

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	In Proceedings
)	Under Chapter 11
LOCKE HOME PRODUCTS, INC.,)	
)	No. BK 92-30548
Debtor(s).)	
)	
LOCKE HOME PRODUCTS, INC.,)	Adv. No. 92-3041
)	
Plaintiff,)	
)	
vs.)	
)	
ROADWAY PACKAGE SYSTEM,)	
)	
Defendant.)	

OPINION

On May 29, 1990, Locke Home Products, Inc. ("debtor") filed a chapter 11 bankruptcy petition. On May 1, 1992, debtor filed a Complaint to Recover Preference and Avoidable Transfers against defendant Roadway Package System, Inc. ("RPS"). The following facts are not in dispute.

Prior to seeking relief under chapter 11 of the Bankruptcy Code, debtor was in the business of manufacturing, for wholesale, space heating equipment and barbecue grills. Debtor utilized the services of motor carriers for hire to ship the products it manufactured to its customers. RPS is a motor carrier for hire operating under authority issued by the Interstate Commerce Commission. Debtor utilized the services of RPS from January 1989 through May 1990. RPS billed debtor by invoice for the motor carrier services that it rendered. Debtor paid RPS by check and with each payment, debtor indicated the invoice numbers to which the payment was to be applied.

Within ninety days prior to filing for bankruptcy, debtor transferred the following checks to RPS for payment of various invoices:

<u>Check Number</u>	<u>Date of Check</u>	<u>Amount of Check</u>
10004	3/5/90	\$2,292.42
10029	3/12/90	\$2,977.97
6744	4/9/90	\$975.26
6850	4/17/90	\$386.13
7040	4/25/90	\$767.40

Debtor argues that these payments were preferential under 11 U.S.C. §547(b). RPS, however, contends that the payments were made in the ordinary course of business and according to ordinary business terms, and therefore cannot be avoided as preferential transfers.¹

Section 547(c)(2) of the Bankruptcy Code provides:

(c) The trustee may not avoid under this section a transfer--

(2) to the extent that such transfer was--

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms....

11 U. S. C. §547(c)(2). RPS has the burden of proving that the payments in question fall within the "ordinary course of business"

¹At the hearing on debtor's complaint, the parties stipulated that the only issue the Court need decide was whether the payments fell within the "ordinary course of business" exception established by 11 U.S.C. §547(c)(2).

exception. Debtor contends that RPS has failed to meet its burden with respect to subsections (B) and (C).

In determining whether the payments made by the debtor to RPS were made in the ordinary course of business, "there is no precise legal test which can be applied; rather, [the] court must engage in a 'peculiarly factual' analysis." In re Fulghum Corp., 872 F.2d 739, 743 (6th Cir. 1989) (citing In re First Software Corp., 81 B.R. 211, 213 (Bankr. D. Mass. 1988)). Ordinary course of business is determined from the way the parties actually conducted their business affairs, and not by merely looking to contractual terms neither party in fact followed. See In re Xonics Imaging, Inc., 837 F.2d 763, 766 (7th Cir. 1988). "'[T]he cornerstone of this element of a preference defense is that the creditor needs [to] demonstrate some consistency with other business transactions between the debtor and the creditor.'" Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991) (citing In Re Magic Circle Energy Corp., 64 B.R. 269, 272 (Bankr. W.D. Okla. 1986)).

In the present case, while the terms of RPS's invoices were "net seven days," the record shows that during the twelve-month period immediately preceding the ninety-day preference period, all payments made by debtor to RPS were made more than thirty days after the invoice date. In fact, 87% of all payments made during this period were made more than sixty days after the invoice date. The average age of the invoices upon payment was eighty-eight days during this period. Likewise, during the ninety-day preference period, with the exception of only one payment, all payments made to RPS were made more than thirty days after the invoice date, with 80% of all payments being made

more than sixty days after the invoice date. Upon payment, the average age of the invoices for this period was seventy-nine days.

This case is strikingly similar to Lovett. In Lovett, the central issue was whether certain payments made by debtor to a motor carrier within the ninety-day preference period were made in the ordinary course of business. After noting that the average age of the invoices paid by debtor during the twelve months preceding the preference period was sixty-two days, and the average age of the invoices paid during the preference period was fifty-two days, the Eighth Circuit held that the payments in question were made in the ordinary course of business and therefore were not avoidable by the trustee. In reaching this conclusion, the Court noted that "'[n]ormally, if late payments were the standard course of dealing between the parties, they shall be considered as within the ordinary course of business under § 547(c)(2).'" Lovett, 931 F.2d at 498 (citing In re Yurika Foods Corp., 888 F.2d 42, 44 (6th Cir. 1989)).

The Court finds that in the instant case, as in Lovett, the payments made by debtor to RPS were made in the ordinary course of business. Any differences in the manner and timing of payments during the twelve-month period preceding the preference period are "not sufficiently significant to show that the payments during the 90-day period did not follow the ordinary course of business reflected in the prior 12 months." Lovett, 931 F.2d at 498. Rather, debtor consistently paid the invoices well beyond seven days, and usually beyond sixty days, and this practice continued during the ninety-day preference period. Thus, this case is "one where the parties to a

contract adopt[ed] an extra-contractual practice that [became] the ordinary course of business between them." In re Xonics Imaging, Inc., 837 F.2d at 767.²

The Court also finds that the payments made by debtor to RPS during the ninety-day preference period were made "according to ordinary business terms" under section 547(c)(2)(C). To the extent that subsection (C) requires a comparison between the payment record of debtor and the general practice in the industry regarding the time of payment, RPS introduced testimony by Trudi Stephenson, the supervisor of credit and collection for RPS, that it is not unusual in the trucking business for payments to be made later than what is required by the terms of the contract. She further testified that it is not unusual for customers of RPS to make their payments later than seven days from the date of the invoice. In the absence of any contrary evidence, this was sufficient to carry whatever burden RPS may have had on this issue. See Lovett, 931 F.2d at 499.

Accordingly, for the reasons stated, the Court finds for the defendant and against the plaintiff on the complaint.

See order entered this date.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: December 21, 1992

²In Xonics, the Seventh Circuit held that debtor's late payments under a lease were not made in the ordinary course of business since there was no history, pattern or course of dealing between the parties in which late payments were accepted. Id. at 767.