IT IS SO ORDERED.

Dated: November 7, 2016
01:19:49 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
D & L ENERGY, INC., *et al.*,	*	**CASE NUMBER 13-40813**
Debtors.	*	
*** * * * * * * * * * * * * * ***	*	
ANTHONY J. DEGIROLAMO, CHAPTER 7 TRUSTEE,	*	**ADVERSARY NUMBER 16-04050**
Plaintiff,	*	
v.	*	
THE FARMERS NATIONAL BANK OF CANFIELD, *et al.*,	*	**HONORABLE KAY WOODS**
Defendants.	*	

*****

On April 16, 2013, Debtors D & L Energy, Inc.[1] ("D & L") and Petroflow, Inc. filed voluntary petitions pursuant chapter 11 of the Bankruptcy Code. The Debtors' cases were originally jointly administered (Main Case, Doc. 21) and have since been substantively consolidated (Main Case, Doc. 1462). The Debtors' cases were converted to chapter 7 on March 25, 2015 (Main Case, Doc. 1379), and Anthony J. DeGirolamo ("Trustee") was appointed chapter 7 trustee for the substantively consolidated cases (Main Case, Doc. 1380).

On April 15, 2016, the Trustee filed the instant adversary proceeding seeking to avoid an alleged fraudulent and preferential transfer pursuant to 11 U.S.C. §§ 547, 548, and 550 and O.R.C. §§ 1336.01, *et seq*. The Defendants in this proceeding are: (i) Farmers National Bank of Canfield ("Farmers"); (ii) S&B Investments, LLC ("S&B"); (iii) Hardrock Excavating LLC; (iv) Hardrock Stone LLC; (v) Pipeline Systems, LLC; (vi) Gasearch, LLC; (vii) Benedict W. Lupo; and (viii) Susan Faith (collectively, "Defendants"). In their pleadings, the Trustee and Farmers define S&B, Mr. Lupo, and Ms. Faith collectively as "Insiders."

On July 14, 2016, the Court held a telephonic status conference at the request of the Trustee and Farmers to discuss

[1] Although the pleadings often refer to the Debtor as D&L Energy, Inc., the Voluntary Petition (Doc. 1) lists the entity as D & L Energy, Inc., which is the form the Court will use.

certain discovery issues. The following participated in the status conference: (i) John C. Allerding, Esq. on behalf of the Trustee; (ii) Melody Dugic Gazda, Esq. on behalf of Farmers; and (iii) Whitney L. Willits-Monroe, Esq. on behalf of Mr. Lupo. During the course of the status conference, Mr. Allerding and Ms. Gazda stated that they believed it would be helpful for the Court to determine when the alleged avoidable transfer at issue in this adversary proceeding occurred. Specifically, they stated that there were three possible times when a transfer could have occurred: (i) September 28, 2012 when the Deposit Account, as defined *infra* at 5, was assigned to Farmers; (ii) October 12, 2012 when $1.3 million was transferred to the Deposit Account; and (iii) February 12, 2013 when Farmers applied the $1.3 million in the Deposit Account to various outstanding debt owed by D & L and the other Defendants. Because D & L filed its voluntary bankruptcy petition on April 16, 2013 ("Petition Date"), the first two dates are outside the 90-day preference period in § 547. As a consequence, the Trustee and Farmers asserted that resolution of when the alleged avoidable transfer occurred would determine whether the Trustee has potential causes of action against Farmers for recovery as a preference and fraudulent transfer or only a fraudulent transfer. Mr. Allerding and Ms. Gazda each asserted that the timing issue did not involve any factual disputes and could be determined as a matter of law.

Subsequent to the status conference, the Court entered Order (i) Denying Farmers [sic] Motion for Order Approving Discovery Plan, Without Prejudice; (ii) Approving Trustee's Proposed Discovery Plan, as Modified; and (iii) Staying Discovery Between Trustee and Farmers ("Order") (Doc. 19).[2] The Order provided for the parties to "brief the issue of when, as a matter of law, the alleged voidable transfer occurred." (Order at 2.)

On September 12, 2016, the Trustee filed Brief of Plaintiff Anthony J. DeGirolamo on Issue of When, as a Matter of Law, Alleged Voidable Transfers at Issue in this Adversary Proceeding Occurred ("Trustee Brief") (Doc. 30). On September 26, 2016, Farmers filed Response Brief of Defendant The Farmers National Bank of Canfield to Brief of Plaintiff Anthony J. DeGirolamo on Issue of When, as a Matter of Law, Alleged Voidable Transfers at Issue in this Adversary Proceeding Occurred ("Farmers Response") (Doc. 31). The Trustee filed Reply in Support of Plaintiff Anthony J. DeGirolamo's Brief on Issue of When, as a Matter of Law, Alleged Voidable Transfers at Issue in this Adversary Proceeding Occurred ("Trustee Reply") (Doc. 32) on October 3, 2016.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to

[2] The Order was amended on August 31, 2016 (Doc. 28), which amendment is not germane to this Memorandum Opinion.

28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F) and (H). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. UNDISPUTED FACTS

Although the parties characterize the various documents differently, the Trustee and Farmers attach many of the same documents to their respective pleadings and agree on the following facts:

1. On September 28, 2012, D & L and Farmers executed Assignment of Deposit/Share Account ("Assignment Agreement") in which D & L assigned and granted a security interest to Farmers in Account Number 1720834 held at Farmers ("Deposit Account"). The Assignment Agreement is attached as Exhibit A to the Trustee Brief and as Exhibit C to the Farmers Response.
2. On October 3, 2012, Farmers sent a letter ("Release Agreement Letter") to D & L memorializing terms of an agreement whereby Farmers would release its liens on certain collateral securing outstanding debt from D & L and S&B to Farmers in consideration of receiving cash collateral totaling $1.3 million, which was to be deposited in the Deposit Account. The Release Agreement Letter is attached as Exhibit B to the Trustee Brief and as Exhibit D to the Farmers Response.

3. Also on October 3, 2012, Farmers sent a letter ("Hilcorp Letter") to Hilcorp Energy I, L.P. ("Hilcorp") in which Farmers stated that, as consideration for receipt of the $1.3 million in the Deposit Account, Farmers would release its liens on all property and assets being transferred to Hilcorp that had been pledged as security to Farmers. The Hilcorp Letter is attached as Exhibit C to the Trustee Brief and as Exhibit E to the Farmers Response.

4. On October 4, 2012, Farmers and D & L executed Security Agreement in which D & L pledged the Deposit Account to secure the debts of itself and S&B to Farmers. The Security Agreement is attached as Exhibit D to the Trustee Brief and as Exhibit F to the Farmers Response.

5. On October 12, 2012, Ronald K. Lembright Co. LPA ("Lembright") transferred $1.3 million to the Deposit Account by wire transfer from an IOLTA account, which had been established October 2, 2012 by and between Lembright, as attorney, and D & L, as client ("IOLTA Account"). The wire transfer receipt is attached as Exhibit E to the Trustee Brief and as Exhibit G to the Farmers Response. Authorization for Payment, which authorized the transfer of $1.3 million to the Deposit Account from the IOLTA Account, is attached as Exhibit F to the Trustee Brief. Amended IOLTA Trust Agreement ("IOLTA Account

Agreement") for the IOLTA Account is attached as Exhibit G to the Trustee Brief.

6. The $1.3 million remained in the Deposit Account until February 12, 2013.

7. On February 12, 2013, Farmers sent a letter ("February 12 Letter") to D & L in which Farmers asserted that certain defaults had occurred that permitted Farmers to apply the balance in the Deposit Account to the loans identified in the Assignment Agreement. The February 12 Letter is attached as Exhibit H to both the Trustee Brief and the Farmers Response.

Despite representing to the Court that the issue of when the alleged avoidable transfer occurred could be determined as a matter of law, the parties do not agree on all facts, as follows:

1. Farmers references two documents dated September 25, 2012: (i) Account Agreement dated September 25, 2012 pursuant to which the Deposit Account was opened in the name of "Farmers National Bank FBO D & L Energy, Inc."; and (ii) Entity Authorization. The Account Agreement and the Entity Authorization are attached to the Farmers Response as Exhibits A and B, respectively. Farmers argues that the "Account Agreement clearly states that the [Deposit] Account was 'BANK OWNED.'" (Farmers Resp. at 2.) Although the Trustee does not dispute the existence and execution of either the Account Agreement or the Entity Authorization, the

Trustee asserts that these documents do not establish ownership of the Deposit Account. The Trustee also argues that these documents were signed only by Farmers and were internal bank documents.

2. Farmers asserts that "a factual issue remains as to what, if any, portion of the proceeds of sale of assets to Hilcorp were assets of D&L; thus, it has yet to be established to what extent the funds deposited into the IOLTA Account were actually property of D&L." (*Id.* at 4.)

3. The Trustee counters that Hilcorp's Letter of Intent to Purchase Leasehold ("LOI") offered to pay D & L $600.00 per acre for certain leases expiring prior to January 1, 2014. The LOI is attached as Exhibit I to the Trustee Reply. The LOI states the $600.00 per acre payment is for "approximately 1,204 net acres." (LOI ¶ 1.) The Trustee asserts that the total acreage of the leased properties is only 183.12 acres and "at most, the proceeds of the Leases equaled $109,872 — a fraction of the $1.3 million in cash on which Farmers claims to have a replacement lien." (Trustee Reply ¶ 29.)

This Memorandum Opinion is based on the undisputed facts agreed to by the parties in their respective pleadings and deals only with <u>when a transfer could have occurred</u>. To the extent there may be questions of fact, the Court finds that those questions are

not material to and do not preclude the findings herein concerning the time when the alleged avoidable transfer could have occurred.

II. LEGAL ANALYSIS

A. D & L Was the Owner of the Deposit Account

The first issue the Court will address is ownership of the Deposit Account. Both §§ 547 and 548 apply only to a transfer of "an interest of the debtor in property."[3] The threshold issue is whether D & L had a legal or equitable interest in the Deposit Account and its contents such that, absent Farmers applying the $1.3 million to outstanding debt on February 12, 2013, the Deposit Account would have constituted property of the bankruptcy estate as of the Petition Date. As set forth below, the Court finds that the Deposit Account would have constituted property of the bankruptcy estate as set forth in 11 U.S.C. § 541 and, thus, would be "an interest of the debtor in property" for purposes of §§ 547 and 548.

Based on the Account Agreement dated September 25, 2012, Farmers argues that it — rather than D & L — owned the Deposit Account. Farmers notes that the Account Agreement lists "Farmers National Bank FBO D & L Energy, Inc., Thomas Ogg, Hold at Main

[3] Section 547 permits the trustee to "avoid any transfer of an interest of the debtor in property— . . . ." 11 U.S.C. § 547(b) (2016). Likewise, § 548 permits the trustee to "avoid any transfer . . . of an interest of the debtor in property . . . ." 11 U.S.C. § 548(a)(1) (2016).

Office, Canfield, OH 44406" in the box for "Account Title & Address." (Acct. Agreement at 1.) Farmers argues:

> Pursuant to the Account Agreement (Exhibit A) and the Entity Authorization (Exhibit B), the Deposit Account was, as of its effective date, owned and controlled by Farmers. Once the $1.3 million was transferred into the Deposit Account, D&L had neither a legal nor an equitable interest in the Deposit Account. At the time the $1.3 million was deposited in the Deposit Account and thereafter, D&L held only an [sic] beneficial interest in said Deposit Account to the extent all or a portion of the $1.3 million was actual "property" of D&L (and not a third-party) at the time the deposit was made and only to the extent of any such amount in the account that exceeded the amount due to Farmers by D&L and the Insiders.

(Farmers Resp. at 7-8 (emphasis added).)

As the Trustee points out, the Account Agreement and the Entity Authorization are internal bank documents only. Farmers offers no legal authority that would bind D & L to the statements of ownership of the Deposit Account based on the execution by Farmers alone of the Account Agreement and the Entity Authorization. Subsequent to execution of the Account Agreement and the Entity Authorization by Farmers, Farmers and D & L executed the Assignment Agreement in which Farmers acknowledges that D & L is "owner" of the Deposit Account. Unlike the Account Agreement and the Entity Authorization, the Security Agreement was signed by both Farmers and D & L and constitutes a binding agreement. Based on the facts that (i) the Assignment Agreement was executed after the Account Agreement and the Entity Authorization; and (ii) the

Assignment Agreement was signed by both D & L and Farmers, the Court finds no basis for the assertion by Farmers that it — rather than D & L — was the owner of the Deposit Account.

In addition, Farmers acknowledges that D & L held a "beneficial interest" in the Deposit Account. (*Id.* at 8.) A beneficial interest or beneficial ownership is the same as an equitable interest or equitable ownership. Black's Law Dictionary defines beneficial ownership as "[a] beneficiary's interest in trust property. — Also termed *equitable ownership*." BLACK'S LAW DICTIONARY 1280 (10th ed. 2014). Accordingly, the attempt by Farmers to distinguish a beneficial interest from an equitable interest is unavailing; such interests are one and the same. Having an equitable interest in the Deposit Account means that it falls within the definition of property of the estate in § 541. 11 U.S.C. § 541(a)(1) (2016) (The bankruptcy "estate is comprised of all the following property, wherever located and by whomever held: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case."). Thus, even if, *arguendo*, Farmers was the owner of the Deposit Account, D & L still had an equitable interest in the Deposit Account such that the Deposit Account would constitute property of the bankruptcy estate.

Having found that D & L — rather than Farmers — was the owner of the Deposit Account, the next issue is whether D & L had a

property interest in the $1.3 million transferred to the Deposit Account.

Farmers states that the Assignment Agreement transferred to Farmers only an interest in property that D & L "own[ed] or ha[d] sufficient rights in which to transfer an interest, now or in the future." (Farmers Resp. at 3 (quoting Assignment Agreement ¶ 2).) Based on the Hilcorp Letter, Farmers argues that remittance of the $1.3 million to the Deposit Account was to be derived from the sale by D & L and others to Hilcorp of certain property that had been pledged as security to Farmers. Farmers agreed to release its liens on the property to be sold to Hilcorp in consideration of the $1.3 million being transferred to the Deposit Account. As a consequence, Farmers states that there is a factual issue as to what, if any, portion of the proceeds of sale of the property to Hilcorp was an asset of D & L and, accordingly, there is a question concerning the extent to which the funds deposited into the Deposit Account were actually property of D & L. (*Id.* at 4.)

The IOLTA Account Agreement and the Authorization for Payment clearly define D & L as "Client." The IOLTA Account was established "for the receipt, custody, and distribution at the client's direction, of client funds" "to hold the proceeds from the Hilcorp Transaction," which was a "transaction that the Client ha[d] entered into with Hilcorp Energy Company and Hilcorp Energy I LP for the purchase and sale of assets owned by Client." (IOLTA

Acct. Agreement at 1.) Thus, the IOLTA Account Agreement establishes that the IOLTA Account held funds owned by D & L. The Authorization for Payment likewise states that D & L authorized transfer of the $1.3 million from the IOLTA Account to the Deposit Account. When the $1.3 million was transferred from the IOLTA Account to the Deposit Account, the $1.3 million continued to be property of D & L. Thus, even if there is a factual question about who owned the assets sold to Hilcorp,[4] that question is not material to and does not affect D & L's ownership of the $1.3 million transferred to the Deposit Account. As a consequence, the Court finds that D & L had a legal interest, as well as an equitable interest, in the $1.3 million in the Deposit Account.

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[4] Hilcorp sent the LOI to "D & L Energy Group" regarding the purchase of "certain properties owned and operated by D & L Energy Group" for the purchase price of $14,808,750.00 in cash. (LOI at 1.) It is not clear whether the designation "D & L Energy Group" meant only D & L or also encompassed other entities. It is also not clear whether D & L owned all of the assets to be purchased by Hilcorp. Farmers states that the "assets being transferred to Hilcorp in this transaction . . . were pledged to Farmers by D&L, Gasearch, LLC., Petroflow, Inc., S&B, Susan A. Faith and Ben W. Lupo." (Farmers Resp. at 3.)

The Hilcorp Letter contemplated that the $1.3 million would be derived from the purchase price — *i.e.*, $14.8 million as set forth in the LOI — for the sale of the assets covered by the LOI that were pledged to Farmers as security. The Trustee references the LOI to argue that Hilcorp offered to pay D & L $600.00 per acre for certain leases expiring prior to January 1, 2014, which the Trustee represents totaled 183.12 acres. (Tr. Reply ¶ 29.) The Trustee then calculates the amount of the proceeds for the sale of the leased properties, as pledged to Farmers, to be "$109,872 — a fraction of the $1.3 million in cash on which Farmers claims to have taken a replacement lien." (*Id.*) However, the Trustee's argument does not appear to square with the LOI, which states that Hilcorp will pay $600.00 per acre for "approximately 1,204 net acres." (LOI ¶ 1.)

B. October 12, 2012 Transfer

The Trustee submits that there are two voidable transfers, one of which occurred when the security interest of Farmers attached to the $1.3 million when it was transferred to the Deposit Account on October 12, 2012. The Trustee seeks to avoid the October 12, 2012 transfer as a fraudulent transfer under 11 U.S.C. § 548 and O.R.C. §§ 1336.01 *et seq*.

Section 548(a)(1) provides,

> [(a)](1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> > (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> >
> > (B)
> >
> > > (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> > >
> > > (ii)
> > >
> > > > (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> > > >
> > > > (II) was engaged in business or a transaction, or was about to engage in

> business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1) (2016). Similarly, O.R.C. § 1336.04(A) provides,

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or within a reasonable time not to exceed four years after, the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
>
> > (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
> >
> > (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
> >
> > > (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
> > >
> > > (b) The debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

O.R.C. § 1336.04(A) (2016). Generally speaking, these provisions are materially similar except for the two-year look back period in § 548(a)(1) and the four-year look back period in O.R.C. § 1336.04(A). *Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 789 (Bankr. S.D. Ohio 2009 (citations omitted) ("The fraudulent transfer provisions of the Code and the Ohio [Uniform Fraudulent Transfers Act – *i.e.*, O.R.C. § 1336.04] are substantially similar both in terms of rights, remedies, and defenses.").

In support of his position concerning the October 12, 2012 security interest, the Trustee argues that § 548 permits a trustee to avoid certain transfers of an interest of a debtor in property. The Trustee cites to the definition of "transfer" in 11 U.S.C. § 101(54), which encompasses "the creation of a lien" and "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with– (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54) (2016).

There are several issues to be considered in determining whether a transfer could have occurred on October 12, 2012. The first is whether the Assignment Agreement created a lien for purposes of § 548. The Trustee states that, in executing the Assignment Agreement, D & L and Farmers intended to create a lien on D & L's funds held in the Deposit Account and that "[t]he creation of a lien on Debtor's property is specifically identified

as a transfer under the Bankruptcy Code." (Trustee Br. ¶ 21.) What the Trustee does not address, however, is whether the Assignment Agreement created a new lien or merely constituted a replacement lien for collateral on which Farmers had an existing lien. The Release Agreement Letter states that Farmers "will release its liens on certain collateral security [D & L and S&B]'s outstanding loans to the Bank, in consideration of receiving replacement cash collateral totaling $1,300,000. The $1,300,000 represents the anticipated proceeds from the sale of a portion of the Bank's collateral that is located in Mercer County, Pennsylvania." (Release Agreement Letter at 1.)

Whether the Assignment Agreement comes within the purview of "transfer" in § 548 depends on whether the Assignment Agreement created a new lien in favor of Farmers. To the extent the Assignment Agreement merely secured replacement collateral for a prior valid security interest, the Trustee cannot avoid the Assignment Agreement as a fraudulent transfer because D & L would have received "reasonable equivalent value" in exchange for the transaction. *See Rhief v. MERS (In re Gavin)*, No. 08-60881, Adv. No. 09-2059, 2011 Bankr. LEXIS 2613 (Bankr. S.D. Ohio July 11, 2011) (finding that a refinancing agreement and replacement mortgage was reasonably equivalent value for release of the original note and mortgage).

While "reasonably equivalent value" is not defined in the Bankruptcy Code, § 548(d)(2)(A) states, "(2) In this section— (A) 'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor . . . ." 11 U.S.C. § 548(d)(2)(A). A determination of reasonably equivalent value is a question of fact. *Onkyo Europe Elecs. GMBH v. Global Technovations, Inc. (In re Global Technovations, Inc.)*, 694 F.3d 705, 719-20 (6th Cir. 2012) (citations omitted). "The focus always is on the economic benefit, if any, flowing to the debtor as a result of the transfer." *Enwotwen Indus., Inc. v. Brookstone Ltd. P'ship (In re Newtown, Inc.)*, 157 B.R. 374, 379 (S.D. Ohio 1993) (citations omitted). Whether D & L received reasonably equivalent value is a question of fact that cannot be decided at this stage of the pleadings.

Farmers argues that the Trustee failed to address his asserted claims for fraudulent transfer under O.R.C. § 1336 because, by definition, an asset encumbered by a valid lien is not included within an avoidable transfer. Farmers states, "[B]ased on the fact that the $1.3 million at issue was generated from the sale of assets that were encumbered by valid liens of Farmers and other secured creditors, no transfer could have occurred for purposes of ORC §§ 1336.01 *et seq.* when the $1.3 million was deposited into the Deposit Account, or when Farmers applied the funds to the outstanding loan balances." (Farmers Resp. at 7.)

In his Reply, the Trustee argues that Farmers cannot rely on O.R.C § 1336.01(b)(1), which excludes from the definition of "asset" property "to the extent it is encumbered by a valid lien," to protect the entire $1.3 million from the Trustee's state law fraudulent law claim. O.R.C. § 1336.01(B)(1) (2016). The Trustee asserts three bases for this argument: (i) there was no lien on the funds when they were in the IOLTA Account, prior to being deposited into the Deposit Account; (ii) O.R.C. § 1336.01(B)(1) protects property only to the extent it is subject to a valid lien and the Trustee challenges the lien of Farmers based on the lack of reasonably equivalent value received by D & L for the $1.3 million subjected to the security interest of Farmers; and (iii) the total outstanding debt owed by D & L at the time the lien of Farmers attached to the $1.3 million was approximately $418,810.27. (Trustee Reply ¶¶ 27-30.)

Resolution of the issue concerning the replacement lien appears to be a question of fact that the Court cannot determine at this juncture. The Court can only find that, if the Security Agreement created a new lien (as opposed to a replacement lien), there could be a transfer for purposes of § 548 and O.R.C. §§ 1336.01 *et seq*.

C. February 12, 2013 Transfer

The Trustee argues that the second time a transfer could have occurred was when Farmers took possession of the $1.3 million in

the Deposit Account and applied those funds to loan obligations of D & L and non-debtor parties on February 12, 2013. The Trustee argues that the February 12, 2013 transfer is avoidable as a preference because, "[h]ad Farmers not seized such funds, they would have constituted estate property as of the petition date under section 541(a). It is well established that a secured lender's execution on property that would have otherwise been property of the estate is a transfer of property subject to a bankruptcy trustee's avoidance powers." (Trustee Br. ¶ 22 (citations and parenthetical omitted).) The elements of a § 547 preference are as follows:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid 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 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
>
> (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.

11 U.S.C. § 547(b) (2016).

As set forth above, D & L had a property interest in the entire $1.3 million in the Deposit Account. Thus, absent application by Farmers of the $1.3 million to debts owing by D & L and the other Defendants, the $1.3 million would have constituted property of the estate pursuant to § 541. However, if Farmers had a valid security interest in all or a portion of the Deposit Account, Farmers was secured to the amount of D & L's indebtedness. The Trustee and Farmers each recognize that Farmers applied $397,503.72 of the $1.3 million to debts owed by D & L. (*See* Trustee Br. at 5; Farmers Resp. at 5.) If Farmers had a valid replacement lien on all or a portion of the $1.3 million in the Deposit Account, payment of <u>debts owing by D & L</u> would not have enabled Farmers to receive more than it would receive in a chapter 7 distribution. Because D & L had a legal and equitable interest in the entire $1.3 million in the Deposit Account, however, payment of debts owing by entities other than the Debtor would appear to be avoidable. Accordingly, whether the February 12, 2013 transfer can be avoided as a preference depends,

in part, on whether and to what extent the creation of the security interest of Farmers in the Deposit Account on October 12, 2012 is avoidable as a fraudulent transfer. Again, this is a question of fact that cannot be resolved at this juncture.

III. CONCLUSION

As set forth above, (i) D & L had a legal interest, as well as an equitable interest, in the $1.3 million in the Deposit Account; (ii) the October 12, 2012 transfer of $1.3 million into the Deposit Account could constitute a fraudulent transfer for avoidance purposes to the extent it created a lien in favor of Farmers that was not a replacement lien; and (iii) the February 12, 2013 application of funds to the debt owing by D & L would not be a preference if Farmers had a valid replacement lien. Because questions of fact remain to determine each of those issues, resolution of when the alleged avoidable transfer occurred is not possible at this juncture.

# # #

IT IS SO ORDERED.

Dated: November 7, 2016
01:20:23 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
D & L ENERGY, INC., *et al.*,	*	**CASE NUMBER 13-40813**
Debtors.	*	
* * * * * * * * * * * * * * * *	*	
ANTHONY J. DEGIROLAMO, CHAPTER 7 TRUSTEE,	*	**ADVERSARY NUMBER 16-04050**
Plaintiff,	*	
v.	*	
THE FARMERS NATIONAL BANK OF CANFIELD, *et al.*,	*	**HONORABLE KAY WOODS**
Defendants.	*	

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ORDER (i) REGARDING WHEN ALLEGED AVOIDABLE TRANSFER OCCURRED; AND (ii) SCHEDULING TELEPHONIC STATUS CONFERENCE

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On September 12, 2016, the Trustee[1] filed Brief of Plaintiff Anthony J. DeGirolamo on Issue of When, as a Matter of Law, Alleged Voidable Transfers at Issue in this Adversary Proceeding Occurred (Doc. 30). On September 26, 2016, Farmers filed Response Brief of Defendant The Farmers National Bank of Canfield to Brief of Plaintiff Anthony J. DeGirolamo on Issue of When, as a Matter of Law, Alleged Voidable Transfers at Issue in this Adversary Proceeding Occurred (Doc. 31). The Trustee filed Reply in Support of Plaintiff Anthony J. DeGirolamo's Brief on Issue of When, as a Matter of Law, Alleged Voidable Transfers at Issue in this Adversary Proceeding Occurred (Doc. 32) on October 3, 2016.

For the reasons set forth in the Court's Memorandum Opinion Regarding When Alleged Avoidable Transfer Occurred entered on this date, the Court hereby:

1. Finds that D & L had a legal interest, as well as an equitable interest, in the $1.3 million in the Deposit Account.
2. Finds that resolution of whether the October 12, 2012 transfer is an avoidable transfer is a question of fact that cannot be resolved at this juncture.
3. Finds that resolution of whether the February 12, 2013 transfer is an avoidable transfer is a question of fact that cannot be resolved at this juncture.

[1] This Order utilizes the defined terms in the accompanying Memorandum Opinion Regarding When Alleged Avoidable Transfer Occurred.

The Court hereby sets this adversary proceeding for a telephonic status conference to be held on December 5, 2016 at 10:00 a.m.

# # #