United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re I. M. Import & Export, Inc. d/b/a I. M. D. Computers

Bankruptcy No. 99-16835-BKC-AJC

Adversary Caption:

Adversary No. **00-1499-BKC-AJC-A**]

Date of Issuance: February 27, 2001

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff/Trustee: Brian S. Behar, Esq. Behar, Gutt & Glazer, P.A., 2999 N.E. 191St Street, Suite 800, Aventura, FL 33180

Attorney for Defendant: Brian K. McMahon, Esq. 7301-A W. Palmetto Park Road, Suite 305C, Boca Raton, FL 33433

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: I.M. IMPORT & EXPORT, INC. d/b/a/ I.M.D. COMPUTERS, Debtor.	)	Chapter 7 Bankruptcy No 99-16835-BKC-AJC Judge John H. Squires
SONEET KAPILA, as Trustee for the Estate of I.M. IMPORT & EXPORT, INC. d/b/a I.M.D. COMPUTERS, Plaintiff.	)	
v.	)	Adversary No 00-1499-BKC-AJC-A
ACME PORTABLE MACHINES, INC., ET AL., Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Acme Portable Machines, Inc. ("Acme") for summary judgment and the cross motion of Soneet Kapila, the Chapter 7 case trustee (the "Trustee") for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56 to determine whether payments made by I.M. Import & Export, Inc. d/b/a I.M.D. Computers to Acme were preferential transfers pursuant to 11 U.S.C. § 547(b) and whether those transfers are excepted from avoidance by the Trustee pursuant to 11 U.S.C. § 547(c)(1) and (c)(2). For the reasons set forth herein, the Court denies Acme's motion for summary judgment and denies the Trustee's cross motion for summary judgment.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Local Rule 87.2 of the United States District Court for the Southern District of Florida. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(F).

II. FACTS AND BACKGROUND

Most of the relevant facts are undisputed and are drawn from the pleadings and papers furnished by the parties. On July 12, 1999, an involuntary Chapter 7 petition was filed against I.M. Import & Export, Inc. d/b/a I.M.D. Computers (the "Debtor"). An order for relief pursuant to Chapter 7 was entered on August 5, 1999. The Trustee was thereafter appointed. On November 17, 2000, the Trustee filed an adversary proceeding against, inter alia, Acme, seeking to avoid certain transfers from the Debtor to Acme. Acme filed an answer to the complaint on December 22, 2000.

Count I of the complaint, which is against Acme, seeks to avoid transfers from the Debtor to Acme pursuant to 11 U.S.C. § 547(b) for payments made on April 13, 1999 in the sum of $17,830.00; April 20, 1999 in the sum of $1,847.00; and April 26, 1999 in the sum of $22,218.00, for a total of $41,895.00. See Complaint at ¶ 14 and Exhibits A-C to Trustee's Response in Opposition to Acme's Motion for Summary Judgment and Trustee's Cross Motion for Summary Judgment. Acme contends that these payments were contemporaneous exchanges for new value and/or were made in the ordinary course of business and are not subject to avoidance by the Trustee pursuant to § 547(c)(1) and (c)(2).

Acme is a California company in the business of manufacturing and wholesaling central processing units ("CPU") and random access memory chips ("RAM") for computers. Acme supplied CPUs and RAM to the Debtor. Acme has been doing business with the Debtor since February 2, 1999. See Affidavit of Chih-Wen Cheng, Chief Executive Officer of Acme at ¶ 4. During the course of that relationship, the Debtor would order computer goods from Acme, and Acme would then prepare an invoice for the goods and ship the product, via either UPS or Federal Express, to the Debtor on a C.O.D. basis. Id. Upon receipt of the goods, the Debtor would provide a check for the amount of the invoice and the check would be returned to Acme by the delivery company. Id. This has been the course of dealing between the Debtor and Acme. Id.

III. APPLICABLE STANDARDS

A. 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).

Summary judgment is appropriate only where there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 760 (11th Cir. 1995). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Burger King Corp. v. Weaver, 169 F.3d 1310, 1315 (11th Cir.), cert. denied, 528 U.S. 948 (1999). All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990).

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.

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection d is styled partial summary judgment. Partial summary judgment is available only to dispose of one or more counts of the complaint in their entirety. Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a motion properly brought under Rule 56. The Trustee and Acme seek partial summary judgment as their motions relate only to Count I of the six-count complaint.

The parties have filed cross motions for summary judgment. Each motion must be ruled on independently and must be denied if there are genuine issues of material fact. ITT Industrial Credit Co. v. D.S. America, Inc., 674 F.Supp. 1330, 1331 (N.D. Ill. 1987). Cross motions for summary judgment do not require the Court to decide the case on those motions; the Court can deny both motions if both parties have failed to meet the burden of establishing any genuine issue of material fact exists and that they are entitled to judgment as a matter of law. Id.; Pettibone Corp. v. Ramirez, 90 B.R. 918, 922 (Bankr. N.D. Ill. 1988).

B. 11 U.S.C. § 547

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.

11 U.S.C. § 547(b); In re Superior Toy & Mfg. Co., 78 F.3d 1169, 1171 (7th Cir. 1996). "In other words, when the trustee brings a § 547(b) preference suit, the court is required to determine what each creditor would have received if the estate was liquidated and distributed to the creditors as provided in chapter 7 on the date that the bankruptcy petition was filed, and whether the creditor in question received more than his fair share." Id.

Two purposes animate § 547. "First, the avoidance power promotes the 'prime

bankruptcy policy of equality of distribution among creditors' by ensuring that all creditors of the same class will receive the same pro rata share of the debtor's estate." In re Smith, 966 F.2d 1527, 1535 (7th Cir.) (citation omitted), cert. dismissed, Baker & Schultz v. Boyer, 506 U.S. 1030 (1992). "Second, by providing for the recapture of last-minute payments to creditors, the avoidance power reduces the incentive to rush to dismember a financially unstable debtor." Id. (citations omitted). "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).

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 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 Acme to present evidence to rebut the presumption, but it does not relieve the Trustee of her 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). All elements must be present in order for the Trustee to avoid a transaction as a preference. In re Wey, 854 F.2d 196, 198 (7th Cir. 1988).

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). Acme relies upon two exceptions to preference: (1) contemporaneous exchange for new value (§ 547(c)(1)); and (2) payment of the debt was made in the ordinary course of business (§ 547(c)(2)).

IV. DISCUSSION

A. The Trustee's Motion

The Trustee has demonstrated by a preponderance of the evidence and Acme does not dispute that the transfers were made to or for the benefit of Acme. See 11 U.S.C. § 547(b)(1). In addition, because the transfers were made within 90 days immediately preceding the filing of the petition, the Debtor is presumed to be insolvent at the time the transfers were made. See 11 U.S.C. § 547(f). Hence, the Trustee is not obligated to come forward with evidence of insolvency and may rely on the statutory presumption. See Roeder v. Climax Molybdenum Co. (In re Old Electralloy Corp.), 164 B.R. 501, 504 (Bankr. W.D. Pa. 1994). Acme has not submitted any evidence on the issue of insolvency. Accordingly, the Trustee is entitled to rest on the presumption and has therefore met the required burden to satisfy the first and third elements of § 547(b).

Acme disputes whether the transfers were for or on account of an antecedent debt owed by the Debtor. The Trustee contends that all of the payments made by the Debtor to Acme were late and thus were for an antecedent debt. See Exhibit F to Trustee's Response in Opposition to Acme's Motion for Summary Judgment and Trustee's Cross Motion for

Summary Judgment. Specifically, the invoices which relate to the alleged preferential transfers show that the payments by the Debtor to Acme were late. The transfer of $17,830.00 by the Debtor to Acme was made by check on April 13, 1999 and cleared on April 20, 1999. The payment due date on Acme's invoice was April 12, 1999. Id. The transfer of $1,847.00 by the Debtor to Acme was made by check on April 20, 1999 and cleared on April 24, 1999. The payment due date on Acme's invoice was April 16, 1999. Finally, the transfer of $22, 218.00 by the Debtor to Acme was made by check on April 26, 1999 and cleared on May 1, 1999. Id. The payment due date on Acme's invoice was April 23, 1999. Id. The United States Supreme Court has held that for purposes of § 547(b), a transfer by check is deemed to occur the date the check is honored by the drawee bank, not the date it is presented to the creditor. Barnhill v. Johnson, 503 U.S. 393, 400 (1992).

Antecedent debt is not defined by the Bankruptcy Code. A debt is antecedent, however, if it is incurred before the transfer; the debt must have preceded the transfer. Based on the invoices provided by the Trustee, the debts incurred by the Debtor and owed to Acme all preceded the transfers made by the Debtor to Acme. Those payments were all made on antecedent debts which were created when the Debtor took possession of Acme's goods at the latest. Thus, the Court finds that the Trustee has demonstrated this second element.

Moreover, each of the three payments was made in April or May, 1999 within the ninety-day period prior to the filing of the involuntary petition in July, 1999. Thus, the fourth element is satisfied.

Finally, and fatal to the Trustee's motion is her failure to allege, let alone demonstrate, the fifth element necessary to establish a preferential transfer--that the transfers

allowed Acme to receive more than it would have under Chapter 7 of the Bankruptcy Code. Specifically, the Trustee must not only allege, but show, prima facie proof that the creditor received more than it would have received if the case were a Chapter 7 liquidation case, the transfers had not been made, and the creditor received payments on the debts to the extent provided by the provisions of the Code. In re Powerine Oil Co., 59 F.3d 969, 972 (9th Cir. 1995), cert. denied, 516 U.S. 1140 (1996). The Court must look to what the creditor actually received as compared to what creditors of the same class would receive in a Chapter 7 liquidation. See L. King, 5 Collier on Bankruptcy ¶ 547.03[7] at 547-39(15th ed. rev. 2000). The burden of proof is on the Trustee. The Trustee's failure to allege this element or provide any evidence with respect thereto, such as the Debtor's schedules, mandates denial of her cross motion for summary judgment. Her affidavit is silent on this element and the limited record before the Court is devoid of the requisite supporting evidentiary basis on this point. Consequently, the Court denies the Trustee's cross motion for summary judgment as she has not established all of the requisite elements under § 547(b).

B. Acme's Motion

Acme contends that the alleged preferential transfers were made contemporaneously with the delivery of the product and/or made in the ordinary course of business between the Debtor and Acme and thus constitute exceptions from preferential avoidance. The Court will address each defense. First, Acme contends that under § 547(c)(1) the transfers were made contemporaneously and for new value. Section 547(c)(1) provides:

> (c) The trustee may not avoid under this section a transfer–
> (1) to the extent that such transfer was
> (A) intended by the debtor and
> the creditor to or for whose

> benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1). Acme must demonstrate by a preponderance of the evidence that (1) it extended new value to the Debtor; (2) both Acme and the Debtor intended the new value and reciprocal transfers by the Debtor to be contemporaneous; and (3) the exchanges were in fact substantially contemporaneous.

Section 547(a)(2) states that "new value" means:

> money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

11 U.S.C. § 547(a)(2). Section 547(a)(2)'s definition of new value is exclusive. In re Energy Coop., Inc., 832 F.2d 997, 1003 (7th Cir. 1987). "By using 'means' instead of 'includes' in § 547(a)(2), Congress created an exclusive, rather than open-ended definition for new value." Id. (citation omitted). The theory behind § 547(c)(1) is that, to the extent new value is offered, the preference is repaid to the estate. Prescott, 805 F.2d at 727. There must be proof of some value in the "new value." In re Jet Florida Sys., Inc., 861 F.2d 1555, 1559 (11th Cir. 1988).

As to intent, the proof must demonstrate that each of the parties intended such an exchange. Friedman v. Ginsburg (In re David Jones Builder, Inc.), 129 B.R. 682, 695 (Bankr. S.D. Fla. 1991) (citation omitted). It is the intent at the outset of the transaction that

is critical. Prescott, 805 F.2d at 727-28.

Section 547(c)(1)(B) also requires proof that the transfer was "in fact a substantially contemporaneous exchange." The legislative history of § 547(c)(1) states:

> The first exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. Normally, a check is a credit transaction. However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous," and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, UCC § 3-503(2)(a), that will amount to a transfer that is "in fact substantially contemporaneous."

S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5874; see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6329. See also In re Standard Food Servs., Inc., 723 F.2d 820, 821 (11th Cir. 1984)(quoting legislative history).

The uncontroverted evidence demonstrates that the payments made by the Debtor, pursuant to Acme's invoices, were late, but this does not, ipso facto, demonstrate that they were not substantially contemporaneous. See, e.g., Everlock Fastening Sys., Inc. v. Health Alliance Plan (In re Everlock Fastening Sys., Inc.), 171 B.R. 251, 255 (Bankr. E.D. Mich. 1994). All three of the checks cleared and were not dishonored. Moreover, the checks were presented and paid within the normal course of affairs between the parties–within 30 days. Thus, it appears that the transfers were in fact substantially contemporaneous exchanges.

The Court finds, however, that Acme's defense under § 547(c)(1) fails because Acme failed to demonstrate that the Debtor intended the exchanges to be contemporaneous. The record is devoid of any allegations, let alone evidence, regarding the Debtor's intentions.

Neither Cheng's affidavit nor the Trustee's affidavit spoke to the Debtor's intent at the relevant time. Further, Acme has failed to allege or demonstrate that new value was exchanged by it for each payment made by the Debtor. Acme's failure to allege and prove the proper elements is fatal to its defense under § 547(c)(1).

Next, Acme argues that the alleged preferential transfers fall under the ordinary course of business exception pursuant to § 547(c)(2) which provides:

> (c) The trustee may not avoid under this section a transfer–
> (2) 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.

11 U.S.C. § 547(c)(2); see also In re Craig Oil Co., 785 F.2d 1563, 1564-65 (11th Cir. 1986). The purpose of the subsection 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." H.R. Rep. No. 595, 95th Cong., 1st Sess. 373-74 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 6329.

In order to fall within the exception, Acme must prove, by a preponderance of the evidence, that (1) the debt underlying such payment was incurred in the ordinary course of business between the debtor and the creditor, see § 547(c)(2)(A); (2) that such payment was made in the ordinary course of business of the debtor and the creditor, see § 547(c)(2)(B);

and (3) that such payment was ordinary in the industry examined as a whole, see § 547(c)(2)(C). In re A.W. & Assocs., Inc., 136 F.3d 1439, 1441(11th Cir. 1998); Graphic Prods. Corp. v. WWF Paper Corp. (In re Graphic Prods. Corp.), 176 B.R. 65, 69-70 (Bankr. S.D. Fla. 1994); Braniff, Inc. v. Sundstrand Data Control, Inc. (In re Braniff, Inc.), 154 B.R. 773, 780 (Bankr. M.D. Fla. 1993). "It is firmly established that the creditor has the burden of proving, by the preponderance of the evidence, that a transfer was made in the ordinary course of business under § 547(c)(2)." Grant v. Cosec Int'l, Inc. (In re L. Bee Furniture Co., Inc.), 230 B.R. 185, 190 (Bankr. M.D. Fla. 1999); see also A.W. Assocs., 136 F.3d at 1441.

The Court may consider several factors in order to determine whether the payments at bar are protected from avoidance under § 547(c)(2). Such factors include: "(1) the prior course of dealing between the parties; (2) the amount of the payments; (3) the timing of the payments; and (4) the circumstances surrounding the payments." In re C.J. Spirits, Inc. v. Godsey (In re C.J. Spirits, Inc.), 238 B.R. 889, 892 (Bankr. M.D. Fla. 1999) (citing Crews v. National Coating, Inc. (In re National Aerospace, Inc.), 219 B.R. 625, 628 (Bankr. M.D. Fla. 1998); Grant v. Sun Bank/North Cent. Fla. (In re Thurman Const., Inc.), 189 B.R. 1004, 1011-12 (Bankr. M.D. Fla. 1995)). Late payments can fall within the ordinary course of business exception if the prior course of conduct between the parties demonstrates that those types of payments were ordinarily made late. Graphic Prods., 176 B.R. at 70 (citations omitted); Jerry-Sue Fashions, Inc. v. I.T. Assocs., Inc. (In re Jerry-Sue Fashions, Inc.), 91 B.R. 1006, 1008 (Bankr. S.D. Fla. 1988).

Subsections 547(c)(2)(B) and (c)(2)(C) are distinct elements of the ordinary course defense which must be analyzed separately. In re Tolona Pizza Prods. Corp., 3 F.3d 1029,

1031-33 (7th Cir. 1993). To merge the two elements would "cut out and throw away one-third of an important provision of the Bankruptcy Code. . . ." Id. at 1032. In Tolona Pizza, the Seventh Circuit addressed the meaning of "ordinary business terms." The court held:

> "[O]rdinary business terms" refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.

3 F.3d at 1033 (citations omitted; emphasis in original). This does not mean that the creditor must establish the existence of some single, uniform set of business terms. Instead, to satisfy § 547(c)(2)(C), the creditor need only establish that its own dealings with the debtor are situated "within the outer limits of normal industry practices." Id. Section 547(c)(2)(C) requires proof beyond what is normal between the debtor and the creditor. The creditor must also show that the disputed payment was made according to terms that are ordinary when compared to those employed by other firms in the same industry. Id. at 1032-33. Section 547(c)(2)(C) requires objective proof that the disputed payment was "ordinary" in relation to the prevailing standards in the creditor's industry; proof of the parties' own relationship is insufficient. Midway Airlines, 69 F.3d at 799; In re Loretto Winery, Ltd., 107 B.R. 707, 709-10 (B.A.P. 9th Cir. 1989). The Eleventh Circuit endorsed the reasoning of the Seventh Circuit in the Tolona Pizza case and agrees that § 547(c)(2) requires the bankruptcy court to examine industry standards. A.W. & Assocs., 136 F.3d at 1442-43.

The Court determines that the uncontroverted evidence and statements in Cheng's affidavit at ¶ s2 and 4 demonstrate that the debt underlying the payments was incurred in the ordinary course of business between the Debtor and Acme pursuant to § 547(c)(2)(A).

Acme supplied CPUs and RAM to the Debtor and had done so since February 2, 1999. During the course of dealings between the Debtor and Acme, Acme provided computer goods to the Debtor on eleven occasions. See Exhibit D to Acme's Motion for Summary Judgment. The three payments at bar were for computer products ordered by the Debtor from Acme. Moreover, the Court finds, based on the uncontroverted evidence, that the payments to Acme from the Debtor were made in the ordinary course of business between Acme and the Debtor under § 547(c)(2)(B). Acme contends that the evidence--the affidavit of Cheng and Exhibits A-C to its Motion for Summary Judgment--demonstrates that the Debtor ordered goods on one day, the goods were delivered shortly thereafter, and the Debtor paid for the goods with a check given to Acme on the same day the goods were delivered and received by the Debtor. Exhibits A-C do not demonstrate that the payments at bar were made on the same date as the delivery of the goods. In fact, payment to Acme made on April 13, 1999 in the sum of $17,830.00 was for an April 12, 1999 invoice; payment on April 20, 1999 in the sum of $1,847.00 was for an April 16, 1999 invoice; and payment on April 26, 1999 in the sum of $22,218.00, was for an April 23, 1999 invoice. See Exhibits A-C to Trustee's Response in Opposition to Acme's Motion for Summary Judgment and Trustee's Cross Motion for Summary Judgment and Exhibits A-C to Acme's Motion for Summary Judgment.

Group Exhibit D to Acme's Motion for Summary Judgment, which shows the course of dealings between the parties prior and subsequent to the payments at bar, demonstrates a pattern of payment similar to the payments at issue: payment made to Acme in the sum of $5,626.00 on February 4, 1999 for an invoice dated February 2, 1999; payment made to

Acme in the sum of $3,267.00 on February 17, 1999 for an invoice dated February 16, 1999; payment made to Acme in the sum of $3,256.00 on February 18, 1999 for an invoice dated February 17, 1999; payment made to Acme in the sum of $13,764.00 on March 3, 1999 for an invoice dated March 3, 1999; payment made to Acme in the sum of $18,864.00 on March 17, 1999 for an invoice dated March 17, 1999; payment made to Acme in the sum of $20,438.00 on March 31, 1999 for an invoice dated March 30, 1999; payment made to Acme in the sum of $24,506.00 on May 11, 1999 for an invoice dated May 10, 1999; and payment made to Acme in the sum of $23,756.00 on May 24, 1999 for an invoice dated May 21, 1999 (check bounced). This establishes the course of dealings between the parties both before and after the payments at issue. Clearly, based on this evidence, the payments at issue were not the only payments made by the Debtor to Acme after the goods were delivered. The payments fall within the range of the same day and four days from the invoice date.

The Court finds, however, that Acme's defense under § 547(c)(2) fails at this stage because it failed to produce any evidence that the disputed payments were "ordinary" in relation to the prevailing standards in the creditor's industry under § 547(c)(2)(C). Proof of the parties' own relationship, which is critical to meet the burdens under the first two prongs of the defense, is insufficient to satisfy the last prong, § 547(c)(2)(C). Proof of the parties' relationship was the only evidence proffered by Acme. Thus, the Court denies Acme's motion for summary judgment.

V. CONCLUSION

For the foregoing reasons, the Court denies Acme's motion for summary judgment and denies the Trustee's cross 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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:	)	
I.M. IMPORT & EXPORT, INC.	)	Chapter 7
d/b/a/ I.M.D. COMPUTERS,	)	Bankruptcy No. 99-16835-BKC-AJC
	)	Judge John H. Squires
Debtor.	)	
_____	)	
	)	
SONEET KAPILA, as Trustee for the	)	
Estate of I.M. IMPORT & EXPORT, INC.	)	
d/b/a I.M.D. COMPUTERS,	)	
	)	
Plaintiff.	)	
	)	
v.	)	Adversary No. 00-1499-BKC-AJC-A
	)	
ACME PORTABLE MACHINES, INC.,	)	
ET AL.,	)	
	)	
Defendants.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 27th day of February 2001, the Court denies the motions of Acme Portable Machines, Inc. and Soneet Kapila for summary judgment.

ENTERED:

.
DATE: _____ _____

John H. Squires
United States Bankruptcy Judge.

cc: See attached Service List