

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
OLD FASHIONED ENTERPRISES, INC.,)
d/b/a GARDEN CAFÉ,) CASE NO. BK98-80334
)
DEBTOR) A99-8066
)
OLD FASHIONED ENTERPRISES, INC.,)
d/b/a GARDEN CAFÉ,)
) CH. 11
Plaintiff)
vs.)
)
EQUIPEMENT DOYON, INC.,)
)
Defendant)

MEMORANDUM

This matter was submitted on briefs. Robert Ginn and Anne Bednar appeared for plaintiff. Kathryn Derr appeared for defendant. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(F).

Introduction

The debtor, Old Fashioned Enterprises, (hereinafter "OFE"), has filed a complaint that seeks to avoid and recover two payments, totaling \$8,046.00, made by the debtor to the defendant, Equipement Doyon, Inc., (hereinafter "Doyon"), as preferential transfers under 11 U.S.C. § 547(b). The defendant does not deny that these transfers took place. Instead, the defendant asserts an affirmative defense against the debtor's preferential transfer claim. The defendant alleges that, pursuant to § 547(c)(2), these transfers were incurred in the ordinary course of business between itself and the debtor. The debtor alleges that the defendant should not benefit from the ordinary course of business defense because there is no prior course of dealings between itself and the defendant.

Defendant has moved for summary judgment.

Issues

1. Does a transfer fall within the ordinary course of business exception to the trustee's avoidance powers, pursuant to 11 U.S.C. § 547(c)(2)(B), if there is no prior course of dealing between the debtor and the transferee?

2. Is summary judgment appropriate?

Decision

1. Prior course of dealing is not required for defendant to assert the ordinary course of business defense of 11 U.S.C. § 547(c)(2)(B).

2. A material issue of fact remains and summary judgment must be denied.

Law and Discussion

Section 547(b) allows transfers made by the debtor during the ninety-day period preceding the filing of a bankruptcy petition to be avoided in bankruptcy as a preference. Section 547(c)(2), however, provides that avoidance may be prevented if the 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).

"There is no precise legal test which can be applied in determining whether payments by the debtor during the 90-day period were made in the ordinary course of business; rather, the court must engage in a 'peculiarly factual' analysis." In re Gateway Pac. Corp., 153 F.3d 915, 917 (8th Cir. 1998) (quoting Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497

(8th Cir. 1991)) (internal citations omitted). The court noted in Jones v. United Sav. & Loan Ass'n (In re U.S.A. Inns of Eureka Springs, Arkansas, Inc.) that the legislative history of § 547 reflects the purpose of the ordinary course of business exception. 9 F.3d 680, 683 n.4 (8th Cir. 1993). "The purpose of this exception is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." Id. (quoting S. Rep. No. 95-989, at 88 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5874; H.R. Rep. No. 95-595, at 373 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6329).

The present case focuses on the subjective test of subparagraph (B). When determining whether payments between the parties are "ordinary," courts generally consider four primary factors: (1) the length of time the parties were engaged in the transactions at issue; (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) the circumstances under which the payment was made. Central Hardware Co., Inc. v. Walker-Williams Lumber Co. (In re Spirit Holding Co., Inc.), 214 B.R. 891, 897 (E.D. Mo. 1997), aff'd, 153 F.3d 902 (8th Cir. 1998). See also In re Tulsa Litho Co., 229 B.R. 806, 809 (B.A.P. 10th Cir. 1999); Hovis v. Aerospace Solutions, Inc. (In re Air South Airlines, Inc.), 247 B.R. 153, 160 (Bankr. D.S.C. 2000); Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.), 220 B.R. 1005, 1020 (B.A.P. 10th Cir. 1998).

There is authority to support the debtor's contention that the lack of prior business dealings renders the exception inapplicable. See, e.g., Miller v. Kibler (In re Winters), 182 B.R. 26, 29 (Bankr. E.D. Ky. 1995) ("It is clear that § 547(c)(2) applies if the debtor and the transferee have an ongoing, 'recurring' business relationship. It does not apply to single, isolated transactions[.]"); Brizendine v. Barrett Oil Distrib., Inc. (In re Brown Trans. Truckload, Inc.), 152 B.R. 690, 692 (Bankr. N.D. Ga. 1992) ("If there is no prior course of dealings between the parties, the transferee cannot satisfy [§ 547(c)(2) (B)], and the transfer may be avoided.").

However, the better view is that the lack of any history between the parties, although relevant, is not necessarily

determinative. Meeks v. Harrah's Tunica Corp. (In re Armstrong), 231 B.R. 723, 731 (Bankr. E.D. Ark. 1999). See also Riske v. C.T.S. Sys., Inc. (In re Keller Tool Corp.), 151 B.R. 912, 914 (Bankr. E.D. Mo. 1993) ("[T]he Court may look to the parties' ordinary course of dealings in other business transactions."); In re Sunset Sales, Inc., 220 B.R. at 1021 ("In the absence of any prior transactions, courts typically look to see if the debtor complied with the payment terms of its contract."); Gosch v. Burns (In re Finn), 909 F.2d 903, 908 (6th Cir. 1990); Remes v. ASC Meat Imports, Ltd. (In re Morren Meat & Poultry Co.), 92 B.R. 737, 740 (W.D. Mich. 1988). In each of these cases, there was no prior course of dealing between the parties.

[T]he course of dealing between the parties themselves is indeed a factor to consider and. . . § [547(c)(2)](B) contemplates an evaluation of the parties' prior subjective dealings, when such exist. However, this Court is not convinced that § (B) requires a history of prior dealings as a *sine qua non* in order to afford a transferee the protections of § 547(c)(2).

In re Morren Meat & Poultry Co., 92 B.R. at 740.

The court in Morren Meat & Poultry goes on to observe that the existence of prior dealings between the parties would definitely aid in assessing the ordinary character of the transfers, but the absence of such prior dealings does not preclude the court from determining that the transfers were ordinary for purposes of § 547(c)(2). Id.

The Sixth Circuit Court of Appeals also held that a first time transaction is eligible for the ordinary course of business exception. In re Finn, 909 F.2d at 908. The plain language of § 547(c)(2)(B) does not require the existence of pre-preference period relations. Styler v. Landmark Petroleum, Inc. (In re Peterson Distrib., Inc.), 197 B.R. 919, 926 (D. Utah 1996). While an analysis of past payment history serves as a significant factor and a guide post, it is not always, by itself, determinative. Rather, other relevant factors should be considered according to their appropriate weight under the circumstances. Official Comm. of Unsecured Creditors v. Conceria Sabrina S.P.A. (In re R.M.L., Inc.), 195 B.R. 602, 614 (Bankr. M.D. Penn. 1996) (citing In re

Daedalean, Inc., 193 B.R. 204, 213 (Bankr. D. Md. 1996)). As the Finn court notes, every debtor who does something in the ordinary course of his or her affairs must, at some point, have done it for the first time. 909 F.2d at 908.

Although there are no Eighth Circuit cases directly on point, there are cases from courts within the Eighth Circuit which have held that first-time transactions fall within the scope of § 547(c)(2)(B). When there are no prior transactions with which to compare, the court may analyze other factors. The court may consider whether the transaction is out of the ordinary for a person in the debtor's position. In re Armstrong, 231 B.R. at 731 (citing Finn, 909 F.2d at 908). The court can also look at whether the debtor complied with the terms of the contract. Id. (citing In re Sunset Sales, Inc., 220 B.R. at 1021). See also In re Tulsa Litho Co., 229 B.R. at 809. Another factor a court may look at is the parties' ordinary course of dealing in other business transactions. In re Armstrong, 231 B.R. at 731 (citing In re Keller Tool Corp., 151 B.R. at 914). See also In re Air South Airlines, Inc., 247 B.R. at 162.

Initially, however, the court must examine the course of business dealings between the debtor and the defendant, as it may be established by the documents or other evidence in the record. In re Keller Tool Corp., 151 B.R. at 914. In Keller, the debtor agreed to purchase certain computer hardware and software from the defendant. This was the first business transaction between these two parties. The debtor made an initial deposit and subsequently received an invoice reflecting the balance due. The invoice terms required full payment within thirty days of the invoice date. The debtor failed to comply with the invoice terms, but delivered two checks in full satisfaction of the debt approximately sixty and sixty-two days after the date of the invoice. These two payments were made within the ninety days preceding the bankruptcy filing and were the subject of a preference action brought by the Chapter 7 Trustee.

The defendant in Keller argued that the payments were not made within the thirty-day invoice period because the debtor was not satisfied with the equipment until certain adjustments were made. The court concluded that although the defendant's testimony was credible, the evidence contained no written corroboration of any agreement to waive or alter the specific

course of business dealings as set out by the invoice. Thus, the defendant failed to establish that the payments were made in the ordinary course of business of the debtor and the defendant transferee.

In the present case, Doyon agreed to sell an oven to OFE on a thirty-day trial basis. This was the first business transaction between the parties. After the thirty days, OFE agreed to purchase the oven. On August 15, 1997, Doyon sent an invoice to OFE. According to Doyon, it was understood and agreed by Doyon and OFE that payment for this oven would be delayed beyond the initial invoice period while the parties negotiated the purchase of additional ovens. Several discussions followed, but OFE decided not to purchase any additional ovens. In November 1997, OFE and Doyon then agreed that the initial oven would be paid for in three installments over the next three months. The parties agreed that the December and January payments were to be tendered to Doyon in November in the form of post-dated checks and were to be applied as agreed upon.

Although there is no evidence of a written agreement altering or waiving the terms of the invoice, Doyon has presented affidavit evidence that the parties agreed to extend time for payment. The debtor does not concede the existence of any such agreement, but has provided no evidence to the contrary. The existence of a modified agreement is material to the determination of whether the parties complied with the terms of the original contract represented by the invoice. Only after this factual determination has been made and factored into the § 547(c)(2)(B) equation can the court decide whether debtor's payments to the defendant during the preference period were in the ordinary course of business and financial affairs of debtor and of defendant.

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Embry v. Lewis, 215 F.3d 884, 887 (8th Cir. 2000); Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1401 (8th Cir. 1997). Pursuant to § 547(g), the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under § 547(c).

Whether the debtor and the defendant entered into an agreement altering or waiving the terms of the invoice is a

material issue of fact. Therefore, defendant is not entitled to summary judgment.

The parties shall submit a preliminary pretrial statement by May 1, 2001.

Separate journal entry to be filed.

DATED: March 23, 2001

BY THE COURT:

/s/Timothy J. Mahoney

Timothy J. Mahoney

Chief Judge

Copies faxed by the Court to:

39 GINN, ROBERT/BEDNAR, ANNA

27 DERR, KATHRYN

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
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OLD FASHIONED ENTERPRISES,)
INC., d/b/a GARDEN CAFÉ,) CASE NO. BK98-80334
) A99-8066
DEBTOR(S))
)
OLD FASHIONED ENTERPRISES,) CH. 11
INC., d/b/a GARDEN CAFÉ,) Filing No.
Plaintiff(s))
vs.) JOURNAL ENTRY
)
EQUIPEMENT DOYON, INC.,)
)
Defendant(s)) DATE: March 23, 2001

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion for Summary Judgment filed by
defendant.

APPEARANCES

Robert Ginn and Anna Bednar, Attorney for plaintiff
Kathryn Derr, Attorney for defendant

IT IS ORDERED:

Whether the debtor and the defendant entered into an
agreement altering or waiving the terms of the invoice is a
material issue of fact. Therefore, defendant is not entitled
to summary judgment.

The parties shall submit a preliminary pretrial statement
by May 1, 2001. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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