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

IN RE:	)	
SPARTAN PRINTING COMPANY,	)	Bankruptcy Case No. 95-41031
Debtor.	)	
JOEL A. KUNIN, Trustee of the Estate of Spartan Printing Company,	)	
Plaintiff,	)	
vs.	)	Adversary Case No. 97-3328
J. W. WRIGHT BUILDING CENTER, INC.,	)	
Defendant.	)	

OPINION

This matter comes before the Court for a trial on Plaintiffs First Amended Complaint to Avoid Preferential Transfers pursuant to 11 U.S.C. § 547. The following Findings of Fact and Conclusions of Law are now made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Findings of Fact

On October 31, 1995 (the "Petition Date"), Spartan Printing Company ("Debtor") filed a Petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq*. On March 19, 1996, the Debtor's Chapter 11 case was converted to a proceeding under Chapter 7 of the United States Bankruptcy Code. Joel A. Kunin ("Trustee"), the Plaintiff in this action, was appointed Trustee of the Debtor's Chapter 7 estate.

On October 27, 1997, the Trustee filed a Complaint to Avoid Preferential Transfers against J. W. Wright Building Center, Inc. ("Defendant"). This Complaint sought to avoid and recover alleged preferential transfers under §§ 547 and 550 of the Bankruptcy Code. The Trustee alleged that ten payments totaling $70,166.12 were made by Debtor to Defendant during the 90 day period immediately preceding the Petition Date. From these ten payments, the Trustee deducted the sum of

$34,677.10 as a credit for "new value" extended by Defendant to Debtor during the 90 day period preceding the Petition Date. The Trustee sought repayment of $35,489.02.

Defendant asserts as its affirmative defense that the ten payments were made in the ordinary course of business, pursuant to 11 U.S.C. § 547(c)(2) and, therefore, not voidable preferences. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C. §§ 547 and 550. Furthermore, this is a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(2)(F).

Based on the evidence presented at trial, it is the finding of this court that the Trustee has, by a preponderance of the evidence, established each of the *prima facie* elements of a preference as to each of the transfers under § 547(b). This evidence consisted of the Trustee's Complaint, Defendant's Answer to the Complaint, Defendant's Answers to Request for Admissions submitted to this Court as Plaintiff's Exhibit 1, the stipulations of the parties prior to trial, the Trustee's liquidation analysis presented as Plaintiffs Exhibit 2, and the testimony of the witnesses at trial.

It is also the finding of this Court that Defendant has established, by a preponderance of the evidence, that the payments sought to be recovered by the Trustee were payments made in the ordinary course of business as defined in 11 U.S.C. § 547(c)(2). This finding is based on the evidence presented at trial consisting of Plaintiff's Exhibit 2, Summary of Monthly Statements representing transactions between the Debtor and the Defendant from November 30, 1993, through October 31, 1995; Plaintiff's Exhibit 1, the monthly invoices of Defendant to the Debtor for the same time period; and the trial testimony of Defendant's witnesses - Mark Meyerhoff, the Assistant Manager of Defendant's Sparta store, Dennis McIntyer, Manager of Defendant's Sparta store, and Don Minton, the former Manager of Associated Lumber, a competitor of Defendant. In addition, these findings are based on the Trustee's preference analysis submitted and admitted as Plaintiff's Exhibit 3, along with the Trustee's analysis of invoices and payments made, submitted as Plaintiff's Exhibit 4.

Mr. Meyerhoff and Mr. Mclntyer testified that Defendant, J. W. Wright Building Center, Inc., is a building material and supply operation doing business as Wright Building Center in Southern Illinois. Debtor, Spartan Printing Company, was a printing company with its principal place of business in Sparta, Illinois. Defendant maintains a store in Sparta, Illinois, for purposes of selling building materials and supplies. The pleadings and stipulations established that, during the time the preference payments were made, the Debtor was insolvent and that each of the payments were made within 90 days of the Petition Date. Furthermore, the preference payments enabled Defendant to receive more than it would receive if this were a case under Chapter 7, the payments had not been made, and Defendant had received payments of such debts to the extent provided by the provisions of Title 11 of the United States Code. Mr. Meyerhoff explained during his testimony that Defendant delivered goods and products to Debtor pursuant to written or oral requests for purchase of goods issued by the purchasing department of Debtor. Upon the acceptance of a written or oral quote of costs for products to be delivered to Debtor, Defendant delivered products and material to Debtor's place of business in Sparta, Illinois.

Mr. McIntyer testified that Defendant would enter invoices in its accounts receivable computer program for deliveries made to Debtor on a daily basis. Defendant's general credit terms were net 10, which provided that payment of current invoices was expected by the 10th day of the month immediately following the month in which the delivery was made. The Debtor did not make payments to Defendant pursuant to the Defendant's general credit terms. Mr. McIntyer also testified that each month the Defendant prepared a monthly invoice for each of its customers, including Debtor, which provided a complete list of all purchase orders for the month, all credit memos issued during the month, and all payments and other activity affecting the customer's account each month. All purchase orders for the month were considered to be current with respect to Defendant's aging of its accounts receivable. In addition, all purchase orders on the previous month's statement were also considered current until the last day of the month for which the then current statement was issued. Any purchase order paid later than the last day of the month following the month in which the purchase order was issued was deemed to be past due for 1 to 30 days. The last page of Defendant's monthly statements reflected the status of each customer's account as of the last day of the month for which the statement was issued, including an aging of the customer's accounts receivable, the previous balance owed, and the new balance owed by the customer to Defendant. The method of aging accounts receivable used by Defendant is a standard method in the building materials and trades supply industry.

Both Mr. Meyerhoff and Mr. Mclntyer testified that Debtor and Defendant had been doing business together for at least four years prior to Debtor's Bankruptcy Petition. Defendant's personnel and Debtor's personnel were in daily contact with one another for purposes of purchasing new merchandise. During the 90 day period prior to the Petition Date, Defendant conducted no unusual or additional collection actions or efforts against Debtor. Defendant never threatened Debtor with termination of business in the event Debtor failed or refused to make any payment to Defendant. Defendant never sent a demand letter to Debtor for payment of unpaid invoices. Furthermore, Defendant was unaware of Debtor's pending bankruptcy or of any severe financial condition of Debtor which required Debtor to file a Bankruptcy Petition. Defendant never threatened to withhold shipment of goods or materials until payment was made by Debtor on unpaid invoices. Defendant's business activities with Debtor during the 90 day period prior to the Petition Date were substantially the same, if not identical, to the business activities during the pre-preference period. The payments made to Defendant by Debtor in the preference period were in the same form as payments made prior to the preference period.

The trial testimony of Defendant's expert, Mr. Don Minton, established that the Debtor's payments to Defendant during the entire time they transacted business, as analyzed by the parties, up to and including the Petition Date, were made within normal time periods established in the industry. Mr. Minton testified that he is the former Manager of Associated Lumber, which is a competitor of Defendant and a business organization very similar, if not identical to, Defendant's business. Mr. Minton testified that he had 44 years experience in the building trade and supply industry and was familiar with billing and collection practices of the building trade and supply industry. Mr. Minton was recognized as an expert by the Court without objection. Having reviewed the accounts receivable analyses presented in Defendant's Exhibits 1 and 2, Mr. Minton testified that all payments made by Debtor to Defendant, including those in the 90 day period prior to the Petition Date, were made well within the time periods acceptable in Defendant's industry. The Trustee's witness, Mr. Beighel, testified that, based on his analysis for the period from January 1, 1994, through October 31, 1995, the Debtor made payments to Defendant, on average, 56 days after delivery of products by Defendant. For the same time

period, the median number of days between delivery of product and Debtor's payments was 48. The evidence further showed that, with respect to payments made by Debtor within the 90 days prior to the Petition Date, the number of days between delivery of product and Debtor's payments was 66 days.

Based on the evidence, the Court finds that the payments by Debtor to Defendant during the 90 days prior to the Petition Date were within the limits of normal industry practice. Furthermore, the Court finds that the transactions conducted between Debtor and Defendant were ordinary course of business between these two parties.

Conclusions of Law

The payments of Debtor to Defendant, J. W. Wright Building Center, Inc., are not preferences recoverable by the Trustee pursuant to 11 U.S.C. § 547. Section 547(b) states that:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
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> (1) to or for the benefit of a creditor;
>
> (2) for on account of an antecedent debt owned 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 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.

However, according to § 547(c), the Trustee may not avoid a transfer under § 547 to the extent that such transfer was:

> (2) (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;

In addition, pursuant to § 547(c)(4), the Trustee may not avoid a transfer to or for the benefit of a creditor to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor which was:

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

For purposes of § 547, the Trustee has the burden of proving the avoidability of a transfer under subsection (b) and the creditor against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section. 11 U.S.C. § 547(g). The burden of proof is by a preponderance of the evidence. Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044 (4th Cir. 1994).

Prior to trial, the parties stipulated that the Plaintiff satisfied the elements of subsection 547(b). Further, the parties stipulated that Defendant had satisfied subsection 547(c)(2)(A). The issues at trial were whether the contested payments to Defendant were made in the ordinary course of business of the Debtor and Defendant and were made according to ordinary business terms. The "ordinary business terms" in subsection (c)(2)(C) refers to the range of terms which encompasses the practice in which businesses similar in some general way to the Defendant engage, and only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and, therefore, outside the scope of subsection (c). In the Matter of Tolona Pizza Products Corp., 3 F.3d 1029, 1033 (7th Cir. 1993). The evidence presented shows that the Defendant and the Debtor have a business history dating back many years. The parties have provided billing and payment history between Debtor and Defendant dating back to November 1993. The evidence shows that payments made by the Debtor to the Defendant were made within the "industry standard" time frame.

A creditor must show that the payments it received were made in accordance with the ordinary business terms in the industry. However, the creditor need not establish the existence of some single, uniform set of business terms. In the Matter of Tolona Pizza Products Corp., 3 F.3d 1029, 1033 (7th Cir. 1993). Defendant must also prove that the transaction was ordinary between it and the Debtor ("past practices"). Among the factors a Court considers in determining whether transfers are ordinary in relation to past practices are:

1. The length of time the parties were engaged in the transaction as usual;
2. Whether the amount or form of tender differed from past practices;
3. Whether the debtor or creditor engaged in any unusual collection or payment activity; and
4. Whether creditor took advantage of debtor's deteriorating financial condition.

The evidence in the instant case supports a finding that the payments made to the Defendant by the Debtor had been made and received in the ordinary course of their respective businesses and the payments had been made according to ordinary business terms. The evidence showed that the parties had considerable prior history, and that the amount or form of the payments by Debtor to Defendant did not differ from past practices. The evidence also showed that the Defendant did not engaged in any unusual collection activities against Defendant. The evidence showed that, up until the date of bankruptcy, the Defendant conducted business as normal with the Debtor as it had no knowledge of the Debtor's pending bankruptcy. The Defendant delivered goods and supplies purchased by the Debtor on the very date on which Debtor filed the Bankruptcy Petition. No threats were made by Defendant to cut off deliveries in exchange for prompt payment, nor did Defendant write dunning letters or threaten litigation to prompt Debtor to make payments on its account. The evidence showed Defendant did everything possible to work with the Debtor as it had in the past by permitting Debtor normal leeway in its payment of its account. As many Courts have stated, the "ordinary course exception was intended to . . . leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual actions by either the debtor or his creditors during the debtor's slide into bankruptcy." Union Bank v. Wolan, 112 S.Ct. 527, 532 (1991) quoting H.R.Rep. 95-595, at 373, U.S. Code Cong. and Admin. News 1978, Page 6329. It is this very policy that Defendant, albeit unknowingly, followed in this case in continuing to conduct business as usual with the Debtor, Spartan Printing, in spite of the not-so-apparent fact of a pending bankruptcy.

Although Plaintiff shows that there is some variation in the number of days each invoice was unpaid as reflected in the Creditor's records, this is not the only test for the Court to apply. The simple statistical comparisons in the differing lengths of time in payment does not end the inquiry, nor conclusively establish that the longer the time the Debtor took to pay the invoices, *ipso facto,* makes the payments out of the ordinary course of its business with the Creditor. See: In re Midway Airline, Inc., 180 B. R. 1009, 1013 (N.D. Ill. 1995). Furthermore, even though the payment history between these parties does not conform to the Defendant's standard credit policy, this is not determinative of the issues of whether the payments were in the ordinary course of business. Payments which are late can fall within the ordinary course of business exception. See: In re Grand Chevrolet, Inc., 25 F. 3d 728, 732 (9th Cir. 1994).

Conclusions

The Defendant has proven by a preponderance of the evidence each of the elements under § 547(c)(2) as to each of the transfers made by Debtor to Defendant during the 90 day period prior to Debtor's Petition Date. Thus, the Trustee is not entitled to avoid and recover from Defendant, under §§ 547 and 550 of the Bankruptcy Code, the ten transfers made by Debtor to Defendant during the 90 day period prior to Debtor's Petition Date. Therefore, judgment is entered in favor of Defendant and against the Trustee on his Complaint and Amended Complaint. Each party shall bear its own costs.

ENTERED: June 15, 1998.

/s/ GERALD D. FINES
United States Bankruptcy Judge