

**United States Bankruptcy Court
District of New Mexico**

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Case Number: 03-01090
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
FURRS,
Debtor.

No. 7-01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,
v.

Adv. No. 03-1090 S

RICHARDSON & RICHARDSON, INC.,
Defendant.

**MEMORANDUM OPINION ON SECOND
CROSS MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Court on the parties second cross motions for summary judgment (Defendant, doc 39; Plaintiff, doc 41). This Court entered a Memorandum Opinion on earlier cross motions for summary judgment, doc 20, which was appealed to the United States District Court. This case is now before the Court on remand with instructions from that court. Having considered the motions and arguments, the appellate opinion and order, and being sufficiently advised, the Court finds that each of the second motions is well taken in part and should be granted in part. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

FACTS

1. The Court incorporates facts 1 through 16 of the earlier Memorandum Opinion (doc 20).

CONCLUSIONS

1. Under New Mexico law, a mechanics lien attaches upon commencement of the work or furnishing of materials and is

perfected by filing a notice. N.M. Stat. § 48-2-5, -6 (1978).

2. Debtor's interest in the leases were real property upon which mechanics liens would attach. (Opinion from appeal to U.S. District Court.)
3. Defendants had inchoate liens after performing work or providing materials but before filing written liens, and payments on those inchoate liens are immune from attack as preferential transfers. Bryant v. JCOR Mechanical, Inc. (In re The Electron Corp.), ___ B.R. ___, 2006 WL 45843, *2-3 (10th Cir. BAP 2006).
4. Defendant filed liens for unpaid invoices before the Debtor filed its Chapter 11 petition.
5. Two leases on which Defendant was paid were not assumed or assigned by the Debtor; these were leases 894 and 905. Those leases therefore had no value and any lien thereon would not have had value. Payments received by Defendants on these two leases were preferential. See, e.g., Krasfur v. Scurlock Permian Corp. (In re El Paso Refinery, LP), 171 F.3d 249, 254 (5th Cir. 1999)(If a payment to undersecured creditor is applied to the unsecured portion of the debt, the transfer is preferential.)
6. The remaining leases for which Defendant was paid were assumed and assigned for amounts in excess of all liens

against them; these were leases 874, 875, 876, 879, 886, 896 and 897. Payments received by Defendants on those leases were not preferential because Defendant was fully secured. See, e.g., Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Services, Inc.), 980 F.2d 792, 803 (1st Cir. 1992)(Transfers to a fully-secured creditor are not avoidable as preferences.)

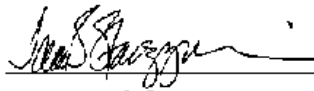
7. Alternatively, Defendant received payments that were in connection with assumed leases¹. Assumption of a contract or lease generally precludes a preference claim against the other party. See Kimmelman v. Port Authority of New York and New Jersey (In re Kiwi Int'l Air Lines, Inc.), 344 F.3d 311, 318-19 (3rd Cir. 2003)(A creditor whose contract is assumed is not similarly situated to general unsecured creditors and has more than a simple unsecured claim for money.); LPC Alvarado Phase II v. Walsh (In re LCO Enterprises), 12 F.3d 938, 942 (9th Cir. 1993)(The legal effect of assumption is that prepetition rent payments made within the preference period do not improve the landlord's position.)
8. Plaintiff should be awarded judgment for the payments in connection with leases 894 and 905.

¹ To the extent Defendant had not been paid prepetition for work in connection with the assumed leases, the cure amounts would have been correspondingly higher.

9. Defendant should be awarded judgment of a declaration that the payments it received in connection with leases 874, 875, 876, 879, 886, 896 and 897 were not preferential and are not avoidable by the Plaintiff.
10. Defendant may file a request for interest and fees in connection with its oversecured claim, as an administrative expense, subject to the Trustee's ability to object on grounds of timeliness, amount, or any other reason.

CONCLUSION & ORDER

IT IS ORDERED that Plaintiff shall prepare a judgment in conformity with this Memorandum within 14 days.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on February 22, 2006, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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