoint Securities, Inc. for payment.[7] The cumulative amount owed for this series of repairs to the Aircraft totaled $76,322.09. It was Sunpoint's normal course of business to pay such invoices in full, although when the large amounts were incurred, the Defendant had allowed Sunpoint to make incremental payments, without the filing of any lien.[8]

During the 90-day preference period prior to the initiation of this SIPA liquidation proceeding,[9] Sunpoint made three payments to the Defendant totaling $54,000.00.[10] However, because Sunpoint failed to pay the remaining balance of $22,322.09 due for the repairs, the Defendant asserted a mechanic's lien against the Aircraft pursuant to §70.301, *et. seq.* of the Texas Property Code[11] and properly recorded that lien with the Federal Aviation Administration

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[7] *Id.* at p. 00126, lines 2-11 and p. 00128, lines 21-25.

[8] *Id.* at p. 00130, lines 11-25 and p. 00131, lines 1-6.

[9] On November 19, 1999, the Honorable John Hannah, Judge of the United States District Court for the Eastern District of Texas, signed an order (the "Liquidation Order") granting certain relief requested in an Application filed on that date by the Securities Investor Protection Corporation ("SIPC") under 15 U.S.C. §78aaa, *et seq.* in a case styled *SEC v. Sunpoint Securities, Inc.*, Civ. Action No. 99-CV-0667 in which the Court found that the customers of Sunpoint Securities, Inc. were in need of the protections afforded by the Securities Investor Protection Act ("SIPA") and that a trustee should be appointed to liquidate Sunpoint Securities, Inc. The liquidation case was then removed to this court for all further proceedings.

[10] *See* Joint Trial Exhibits 1-3.

[11] A constitutional mechanic's lien also arose pursuant to TEX. CONST. art. XVI, §37, however, the constitutional lien "is ineffective against a subsequent bona fide good faith purchase for value without notice," and, therefore, the statutory lien provisions under the Texas Property Code are utilized in order to create a proper recordation system as against such good faith purchasers. *See generally, A & M Operating Co. v. South Coast Supply Co., Inc.*, 182 B.R. 997, 1000-02 (E.D. Tex. 1995), *aff'd*, 84 F.3d 433 (5th Cir. 1996).

pursuant to 44 U.S.C. §44107 on December 2, 1999, and December 7, 1999.[12]

At some point following the entry of the Liquidation Order, the Trustee became involved with the sale of the Aircraft. Although the rationale and the authority for the Trustee's involvement in this sale has not been disclosed to the Court, it is undisputed that the Trustee engaged in negotiations with the Defendant regarding the Defendant's lien claims against the Aircraft and that eventually, in recognition of the fact that the Defendant had a valid and subsisting lien upon the Aircraft, the Trustee agreed to pay a compromised sum of $18,700.00 to the Defendant in exchange for the Defendant's release of its lien.[13] Thereafter, the Aircraft was sold in a commercially reasonable manner for $1,295,000.00 with the proceeds being distributed as follows: $18,700.00 to the Defendant in fulfillment of its perfected mechanic's lien; $1,250,638.63 to Textron Financial in fulfillment of its purchase money security interest; $2,000.00 to Mr. Skains for his assistance with the sale of the Aircraft; $10,000.00 to the Estate of Sunpoint Securities, Inc. for the Trustee's "assistance" in the sale; with the remaining $13,661.37 being paid to Van Lewis, Inc., as the registered owner of the Aircraft.[14] The sale of the Aircraft closed in March, 2000.

On January 9, 2001, some ten (10) months after the closing of the sale of the Aircraft, the Trustee sued the Defendant for the recovery of the $54,000.00 which had been paid by Sunpoint to the Defendant for the repair services to the Aircraft in the ninety (90) days prior to the entry of

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[12] *See* Joint Trial Exhibits 5 and 13. The second filing was necessitated upon the Defendant's discovery that Van Lewis, Inc., and not Sunpoint Securities, Inc., was actually the registered title holder to the Aircraft.

[13] *See* Joint Trial Exhibits 5 and 14.

[14] *See* Joint Pre-Trial Order, ¶19.

the Liquidation Order. The Trustee asserts that such transfers should be set aside and recovered either as fraudulent transfers under 11 U.S.C. §548 and/or the Texas adoption of the Uniform Fraudulent Transfer Act, or alternatively, as a preferential transfer under 11 U.S.C. §547.

Discussion

Fraudulent Transfers under 11 U.S.C. §548 and TUFTA §24.005.

At the hearing on these matters, the Trustee presented limited argument regarding his asserted cause of action for fraudulent transfer under 11 U.S.C. §548 and §24.005 of the Texas Uniform Fraudulent Transfer Act ("TUFTA").[15] Utilizing the Trustee's pre-trial brief as the primary source of argument for his fraudulent transfer claim, the Court will briefly discuss this issue.

To establish the existence of a constructive fraudulent transfer under 11 U.S.C. §548(a), a plaintiff must show: (1) the debtor transferred an interest in property; (2) the transfer of that interest occurred within one year prior to the filing of the bankruptcy petition; (3) the debtor was insolvent on the date of the transfer or became insolvent as a result thereof; and (4) the debtor received less than reasonably equivalent value in exchange for such transfer. *In re GWI PCS 1 Inc.*, 230 F.3d 788, 805 (5th Cir. 2000) (*citing In re McConnell*, 934 F.2d 662, 664 (5th Cir. 1991)). A similar analysis exists under TUFTA §24.005.[16]

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[15] TEX. BUS. & COM. CODE ANN. §24.005 (Vernon Supp. 2002).

[16] *Floyd v. Dunson (In re Ramirez Rodriguez)*, 209 B.R. 424, 433 (Bankr. S.D. Tex.1997) ["The [Texas] UFTA closely parallels the actual and constructive fraudulent transfer provisions of Sections 548(a)(1) and 548(a)(2) of the Bankruptcy Code, but provides for avoidance of fraudulent transfers within four years rather than the one year period allowed by the Bankruptcy Code."]; *see also, United States v. Klutts (In re Klutts)*, 216 B.R. 558 (Bankr. W.D. Tex. 1997).

The Court notes that the first three elements have either been established by the stipulation of the parties or are conclusively established by the evidence. Thus, the sole issue is whether the debtor received less than reasonably equivalent value in exchange for the transfer. The Trustee argues that Sunpoint did not receive any benefit from the transfer of the $54,000.00 to the Defendant because Sunpoint did not own the Aircraft.[17] However, notwithstanding the fact that the evidence did not address whether Sunpoint was an actual, or merely a constructive, lessee of the Aircraft, the evidence overwhelmingly establishes that Sunpoint enjoyed all of the incidents of ownership and exercised care, custody, and control over the Aircraft. It was Sunpoint's employee who solicited the repair services from the Defendant. It was Sunpoint for whom the services were rendered. It was Sunpoint who incurred the indebtedness. If it had not been for Sunpoint, there would have been no repairs initiated nor any indebtedness incurred. It is uncontested that the repairs performed by the Defendant enabled Sunpoint to utilize the Aircraft approximately sixty-four (64) times in the short two-month period between September 3, 1999, and November 13, 1999.[18] To assert that Sunpoint received no benefit from the services rendered by the Defendant is belied by almost every aspect of this evidentiary record. The fact that record title to the Aircraft was held in another of Van Lewis' companies does not preclude the receipt of reasonably equivalent value by Sunpoint, given its almost exclusive utilization of the Aircraft under a leasing arrangement.[19] Hence, the Court concludes that Sunpoint received a substantial

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[17] *See* Joint Pre-Trial Order (stipulating that Van Lewis, Inc., rather than Sunpoint Securities, Inc., owned the Aircraft).

[18] *See* Joint Trial Exhibit 15.

[19] It is uncontested that Sunpoint owed the indebtedness to the Defendant. Thus, Sunpoint was a "debtor" as defined by TEX. BUS. & COM. CODE ANN. §24.002(5) and (6) (Vernon Supp. 2002) and the fact that the debtor was a lessee of the property affected does not preclude it from receiving "reasonably

and valuable benefit from the repair work performed by the Defendant upon the Aircraft, and that such benefit constituted reasonably equivalent value for the $54,000.00 transfer to the Defendant. Consequently, the Trustee's fraudulent transfer cause of action must be denied.

Preferential Transfer under 11 U.S.C. §547.

Section 547(b) of the Bankruptcy Code provides in relevant part:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
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> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
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> (3) made while the debtor was insolvent;
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> (4) made ...
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> (A) on or within 90 days before the date of the filing of the petition; or
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> (B) between ninety 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
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> (5) that enables such creditor to receive more than it would receive if--
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> (A) the case were a case under Chapter 7 of this title;
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> (B) the transfer had not been made; and
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> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

At the hearing before the Court on February 21, 2002, the parties stipulated to the existence of the first four required elements under §547(b). Thus, if the evidence establishes that the fifth element as set forth in §547(b)(5) has been satisfied, then Sunpoint's payment of $54,000.00 to the Defendant must be declared to have been preferential to creditors.

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equivalent value" in regard to a transaction. *See generally, Katz v. Drabkin (In re Van Dyck/Columbia Printing),* 263 B.R. 167, 182 (Bankr. D. Conn. 2001).

The Defendant argues that it did not receive more than it otherwise would have received from the liquidation of Sunpoint's estate because, in the absence of receipt of the payments, it would have filed a mechanic's lien for the full amount of the debt ($76,322.09) rather than for $22,322.09 ($76,322.09 minus the $54,000.00 initially paid by Sunpoint). According to the Defendant, its lien would still have been fully secured by the value of the Aircraft and it would have therefore received the same amount of money, regardless of whether the $54,000.00 transfer occurred.[20]

The Court will acknowledge that it is proper to infer from the Defendant's actual filing of a mechanic's lien in the amount of the outstanding balance still owed by Sunpoint ($22,322.09) that the Defendant would have filed a mechanic's lien for the full amount owed ($76,322.09), had no payment been tendered by Sunpoint. *See Cocolat, Inc. v. Fisher Development, Inc.*, 176 B.R. 540, 546 (Bankr. N.D. Calif. 1995) ["[I]t is safe to assume that, had the $10,000 payment not been made, this portion of the debt would have been included in [the creditor's] mechanics' lien claim."]. Hence, the Defendant argues that its receipt of the $54,000.00 during the 90-day preference period was immaterial and that the §547(b)(5) element was not satisfied because it did not receive more than it otherwise would have ultimately received from the satisfaction of its mechanic's lien.

The Defendant's argument, however, fails to recognize that "[a] creditor receives a preference whenever it receives more from the challenged transfer than it would have received in a liquidation of *the debtor's estate*." *Id.* (emphasis in original). This is consistent with the "basic

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[20] Actually, the Defendant might have received more if it had filed a mechanic's lien for the full $76,322.09 because the Defendant compromised the remaining $22,322.09 and accepted only $18,700.00 from Sunpoint; thus, the total amount actually received by the Defendant in this case is $72,700.00.

goal of the Bankruptcy Code with respect to preferences, [which] is to secure equal distribution of the debtor's assets among his creditors . . . and to prevent favoritism." *Cimmaron Oil Co. v. Cameron Consultants, Inc.*, 71 B.R. 1005, 1011 (N.D. Tex. 1987) (citations omitted).

Thus, the Trustee's argument that the Sunpoint estate never owned the Aircraft is dispositive in determining whether a preferential transfer occurred. The liquidation of the "Debtor's estate" in this case would not have resulted either in the liquidation of the Aircraft, or in the subsequent dissemination of proceeds therefrom to the Defendant, because the Aircraft was not owned by the Debtor's estate, but rather by Van Lewis, Inc. Thus, the Defendant would not have received anything from the Debtor's estate, even if it had failed to receive any payment and had subsequently filed a mechanic's lien for the full amount of $76,322.09, because the subsequent liquidation of the Aircraft would have resulted in payment from the hands of a third party (Van Lewis, Inc.) as opposed to payment from the Debtor's estate.[21] *See Cocolat*, 176 B.R. at 546 ["It is irrelevant to this determination that a creditor might have been assured of payment in full from some other source."] (*citing In re Virginia-Carolina Fin. Corp.*, 954 F.2d 193, 198-99 (4th Cir. 1992)). Therefore, because the Defendant admittedly received a $54,000.00 transfer from the Debtor during the 90-day preference period, through which the Defendant received more than it otherwise would have received from the liquidation of the "Debtor's estate," the payments received by the Defendant were clearly preferential.

However, the fact that the payments to the Defendants were preferential in nature does

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[21] Actually, no unsecured creditor is likely to receive any payment from the liquidation of the Sunpoint estate. *See* Supplement to Joint Pre-Trial Order. ["The parties hereby stipulate that it is unlikely that the general creditors of Sunpoint Securities, Inc. will receive any distribution from the liquidation of Sunpoint Securities, Inc."].

not guarantee the recovery of such payments by the Debtor's estate. 11 U.S.C. §547(c) describes several circumstances which, if affirmatively demonstrated by the recipient of payments, will prevent a bankruptcy estate from recovering payments from that recipient, even though the payments may meet the statutory definition of a preferential transfer. Though the Defendant in the present case argues for the existence of several of these defenses, the Court need only discuss one.[22]

11 U.S.C. §547(c)(6) states that:

> [t]he trustee may not avoid under this section a transfer —
> (6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title.

Hence, it is evident that a transfer which constitutes a fixing of a statutory lien cannot be subsequently avoided as a preference. Utilizing the same rationale, other courts have held that "[a]lthough the language of § 547(c)(6) arguably applies only to the *fixing* of a lien, the legislative history reflects Congress' intent that § (c)(6) also exempt from the trustee's avoiding power 'transfers in satisfaction of such liens.'" *Cimmaron*, 71 B.R. at 1010 (*quoting* S. Rep. No. 989, 95th Cong., 2d Sess. 88, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5874; H.R. Rep. No. 595, 95th Cong., 1st Sess. 374, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6330); *see also Weill v. Evans Lumber Co. (In re Johnson)*, 25 B.R. 889, 893-94 (Bankr. E.D. Tenn. 1982). Thus, according to the *Cimmaron* Court, 11 U.S.C. §547(c)(6) affords protection from avoidance to transfers fixing statutory liens as well as to "transfers that preclude imposition

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[22] 5 COLLIER ON BANKRUPTCY ¶ 547.04 at p. 547-42 (15th ed. rev. 2002) ["Thus, even when the trustee satisfies all of the elements of section 547(b) in attacking a transfer, the transfer may not be avoided if the defendant transferee can that it is entitled to rely on <u>one</u> of the exceptions contained in subsection (c)."] (emphasis added).

of statutory liens." 71 B.R. at 1010; *see also Newton v. Andrews Distrib. Co. (In re White)*, 64 B.R. 843, 851 (Bankr. E.D. Tenn. 1986). This holding comports with what the *Cimmaron* Court finds to be the underlying rationale of §547(c)(6) — that its purpose is to prevent a trustee, after the expiration of the applicable lien perfection period, from seeking the return of payments made by a debtor to a creditor when the debtor's tendering of such "reversible" payments either: (1) wholly precluded that creditor from fixing any lien in the applicable period due to the transmittal of full payment; or (2), if only partial payments were made, such payments induced that creditor to forbear from the fixing of any lien for the unpaid amount until the applicable lien period expired.[23]

The *Cimmaron* holding, however, has not been universally accepted. *See Milchem, Inc. v. Freedman (In re Nucorp)*, 902 F.2d 729, 733-34 (9th Cir. 1990) [holding that no §547(c)(6) defense was available where the debtor completely pays off a potential statutory lien creditor during the 90-day preference period; finding that the creditor's failure to "take the necessary steps to perfect its lien by the date the petition for bankruptcy was filed" allows the lien to be avoided under the language of §545, notwithstanding the court's common-sense recognition that the lien filing "presumably bec[a]me inappropriate because there remained no obligation against which to claim a lien"]; *Rieser v. Landis & GYR Powers, Inc. (In re Bownic Insulation Contractors, Inc.)*, 134 B.R. 261, 266 (Bankr. S.D. Ohio 1991). This split of authority has been recognized, *see, e.g., In re Fandre,* 167 B.R. 837, 840-41 (Bankr. E.D. Tex. 1994) ["The Courts

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[23] Under Texas law, a mechanic has a 180-day period in which to file any statutory mechanic's lien arising out of repair work performed on an aircraft by that mechanic, and this 180-day period begins to run on the first day "after the date of the completion of . . . the performance of the last repair or maintenance" by the mechanic. *See* TEX. PROP. CODE ANN. §70.303 (Vernon Supp. 2002).

are divided over whether payments made during the preference period in satisfaction of §547(c)(6) liens are permissible."] (*comparing Cimmaron*, 71 B.R. 1005, *with Matter of R & T Roofing Structures & Commercial Framing, Inc.*, 79 B.R. 22, 25 (D. Nev. 1987) ["Fixing" as used in Section 547(c)(6) does not protect the seizure of money in satisfaction of a lien]). In fact, a recent bankruptcy decision from the Northern District of Texas, the same district that decided *Cimmaron*, found the *Cimmaron* reasoning to be troublesome, but applied its holding because of its standing as binding precedent upon bankruptcy courts in that district. *See In re Rand Energy Co.*, 259 B.R. 274, 276 (Bankr. N.D. Tex. 2001). Despite the split of authority on the issue, this Court agrees that *Cimmaron* cites the better rule — one where a preferential payment precluding the imposition of a statutory lien is entitled to the protections afforded by 11 U.S.C. §547(c)(6).

Applying this rule, the Court finds that Sunpoint incurred $76,322.09 in repair bills and made $54,000.00 in payments to the Defendant, thereby decreasing the amount owed to $22,322.09. The $54,000.00 in payments not only induced the Defendant to forbear from taking the necessary steps to fully protect itself, but the tendering of these payments actually precluded the imposition of the Defendant's statutory mechanic's lien for the full $76,322.09.[24] It obviously would have been improper for the Defendant to have fixed a lien against the Aircraft for sums which had already been paid by Sunpoint. Such an action could have subjected the Defendant to damages for imposing an improper cloud upon the title to the Aircraft.[25]

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[24] As mentioned previously, it is proper to infer from the Defendant's actual filing of a mechanic's lien in the amount still owed by Sunpoint after the $54,000.00 in payments, i.e. $22,322.09, that the Defendant, if no payment been made by Sunpoint, would have filed a mechanic's lien for the full amount owed by Sunpoint. *See Cocolat, Inc. v. Fisher Development, Inc.*, 176 B.R. 540, 546 (Bankr. N.D. Calif. 1995) ["[I]t is safe to assume that, had the $10,000 payment not been made (by the debtor), this portion of the debt would have been included in Fisher's (the creditor's) mechanics' lien claim."].

[25] *See generally, Triad Home Renovators, Inc. v. Dickey*, 15 S.W.2d 142 (Tex. App. – Houston [14th Dist.] 2000, no writ).

Therefore, because the $54,000.00 in payments made by Sunpoint effectively precluded the Defendant from protecting itself from this preference action by filing a mechanic's lien for the full amount of the debt, the rationale underlying 11 U.S.C. §547(c)(6) operates to prevent the Trustee from now attempting to avoid the $54,000.00 transfer by Sunpoint.

The Trustee, however, attempts to distinguish *Cimmaron* from the current situation because the statutory lien in *Cimmaron* would have attached to property of the debtor if no preferential transfer had occurred, while the Defendant's statutory lien for its repair bill in the present case would have attached to the Aircraft actually owned by a third party — Van Lewis, Inc. *See In re White*, 64 B.R. at 851-52 [finding that "a payment to prevent attachment or perfection of a statutory lien may not be avoidable as a preference," but later stating that "[t]he question is much more difficult if the lien would have attached to a third party's property, rather than the debtor's property"] (*comparing In re Johnson*, 25 B.R. 889 *with In re Dick Henley, Inc.*, 38 B.R. 210 (Bankr. M.D. La. 1984)). The Trustee is obviously correct in his assertion that the statutory lien would not have attached to property of Sunpoint, notwithstanding the fact that, at the time the services were rendered, the Defendant had every reason to believe that the Aircraft was owned by Sunpoint and the Defendant only subsequently learned that Van Lewis, Inc. was the actual registered owner of the Aircraft.

However, the fact that the statutory lien would not have attached to the property of Sunpoint does not prevent §547(c)(6) from protecting the $54,000.00 previously received by the Defendant. Again, the rationale underlying §547(c)(6) is that a debtor should not be allowed to make a payment to a supplier, thereby preventing or otherwise inducing that supplier to forbear any perfecting of its statutory lien, and then have such debtor's bankruptcy trustee, upon the

expiration of the supplier's opportunity to file a lien, subsequently sue to recover the payments as a preference. That rationale of fundamental fairness applies with equal force regardless of whether the property is owned by the bankruptcy estate or a third party.

At the hearing before this Court, the Trustee argued that a statutory lien must first fit within the parameters of §545 before the §547(c)(6) defense ever becomes available. In other words, the Trustee asserts that, because §545 only applies to "the fixing of a statutory lien on property of the debtor,"[26] and because it is clear that the statutory lien in this case would have been fixed on property other than that of the debtor, the Defendant cannot legitimately invoke the protections offered by §547(c)(6). The Defendant, on the other hand, argues that §547(c)(6) provides an absolute defense that is available any time a transfer constitutes "the fixing of a statutory lien that is not avoidable under section 545 of this title."[27]

The Court acknowledges the existence of certain jurisprudence which supports the Trustee's position. *In re Bownic Insulation*, 134 B.R. at 266; *In re Hatfield Elec. Co.*, 91 B.R. 782, 786 (Bankr. N.D. Ohio 1988). However, the Court does not find the reasoning contained in those cases to be persuasive. The Court is convinced that the language and the rationale of 11 U.S.C. §547(c)(6) require a finding in favor of the Defendant. The literal language of §547(c)(6) does not limit its applicability to those liens which can be addressed by §545 — i.e., those where the statutory lien is against property of the debtor. It instead, under the *Cimarron* rationale,[28]

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[26] *See* 11 U.S.C. §545(a).

[27] *See* 11 U.S.C. §547(c)(6).

[28] Again, the Court agrees with *Cimmaron* that "if the creation or perfection of a lien would not have been avoidable under other statutes (i.e., §545,), then payments which merely avoid the bite of a lien which the trustee could not have successfully attacked should likewise not be avoidable," 71 B.R. at 1010-1011.

provides an absolute defense to any statutory lien creditor who receives a transfer in lieu of "the fixing of a statutory lien that is not avoidable under section 545 of this title."[29] Clearly the fixing of a lien against the property of a third party, such as Van Lewis, Inc., is not avoidable under §545. Setting aside the specific language for a moment, what rational sense does it make for a creditor to be protected from a trustee's attempt to recover payments which have induced that creditor to forbear from protecting itself by the filing of a lien on estate property, but for that same creditor to be denied similar protection under the same circumstances, except that the creditor would be protected by a lien fixed on third-party property rather than that of the debtor's estate? In both instances, the conduct creating the necessity for creditor protection is the same. The debtor has induced the creditor to forbear from protecting itself through the payment of money and then it [or its trustee] subsequently has sought the return of such money upon the expiration of the applicable lien perfection period. The impropriety of inducing the creditor's forbearance in the former circumstance is equally improper in the latter. This Court cannot condone such an inconsistent result.

The rationale that §547(c)(6) applies to protect even those payments made in satisfaction of a statutory lien on non-debtor property is especially compelling in situations, such as presented here, in which several corporate entities, including both Sunpoint and the corporation owning the property upon which the statutory lien would have attached, have lost their practical autonomy and have essentially been improperly utilized as one combined entity. It is clear from the invoices sent by the Defendant to Sunpoint that the Defendant had been (inadvertently) misled to

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[29] *See* 11 U.S.C. §547(c)(6).

believe that Sunpoint was the title owner of the Aircraft.[30] Stephen Skains had requested the services "on behalf of Sunpoint."[31] From the Defendant's perspective, Sunpoint appeared to be exercising all rights and privileges attributable to ownership. The evidence demonstrates that the Defendant still mistakenly believed that Sunpoint was the owner of the Aircraft until it was notified of the erroneous nature of its initial "Claim of Lien" with the FAA on December 2, 1999.[32] The fact that the Trustee was at all involved with the sale of this "third-party" asset, as well as his subsequent receipt of $10,000.00 from the sale of the Aircraft for his purported "assistance" in that sale,[33] further demonstrates the undefined and unexplored "interrelationship" between Sunpoint and Van Lewis, Inc. To allow the Trustee to recover the $54,000.00 paid to the Defendant as an avoidable preference solely because the record title to the Aircraft was attributed to Van Lewis, Inc., rather than to Sunpoint, particularly when the Trustee would not be able to avoid those transfers had the Aircraft actually be listed in Sunpoint's name, would essentially allow the Trustee to utilize the fruits of Mr. Lewis' illegitimate corporate shenanigans as a sword against the Defendant. Such a result cannot be endorsed.

In the present case, it is undisputed that the Trustee could not have utilized his avoidance powers under §545 to avoid the fixing of the Defendant's statutory lien against the Aircraft because it did not constitute estate property. Because the Court has already determined that

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[30] *See* Joint Trial Exhibits 6-12, stating that "Sunpoint Securities" (the Debtor) was the customer for whom the repair work was being performed.

[31] *See* Joint Pre-Trial Order, ¶9.

[32] *See* Joint Trial Exhibit 13, demonstrating that the Defendant filed its original "Claim of Lien" on December 2, 1999, asserting that Sunpoint owned the Aircraft, but later filed a corrected "Claim of Lien" on December 7, 1999, stating that the Aircraft was owned by Van Lewis, Inc.

[33] *See* Joint Pre-Trial Order, ¶19.

transfers in satisfaction of a statutory lien are included within the scope of §547(c)(6), and because the Defendant's statutory lien is not avoidable under §545, the Defendant has satisfied its burden of proof regarding the applicability of the affirmative defense offered under §547(c)(6) and the Trustee is precluded from avoiding the transfers as preferential. Accordingly, since the transfers totaling $54,000.00 cannot be avoided either as a fraudulent transfer or as a preferential transfer, the relief sought by the Trustee's complaint must be denied.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[34] pursuant to Fed. R. Civ. P. 52, as incorporated into adversary proceedings in bankruptcy cases by Fed. R. Bankr. P. 7052. An appropriate judgment will be entered which is consistent with this opinion.

SIGNED: APR 1 0 2002.

BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

[34]To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as may be necessary or appropriate.