

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

In the matter of:

CONCRETE PRODUCTS, INC.
(Chapter 11 Case 88-20540)

Debtor

JAMES D. WALKER, JR.,

Plaintiff

v.

J. D. MOORE
DISTRIBUTING COMPANY

Defendant

And

JAMES D. WALKER, JR.

Plaintiff

v.

FILED

at 4 O'clock & 31 min PM

Date 9/24/92

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



Adversary Proceeding

Number 90-2042

Adversary Proceeding

Number 90-2073

HORNADY TRUCK LINES, INC.)

Defendant)

MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

For purposes of this order, Adversary Number 90-2042, and Adversary Number 90-2073 have been consolidated as the summary judgment issues to be decided are identical. Therefore, "Defendant" as used in the order may refer to either Hornady Truck Lines, Inc., or J. D. Moore Distributing Company.

Plaintiff filed both adversary proceedings on September 28, 1990, alleging that certain payments to Defendants should be avoided as a preference under 11 U.S.C. Section 547. The answer in each case was filed November 7, 1990. On June 12, 1992, a Motion for Summary Judgment was filed in each adversary case based on the exception in Section 547(c)(2), which prevents payments made in the ordinary course of business from being avoided as a preference. Upon consideration of the pre-trial stipulation, briefs, and other documentation submitted, as well as applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor, Concrete Products, Inc., filed a voluntary petition under Chapter 11 of the Bankruptcy Code on or about October 3, 1988. These adversary proceedings were filed by the Chapter 11 Trustee, who has since been discharged. The debtor-in-possession has been substituted as Plaintiff in each adversary.

On August 16, 1988, Concrete Products, Inc., made a payment of \$1,189.58 to J. D. Moore Distributing Company ("J. D. Moore") for fuel oil deliveries invoiced between January 2, 1988, and February 10, 1988. The invoice clearly states its terms as "NET 30 DAYS". All balances 30 days past due will be charged a 1½% monthly service charge which is an ANNUAL PERCENTAGE RATE OF 18%." See Invoice dated January 31, 1988, Exhibit B of Plaintiff's Response to Defendant's Motion for Summary Judgment filed July 13, 1992, in the J. D. Moore adversary.

J. D. Moore admits that the payment was made within the ninety day period preceding Concrete Products' bankruptcy filing, but argues that the payments are not avoidable as a preference, as argued by Plaintiff, but are covered by the Section 547(c)(2) exception for payments made in the ordinary course of business.

The Hornady Truck Lines ("Hornady") adversary stems from a payment made under similar timing considerations. Concrete Products made a payment of \$9,781.67 to Hornady on July 15, 1988, for trucking services supplied by that company and invoiced between January 27, 1988, and February 16, 1988. Copies of the invoices clearly show the payments terms which state "ICC REGULATIONS REQUIRE PAYMENT WITHIN 15 DAYS." See Invoices, Exhibit B of Plaintiff's Response to Defendant's Motion for Summary Judgment filed July 6, 1992, in the Hornady adversary. Defendant Hornady admits that the payment was made within the ninety day preference period, but argues that the Section 547(c)(2) ordinary course of business exception applies.

Both Defendants rely on the deposition of Bob Bledsoe to establish that the payments were made in the ordinary course of Debtor's business. Bob Bledsoe was the president and chief executive officer of Concrete Products, Inc., from 1979 through 1990. According to Defendants, Concrete Products had an ongoing business relationship with both Defendants for over ten years. (Deposition of Bob Bledsoe, page 5).

In its business transactions Concrete Products would issue a blanket

purchase order to J. D. Moore for a given year of transactions. Concrete Products would incur fuel bills over time and make periodic payments, with the oldest invoices being paid first. (Deposition of Bob Bledsoe, pages 6-9).

Defendant J. D. Moore alleges that there was nothing unusual about Concrete Products having outstanding invoices more than six months old from J. D. Moore as well as from other vendors doing business with Concrete Products. Defendant alleges that such late payments were in the ordinary course of business for Concrete Products and for both parties. (Bledsoe's deposition pages 8-10). J. D. Moore further alleges that such late payments were usually accepted in the petroleum industry.

Defendant Hornady argues a similar case that Concrete Products would usually send payments several months late. Concrete Products incurred delivery service bills over time and made periodic payments to Hornady. The oldest invoices would be paid first. There was nothing unusual about Concrete Products paying invoices which had been outstanding more than five months. Hornady argues that the payments were made in the ordinary course of business of Concrete Products, the parties, and the trucking industry. (Bledsoe deposition, page 7).

Plaintiff argues a different interpretation of Mr. Bledsoe's deposition citing Bledsoe's statements that he did not specifically remember the payment terms with Defendants but believed them to be thirty to forty-five days. According to Plaintiff, Bledsoe did state that it was normal for Concrete Products to take longer in making its payments closer to the time it filed bankruptcy. Plaintiff asserts that Concrete Products tried to pay invoices within thirty days but frequently the payment was "drug out" longer.

Concrete Products admits that the payments were made in the ordinary course of business of the Debtor. However, Concrete Products denies that the payment was made in the ordinary course of business between the parties and in the ordinary course of business within the industry. Defendants' summary judgment motion is based on this ordinary course exception found in Section 547(c)(2).

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 Park, 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 265 (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 . . ." U. S. 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. U. S. v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991); Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1022 (11th Cir. 1988); Kramer v. Unitas, 831 F.2d 994, 997 (11th Cir. 1987). The non-moving party

must come forth with some evidence to show that a genuine issue of material fact exists. U. S. 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. TechSouth, 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. §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).¹

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

¹ The Craig Oil court cites a fourth condition, that the payments must be made within forty-five days of incurring the debts, but acknowledges that Congress eliminated this requirement in 1984.

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 debtors 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 exception requires a two step analysis. Subsections (a) and (b) require a subjective analysis of the ordinary course of business between the debtor and the transferee. See Matter of Scott Housing, Chapter 7 Case No. 86-50123, Adversary No. 88-5066, slip op. at 10 (Bankr. S.D.Ga. May 24, 1991). Bledsoe, former president and chief executive officer of Concrete Products, testified at his deposition that his company would frequently pay both Hornady and J. D. Moore several months late despite invoices which reflected that payments were due in thirty days, or less in Hornady's case. Bledsoe's deposition is sufficient to shift the burden on the issue of whether such late payments were made in the ordinary course of business of these parties. However, the third requirement of Section 547(c)(2) must be addressed which requires that the transfer be made "according to ordinary business terms." This subsection requires an objective analysis of payment terms in the parties' business or industry. See Matter of Scott Housing, supra. Terms which may be

ordinary in one type of business may not be ordinary in another. In re Production Steel, Inc., 54 B.R. 417, 423 (Bankr. M.D.Tenn. 1985). This element cannot be proven solely by evidence of the actual course of dealings between the parties. The only evidence before the court as to what constitutes "ordinary business terms" for a transaction of this type are the copies of the invoices which clearly state that the payment to J. D. Moore was due in thirty days and the payment to Hornady was due in fifteen days. *See* attachments to Plaintiff's Response to Defendant's Motion for Summary Judgment. Debtor's payments clearly were not made in accordance with those terms.

I therefore rule that Defendants have failed to establish that element of the Section 547(c)(2) defense which requires a showing that the payment was made according to industry norms or ordinary business terms of similarly situated businesses. Accordingly, I must deny Defendants' Motions. An appropriate order will issue followed by notice of trial date set for this case.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS THE ORDER OF THIS COURT that Defendants' Motions for Summary Judgment are denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of September, 1992.