UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Bankruptcy Caption: In re H. King & Associates

Bankruptcy No. 99 B 17717

Adversary Caption: Gina B. Krol, Trustee v. The Finishing Company

Adversary No. 01 A 00540

Date of Issuance: August 27, 2001

Judge: John H. Squires

Appearance of Counsel:

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Trustee: Gina B. Krol, Esq., Cohen & Krol, 105 West Adams Street, Suite 3100, Chicago, IL 60603

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
H. KING & ASSOCIATES,	)	Bankruptcy No. 99 B 17717
	)	Chapter 11
Debtor.	)	Judge John H. Squires
	)	
	)	
GINA B. KROL, Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	
	)	
	)	
THE FINISHING COMPANY,	)	Adversary No. 01 A 00540
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of The Finishing Company (the "Defendant") for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the complaint filed by Gina B. Krol, the Chapter 7 Trustee (the "Trustee") for H. King & Associates (the "Debtor"). For the reasons set forth herein, the Court denies the motion because issues of fact exist with respect to the Defendant's statutory defense under 11 U.S.C. § 547(c)(2)(C) on which it has the burden of proof.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F) and (O).

II. APPLICABLE STANDARDS FOR SUMMARY JUDGMENT

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought 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). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd.

v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including, within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

The Defendant filed a 402.M statement that substantially complied with the requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts with reference to parts of the record.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b).

The Trustee has not timely complied with this Rule. On August 16, 2001, the Trustee filed a late 402.N statement. The Seventh Circuit has upheld strict application of local rules regarding motions for summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991). Although the Trustee failed to file the 402.N statement within the allotted time, she does not dispute any of the factual statements made by the Defendant in its 402.M statement. Rather, the Trustee's Rule 402.N statement asserts

additional facts which, to date, have not been disputed by the Defendant.

III. FACTS AND BACKGROUND

The Debtor was in the business of designing and building retail displays for various retail chains. The normal business of the Debtor was the design and sale of point of purchase displays to manufacturers of products who market those products in the retail environment. The focus of the Debtor's business was point of purchase displays for cigarette manufacturers.

The Defendant has been engaged in business since 1964 in various aspects of metal finishing, and is a member of the National Association of Metal Finishers. One of the processes commonly used by the Defendant is powder coating. The Defendant is regularly engaged in the normal course of its business in performing powder coating. Powder coating is a paint process that eliminates the need for solvents and eliminates drying time, making the finished product ready for immediate shipment.

In approximately Spring 1999, the Debtor shipped products to the Defendant for powder coating. The products were parts for R. J. Reynolds' cigarette points of sale displays. The Defendant performed powder coating on all parts received from the Debtor and shipped the parts back. On March 19, 1999, the Defendant sent its invoices numbered 9027 and 9028 to the Debtor for the powder coating of those various parts. See Exhibits A and B to Defendant's Motion for Summary Judgment. These invoices included customary and usual payment terms of "2% 10 net 30 days." The Debtor paid both of these invoices on April 23, 1999 with a check in the sum of $1,340.50.

Thereafter, the Defendant sent additional invoices to the Debtor for powder coating of R. J. Reynolds' point of sale materials. These invoices also included the customary and usual payment terms of "2% 10 net 30 days." The Debtor paid these invoices with a check in the sum of $4,864.60 on May 28, 1999. A discount of $32.76 was given to the Debtor based upon a count discrepancy in the number of parts shipped.

Prior to the above transactions, the Defendant performed similar work on the same payment terms for the Debtor for approximately two years. On each occasion, the Debtor sent in parts to the Defendant for powder coating. The Defendant performed the requested services and shipped the parts to the Debtor, and then invoiced the Debtor, with such invoices on each occasion containing the payment terms of "2% 10 net 30 days." The Debtor customarily paid such invoices by issuing checks to the Defendant within 40-45 days of the date of the invoice.

The Debtor transferred the respective sums of $1,340.50 and $4,864.50 to the Defendant on account of antecedent debts owing from the Debtor to the Defendant when the Debtor was insolvent. The transfers enabled the Defendant to receive more than it would have received if the Debtor had subsequently filed a Chapter 7 bankruptcy petition and the transfers had not been made. The Defendant has refused to repay these sums.

On June 1, 2001, the Trustee filed a complaint in which she asserts that the two pre-petition transfers in the sum of $6,205.10 made by the Debtor to the Defendant are preferential payments under 11 U.S.C. § 547(b). The Defendant has not filed an answer to the complaint. Instead, on June 27, 2001, it filed the instant motion for summary judgment.

IV. DISCUSSION

A trustee may avoid certain preferential transfers made from the debtor's estate before the debtor filed a bankruptcy petition. See 11 U.S.C. § 547(b). The trustee's power to avoid preferential transfers is designed to further the Bankruptcy Code's central policy of equality of distribution: "creditors of equal priority should receive pro rata shares of the debtor's property." Begier v. IRS, 496 U.S. 53, 58 (1990). Additionally, by preventing the debtor from favoring certain creditors over others and by ensuring an equal distribution, the preference provision helps reduce "the incentive to rush to dismember a financially unstable debtor." In re Smith, 966 F.2d 1527, 1535 (7th Cir.) (citations omitted), cert. dismissed, Baker & Schultz v. Boyer, 506 U.S. 1030 (1992). "The purpose of allowing preferential transfers to be set aside is to prevent debtors who are tottering toward bankruptcy from playing favorites among their creditors, trying to keep alive a little longer by placating the most importunate ones." In re Freedom Group, Inc., 50 F.3d 408, 410 (7th Cir. 1995).

Section 547(b) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in property if the transfer meets five requirements: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; and (5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code. See 11 U.S.C. § 547(b); Warsco v. Preferred Technical Group, 258 F.3d 557 (7th Cir. 2001); In re Superior Toy & Mfg. Co., 78 F.3d 1169, 1171 (7th Cir.

1996).

The Trustee has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g); In re Jones, 226 F.3d 917, 921 (7th Cir. 2000); In re Badger Lines, Inc., 140 F.3d 691, 698 (7th Cir. 1998); In re Prescott, 805 F.2d 719, 726 (7th Cir. 1986). The Bankruptcy Code presumes the Debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); see also Barash v. Public Fin. Corp., 658 F.2d 504, 507 (7th Cir. 1981). This presumption requires the Defendant to present evidence to rebut the presumption, but it does not relieve the Trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). See In re Taxman Clothing Co., Inc., 905 F.2d 166, 168 (7th Cir. 1990); Schwinn Plan Comm. v. AFS Cycle & Co., Ltd. (In re Schwinn Bicycle Co.), 192 B.R. 477, 485 (Bankr. N.D. Ill. 1996).

The Defendant does not contest that the transfers constitute preferences. Rather, it contends that such transfers are excepted under § 547(c)(2). In contrast to the Trustee's burden of proof under § 547(b), creditors who defend by invoking one or more of the eight separate statutory defenses available under § 547(c)(1)-(8) have the burden of proving the nonavoidability of such transfers and such defenses under § 547(g). In re Midway Airlines, Inc., 69 F.3d 792, 797 (7th Cir. 1995).

In order to claim the ordinary course of business exception to preference avoidance under § 547(c)(2), a defendant must prove, by a preponderance of the evidence, three distinct elements of the defense. Midway Airlines, 69 F.3d at 797. Here, the Defendant must establish that the challenged transfers were (1) in payment of a debt incurred in the ordinary

course of business; (2) made in the ordinary course of business of both the Debtor and the Defendant; and (3) made according to ordinary business terms. Id. Many decisions describe these requirements as comprising a two-pronged test that includes a subjective inquiry under § 547(c)(2)(A)-(B) as to whether the transaction was ordinary as between the parties, and an objective inquiry under § 547(c)(2)(C) as to whether the transaction was ordinary in the relevant industry examined as a whole. See, e.g., Midway Airlines, 69 F.3d at 797; Grigsby v. Carmell (In re Apex Automotive Warehouse, L.P.), 238 B.R. 758, 775 (Bankr. N.D. Ill. 1999). The Seventh Circuit has made it clear that "ordinary business terms" for purposes of this third element refers to the range of terms that encompasses the practices of firms that are similar in some general way to the creditor. In re Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (7th Cir. 1993). Each requirement must be proved separately. Grigsby v. Purolator Prods. Air Filtration Co. (In re Apex Automotive Warehouse, L.P.), 245 B.R. 543, 548-49 (Bankr. N.D. Ill. 2000).

The Court finds that the Defendant has failed to proffer any evidence regarding the objective inquiry under § 547(c)(2)(C). The record is wholly devoid of any evidence with respect to whether these payment transactions were ordinary in the industry examined as a whole. That industry is comprised of companies who, like the Defendant, are engaged in metal finishing and who specifically perform the powder coating process on retail displays, such as those built by the Debtor. See, e.g., In re DeMert & Dougherty, Inc., 232 B.R. 103, 110 (N.D. Ill. 1999) (a meaningful inquiry into ordinary business terms requires a comparison of firms similarly situated to the creditor who are facing the same or similar problems). The Defendant has failed to establish by a preponderance of the evidence all

three elements of the ordinary course of business exception. Accordingly, the Defendant is not entitled to summary judgment as a matter of law and the Court denies the motion.

V. CONCLUSION

For the foregoing reasons, the Court denies the motion for summary judgment.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

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NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
H. KING & ASSOCIATES,	)	Bankruptcy No. 99 B 17717
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Debtor.	)	Judge John H. Squires
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GINA B. KROL, Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	
	)	
	)	
THE FINISHING COMPANY,	)	Adversary No. 01 A 00540
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 27th day of August, 2001, the Court hereby denies the motion of The Finishing Company for summary judgment.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List