UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF | |
| JAMES J. PARKS COMPANY, | CASE NO. BK85-1357 |
| DEBTOR | A87-114 |
| EUGENE C. CHAMBERLAIN, Trustee, | Chapter 7 |
| Plaintiff | |
| vs. | |
| INLAND TRUCK PARTS COMPANY, A Minnesota Corporation, | |
| Defendant | |

## MEMORANDUM OPINION

Trial was held on this preference action brought by the trustee on January 27, 1988. C. G. Wallace of Thompson, Crounse, Pieper, Wallace & Eggers, P.C., Omaha, Nebraska, appeared on behalf of the plaintiff. David Stokes of Green, Hauptman & Stokes, Omaha, Nebraska, appeared on behalf of the defendant.

This Memorandum Opinion is the findings of fact and conclusions of law required pursuant to Bankruptcy Rule of Procedure 7052.

### Facts

On June 17, 1985, this bankruptcy case began. Prior to that date, debtor had been involved in business transactions with defendant. Defendant is a supplier of vehicle parts and maintenance services. Within 90 days of the beginning of this case, the defendant received payment from debtor of $1,956.96.

Trustee alleges that payment was made on account of an antecedent debt owed by the debtor before the transfer was made; that it was made while the debtor was insolvent; and enabled the defendant to receive more than it would have received if the transfer had not been made and said defendant received payment of its debt to the extent provided by the provisions of the chapter and the title. In other words, the plaintiff alleges that the payment was a preference and should be avoided pursuant to 11 U.S.C. Section 547.

Defendant admits payment but argues that the payment should not be avoided as a preference because such payment fits into the exception of 11 U.S.C. Section 547(c)(2) which prohibits the trustee from avoiding such a transfer "to the extent that such 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."

Pursuant to 11 U.S.C. Section 547(g), the trustee has the burden of proving the avoidability of a transfer under subsection (b) of Section 547 and the defendant has the burden of proving the nonavoidability of a transfer under subsection (c).

The plaintiff offered certain answers to interrogatories and requests for admissions by the defendant which showed the date of the payment and the amount of the payment and that it was for an antecedent debt. The plaintiff then requested the Court to take judicial notice of portions of the bankruptcy file, including the schedules and statement of assets and liabilities, in order to show that the defendant received more than it would have received through an ordinary liquidation process.

Defendant objected to the request to take judicial notice on the grounds that it was not requested in a timely fashion and that the plaintiff had failed to prove all of the elements necessary to avoid a transfer under Section 547(b). The Court reserved ruling on the objection and now enters its ruling. The objection is overruled.

The defendant then presented testimony from its local credit manager that the payment was made in the ordinary course of business between the parties. The testimony included the regular terms between these parties and terms of payment between this defendant and other parties. It appears to the Court and the Court finds as a fact that the payment, although within 90 days of the filing of the petition in this case, was in the ordinary course of business between the debtor and the defendant and was in the ordinary course of business between this defendant and other customers of this defendant. The witness presented testimony concerning the invoicing practices of the business and the manner in which a customer was treated if payment was not made within 90 to 120 days of the invoice date. The policy seems to be that, when a purchase of either service or supplies is made, an invoice is delivered to the customer. At the end of the month in which the service or sale was made, a statement is generated by the defendant and sent to the customer. The customer is permitted to continue purchasing on credit until the customer has received three monthly statements from defendant for a particular invoice. If that invoice is not paid at the end of such period, the customer is put on a C.O.D. basis and no further credit is extended.

This procedure which would permit credit purchases to continue during a period of 90 to 120 days from a sale/purchase which was made on credit and has not been paid, is in the ordinary course of business of this defendant and all of its customers.

The debtor/customer was never put on a C.O.D. basis. It made payments on a regular basis during the 90 to 120 day grace period. The payment in question was made on April 29, 1985, on an invoice from December of 1984. No special collection efforts were made to obtain the payment; no demand letters or calls were made and the debtor was not put on C.O.D. at the time of payment.

Further, the defendant, through its employees, had no knowledge of the financial difficulty of the debtor at the time the payment was received.

## Conclusions of Law and Discussion

The issue before the Court is whether or not the payment made on April 29, 1985, by debtor to defendant is avoidable under Section 547(b) or is not avoidable pursuant to Section 547(c)(2), the terms of which are recited above.

The purpose of Section 547 is to "discourage the race to the courthouse and to promote the equal treatment of creditors." In re Independent Clearing House Co., 77 B.R. 843, 874 (D. Utah 1987).

The Bankruptcy Code does not define "ordinary course of business." "'Ordinary' contemplates what is ordinary with respect to the parties." In re Fulgum Construction Corp., 78 B.R. 146, 152 (Bankr. M.D. Tenn. 1987).

The transferee must establish the following factors to be excused from the avoidance powers of the trustee:

1. the prior course of dealing between the parties;

2. the amount of the payments;

3. the timing of the payments;

4. the circumstances surrounding the payments.

See In re First Software Corp., 81 B.R. 211, 213 (Bkrtcy. D. Mass. 1988).

This Court believes that the defendant has met its burden. It has explained the prior course of dealing between the parties as being similar to the procedures used in the collection of this particular payment. The amount of the payment was a specific amount directed at a specific invoice. The timing of the payment was within the 90 to 120 day requirement of the ordinary business terms of the defendant. There were no special circumstances surrounding the payments.

Judgment shall be entered in favor of the defendant and against the plaintiff.

Separate Journal Entry shall be entered.

DATED: March 16, 1988.

BY THE COURT:

Timothy J Mahoney
Chief Judge

Copies mailed to each of the following:

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