IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE:	§	
	§	
PRECEPT BUSINESS SERVICES, INC., et al., D E B T O R S.	§	CASE NO. 01-31351-SAF-7 (Jointly Administered)
	§	
STEVEN S. TUROFF, CHAPTER 7 TRUSTEE, PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 02-3287
	§	
BRW PAPER CO., INC., DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding, initiated on August 5, 2002, Steven S. Turoff, the Chapter 7 Trustee for the bankruptcy estate of Precept Business Products Inc. ("Precept"), seeks under 11 U.S.C. §§ 547(b) and 550 to avoid and recover transfers made by the debtor to BRW Paper Co., Inc. ("BRW"), from October 30, 2000 through January 9, 2001, in the sum of $49,639.64. On March 14, 2003, the Trustee filed a motion for summary judgment. Defendant BRW Paper filed a motion for summary judgment on March 17, 2003. The court conducted a hearing on the motions on April 14, 2003. At the hearing, the parties agreed that the trustee established the elements of § 547(b) and that BRW established the "new value"

defense under § 547(c)(4). The parties argued the remaining issue of the "ordinary course of business" defense under 11 U.S.C. § 547(c)(2).

This adversary proceeding raises a core matter over which this court has jurisdiction to enter a final judgment. 28 U.S.C. § 157(b)(2)(F) and 1334.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Anderson, 477 U.S. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts

showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

BRW argues that the trustee may not avoid the transfers made by checks on October 30, 2000, in the amount of $8,860.84 (clear date November 1, 2000); December 19, 2000, in the amount of $18,721.45 (clear date December 27, 2000); January 5, 2001, in the amount of $21,673.57 (clear date January 10, 2001); and January 9, 2001, in the amount of $383.78 (clear date January 18, 2001), "to the extent that [each] 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). "The ordinary course of business defense provides a safe haven for a creditor who continues to conduct normal business on normal terms." In re Gulf City Seafoods, Inc., 296 F.3d 363, 367 (5th Cir. 2002). BRW has the burden of proving the ordinary course of business defense. 11 U.S.C. § 547(g); Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp., 158 F.3d 312, 315 (5th Cir. 1998).

Under the first prong of the ordinary course test, § 547(c)(2)(A), BRW must establish that the debtor incurred each

debt in the ordinary course of Precept's business or financial affairs. Precept was a commercial consumer of paper products. The first prong of the ordinary course test also requires that BRW establish that it supplied the product in the ordinary course of its business. In re Rand Energy Co., Case No. 98-80004-SAF-11, Adv. No. 99-3262, 2000 Bankr. LEXIS 1607, at *26 (Bankr. N.D. Tex. July 28, 2000). Jon Hanson, BRW's Credit Manager, submitted an affidavit averring that BRW supplies paper products to businesses and other commercial paper consumers. Hanson Aff. at ¶ 3. Hanson averred that Precept was a commercial consumer of paper and a customer of BRW's since 1994. Over the course of the business relationship between Precept and BRW, Precept routinely purchased paper products from BRW for use in its business. Id. The paper products supplied by BRW to Precept were the type of paper products BRW commonly supplies to its customers in the ordinary course of its business. They were also the type of paper products the debtor commonly purchased in the ordinary course of its business. Thus, regarding the above four mentioned transfers, there is no genuine question of material fact that as a commercial consumer of paper, Precept purchased paper products supplied by BRW, who is in the business of supplying such products to consumers.

Under the second prong of the ordinary course test, BRW must establish that the payments were made in the ordinary course of

its and Precept's business or financial affairs. 11 U.S.C. § 547(c)(2)(B). The Bankruptcy Code does not impose a precise legal test for whether payments have been made in the ordinary course of business. Gasmark, 158 F.3d at 317-18. Accordingly, courts focus on the time within which the debtor ordinarily paid the creditor and whether the timing of the payments during the preference period demonstrated some consistency with that practice. Id. The court must also compare prior dealings between the debtor and the creditor with their dealings during the preference period to determine whether the challenged dealings were ordinary. Mossay v. Hallwood Petroleum, Inc., NO. CIV. A. 3:96-CV-2898, 1997 WL 222921, at *4 (N.D. Tex. Apr. 28, 1997). The court considers the timing of the payments, the amount and manner in which the transaction was paid and the circumstances under which the transfer was made. Id.

According to the summary judgment evidence regarding payment, BRW extended credit to Precept and allowed Precept to purchase the paper products on open account. Hanson Aff. at ¶ 3. Hanson averred that the "vast majority of BRW's customers purchase paper from BRW on the same type of credit account." Id. In its standard business practice, BRW invoices all customers for all paper purchased on credit. The credit terms call for payment of the invoiced amount within 30 days from the date of invoice. Hanson Aff. at ¶ 4. In his affidavit, Hanson states that during

the BRW/Precept business relationship, Precept rarely made payments within 30 days from the date of invoice. Rather since December 1996, Precept paid the BRW invoices later than 50 days after the date of invoice. Id. BRW continued to sell paper to the debtor on credit despite Precept paying its invoices 60 to 90 days from the date of invoice, because BRW had similar relationships with other customers and these late payment practices have become the "norm." Hanson Aff. at ¶ 4, 6. The summary judgment evidence further shows that the debtor made its payments to BRW by check.

Precept filed its petition for relief under the Bankruptcy Code on January 26, 2001. According to Stephen H. Thomas, a shareholder of Lain Faulkner & Co., P.C., the firm retained by the Trustee to prepare an analysis of claims for the Precept estate, the debtor paid most vendors from October 1998 to June 2000 in a reasonably consistent pattern, ranging between 40 to 60 days or less from the date of the invoices. Thomas Aff. at ¶ 4. In addition, from October 28, 1998, to June 1, 2000, Precept paid BRW four invoices, each of which were paid between 27-51 days from the invoice date. Id. at ¶ 3.

Thomas averred that significant changes occurred in June 2000 - for a period of time no payments were made and when they resumed, "the payments were less frequent, paid a larger number of invoices per payment and the age of invoices being paid was

greater." Id. at ¶ 5. Near the start of the preference period, the timing of payments changed again. Precept paid some vendors more promptly and others less promptly. Id. at ¶ 6. From June 1, 2000, through October 27, 2000, the debtor made payments to BRW between 74 to 86 days after the invoice dates, no payments were paid to BRW during the 27 to 51 days. During the preference period, commencing October 28, 2000, Precept made payments to BRW ranging from 65 to 90 days after the invoice dates, none were made within the 27-51 days. Id. at ¶ 7, 8. During October 28, 1998, through June 1, 2000, Precept's payments to BRW show an average payment of $118.26 paid by an average of one invoice per payment. During the preference period, Precept's payments to BRW averaged $12,409.91 per payment and an average of two invoices per payment. Id. at ¶ 9. Prior to the preference period, Precept mailed payment checks to BRW. During the preference period couriers brought Precept's checks to BRW. The checks were not mailed.

The summary judgment evidence establishes that although BRW called for payment within 30 days of an invoice, Precept continuously made payments 60-90 days from the date of an invoice and BRW accepted those payments. According to the summary judgment evidence, the dealings between Precept and BRW immediately prior to the preference period and during the preference period differ considerably to those dealings from

October 1998 to June 2000. BRW contends that the timing of payments changed prior to the preference period when Precept retained the services of a restructuring officer, Lee Hassell. Hassell did alter Precept's practice. Payments during the preference period coincided with the changed practice, but differed considerably from the two years before the changed practice. Based on this summary judgment evidence, there is a genuine question of material fact whether the payments made from October to January 2001 were made in the ordinary course of Precept's and BRW's business.

Under the third prong of the ordinary course test, BRW must establish that the transfers had been made according to ordinary business terms. 11 U.S.C. § 547(c)(2)(C). To meet that burden, BRW must establish the customary terms and conditions used by other enterprises in the same industry facing the same or similar problems. The court must analyze whether the transfers were made according to ordinary business terms using an objective standard. Gulf City Seafoods, Inc., v. Ludwig Shrimp Co., Inc. (In re Gulf City Seafoods, Inc.), 296 F.3d 363, 369-70 (5th Cir. 2002). "The question must be resolved by consideration of the practices in the industry-not by the parties' dealing with each other." Id. at 369. Dealings outside the range of practices in the industry would be outside the ordinary business terms of § 547(c)(2)(C).

To establish an industry standard as a rough benchmark, "the

creditor must provide evidence of credit arrangements of other debtors and creditors in a similar market, preferably both geographic and product." 296 F.3d at 369. The affidavits of David Watson, Vice President and Corporate Credit Manager for Olmsted-Kirk Paper Company (corporate offices in Dallas), Robert J. Nielsen, President of both Primepapers and Primepapers Southwest Inc. (corporate offices in California), and Jay Zimmerman, Regional Credit Manager for Sabin Robbins Paper Company (corporate offices in Ohio), state that the affiants' respective companies are in the same business as BRW. The affiants state that each of their companies' standard credit terms require payment within 30 days from the date of invoice, but that the majority of their customers consistently make payments between 60 and 90 days from the date of invoice, which has become normal practice. Watson Aff. at ¶ 4-5; Nielsen Aff. at ¶ 4-5; Zimmerman Aff. at ¶ 4-5.

The trustee argues that BRW has only established the industry standard for BRW and not that of Precept. BRW offered evidence of other paper suppliers' standard credit terms with long-standing customers. Those suppliers sold to customers using the paper products. The summary judgment evidence establishes that Precept purchased the paper products from BRW that BRW commonly supplied to its other customers. The only reasonable inference to be drawn from this evidence is that Precept was a

commonly situated debtor in the industry. Gulf City Seafoods, 296 F.3d at 369. The summary judgment evidence therefore establishes that there is no general issue of material fact of whether the transfers were made according to ordinary business terms.

Based on the foregoing,

IT IS ORDERED that:

1. The motions for summary judgment are **GRANTED IN PART** and **DENIED IN PART.**

2. Steven S. Turoff, the Chapter 7 Trustee, shall have a partial summary judgment declaring that 11 U.S.C. § 547(b) has been established for the subject transfers.

3. BRW Paper Co., Inc., shall have a partial summary judgment that 11 U.S.C. § 547(c)(4) in the amount of $5,202 has been established, and that 11 U.S.C. § 547(c)(2)(A) and (C) have been established for the subject transfers.

4. The court shall conduct a trial regarding 11 U.S.C. § 547(c)(2)(B).

Signed this 25th day of April, 2003.

Steven A. Felsenthal
United States Bankruptcy Judge