United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Outboard Marine Corporation, et al.

Bankruptcy No. 00 B 37405

Adversary Caption: Alex D. Moglia, Trustee v. The Boat Warehouse

Adversary No. 02 A 02576

Date of Issuance: November 24, 2003

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff/Trustee: Steven B. Towbin, Esq., Shaw Gussis Fishman Glantz Wolfson & Town LLC, 321 North Clark Street, Suite 800, Chicago, IL 60610

Attorney for Defendant: John W. Guarisco, Esq., Neal Gerber & Eisenberg, Two North LaSalle Street, Suite 2300l, Chicago, IL 60602

Trustee: Alex D. Moglia, Alex D. Moglia & Associates, Inc., 1325 Remington Road, Suite H, Schaumburg, IL 60173

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
OUTBOARD MARINE CORPORATION, et al.,	)	Bankruptcy No. 00 B 37405
	)	Chapter 7
	)	Judge John H. Squires
Debtors.	)	
_____	)	
	)	
ALEX D. MOGLIA, not personally but as Chapter 7 Trustee for Outboard Marine Corporation and its related debtor entities,	)	Adv. No. 02 A 02576
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE BOAT WAREHOUSE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

These matters come before the Court on the motion of The Boat Warehouse (the "Defendant") for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56 on the complaint filed by Alex D. Moglia, the Chapter 7 trustee (the "Trustee") for Outboard Marine Corporation and its related debtor entities (the "Debtor") seeking to avoid and recover an alleged preferential transfer made by the Debtor to the Defendant, and on the motion of the Trustee for leave to replace default admissions with the Trustee's responses to the Defendant's first requests for admissions.

For the reasons set forth herein, the Court grants the Trustee's motion to replace the default admissions with the Trustee's responses to the Defendant's first requests for admissions. As a result of the Court granting the Trustee's motion, material factual issues exist which preclude disposition of this matter through summary judgment. Accordingly, the Court denies the Defendant's motion for summary judgment. This adversary proceeding is set for a pretrial conference on December 2, 2003 at 8:30 a.m.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain these matters 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. They are core proceedings under 28 U.S.C. § 157(b)(2)(A), (F) and (O).

II. FACTS AND BACKGROUND

On December 22, 2000, the Debtor filed a voluntary petition for relief under Chapter 11. On August 20, 2001, the case was converted to Chapter 7 and the Trustee was appointed shortly thereafter. On December 18, 2002, the Trustee filed the instant

complaint against the Defendant pursuant to 11 U.S.C. §§ 547 and 550 to avoid and recover an alleged preferential transfer by the Debtor to the Defendant in the sum of $97,461.24. *See* Rule 7056-1 Statement, Ex. 1. On June 23, 2003, the Defendant filed an answer and affirmative defenses to the complaint.[1] *Id.* at Ex. 2.

According to John W. Guarisco ("Guarisco"), a partner in the law firm of Neal, Gerber & Eisenberg LLP, local counsel for the Defendant, on July 16, 2003, the Defendant propounded certain discovery requests upon the Trustee, including the Defendant's first requests for admissions by hand delivery. *See* Rule 7056-1 Statement, ¶ 3; Rule 7056-1 Statement, Ex. 3, Guarisco Affidavit, ¶s 1-2; Ex. B to Defendant's Reply

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[1] The nine defenses are, briefly, as follows:
(1) The complaint fails to state a claim against the Defendant upon which relief can be granted.
(2) The Trustee failed to establish personal jurisdiction over the Defendant.
(3) The adversary proceeding must be dismissed for insufficiency of legal process and service of process.
(4) Any payments or transfers made by the Debtor to the Defendant were made in the ordinary course of business and excepted from avoidance pursuant to 11 U.S.C. § 547(c)(2).
(5) Following receipt of any payments or transfers of assets made by the Debtor to the Defendant, the Defendant extended new credit/value within the meaning of 11 U.S.C. § 547(c)(4).
(6) Any payments or transfers made by the Debtor to the Defendant were not preferential and were intended to be and were substantially contemporaneous exchanges for new value given by the Defendant to the Debtor and thus are protected from avoidance pursuant to 11 U.S.C. § 547(c)(1).
(7) The transfer challenged by the Trustee is, in whole or in part, excepted from the Trustee's powers under 11 U.S.C. § 547(b) pursuant to the earmarking doctrine.
(8) The adversary proceeding should be dismissed or transferred pursuant to the doctrine of forum non conveniens.
(9) The Defendant reserves all rights of setoff and recoupment.

See Rule 7056-1 Statement, Ex. 2. Only the fourth and sixth defenses are at issue in this matter, and this Opinion is so limited to those defenses.

in Support of the Motion for Summary Judgment, Affidavit of Kevin Venechuk; Ex. C to Defendant's Reply in Support of the Motion for Summary Judgment, Guarisco Affidavit, dated November 12, 2003, ¶ 2. The Trustee's answers to the requests for admissions were due on August 15, 2003. *See* Rule 7056-1 Statement, ¶ 4. Guarisco's certificate of service for the requests for admissions indicates that he served Steven B. Towbin ("Towbin")[2] and the Office of the United States Trustee with the requests for admissions by hand delivery on July 16, 2003. *See* Guarisco's Nov. 12, 2003 Affidavit, Ex. 1. Guarisco's November 12, 2003 affidavit, however, states that on July 16, 2003, he served the Trustee, not Towbin, with the requests for admissions and other discovery and pleadings. *Id*. ¶ 2.

Unlike the hand delivery service purportedly made by Guarisco, the affidavit from Kevin Venechuk, the director of sales for Dynamex, Inc., a company which provides same day delivery, indicates that a delivery from local counsel for the Defendant was made by an unnamed employee of Dynamex, Inc. to the law firm of counsel for the Trustee on July16, 2003. *See* Ex. B to Reply in Support of Motion for Summary Judgment, Venechuk Affidavit. However, neither Venechuk's affidavit nor the delivery confirmation sheet indicate precisely what was delivered. *Id.* It is undisputed that the Trustee never answered those requests for admissions nor requested or obtained an extension of time in which to do so. Rule 7056-1 Statement, ¶ 5.

On September 10, 2003, the Defendant filed its motion for summary judgment

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[2] Towbin is a member of the law firm of Shaw Gussis Fishman Glantz Wolfson & Towbin, LLC, which represents the Trustee.

based upon case dispositive default admissions resulting from the Trustee's failure to answer the first requests for admissions. The Defendant contends that pursuant to Federal Rule of Civil Procedure 36, made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7036, the Trustee is deemed to have admitted the following facts: (1) at all pertinent times, one of the Debtor's solvent affiliates, OMC Recreational Boat Group Limited Partnership d/b/a Four Winns ("Four Winns") was solvent; (2) the challenged payment was made in a manner that corresponds with the ordinary practice between the parties; (3) the Defendant did not engage in any unusual collection practices relative to the alleged preferential payment; (4) the Debtor did not engage in any unusual payment activities relative to the alleged preferential payment; (5) the challenged transfer was intended by the Debtor and the Defendant to be a contemporaneous exchange for new value given to the Debtor; (6) the transfer was a substantially contemporaneous exchange for new value given to the Debtor; (7) the transfer was made within the time required by the applicable payment terms agreed upon by the Debtor and Defendant; (8) the transfer was a payment for a debt incurred by the Debtor in the ordinary course of business or financial affairs of the Debtor and the Defendant; (9) the transfer was made in the ordinary course of business of financial affairs of the Debtor and the Defendant; and (10) the transfer was made according to business terms that are ordinary within the Defendant's industry and applicable market. *See* Rule 7056-1 Statement, ¶ 6.

On October 23, 2003, the Trustee filed the motion at bar for leave to replace the default admissions with the Trustee's responses to the Defendant's first requests for admissions. According to Mark L. Radtke ("Radtke"), an attorney with the law firm of

Shaw Gussis Fishman Glantz Wolfson & Towbin LLC, neither the Trustee nor *any* of his attorneys (which includes Towbin) received the discovery requests sent by the Defendant, including the first requests for admissions. *See* Ex. 1 to the Trustee's Motion for Leave to Replace Default Admissions, Declaration of Radtke at ¶ 5. Radtke contends that he has the primary responsibility for prosecuting the Trustee's complaint against the Defendant. *Id.* at ¶ 4. At the time of the alleged delivery to Towbin, his firm was leasing space from another firm, which provided its mail room service through which all incoming packages were "filtered." *Id.* ¶ 6. Radtke further states that the Trustee has filed over 1,400 preference avoidance actions and has timely responded to or has received timely extensions to respond to all discovery propounded upon him. *Id.* at ¶ 7. Additionally, Radtke declares that he and other attorneys at his law firm have litigated approximately 550 of the preference avoidance actions. *Id.* He contends that there is an established system at his firm to ensure strict adherence and respect for discovery deadlines. *Id.* Radtke states that for some inexplicable reason, the discovery propounded by the Defendant did not reach the Trustee or his attorneys and, therefore, the Trustee did not have an opportunity to timely respond to the discovery requests. *Id.* Radtke avers that upon seeing the Defendant's first requests for admissions, which were attached as an exhibit to the Defendant's Rule 7056-1 statement, he promptly called counsel for the Defendant to inform him that he had not received the discovery. *Id.* at ¶ 8.

Radtke states that on September 15, 2003, he sent to counsel for the Defendant the Trustee's responses to the Defendant's requests for admissions. *Id.* at ¶ 10, Ex. A. In the Trustee's responses to the Defendant's requests for admissions, the only fact that the

Trustee admits as true is that the debt that gave rise to the preferential transfer set forth in the complaint was incurred in the ordinary course of business between the Debtor and the Defendant. Because the Defendant's motion for summary judgment is premised on the Trustee's default admissions that would have a dispositive effect in favor of the Defendant and against the Trustee, the Court will initially address the Trustee's motion for leave to withdraw the default admissions.

III. DISCUSSION

A. The Trustee's Motion for Leave to Replace the Default Admissions

The Trustee seeks an order from the Court allowing him to withdraw any default admissions in connection with the Defendant's first requests for admissions and replace any such admissions with the Trustee's responses to the Defendant's first requests for admissions. The Trustee seeks such relief under Federal Rule of Civil Procedure 36(b), made applicable by Federal Rule of Bankruptcy Procedure 7036, which provides in relevant part:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Fed. R. Civ. P. 36(b).

Pursuant to Rule 36(b), any matter admitted under these rules is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The proper procedure for withdrawing admissions made by virtue of failure to respond to a request for admissions is by motion. *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987).

It is well established that a failure to respond to a request to admit will permit a court to enter summary judgment if the facts deemed admitted are dispositive. *Id.; Central States, Southeast and Southwest Areas Pension Fund v. GL & B Leasing Co., Inc.*, 874 F. Supp. 217, 218 n.1 (N.D. Ill. 1995); *Hartwig Poultry Inc. v. American Eagle Poultry (In re Hartwig Poultry, Inc.)*, 54 B.R. 37, 39 (Bankr. N.D. Ohio 1985). However, a court is not required to do so. Courts are particularly responsive to allowing late answers to requests for admission when summary judgment is involved. *White Consol. Indus., Inc. v. Waterhouse*, 158 F.R.D. 429 (D. Minn. 1994).

A court may permit a party to withdraw default admissions if several requirements are met: (1) the presentation of the merits of the action will be subserved by the withdrawal; (2) the party who obtained the default admissions fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits; and (3) the court, in its discretion, permits the withdrawal. Fed.R.Civ.P. 36(b); *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995); *American Auto Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1119 (5th Cir. 1991); *Ryan v. State of Illinois*, No. 91 C 3725, 1997 WL 399648 at *3 (N.D. Ill. July 11, 1997); *Paymaster Corp. v. California Checkwriter Co.*, No. 95 C 3646, 1996 WL 543322 at *1

(N.D. Ill. Sept. 23, 1996); *Skolnick v. Puritan Pride*, 92 C 1022, 1995 WL 215178 at *2 (N.D. Ill. April 10, 1995) . The party who obtained the admissions bears the burden of proving that withdrawal or amendment would prejudice that party. *Lucas v. Higher Educ. Assistance Found. (In re Lucas)*, 124 B.R. 57, 59 (Bankr. N.D. Ohio 1991).

"[T]he interests of justice are not furthered by automatically determining all the issues of an adversary proceeding and perfunctorily entering summary judgment against a party simply because a deadline is missed." *Sadowsky v. Larson (In re Larson)*, 169 B.R. 945, 955 (Bankr. D. N.D. 1994) (citation omitted). Allowing the tardy admission to stand, or permitting the withdrawal of the otherwise deemed admissions, may facilitate the development of the case in reaching the truth. Id. (citation omitted).

The Court finds that the Trustee has demonstrated the requisite elements necessary to warrant the withdrawal of the default admissions. First, because the default admissions are dispositive in this adversary proceeding, permitting the withdrawal of the default admissions in favor of the Trustee's responses to the Defendant's first requests for admissions would further the presentation and resolution of the adversary proceeding on the merits. If the default admissions are allowed to stand, the Trustee will be unable to succeed on the merits of the matter. The Defendant does not dispute that the denial of the Trustee's motion to withdraw the admissions would eliminate a determination of this matter on the merits. Indeed the admissions would have the effect of defeating the Trustee's preference avoidance action on the grounds that Four Winns was solvent and that the transfer was subject to both a contemporaneous exchange for new value defense under 11 U.S.C. § 547(c)(1) and an ordinary course of business defense pursuant to 11

U.S.C. § 547(c)(2). Permitting the withdrawal of the deemed admissions would facilitate the development of the matter in reaching the truth.

Moreover, the dispute about whether Towbin or the Trustee received hand delivery from Guarsico of the Defendant's requests for admissions, as Guarisco's certificate of service and affidavit avers respectively or effectively did not receive delivery of the requests for admissions as Radtke's affidavit states, cannot be resolved on this limited record. Affiants can only be cross examined in person; affidavits cannot be examined. Accordingly, the dispute over whether the Trustee's attorneys actually received the requests for admissions cannot be properly decided at this time.

The Defendant further argues that under Federal Rule of Bankruptcy Procedure 9006(e), service of the requests for admissions was effective upon mailing and that the certificate of service is prima facie evidence of valid service and can be overcome only by strong and convincing evidence. The Court agrees with those points, but concludes that Radtke's affidavit constitutes the strong and convincing evidence of non-receipt to meet the exceptions to the general rule. While it appears from Guarisco's affidavit that he hand delivered the requests for admissions to Towbin on July 16, 2003, Radtke's affidavit effectively denies this, and Radtke, not Towbin, has been one of the many attorneys prosecuting the preference adversary proceedings. Venechuk's affidavit merely purports to show a delivery made by one of his firm's employees to Radtke's firm. The attached delivery receipt does not specify exactly what was delivered on July 16, 2003. Moreover, the delivery receipt furnished refers to a person named "Travis" who apparently signed for whatever document was delivered from the Defendant's counsel on July 16, 2003.

Whoever Travis is, he certainly is not Towbin, Radtke or one of the Trustee's other attorneys who has appeared before the Court on this matter.

Further, the Court finds that the interests of justice are not served by perfunctorily entering summary judgment against the Trustee because he missed one deadline due to mistake or inadvertence. The Court finds that the entry of summary judgment against the Trustee and in favor of the Defendant based on the default admissions would produce an unduly harsh result. Thus, the first condition required for the Court to exercise its discretion has been satisfied.

Next, the Court must determine whether withdrawal of the default admissions will prejudice the Defendant. A defendant cannot argue that it will be prejudiced by the withdrawal simply because it is forced to defend the action on the merits as a result. See Ryan, 1997 WL 399648 at *3. "The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions." *Brook Village North Assocs. v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982) (citation omitted); *see also Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1314 (8th Cir. 1983) (*quoting Brook Village*); *Farr Man & Co., Inc. v. M/V Rozita*, 903 F.2d 871, 876 (1st Cir. 1990) (same).

In arguing that it will be suffer prejudice if the Court allows the Trustee to withdraw the default admissions, the Defendant contends that the Trustee did not preserve any of the documents relevant to this matter, i.e., pre-January 2000 accounts payable and accounts receivable that were in the possession of the Trustee and Four Winns. *See* Ex. D to Defendant's Reply in Support of the Motion for Summary Judgment, Affidavit of Dale Burns, ¶ 3; Ex. A to Defendant's Reply in Support of the Motion for Summary Judgment, Affidavit of Charles R. Powell, III, ¶s 1-3. Further, the Defendant contends that the Trustee failed to instruct Four Winns to retain these documents and Four Winns destroyed the documents in early September 2003. *Id.* According to the Defendant, "the Trustee has hobbled [its] ability to defend itself through failure to preserve documents in his control." *See* Defendant's Reply in Support of the Motion for Summary Judgment, p. 8.

The Court disagrees with the Defendant's argument that it will not be able to defend against the Trustee's preference action. While the pre-January 2000 accounts payable and accounts receivable documents may be relevant to the Defendant's ordinary course of business defense under § 547(c)(2), the Court finds that the unavailability of these documents does not wholly preclude the ordinary course of business defense. In fact, the Trustee's late admissions admit the first of the three elements of the § 547(c)(2) defense–that the underlying debt was incurred between the parties in the ordinary course of their business dealings. Moreover, the Defendant has asserted numerous other defenses, including defenses under § 547(c)(1) and § 547(c)(4) wherein those pre-January 2000 documents may have little or no relevance thereto. Thus, the Court rejects the

Defendant's argument that the Trustee has hobbled its ability to defend itself. The Court finds that the Defendant will not be prejudiced by the withdrawal of the default admissions. The Defendant has not adequately demonstrated that it will have difficulty proving all of its defenses because of the unavailability of key witnesses or the sudden need to obtain evidence. The Defendant has been aware of the Trustee's cause of action for some time and will not suffer any prejudice if required to defend the action on the merits.

Thus, the Court will exercise its discretion and allow the Trustee to withdraw the default admissions and replace such admissions with the responses to the Defendant's first requests for admissions. The Trustee has filed over 1400 preference avoidance actions in the Debtor's bankruptcy case. The Trustee's attorneys have resolved hundreds of those avoidance actions and have not, to the Court's recollection, intentionally disregarded any deadlines imposed by the Court.

The Defendant argues that the Trustee has ignored discovery deadlines in other adversary proceedings brought in the Debtor's bankruptcy case, i.e., *Moglia v. Melvin Village Marina, Inc.*, Adv. No. 02 A 01174 and *Moglia v. International Wire Group, Inc.*, Adv. No. 02 A 0440. *See* Ex. B to Powell's Affidavit. The Court rejects the Defendant's assertion that the failure to timely respond to the Defendant's requests to admit in these adversary proceedings represents examples of a pattern of the Trustee's non-compliance with discovery deadlines. The Court's docket reveals that these adversary proceedings were settled and subsequently closed in May 2003. The Court was not privy to the negotiations that lead to the settlement between the parties. That the

Trustee may not have responded to discovery requests in those settled adversary proceedings does not serve as compelling examples of his ignoring deadlines, which should be binding here. There may have been an agreement between the parties, in light of the settlement discussions, that extended the discovery response date. Indeed, the Court will not engage in guesswork and conclude that the adversary proceedings involving Melvin Village Marina, Inc. and International Wire Group, Inc. represent examples of any pattern of the Trustee's failure to comply with discovery deadlines. The Trustee and his counsel have given this Court no reason to believe that deadlines have been intentionally flouted and disregarded. Accordingly, the Court, in the exercise of its discretion, permits the withdrawal of the Trustee's default admissions, finding the Trustee's present default an "aberration in an otherwise [excellent] track record" before this Court. *Ryan*, 1997 WL 399648 at *3.

B. The Defendant's Motion for Summary Judgment

1. Applicable Standards for Summary Judgment Motions

The Court set forth the applicable standards for summary judgment motions in a previous Opinion. *See Moglia v. Inland Plywood Co. (In re Outboard Marine Corp.)*, 299 B.R. 488, 490-93 (Bankr. N.D. Ill. 2003). Those standards are incorporated by reference and need not be repeated.

2. Requisite Elements of a Preferential Transfer Under 11 U.S.C. § 547(b)

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). Specifically, § 547(b) provides that:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property–
>
> (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–
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if–
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

Accordingly, § 547(b) 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) that 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 Bankruptcy Code. *See* 11 U.S.C. § 547(b); *Warsco v. Preferred Technical Group,* 258 F.3d 557, 564 (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. *See* 11 U.S.C. § 547(g); *In re Jones*, 226 F.3d 917, 921 (7th Cir. 2000) (*citing In re Badger Lines, Inc.*, 140 F.3d 691, 698 (7th Cir. 1998)). 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).

A 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.'" Warsco, 258 F.3d at 564 (*quoting In re Smith*, 966 F.2d 1527, 1535 (7th Cir.), *cert. dismissed, Baker & Schultz, Inc. 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).

In light of the fact that the Court grants the Trustee's motion for leave to replace his default admissions with the responses to the Defendant's first requests for admissions, the Court must deny the motion for summary judgment. Indeed, several issues of material fact exist which preclude the disposition of this matter by way of summary judgment. Specifically, those disputed factual issues include: (1) whether Four Winns was insolvent: (2) whether the Defendant engaged in any unusual collection practices relative to the alleged preferential payment; (3) whether the Debtor engaged in any unusual payment activities relative to the alleged preferential payment; (4) whether the challenged transfer was intended by the Debtor and the Defendant to be a contemporaneous exchange for new value given to the Debtor; (5) whether the transfer was a substantially contemporaneous exchange for new value given to the Debtor; (6) whether the transfer was made within the time required by the applicable payment terms agreed upon by the Debtor and Defendant; and (7) whether the transfer was made according to business terms that are ordinary within the Defendant's industry and applicable market. Consequently, the Court denies the Defendant's motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Trustee's motion for leave to replace the default admissions with the Trustee's responses to the Defendant's first requests for admissions and denies the Defendant's motion for summary judgment. This

adversary proceeding is set for pretrial conference on December 2, 2003 at 8:30 a.m.

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
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
OUTBOARD MARINE	)	Bankruptcy No. 00 B 37405
CORPORATION, et al.,	)	Chapter 7
	)	Judge John H. Squires
Debtors.	)	
_____	)	
	)	
ALEX D. MOGLIA, not personally but as	)	Adv. No. 02 A 02576
Chapter 7 Trustee for Outboard Marine	)	
Corporation and its related debtor entities,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE BOAT WAREHOUSE,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 24th day of November 2003, the Court grants the motion of Alex D. Moglia to replace the default admissions with the responses to The Boat Warehouse's first requests for admissions. As a result of the Court granting the motion of Alex D. Moglia, material factual issues exist which preclude disposition of this matter through summary judgment. Accordingly, the Court denies the motion of The Boat Warehouse for summary judgment. This adversary proceeding is set for a pretrial conference on December 2, 2003 at 8:30 a.m.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List