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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Waycross Division

In the matter of:	)	
	)	
SCOTT HOUSING SYSTEMS, INC.	)	Adversary Proceeding
(Chapter 7 Case <u>86-50123</u> )	)	Number <u>88-5052</u>
	)	
<i>Debtor</i>	)	
	)	
	)	
JAMES D. WALKER, JR.	)	
	)	
<i>Plaintiff</i>	)	
	)	
	)	
v.	)	
	)	
T.J.T. AXLE	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM AND ORDER**  
**ON MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed this adversary proceeding on August 25, 1988. On November 19, 1991, Plaintiff filed a Motion for Summary Judgment with an affidavit and brief in support of the motion. Defendant filed its response and opposition to the motion as well as affidavits, answers to interrogatories, and requested documentation on February 6, 1992. Upon consideration of the affidavits, briefs, documentation submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

The Debtor, a mobile home manufacturer, filed a Chapter 11 petition on or about August 25, 1986. The Chapter 11 case was converted to a Chapter 7 case on or about April 8, 1987. Defendant was a creditor of the Debtor and sold Debtor axles for its mobile home business.

The Plaintiff, the Chapter 7 Trustee, alleges that Defendant received two payments from Debtor which should be recovered as a preference. Debtor, which owed Defendant on an account basis, paid Defendant \$3,564.00 by check dated June 20, 1986. *See* Plaintiff's Statement of Uncontested Material Facts filed November 19, 1991. The goods were delivered on April 15, 1986, the invoice date. Debtor paid for the goods on June 25, 1986. *See* Answers to Interrogatories, paragraph 6, filed February 6, 1992.

The second payment at issue involves a check for \$4,276.80. Defendant delivered goods to Debtor on April 24, 1986, the invoice date. Debtor paid for the goods on June 26, 1986, by check. *See* Answers to Interrogatories, paragraph 6, Plaintiff's Statement of Uncontested Material Facts.

The invoices for the two shipments of goods state that payment is due "net ten (10) days." Plaintiff argues that the June 25, 1986, payment of \$3,564.00 made 70 days (56 excluding weekends and holidays) after the April 15, 1986, invoice was not made in

the ordinary course of Debtor's business. Also, Plaintiff argues that the June 25, 1986, payment of \$4,276.80 made 62 days (52 excluding weekends and holidays) after the April 24, 1986, invoice was not made in the ordinary course of Debtor's business. Plaintiff claims that all elements of a preference under Section 547 have been met, and that no exceptions, not even the exception for transfers made in the ordinary course of business, should apply.

Defendant argues that both payments were made in the ordinary course of business. Defendant produced affidavits of three individuals who work in the mobile home manufacturing industry and who stated that payments were made in the industry on the terms "net thirty days" despite the written terms on invoices which stated payments were due net ten days.

Defendant also filed an account history showing payments made in March, April, May and June, the months immediately before the petition was filed. *See* Answers to Interrogatories, paragraph 6. The account history shows the following dates for delivery, invoice, and payment for each check received by Defendant:

<b>Delivery Date</b>	<b>Invoice Date</b>	<b>Payment Date</b>	<b>Amount</b>
02/03/86	02/03/86	03/11/86	\$8,870.00
03/04/86	03/04/86	04/25/86	\$10,150.00
03/05/86	03/05/86	03/26/86	\$247.50
03/24/86	03/24/86	05/02/86	\$2,151.00
04/03/86	04/03/86	05/08/86	\$7,116.00

04/15/86	04/15/86	06/25/86	\$3,564.00
04/24/86	04/24/86	06/26/86	\$4,276.80

The sixth and seventh payments above are the two payments at issue in this proceeding.

### CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Fed.R.Civ.P. 56 which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Bank, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 465 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . ". United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (quoting Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forth with some evidence to show a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court should consider "all the evidence in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

In order to fall within the ordinary course of business exception, the burden is on the creditor asserting the ordinary course defense to establish each of the elements of Section 547(c)(2) by a preponderance of the evidence. 11 U.S.C. Section 547(g). Section 547(c)(2) provides that a debtor's otherwise preferential payment may not be avoided if the following conditions are satisfied:

- 1) The payment must be made on a debt incurred in the ordinary course of debtor's business;
- 2) The payment must be made in the ordinary course of business between the debtor and the creditor; and
- 3) The payment must be made according to ordinary business terms.

In re Craig Oil Co., 785 F.2d 1563 (11th Cir. 1986).<sup>1</sup>

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<sup>1</sup> The Craig Oil court cited a fourth condition, that the payment must be made within forty-five days of incurring the debts, but acknowledges that Congress eliminated this requirement in 1984.

The purpose of the Section 547(c)(2) preference exception is to protect normal and customary credit transactions paid in the ordinary course of business of the debtor and the transferee. In re Fulghum Constr. Corp., 872 F.2d 739 (6th Cir. 1989). The section encourages short-term credit dealing with troubled debts in order to forestall bankruptcy. O'Neill v. Nestle-Libby's P.R., Inc., 729 F.2d 35 (1st Cir. 1984). The exceptions of Section 547(c) were enacted to allow normal financial relations to continue.

The ordinary course of business exception requires a two step analysis. Subsections (a) and (b) of Section 547(c)(2) require a subjective analysis of the ordinary course of business between the debtor and the transferee. *See* Matter of Scott Housing (James D. Walker, Jr., Trustee v. Waycross Paint and Wall Coverings), Chapter 7 Case No. 86-50123, Adversary No. 88-5066, slip op. at 10 (Bankr. S.D.Ga. May 24, 1991).

Defendant essentially agrees with Plaintiff's statement of uncontested fact. *See* Defendant's Response to Motion for Summary Judgment filed February 6, 1992. Defendant showed that the debt was incurred in the ordinary course of debtor's business. However, the difficulty is in determining if the payments were made in the ordinary course of business between the parties and under ordinary business terms in the industry.

Defendant's Answers to Interrogatories, paragraph 6, shows the course of dealing between the parties for several months before Debtor filed bankruptcy. Of the five payments made in March, April, and May, Debtor made each in less than forty-five days from the date of the invoice with the exception of one on April 25, 1986, for \$10,150.00,

a comparatively large payment. The payments at issue were made 70 days and 62 days, respectively, from the date of the invoice. I cannot conclude that such payments were made in the ordinary course of business between the Debtor and creditor.

I also conclude that the payments were not made according to ordinary business terms in Debtor's industry. The affidavits submitted by Defendant do show that the terms "net ten (10) days" on the invoices were not followed in the industry which recognized payments on terms net thirty days to be considered timely. However, even taking the statements in the affidavits as true, I hold that payments made 70 days or 62 days after invoice were not made in accordance with ordinary business terms in this particular industry. As to these facts there is no genuine issue of material fact. Since the Trustee has established all the elements of a voidable preference and the elements of Section 547(c) have not been established by Defendant, the Trustee is entitled to judgment as a matter of law.

#### ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY THE ORDER OF THIS COURT that Plaintiff have judgment against Defendant in the amount of \$7,840.80.

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of April, 1993.