

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

IN RE:	§	
	§	
HOLLEY & SON CONCRETE COMPANY, INC.,	§	CASE NO. 00-31500-SAF-7
DEBTOR.	§	
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ROBERT YAQUINTO, JR., TRUSTEE, PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 02-3064
	§	
BODIN CONCRETE COMPANY, INC., DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

Bodin Concrete Company, Inc., the defendant, moves the court for summary judgment on its affirmative defenses under 11 U.S.C. § 547(c)(2) and (c)(4). Robert Yaquinto, Jr., the Chapter 7 trustee of the bankruptcy estate of Holley & Son Concrete Company, Inc., opposes the motion. The court conducted a hearing on the motion on August 13, 2002.

In his complaint, the trustee seeks to avoid transfers to Bodin as preferential payments under 11 U.S.C. § 547. The trustee also alleges that transfers may be avoided under 11 U.S.C. § 548. If the trustee successfully avoids any of the transfers, he requests a money judgment against Bodin under 11

U.S.C. § 550. In its answer, Bodin asserts affirmative defenses to the alleged preferences under § 547(c)(2) and (c)(4). Bodin's motion for summary judgment addresses the affirmative defenses.

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., Inc., 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. Id. 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 323. 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, 586-87 (1986).

The court first addresses the new value affirmative defense of § 547(c)(4). At the hearing on the motion, the trustee agreed that there was no genuine issue of material fact that Bodin had established the application of the affirmative defense to all transfers except those totaling \$67,799.59 for payments dated February 3, 2000, February 8, 2000, February 10, 2000, and February 24, 2000. Bodin produced summary judgment evidence that reflects further new value reducing the transfers not covered by the affirmative defense to \$49,493.79. Counsel for the trustee requested an opportunity to verify the additional evidence. The evidence of the additional deliveries refers to new value for the last three pre-petition payments, which Bodin lists as February 3, 2000, February 10, 2000, and February 24, 2000. But the summary judgment evidence reflects another payment on February 8, 2000. The court, therefore, concludes that Bodin is entitled to a partial summary judgment under § 547(c)(4) shielding all transfers from an avoidance judgment under § 547 except for those totaling \$67,799.59. The difference in the calculation need not be resolved at trial because of the application of § 547(c)(2).

With regard to the remaining transfers subject to the trustee's preference action, the court considers the affirmative

defense under § 547(c)(2), the ordinary course of business defense. With the application of § 547(c)(4), the court need only consider the ordinary business defense with respect to the transfers of February 3, 2000, February 8, 2000, February 10, 2000, and February 24, 2000. Bodin asserts that the trustee may not avoid those transfers "(2) 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).

Under § 547(c)(2)(A), Bodin must establish that Holley & Sons incurred each debt in the ordinary course of Holley's business or financial affairs, and that Bodin provided the product in the ordinary course of its business. For all four transfers, there is no genuine issue of material fact that Bodin supplied concrete materials on a credit account basis to Holley. Holley incurred the debt in the ordinary course of its business and Bodin sold the concrete material on credit terms in the ordinary course of its business.

Bodin must next establish that the payments were made in the ordinary course of its and Holley'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 Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp., 158 F.3d 312, 317-18 (5th Cir. 1998). As a result, courts focus on the time within which the debtor ordinarily paid the creditor and whether the timing of the payments during the preference period reflected 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, 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.

J. W. Williams, Bodin's general manager, submitted an affidavit averring that Bodin billed Holley for concrete materials upon delivery. Payment for the materials was due on the tenth of the month following delivery. Holley customarily paid all or a portion of the account balance within 30 to 45 days after the due date.

Holley filed its petition for relief under the Bankruptcy Code on March 3, 2000. For payments for materials during the eight months preceding the bankruptcy filing, Bodin billed Holley for the concrete materials upon delivery. Payment for the

materials was due on the tenth of the month following delivery. Holley paid all or a portion of the account balance between 31 and 47 days after the due date, except the last two transfers of February 10, 2000, and February 24, 2000, which were paid 10 and 24 days following the due date, respectively. The payment of February 3, 2000, was made 33 days after the due date and the payment of February 8, 2000, was made 38 days after the due date.

Thus, the summary judgment evidence establishes that the transfers of February 3, 2000, and February 8, 2000, were made in the ordinary course of Holley's and Bodin's business, but there is a genuine issue of material fact whether the payments of February 10, 2000, and February 24, 2000, were made in the ordinary course of Holley's and Bodin's business.

Lastly, Bodin 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, Bodin must establish the customary terms and conditions used by other parties in the same industry facing the same or similar problems. This requires that the court analyze industry practices using an objective standard. In re Gulf City Seafoods, Inc., 296 F.3d 363, 369-70 (5th Cir. 2002). Dealings outside the range of practices in the industry would be outside the ordinary business terms of § 547(c)(2)(C).

Williams submitted a supplemental affidavit to address § 547(c)(2)(C). Bodin moves the court for leave to file that

affidavit. The trustee opposes the motion. The trustee contends that the affidavit had been submitted too late for consideration. Bodin responds that the affidavit had been submitted in light of the Fifth Circuit's decision in Gulf City Seafoods, issued July 11, 2002. Because of the recent Fifth Circuit decision, the court grants the motion for leave to file the supplemental affidavit.

In the affidavit, Williams describes his experience in the concrete and concrete supplies industry. He avers that concrete suppliers "often receive payment for materials delivered to a project at times which often range from slightly before or after the date upon which the invoice is due for payment (customarily on a given date of the month following the date of delivery) to 30 to 45 days after the due date of the invoice." With regard to the payments made on February 3, 2000, and February 8, 2000, there is no genuine issue of material fact that the payments were made according to ordinary business terms in the concrete industry. But, with regard to the payments made February 10, 2000, and February 24, 2000, the affidavit testimony is ambiguous and, thus, demonstrates the existence of a genuine issue of material fact. The court cannot determine from the summary judgment evidence, even considering the supplemental affidavit, whether payments as soon as 10 days and 24 days after the date of the invoice fall within the range of practices in the concrete

industry, or, whether, the payments are idiosyncratic when viewed from the apparent industry norm of 30 to 45 days after the due date of the invoice.

Accordingly, Bodin is entitled to a partial summary judgment applying the affirmative defense of § 547(c)(2) to the payments of February 3, 2000, and February 8, 2000, but summary judgment must be denied regarding the payments of February 10, 2000, and February 24, 2000. With the partial summary judgment under § 547(c)(4), this leaves for trial the payments of February 10, 2000, and February 24, 2000, totaling \$39,179.37.

Based on the foregoing,

IT IS ORDERED that the motion for summary judgment filed by Bodin Concrete Company, Inc., is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that Bodin Concrete Company, Inc., shall have a partial summary judgment applying 11 U.S.C. § 547(c)(2) and (c)(4) to all transfers except February 10, 2000, and February 24, 2000, with the affirmative defense of § 547(c)(2) to those transfers set for trial.

Signed this _____ day of September, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge