

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division**

In Re:

In Proceedings Under Chapter 7

CLEVELAND DURHAM,

Case No.: 08-19683

Debtor.

CLEVELAND DURHAM

Adv. Proc. No. 09-1104

Plaintiff,

JUDGE RANDOLPH BAXTER

v.

PLYMOUTH PARK TAX SERVICES, ET. AL.

Defendant.

FILED
09 SEP 22 AM 10:38
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Motion of the Debtor, Cleveland Durham, for Summary Judgment on his Complaint to avoid an alleged preferential transfer to Plymouth Park Tax Services (“Motion”). Plymouth Park opposes the Motion. After considering the parties’ respective briefs and conducting a duly-noticed hearing on the Motion, the Court rules as follows:

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The Debtor filed a voluntary Chapter 7 petition on December 10, 2008. The Debtor filed the instant adversary proceeding against Plymouth Park Tax Services alleging that a certain tax lien constitutes a preferential transfer pursuant to 11 U.S.C. § 547(b). The Debtor now moves for summary judgment on the Complaint and Plymouth Park Tax Services opposes the Motion. This

adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O), with jurisdiction further conferred under 28 U.S.C. § 1334 and General Order No. 84 of this District.

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The Debtor seeks to avoid as a preferential transfer the tax lien of Plymouth Park Tax Services, alleging that the lien was recorded within the 90 days preceding the Debtor's petition filing. Plymouth Park argues that there is no preferential transfer because its interest in the lien at issue began when the taxes were due the State of Ohio, not when its certificate was purchased and filed.

Summary judgment is appropriate only where there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c)(made applicable by Fed. R. Bankr.P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-movant to establish the existence of a material fact. *Id.*

Herein, the Debtor relies on 11 U.S.C. § 522(h), as his authority to exercise the trustee's avoidance powers. That provision states in pertinent part that:

- (h) The debtor may avoid the transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer if ----
 - (1) such transfer is avoidable by the trustee under section 544, 545, 547 . . .

(2) the trustee does not attempt to avoid such transfer.

Although § 522(f) allows a debtor to exercise a trustee's avoiding powers under several statutory provisions, the Debtor relies solely on 11 U.S.C. § 547(b). However, there is an exception in § 547 with respect to statutory liens, which states, in pertinent part that:

(c) The 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.

The Debtor makes no reference to 11 U.S.C. § 545 in his complaint. Accordingly, the Debtor's Motion for Summary Judgment is without merit and is hereby denied. Plymouth Park Tax Service's opposition thereto is hereby rendered moot. Each side is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 22nd day of
September, 2009.



JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT