

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re,

Donald Arthur Stevenson and Katie Lynn
Stevenson,

Debtor(s).

Janet B. Haigler, Chapter 7 Trustee for Donald
Arthur Stevenson and Katie Lynn Stevenson,

Plaintiff(s),

v.

Deepak Singh,

Defendant(s).

C/A No. 23-03087-HB

Adv. Pro. No. 24-80034-HB

Chapter 7

**ORDER ADMITTING EXHIBIT,
DENYING MOTION TO AMEND
ANSWER TO COMPLAINT, AND
GRANTING MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER came before the Court for hearings on January 22, 2025, to consider (1) the Motion to Amend Answer to Complaint filed by Defendant Deepak Singh (“Singh”)¹ and the Memorandum in Opposition thereto filed by Plaintiff Janet B. Haigler (the “Trustee”), Chapter 7 Trustee for Debtors Donald Arthur Stevenson (“Mr. Stevenson”) and Katie Lynn Stevenson (“Ms. Stevenson”) (collectively, the “Stevensons”);² and (2) the Motion for Summary Judgment filed by the Trustee³ and Singh’s response thereto.⁴ At the hearing, appearances were made by Robert H. Cooper (“Cooper”) on behalf of Singh and Richard R. Gleissner (“Gleissner”) of the Gleissner Law Firm, LLC (the “Firm”) on behalf of the Trustee. Singh sought to introduce an exhibit into

¹ [ECF No. 13](#), filed Nov. 4, 2024.

² [ECF No. 18](#), filed Nov. 25, 2024.

³ [ECF No. 15](#), filed Nov. 14, 2024. Several exhibits were attached to the Motion for Summary Judgment, including (a) the transcripts of the depositions of Mr. Stevenson, Ms. Stevenson, and Singh; (b) the relevant agreements between the parties; (c) closing documents for the sale of the Thornbriar Property (defined below); (d) letters exchanged between the Trustee and counsel for Singh; and (e) the Partial Satisfaction of Judgment (referenced below).

⁴ [ECF No. 21](#), filed Jan. 8, 2025.

evidence. The Court took the admissibility of Singh's exhibit and the motions under advisement, and now finds as follows.

UNDISPUTED FACTS AND PROCEDURAL HISTORY⁵

Pre-petition, Singh contracted with three entities owned by Mr. Stevenson: Lotus Home Design, LLC, Lotus Interiors, LLC, and Lotus Architecture, LLC (the "Lotus Entities"). The contract was for the Lotus Entities to perform design and construction work on a home located at 25082 Pinewater Cove Lane, Bonita Springs, FL 34134 (the "Pinewater Property"). Unsatisfied with the work being performed, Singh asserted claims against the Lotus Entities and the Stevensons personally, which resulted in Singh demanding and obtaining a confession of judgment that the parties intended to be recorded in South Carolina.

On April 28, 2023, a document entitled "Amendment to Construction Agreement and Confession of Judgment" (the "Confession") was executed by Singh, the Stevensons, and the Lotus Entities. The Confession recited that it was intended to resolve the disputes between the parties, that the Stevensons and the Lotus Entities admitted being liable to Singh in the amount of \$175,000.00 for failing to use that amount that Singh paid them under the Pinewater Property contract to fulfill their duties thereunder, and that the Stevensons and the Lotus Entities wished to confess judgment in favor of Singh in that amount. The Confession stated that the Stevensons and the Lotus Entities "stipulate that this document shall constitute and be a confession of Judgment and Judgment shall be entered in favor of Singh" in the sum of \$178,750.00, consisting of the liability of \$175,000.00 plus \$3,750.00 in attorney fees. The content of the Confession does not

⁵ The facts considered are a combination of the undisputed allegations of the Complaint, the events on the Court's dockets, and the contents of the exhibits to the Motion for Summary Judgment.

contain any language to the effect that any of the parties swear or affirm that the statements contained therein are true and does not contain a jurat.⁶

The section on the Confession for signatures begins “IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals” and is signed by Mr. Stevenson on his own behalf and on behalf of the Lotus Entities, Ms. Stevenson on her own behalf, and Singh on his own behalf. The signature of Ms. Stevenson—who signed the Confession in South Carolina—is notarized by a South Carolina Notary Public, while the signatures of Mr. Stevenson and Singh—who signed the Confession in Florida—are notarized by a Florida Notary Public. Singh engaged a Florida attorney to prepare the Confession rather than consulting with a South Carolina attorney concerning the requirements of a confession of judgment. The Confession was filed on May 8, 2023, in the Court of Common Pleas for Greenville County, South Carolina at Case Number 2023-CP-23-02294.

In July of 2023,⁷ Singh, the Stevensons, and the Lotus Entities entered a Settlement Agreement which recited that the parties understood the Confession to constitute a judgment lien against property owned by Ms. Stevenson located at 10 Thornbriar Court, Travelers Rest, Greenville County, South Carolina 29690 (the “Thornbriar Property”) and agreed to terms whereby the debt owed to Singh under the Confession would be partially paid in exchange for the purported judgment being released as against the Stevensons so that Ms. Stevenson could sell the Thornbriar Property. Specifically, (a) Singh would receive \$166,000.00 at the closing of the sale

⁶ “A jurat typically says ‘Subscribed and sworn to before me this day of [month], [year],’ and the officer (usu. a notary public) thereby certifies three things: (1) that the person signing the document did so in the officer’s presence, (2) that the signer appeared before the officer on the date indicated, and (3) that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.” *Jurat*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁷ The Settlement Agreement states it “is entered as of the ___ day of July, 2023” and the signatures thereon are not dated. The Partial Satisfaction of Judgment as to the Stevensons (referenced below) indicates it was entered on July 6, 2023.

of the Thornbriar Property; (b) a porcelain tile piece would be shipped to Singh; and (c) Singh would be reimbursed for the cost to ship the porcelain. Upon the occurrence of (a)-(c), the Stevensons would be released from the purported judgment and Singh would file a satisfaction of the purported judgment as to them.

On July 7, 2023, Ms. Stevenson sold the Thornbriar Property to a third party.⁸ On July 14, 2023, the closing of the sale occurred, and Singh received \$166,000.00 of the proceeds of sale (the “Transfer”). The Transfer was to or for the benefit of Singh and was made for or on account of the antecedent debt owed by the Stevensons to Singh before the Transfer was made.

On August 18, 2023, Singh filed a Partial Satisfaction of Judgment as to the Stevensons in the Court of Common Pleas for Greenville County, South Carolina at Case Number 2023-CP-23-02294, declaring that, as the Stevensons and the Lotus Entities had fulfilled their obligations under the July 2023 Settlement Agreement, the purported judgment arising from the Confession was satisfied as to the Stevensons and authorizing the state court to cancel such purported judgment as to them.

On October 11, 2023, less than ninety (90) days after Singh received the Transfer, the Stevensons filed a petition for relief under Chapter 7 of the Bankruptcy Code to initiate C/A No. 23-03087-HB, and the Trustee was appointed Chapter 7 Trustee. On November 14, 2023, the Trustee filed a Notice of Assets and Request for Notice to Creditors and an Application to Employ the Firm as legal counsel. The next day, the Court issued a Notice to Creditors to File Claims, advising creditors that assets may be recovered by the Trustee and requiring non-governmental creditors to file proofs of claim by February 15, 2024, and governmental creditors to do so by April

⁸ The parties stipulate—through the Complaint and the Answer thereto—that the sale occurred on July 7, 2023, and the Closing Disclosure was issued on that date. However, the deed transferring the property was signed and the closing occurred on July 14, 2023.

8, 2024. Twenty-one (21) claims were filed, totaling \$3,158,003.04, consisting of \$3,048,555.97 in non-priority unsecured claims, \$95,307.71 in priority unsecured claims, and \$14,139.36 in secured claims.⁹ Singh did not file a claim.

On November 14, 2023, the Trustee sent a letter to Singh demanding he return the \$166,000.00 received in July 2023 as a result of the Transfer, asserting it constituted a preference under § 547. On November 29, 2023, the Court entered an Order authorizing the Trustee to employ the Firm as legal counsel. On November 30, 2023, Bryan R. Bagdady, counsel for Singh, sent the Trustee a letter asserting that any transfer Singh received for purposes of § 547(b) occurred on May 8, 2023 (the date of the filing of the Confession), not July 14, 2023 (the date of the Transfer), and was therefore outside of the ninety (90) days preceding the petition date.

On April 15, 2024, the Court entered an Order granting the Stevensons a discharge under [11 U.S.C. § 727](#).

On May 31, 2024, the Trustee filed a Complaint against Singh to initiate the above-captioned adversary proceeding. In the Complaint, the Trustee specifically asserts the Confession fails to meet the requirements for a confession of judgment under South Carolina law because it does not contain an oath of any kind and because there is no indication that the notaries who witnessed the signatures knew the individuals who signed or otherwise confirmed their identities. The Trustee contends that because the Confession was not proper under South Carolina law, it should not have been recorded and, even though recorded, it did not and could not create a lien on the Thornbriar Property. Therefore, the Trustee alleges that the Transfer occurred on July 14, 2023, when the \$166,000.00 was paid to Singh. The Trustee asserts causes of action for (1) preferential transfer under [11 U.S.C. § 547](#); (2) fraudulent conveyance under [11 U.S.C. § 548](#); (3)

⁹ Dan and Tina Salliotte's general unsecured claim for \$2,667,443.27 (Claim No. 10-1) was allowed in the reduced amount of \$863,000.00. *See* C/A No. 23-03087-hb, [ECF No. 59](#). *See also* Adv. Pro. No. 24-80006-hb, [ECF No. 11](#).

judgment against Singh for the value of the fraudulent conveyance and/or preferential transfer under 11 U.S.C. § 550; and (4) fraudulent conveyance under S.C. Code Ann. § 27-23-10 and 11 U.S.C. § 544. The Trustee requests an Order setting aside the Confession and the Transfer and requiring Singh to pay the costs and attorney fees of the Trustee in bringing the action, and a Judgment against Singh in the amount of \$166,000.00.

On August 1, 2024, Singh filed an Answer to Complaint.¹⁰

On August 29, 2024, the Court entered a Scheduling Order providing, among other things, that all discovery must be completed and any motions to amend pleadings filed by November 6, 2024, motions for summary judgment had to be filed by November 20, 2024, and any responses to a motion for summary judgment had to be filed by December 4, 2024.¹¹ The Scheduling Order further provided that, if an amended scheduling order was needed, “a party in interest may timely move to amend this order”, “[a] deadline established by this order will be extended only upon a showing of good cause”, and “[i]n the absence of disabling circumstances, the deadline for completion of discovery will not be extended unless there has been active discovery and a good faith effort to comply with the discovery schedule.”

On November 4, 2024, the Stevensons were deposed by Gleissner and Cooper. The Stevensons both testified they did not personally know the notaries who witnessed their signatures on the Confession, and both were unsure if the notaries asked for proof of identification. Mr. Stevenson testified that, to the best of his recollection, the Florida notary did not ask him to take a vow of truthfulness on penalty of perjury, and Ms. Stevenson testified there did not appear to be a vow of truthfulness on penalty of perjury in the Confession. The Stevensons both testified they

¹⁰ ECF No. 5.

¹¹ ECF No. 10. The deadline to answer or otherwise respond to the Complaint was extended by a filed Certificate of Extension.

were insolvent at the time the Confession was executed and the Transfer was made. Mr. Stevenson testified the funds Singh paid for work on the Pinewater Property were not segregated and were placed in a general account into which all funds were placed.

Also on November 4, 2024, Singh filed the Motion to Amend Answer to Complaint, asserting he discovered new evidence through discovery that necessitates amendment of his Answer. Attached to the motion is a proposed Amended Answer to Complaint that alleges wrongdoing by Mr. Stevenson and asserts that the funds Singh paid the Lotus Entities for work on the Pinewater Property were held in a constructive trust and did not become property of the Stevensons or thus of the estate, and therefore, the Transfer was not a “transfer of an interest of the debtor in property” under § 547. In support of this defense, Singh notes that Mr. Stevenson admitted in his deposition that the funds Singh paid for work on the Pinewater Property were not segregated. The proposed amended Answer also cites *In re J.A. Jones, Inc.*, 361 B.R. 94 (Bankr. W.D.N.C. 2007) for the proposition that “[u]nder the ‘indirect transfer’ theory, a lien waiver was considered ‘new value’ for purposes of a preference action under Florida law.” The Trustee filed a timely Memorandum in Opposition, arguing the proposed amendment should be denied as futile, as Singh’s constructive trust defense fails even if his allegations are accepted as true.

On November 6, 2024, the last day for discovery, Gleissner took the deposition of Singh. Singh testified he was present when Mr. Stevenson signed the Confession, and that the Florida notary took both of their IDs and witnessed their signatures. Singh testified the Florida notary did not perform any other act.¹² Singh acknowledged the Confession does not contain a vow of

¹² The following exchanges occurred during Singh’s deposition:

Gleissner: “Okay. So [the Florida notary] took it, he took Mr. Stevenson’s ID.”

Singh: “Yep, and my ID.”

Gleissner: “And he witnessed the signature.”

Singh: “Absolutely.”

Gleissner: “Okay. And – and that’s all he did?”

Singh: “Yep.”

truthfulness on penalty of perjury. Singh testified that, in addition to the \$175,000.00 he paid the Lotus Entities for work on the Pinewater Property, he paid approximately \$80,000.00 to vendors because they were not being paid by the Lotus Entities as required.

On November 14, 2024, the Trustee filed the Motion for Summary Judgment pursuant to [Fed. R. Civ. P. 56](#)¹³ on the preference cause of action under § 547. Among other exhibits attached to the motion was an affidavit of the Trustee stating that, after reviewing the estate assets and liabilities, she determined Singh received more through the Transfer than he would have received if his debt was paid through the bankruptcy case. On November 19, 2024, the Court entered an Order requiring any pleadings in support of or opposition to the motion be filed by December 6, 2024.¹⁴

Singh filed a late response in opposition to the Motion for Summary Judgment. In the response, Singh argues that a genuine dispute as to a material fact exists, asserting the oath required for a confession of judgment can be made orally, and only the notaries who were involved in the signing of the Confession can provide proof as to whether such oaths were made. Singh contends that the Stevensons' deposition testimony is inadequate to (a) establish that no oaths were made in connection with the Confession and (b) establish that the notaries failed to verify the signers' identities, and contends that affidavits of the notaries on such issues are necessary. Singh also asserts the Stevensons' deposition testimony that they were insolvent when the Confession was executed and the Transfer made is inadequate, and that the equity in the Thornbriar Property at the time of its sale closing shows the Stevensons were not insolvent at the time of the Transfer.

Ex. 3 to Motion for Summary Judgment, page 22.

Gleissner: "Okay. So that's all this notary did was witness the signature."

Singh: "Yep."

Ex. 3 to Motion for Summary Judgment, page 26.

¹³ [Fed. R. Civ. P. 56](#) is made applicable to this adversary proceeding by [Fed. R. Bankr. P. 7056](#).

¹⁴ [ECF No. 17](#).

On December 16, 2024, the Court entered an Order scheduling hearings for January 22, 2025, to consider Singh's Motion to Amend Answer to Complaint and the Trustee's Motion for Summary Judgment.¹⁵

At the January 22, 2025, hearings, Cooper stated that he still needs to take the deposition of the Stevensons and possibly review their financial records to substantiate Singh's constructive trust theory. Cooper claimed that questioning of the Stevensons at the November 4, 2024, depositions was limited because Mr. Stevenson was ill, and Cooper was waiting to get word that Mr. Stevenson was well enough for another deposition. However, the deposition transcript shows that, because Mr. Stevenson said he needed to review documents to answer certain of Cooper's questions, Cooper intended to subpoena such documents from Mr. Stevenson and take a second deposition of Mr. Stevenson at a later date. There was no indication that Cooper had additional questions to ask Ms. Stevenson at the deposition. Further, the discovery period ended November 6, 2024, and Singh never sought the entry of an amended Scheduling Order. In opposition to the Motion for Summary Judgment, Singh also did not comply with [Fed. R. Civ. P. 56\(d\)](#) to the extent relief is sought thereunder.¹⁶

Cooper also sought introduction of an unnotarized document purporting to be from a Florida Notary Public explaining the procedures Notary Publics in Florida typically follow when notarizing documents. Gleissner objected to its introduction on the grounds that it was not submitted timely, is not an affidavit or declaration, and does not have probative value.

¹⁵ [ECF No. 19](#).

¹⁶ [Fed. R. Civ. P. 56\(d\)](#) provides "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Here, Singh did not present any affidavit or declaration that further discovery was required for his defense to the Motion for Summary Judgment.

APPLICABLE LAW AND DISCUSSION

The Court has jurisdiction over this matter pursuant to [28 U.S.C. §§ 1334](#) and [157](#), this matter is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(F\)](#) and [\(K\)](#), and the Court may enter a final order.

I. Admissibility of Singh's Exhibit

“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” [Fed. R. Civ. P. 56\(c\)\(1\)](#). “[T]he Fourth Circuit has recognized that a court may consider ‘otherwise inadmissible materials’ on summary judgment so long as ‘it will be possible to put the information . . . into an admissible form.’” *Horsetail Techs., LLC v. Del. State Police Fed. Credit Union*, No. ELH-18-556, [2020 WL 3402302](#), at *19 (D. Md. June 19, 2020) (quoting *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, [790 F.3d 532, 538](#) (4th Cir. 2015)). But while “parties may resist a summary judgment motion by presenting evidence not in an admissible *form*, such as an affidavit, the evidence itself still must be admissible.” *Connor v. Prop. Fund 629, LLC (In re Connor)*, 641 B.R. 875, 881 (Bankr. M.D. [Tenn. 2022](#)) (emphasis in original) (quoting *N. Am. Specialty Ins. Co. v. Myers*, [111 F.3d 1273, 1283](#) (6th Cir. 1997)).

Relevant evidence is admissible unless the U.S. Constitution, a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise, and irrelevant evidence is not admissible. [Fed. R. Evid. 402](#). Evidence is relevant if it has any tendency

to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Fed. R. Evid. 401. The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403.

At the outset, the Court notes that Singh's exhibit was not timely submitted, as the Court required any responses to the Motion for Summary Judgment be filed by December 6, 2024. However, the Court will still consider the exhibit, as the procedures that Florida Notary Publics typically follow is relevant to determining what procedures may have been followed when the Confession was executed, its probative value is not substantially outweighed by any of the factors listed in Fed. R. Evid. 403, and it would be possible to present the exhibit in an admissible form. However, no evidence has been provided to substantiate that the individual whose name appears at the end of the document—the signature of whom does not appear to be a wet signature and does not have /s/ next to the name—actually drafted the document or is a Florida Notary Public who is knowledgeable about standard procedures of Notary Publics in Florida. Regardless, the document does not say that Florida Notary Publics ordinarily require individuals signing documents before them to swear or affirm the truthfulness of the document, and while the document indicates Florida Notary Publics ordinarily verify the signer's identity by personal knowledge or a form of identification, that does not mean that occurred in this case. Accordingly, after considering it, the Court gives little weight to Singh's exhibit and finds that it does not demonstrate any issue of material fact.

II. Motion to Amend Answer to Complaint

[Fed. R. Civ. P. 15](#)¹⁷ governs amendment of pleadings. As the time limit for amending as a matter of course under [Fed. R. Civ. P. 15\(a\)\(1\)](#) had expired when the Motion to Amend Answer to Complaint was filed, the applicable provision is [Fed. R. Civ. P. 15\(a\)\(2\)](#), which provides “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” In discussing [Fed. R. Civ. P. 15\(a\)\(2\)](#), the U.S. District Court for the District of S.C. recently reiterated “[t]he law is well-settled that leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Hart v. Amazon.com, Inc.*, No. 6:23-cv-06754-DCC, [2025 WL 211524](#), at *2 (D.S.C. Jan. 16, 2025) (quoting *Edwards v. City of Goldsboro*, [178 F.3d 231, 242](#) (4th Cir. 1999)).

Singh seeks to amend his Answer to Complaint to (1) assert the funds paid to the Lotus Entities for work on the Pinewater Property were held in a constructive trust, did not become property of the Stevensons or thus of the estate, and therefore the Transfer of the proceeds from the sale of the Thornbriar Property was not a “transfer of an interest of the debtor in property” under § 547; and (2) possibly assert a defense under § 547(c)(1) by citing *In re J.A. Jones, Inc.*, [361 B.R. 94](#) (Bankr. W.D.N.C. 2007) for the proposition that “[u]nder the ‘indirect transfer’ theory, a lien waiver was considered ‘new value’ for purposes of a preference action under Florida law”.

For a transfer to be subject to avoidance by a trustee as a preferential transfer under § 547, the transfer must be “of an interest of the debtor in property”. See [11 U.S.C. § 547\(b\)](#). Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable

¹⁷ [Fed. R. Civ. P. 15](#) is made applicable to this adversary proceeding by [Fed. R. Bankr. P. 7015](#).

interest, does not become property of the estate except to a limited extent in circumstances in which the debtor is a mortgagee. See 11 U.S.C. § 541(d); see also *In re Truland Grp., Inc.*, 588 B.R. 447, 456 (Bankr. E.D. Va. 2018) (quoting *Old Republic Nat'l Title Ins. Co. v. Tyler (In re Dameron)*, 155 F.3d 718, 721-22 (4th Cir. 1998)) (“[W]hen a ‘debtor’ does not own an equitable interest in property he holds in trust for another, that interest is not ‘property of the estate’ for purposes of the Bankruptcy Code.”). As “interest of the debtor in property” is not defined by the Bankruptcy Code, state law governs the nature of the debtor’s interest. *In re Cap. Funding and Consulting, LLC*, No. 09–36086–KRH, 2010 WL 4118119, at *4 (Bankr. E.D. Va. 2010) (citing *In re BEV of Va., Inc.*, 237 B.R. 311, 314 (Bankr. E.D. Va. 1998)); see also *Callaway v. Memo Money Order Co.*, 381 B.R. 650, 655 (E.D.N.C. 2008) (quoting *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992)) (“In the absence of any controlling federal law, ‘property’ and ‘interests in property’ are creatures of state law.”).

Under South Carolina law, “[a] constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.” *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998) (quoting *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)). “Generally, fraud is an essential element giving rise to a constructive trust, although it need not be actual fraud.” *Id.*, 330 S.C. at 357, 499 S.E.2d at 501 (citing *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987); *Whitmire v. Adams*, 273 S.C. 453, 257 S.E.2d 160 (1979)). “A constructive trust may only be placed over ascertainable and sufficiently identifiable property—the property subject to the trust, or the trust res.” *Dream Med. Grp., LLC v. Church Enters., Inc. (In re Church)*,

657 B.R. 431, 443 (Bankr. D.S.C. 2024) (quoting *Rogers v. Rowland*, No. 2:22-00279-RMG, 2022 WL 17960777, at *6 (D.S.C. Dec. 27, 2022)). “In order to maintain a claim for constructive trust, the plaintiff must be able to trace the funds into the res at issue.” *Id.* (quoting *Rowland*, 2022 WL 17960777, at *6). “A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust.” *McNair*, 330 S.C. at 356, 499 S.E.2d at 501 (citing *SSI Med. Servs., Inc.*, 301 S.C. 493, 392 S.E.2d 789). “In order to establish a constructive trust, the evidence must be clear and convincing.” *Id.*, 330 S.C. at 357, 499 S.E.2d at 501 (citing *SSI Med. Servs., Inc.*, 301 S.C. 493, 392 S.E.2d 789).

Under Florida law, “Courts impose constructive trusts either upon property acquired by fraud, or when it is ‘against equity’ that someone who acquired property without fraud should continue to retain possession.” *Silva v. de la Noval*, 307 So.3d 131, 134 (Fla. Dist. Ct. App. 2020) (citing *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1025 (Fla. Dist. Ct. App. 1996)). “In order to impose a constructive trust the court must find the following: (1) the existence of a promise express or implied, (2) transfer of the property and reliance thereon, (3) the existence of a confidential relationship, and (4) unjust enrichment.” *Id.* (citing *Abreu v. Amaro*, 534 So.2d 771, 772 (Fla. Dist. Ct. App. 1988)). “Florida courts will impress property with a constructive trust only if the trust res is specific, identifiable property or if it can be clearly traced in assets of the defendant which are claimed by the party seeking such relief.” *In re Cox & Schepp, Inc.*, 523 B.R. 511, 518 (Bankr. W.D.N.C. 2014) (quoting *Finkelstein v. Se. Bank, N.A.*, 490 So.2d 976, 983 (Fla. Dist. Ct. App. 1986)). “The person seeking to impose a constructive trust must prove those factors giving rise to a trust by clear and convincing evidence.” *Silva*, 307 So.3d at 134 (citing *Abreu*, 534 So.2d at 772).

The Trustee may not avoid a transfer as a preferential transfer “to the extent that such transfer was—(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange”. [11 U.S.C. § 547\(c\)\(1\)](#). “New value” is defined as “money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation”. [11 U.S.C. § 547\(a\)\(2\)](#). “When evaluating a new value defense, the key question is whether the alleged preferential transfer diminished the debtor’s estate, *i.e.*, whether the debtor in fact acquired a new asset that offset the loss in value to the estate when the debtor transferred existing assets to acquire the new asset at issue.” *In re ESA Env’t Specialists, Inc.*, [709 F.3d 388, 398](#) (4th Cir. 2013) (citation omitted). The party asserting the new value defense must prove that the parties intended the transaction to be substantially contemporaneous, must prove the exchange of new value between the debtor and the defendant was in fact substantially contemporaneous, and must prove with specificity the new value given to the debtor. *Id.* (citations omitted). The creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under § 547(c). [11 U.S.C. § 547\(g\)](#).

In the *Jones* case, the debtors were general contractors who paid subcontractors for work performed on building projects owned by a third party. *In re J.A. Jones, Inc.*, [361 B.R. 94, 97](#) (Bankr. W.D.N.C. 2007). In exchange for payment, the subcontractor executed lien releases in favor of its general contractor, and each release was given contemporaneously with receipt of payment from the debtor general contractor. *Id.* at 98. Some of the payments fell within the 90-

day preference period and were sought to be set aside as preferential transfers. *Id.* The Court explained the “indirect transfer” theory as follows:

The “indirect transfer” theory assumes that had the debtor general contractor not paid its subcontractor, the subcontractor would have “liened” the project. The owner would be forced to pay the subcontractor, and having done so, would seek indemnification, by a setoff against other sums owed to the debtor. Section 553 preserves setoff rights in bankruptcy and the Code treats setoffs as secured claims. *See* [11 U.S.C. § 506\(a\)](#). Given this, the indirect transfer theory posits that the bankruptcy estate is not harmed by the pre-petition payments to the subcontractors. *Id.*

Id. at 102 (footnote omitted). The Court held that, at that stage of the proceedings (considering motions for summary judgment), it lacked the factual details necessary to determine whether a given subcontractor’s release of lien rights in exchange for payment constituted equivalent new value to provide a § 547(c)(1) defense and held only that such a release could constitute new value, provided the requisite showing was made. *Id.* at 104.

The Court concludes that Singh’s Motion to Amend Answer to Complaint must be denied as futile because the new legal theories advanced in the proposed amended Answer to Complaint fail as a matter of law even assuming Singh’s version of the facts is true. Regarding the constructive trust theory, even assuming Singh can show the other elements, there is no allegation or indication that any funds Singh paid the Lotus Entities in connection with the Pinewater Property can be traced or adequately connected to the Thornbriar Property, the sale of which provided the funds for the Transfer. Singh himself alleges, and Mr. Stevenson’s deposition testimony indicates, that the funds Singh provided under the Pinewater Property contract were not segregated, and he has provided no factual allegations tracing such funds to the Thornbriar Property. At the hearing, counsel for Singh said that further discovery may allow Singh to trace the funds, but discovery has long since ended and Singh has not requested an amended Scheduling

Order or presented adequate grounds therefor. Accordingly, Singh’s claim for a constructive trust fails under South Carolina and Florida law.

Further, to the extent Singh’s proposed amended Answer raises a defense under § 547(c)(1)—which is not apparent from the face of the proposed amended Answer—such a defense fails. The proposed amended Answer does not explain or allege how a § 547(c)(1) defense applies, and a review of the *Jones* case and applicable law does not make the applicability of such a defense apparent.

As amendment of the Answer to Complaint would be futile, the Motion to Amend Answer to Complaint is denied.

III. Motion for Summary Judgment

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A fact is ‘material’ if proof of its existence or non-existence would affect disposition of the case under applicable law.” *Nesbitt v. City of Greenville*, No. 6:22-cv-02867-JDA, 2025 WL 274619, at *3 (D.S.C. Jan. 23, 2025) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “An issue of material fact is ‘genuine’ if the evidence offered is such that a reasonable jury might return a verdict for the non-movant.” *Id.* (citing *Anderson*, 477 U.S. at 257). “When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party.” *Id.* (citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine

issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, [477 U.S. at 252](#). Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248.

Id.

Section 547 of the Bankruptcy Code provides:

(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), 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\(b\)](#). A pre-petition payment to a fully secured, properly perfected creditor is not preferential, as “[a] pre-petition transfer on a secured debt eliminates one debtor asset (the transferred property), but simultaneously augments another (by increasing the debtor's equity in the collateral).” *In re J.A. Jones, Inc.*, [361 B.R. 94, 99-100](#) (Bankr. W.D.N.C. 2007). Under the Bankruptcy Code, “[t]he term ‘transfer’ means—(A) the creation of a lien; (B) the retention of title as a security interest; (C) the foreclosure of a debtor's equity of redemption; or (D) 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\(54\)](#). For purposes of § 547,

“the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.” [11 U.S.C. § 547\(f\)](#). Under the Bankruptcy Code, “insolvent” means, “with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation, exclusive of—(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity’s creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title”. [11 U.S.C. § 101\(32\)](#). The Trustee has the burden of proving the avoidability of a preferential transfer. [11 U.S.C. § 547\(g\)](#). “[T]o the extent that a transfer is avoided under section . . . 547 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.” [11 U.S.C. § 550\(a\)](#).

Before a judgment by confession shall be entered a statement in writing must be made and signed by the defendant and verified by his oath to the following effect:

- (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor;
- (2) If it be for the money due or to become due, it must state concisely the facts out of which it arose and must show that the sum confessed therefor is justly due or to become due; and
- (3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the liability.

[S.C. Code Ann. § 15-35-360](#). “‘Oath’ means a notarial act that is legally equivalent to an affirmation and in which a notary certifies that at a single time and place all of the following occurred: (a) an individual appeared in person before the notary; (b) the individual was personally known to the notary or identified by the notary through satisfactory evidence; and (c) the individual made a vow of truthfulness on penalty of perjury while invoking a deity or using a form of the word “swear”. [S.C. Code Ann. § 26-1-5\(11\)](#). While no cases reviewed by or presented to the

Court have revealed whether the oath to verify a confession of judgment may be made verbally or must be in writing, it appears that the oath may be made verbally. The plain terms of the statute do not require that the oath be in writing; rather, it requires that the confession of judgment be in writing and that such writing be “verified by his oath”. See [S.C. Code Ann. § 15-35-360](#). Further, the U.S. District Court for the District of S.C. has held that the “presence of a jurat establishes that an oath or affirmation was administered” and that the requirements for an affirmation—which is legally equivalent to an oath—have been met. See *Fulton v. Mack*, No. 0:22-1954-BHH-PJG, [2023 WL 10947188](#), at *5 (D.S.C. Oct. 12, 2023) (citing [S.C. Code Ann. § 26-1-5](#)). That implies that the oath does not have to be within the four corners of the document. It appears that the oath may also be in writing. See *Levy v. Grabara*, No. 2012–UP–430, [2012 WL 10862441](#), at *1 (S.C. Ct. App. July 18, 2012) (finding that a confession of judgment was verified by oath, as it contained “a verification of statement at the end of the document providing that [defendant] was duly sworn and affirming that the judgment by confession was true” which verification statement was notarized by a notary after she witnessed defendant sign the document.).

The Court concludes that the Trustee is entitled to judgment as a matter of law on the preference cause of action. The parties stipulate that the Transfer was made within the ninety (90) days preceding the petition date, was to or for the benefit of Singh, and was made for or on account of the antecedent debt owed by the Stevensons to Singh before the Transfer was made. The alleged disputes of fact involve whether Singh’s debt was secured prior to the preference period, whether the Transfer was made while the Stevensons were insolvent, and whether the Transfer enabled Singh to receive more than would have been received had the Transfer not been made and Singh received payment of the debt through the provisions of Chapter 7.

The Stevensons both testified at their depositions they did not personally know the notaries who witnessed them sign the Confession, and both were unsure if the notaries asked for proof of identification, while Singh testified at his deposition that he was present when Mr. Stevenson signed the Confession, and that the Florida notary took both of their IDs. Even assuming the notaries did properly identify all parties before they signed the Confession, the evidence indicates the Confession was not properly verified by oath by the Stevensons.

There is no written oath on the face of the Confession in the form of a verified statement or some other certification that an oath was administered such as a jurat. Further, the record before the Court does not indicate that a verbal oath was made. Mr. Stevenson testified that, to the best of his recollection, the Florida notary did not ask him to take a vow of truthfulness on penalty of perjury, and Ms. Stevenson testified there did not appear to be a vow of truthfulness on penalty of perjury in the Confession. Singh testified the Florida notary witnessed his and Mr. Stevensons' signatures but did not perform any other act, and acknowledged the Confession does not contain a vow of truthfulness on penalty of perjury. While Singh contends that affidavits from the notaries are needed to determine whether oaths were made verbally when the Confession was signed, he did not explain why such affidavits were not obtained during the discovery period and, as noted above, never sought an extension of the discovery period or provided grounds therefor. On this record, there is no genuine dispute that the Confession does not meet the requirements for a confession of judgment under South Carolina law, and therefore the debt from the Stevensons to Singh was unsecured on the date of the Transfer. Therefore, Singh's debt was not secured outside the preference period.

Singh argues that the existence of equity in the Thornbriar Property when it was sold shows that the Stevensons were solvent at the time of the Transfer. The evidence before the Court

indicates the Transfer was made while the Stevensons were insolvent. The Stevensons are presumed to have been insolvent during the ninety (90) days preceding the petition date under § 547(f). The Stevensons both testified they were insolvent at the time the Confession was executed and the Transfer was made. The record on summary judgment also includes the amount of claims filed in the Stevensons' bankruptcy case and the Trustee's affidavit. Singh's mere argument regarding one asset without more does not create a dispute of fact on this point.

In his Answer to Complaint, Singh did not concede that the Transfer enabled him to receive more than he would have received had the Transfer not been made and he received payment of his debt through the provisions of Chapter 7. However, he did not contest that point in his response to the Motion for Summary Judgment or explain how that was not true. The record on this issue includes the affidavit of the Trustee indicating that Singh received more through the Transfer than he would have received had the Transfer not been made and he received payment of his debt through the provisions of Chapter 7. There is nothing in the record to the contrary.

IT IS, THEREFORE, ORDERED:

- 1) Singh's exhibit is admitted as indicated herein;
- 2) Singh's Motion to Amend Answer to Complaint is denied;
- 3) Pursuant to Fed. R. Civ. P. 56, the Trustee's Motion for Summary Judgment is granted as to the preference cause of action under 11 U.S.C. § 547; and
- 4) Pursuant to 11 U.S.C. § 550, a Judgment against Singh and in favor of the Trustee in

the amount of \$166,000.00 shall be entered simultaneously herewith.

FILED BY THE COURT
02/14/2025



Entered: 02/14/2025


Chief US Bankruptcy Judge
District of South Carolina