IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF PUERTO RICO

IN RE:	:	
	:	
KIDDY TOYS, INC.	:	
	:	CASE NO. B-91-02014(ESL)
Debtors	:	
_____	:	
	:	CHAPTER 7
DIEGO FERRER, TRUSTEE	:	
	:	
Plaintiff	:	
	:	ADV. NO. 92-0066
v.	:	
	:	
STORE DISPLAYS, INC.	:	
	:	
Defendant	:	
_____	:	

OPINION AND ORDER

Before the Court is a Summary Judgment Motion (docket No. 9) filed on October 1, 1992 by the trustee for Kiddy Toys, Inc. (Kiddy) against defendant Store Displays, Inc. (Displays) pursuant to 11 U.S.C. § 547. Defendant filed its Opposition and Memorandum (docket Nos. 10 & 11) on December 8, 1992 requesting that the adversary proceeding be dismissed. Plaintiff filed a Reply (docket No. 13) on December 17, 1992.

This adversary proceeding is a preference action whereby the trustee seeks to avoid a transfer of the debtor's estate to defendant, a supplier of store display equipment to various Kiddy

stores, which occurred during the 90 day period prior to the filing of Chapter 7 petition pursuant to his authority under § 547(b). The creditor alleges that the respective transfers are nonavoidable as they fall within the ordinary course of business exception pursuant to § 547(c)(2).

I. SUMMARY JUDGMENT STANDARD

Bankruptcy Rule 7056 makes Rule 56 of the Fed. R. Civ. P. applicable to adversary proceedings. Accordingly, the summary judgment standard utilized in bankruptcy matters mirrors the standard set forth in the federal rules of civil procedure and as developed by case law.

Summary judgment is warranted where, after adequate time for discovery and upon motion, a party establishes the elements essential to its case and upon which it carries the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In addition, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

For there to be a "genuine" issue, facts which are supported by substantial evidence must be in dispute, thereby requiring deference to the finder of fact. Furthermore, the disputed facts must be

"material" or determinative of the outcome of the litigation. Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). When considering a petition for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 473 (1962); Daury v. Smith, 842 F.2d 9, 11 (1st Cir. 1988).

The moving party invariably bears both the initial as well as the ultimate burden in demonstrating its legal entitlement to summary judgment. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). See also López v. Corporación Azucarera de Puerto Rico, 938 F.2d 1510, 1516 (1st Cir. 1991). It is essential that the moving party explain its reasons for concluding that the record does not contain any genuine issue of material fact in addition to making a showing of support for those claims for which it bears the burden at trial. Bias v. Advantage International, Inc., 905 F.2d 1558, 1560-61 (D.C.Cir.), cert. denied, 498 U.S. 958 (1990). Therefore, the moving party cannot prevail if any essential element of its claim or defense requires trial. López, 938 F.2d at 1516. The moving party is also required to demonstrate that there is an absence of evidence supporting the nonmoving party's case. Celotex, 477 U.S. at 325. See also Prokey v. Watkins, 942 F.2d 67, 72 (1st Cir. 1991); Daury,

842 F.2d at 11.

Once the moving party has met its burden, the burden switches to the nonmoving party who must show that a genuine issue of material fact exists requiring deference to the fact finder. The nonmoving party may not merely demonstrate the existence of some factual dispute to defeat a motion for summary judgment. Kennedy v. Josephthal & Co., Inc., 814 F.2d 798, 804 (1st Cir. 1987). See also Kauffman v. Puerto Rico Telephone Co., 841 F.2d 1169, 1172 (1st Cir. 1988); Hahn, 523 F.2d at 464. To meet its burden, the nonmoving party is required to present evidentiary support for every essential element of its case and upon which it bears the burden of proof at trial. Celotex, 477 U.S. at 322-23; J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3rd Cir. 1990). The failure of the nonmoving party to present proof for each element of its case necessarily renders all other facts immaterial. Celotex, 477 U.S. at 323. In other words, there is no issue for trial unless there is sufficient evidence presented by the nonmoving party which could support a verdict in its favor. Anderson, 477 U.S. 249.

The respondent may not rely upon bare allegations to create a factual dispute but is required to point to specific facts contained in affidavits, depositions and other supporting documents which, if

established at trial, could reasonably support a verdict for the nonmoving party. Over the Road Drivers, Inc. v. Transport Insurance Co., 637 F.2d 816, 818 (1st Cir. 1980). Although it is not the function of the trial judge to weigh the evidence or determine its credibility, where the evidence is merely colorable or not sufficiently probative, summary judgment may be granted. Anderson, 477 U.S. 249.

II. PREFERENCE ACTIONS 11 U.S.C. § 547(b)

Section 547 of the Bankruptcy Code governs the avoidance of preference transfers and identifies the exceptions thereto. The Supreme Court articulated the purpose of § 547 to be twofold: (1) to provide protection to the debtor's assets by discouraging creditors from running to the courthouse to force collection as the debtor slides into bankruptcy and (2) to insure that the policy behind the Code requiring that all creditors be treated fairly and equally, is not violated as a result thereby. Union Bank v. Wolas, ___ U.S. ___, 112 S.Ct. 527, 533, 116 L.Ed.2d 514 (1991).

The burdens of the respective parties acting under this section are clearly setforth in the statute. Section 547(g) states that the trustee has the burden of establishing that the transfer meets all requirements for avoidance as indicated in subsection (b). Likewise, the creditor has the burden to show that it is entitled to

any defense asserted under subsection (c).

The Bankruptcy Code, 11 U.S.C. § 547(b), requires that five elements be established by the trustee in a preference action. The statute reads, in pertinent part:

> Except as otherwise provided..., 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).

It is undisputed that the defendant is a creditor and that payments were made to its benefit. The challenged transfers, in the form of checks, were directly applied to Kiddy's outstanding debt by the creditor. In addition, the undisputed facts show that all debts to which these transfers were applied, were antecedent. Kiddy incurred these debts throughout 1990 when purchasing goods for use at their various stores. Furthermore, according to the plain language of § 547(f), a presumption exists as to debtor's insolvency during the 90 day period preceding the filing of a bankruptcy petition. WJM, Inc. v. Massachusetts Department of Public Welfare, 840 F.2d 996, 1010 (1st Cir. 1988). Defendant has not submitted evidence to the contrary, therefore, the presumption of insolvency remains.

The transactions in question all occurred during the 90 day period prior to Kiddy's filing of its bankruptcy petition on March 15, 1991. The facts show that all challenged transfers were made from January 11, 1991 through March 8, 1991.[1]

Finally, the trustee asserts that the transfers have resulted in the creditor receiving more than it would have under the provisions of Chapter 7. To establish this, the trustee relies upon

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[1] See footnote 2, infra.

the debtor's schedules as well as an audit for the year ending June 30, 1990. A review of debtor's schedules filed in this case reveal that there will not be 100% distribution to all unsecured creditors. In re Continental Country Club, Inc., 108 B.R. 327, 332 (Bankr.M.D.Fla. 1989) (where plaintiff's schedules and filed claims show that it will be unable to pay 100% distribution to creditors, any unsecured creditor who received payment during the preference period received more than it would have under Chapter 7); In re Aldridge, 94 B.R. 589, 592 (Bankr.W.D.Mo. 1988) (same).

While it appears that the trustee has, without a doubt, met his burden by establishing that all the questioned transactions are potential preferential transfers of the debtor's property in that each meets the criteria under subsection (b), the analysis is not complete. Defendant has asserted that the challenged transfers fall within an exception which, if established, will render these transactions nonavoidable. Section 547(c) lists several exceptions to the trustee's avoidance powers.

III. ORDINARY COURSE OF BUSINESS EXCEPTION 11 U.S.C. § 547(c)(2)

Defendant creditor contends that the transactions which occurred between it and Kiddy were in the ordinary course of business and, therefore, are exempt from avoidance. Three separate

factors must be established in order to successfully utilize this defense; these are contained in § 547(c)(2):

> The trustee may not avoid under this section a transfer--
>
> (1) ...
>
> (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; ...

The initial requirement is easily satisfied and not often litigated. The defendant need only show that the transfers were between unrelated parties and for general business purposes. In re Tax Reduction Institute, 148 B.R. 63, 72 (Bkrtcy.D.Dist.Col. 1992).

No objection having been raised, it appears that the parties are in agreement that all the transfers in question were credited toward outstanding debts as a result of ordinary business transactions between Kiddy and the defendant. The facts substantiate the conclusion that these payments were applied against an antecedent debt resulting from a business relationship whereby

Kiddy purchased goods from the defendant.

The second and third step require a more rigorous analysis and involve a subjective as well as an objective test as articulated by the First Circuit in WJM, Inc. v. Massachusetts Department of Public Welfare, 840 F.2d 996 (1st Cir. 1988). Accordingly, a defendant is required to submit evidence showing that the payment was made within the ordinary terms of its business dealings with the debtor and that the transfer was made in a manner consistent with debt payment in the industry. WJM, 840 F.2d at 1010-11. This test is also followed by the Third and Sixth Circuits. In re Fred Hawes Organization, Inc, 957 F.2d 239, 244 (6th Cir. 1992); J.P. Fyfe, Inc. of Florida v. Bradco Supply Corp., 891 F.2d 66, 70 (3rd Cir. 1989); but see Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 499 (8th Cir. 1991) (both § 547 (c)(2)(B) & (C) are satisfied as long as the late payments were consistent with the course of dealings between the parties), followed in In re U.S.A. Inns of Eureka Springs, Arkansas, Inc., 151 B.R. 492, 498-500 (W.D.Ark. 1993).

The Court must engage in a fact-specific analysis to determine whether the transfer was made according to the ordinary business terms of the parties. In re Fulghum Construction Corp., 872 F.2d 739, 743 (6th Cir. 1989). Factors to be considered include the

times, amount and manner of payment as well as the circumstances under which the transfer was made. In Yurika Foods Corp., 888 F.2d 42, 45 (6th Cir. 1989).

Even though the business transactions of the debtor are "irregular", they are considered "ordinary" within § 547(c)(2) if consistent with the course of dealings between the parties. Fulghum, 872 F.2d at 743. The defendant need only demonstrate that this transaction is consistent with other business transactions between the debtor and the creditor. WJM, 840 F.2d at 1011.

Payments made within the time allotted by the contract provisions between the debtor and creditor best exemplifies normal business relations. However, although late payments are presumptively "nonordinary", lateness is not sufficient in itself to take the payment outside the of the normal course of business exception. Fred Hawes, 957 F.2d at 244. Contract terms should not be viewed as exclusively indicative of the ordinary course of business between debtor and creditor; the parties' conduct may show that extra-contractual practices were adopted by the parties as normal practice. In re Xonics Imaging Inc., 837 F.2d 763, 767 (7th Cir. 1988). Accordingly, where evidence substantiates that the making and accepting of late payments was the normal practice between the parties, even though such practice deviates from strict

written contract terms between debtor and creditor, the party has met the prerequisites of § 547(c)(2)(B). Matter of Tolona Pizza Products Corp., 3 F.3d 1029, 1032 (7th Cir. 1993); Yurika, 888 F.2d at 45; In re Powerine Oil Co., 126 B.R. 790, 795 (9th Cir.B.A.P. 1991).

However, in the event that a creditor resorts to unusual debt collection methods as a result of lateness, payments made in response are not within the ordinary course of business. In re Braniff, Inc., 154 B.R. 773, 781-82 (Bkrtcy.M.D.Fla. 1993). Collections actions which include sending dunning letters or threatening to discontinue the business relationship with the debtor constitute evidence that the creditor does not agree to adopt any extra-contractual terms. See, e.g., In re A.J. Lane & Co., Inc., Lane Homes, Inc., Lane Management, Inc., Indian Hill Associates, Inc.; Miller (Stanley) Trustee v. Perini Corporation, ___ B.R. ___, 1994 WL 49892, p. 5 (Bankr.D.Mass. 1994) and the cases cited therein.

To meet the third requirement of the defense, the defendant must submit evidence supporting that similar transactions occur between it and other entities. In re Narragansett Clothing Co., 146 B.R. 609, 612 (Bankr.D.R.I. 1992); In re Craig Oil Co., 785 F.2d 1563, 1566-67 (11th Cir. 1986); In Re Energy Co-op., Inc., 103 B.R.

171, 176 (N.D.Ill. 1986). The issue is whether the particular transaction comports with industry-wide business practices. Fred Hawes, 957 F.2d at 246; Yurika, 888 F.2d at 45. This objective test is only satisfied by presentation of separate evidence as to the industry practice and cannot be inferred from evidence evincing the practices between the debtor and the creditor. Tax Reduction, 148 B.R. at 75.

Recently, the objective test required under § 547(b)(2)(C) has been reevaluated and redefined by several Circuit Courts. The Seventh Circuit has held that the difficulty in establishing the existence of a uniform set of business terms and identifying the industry whose norm will govern as well as the broad range of business practices in any given industry hampers the strict application of an objective test comparing the practices of the parties to those of the industry. Tolona Pizza, 3 F.3d at 1033. Therefore, it concludes, the test should be whether the business practices between parties fall within a range of practices utilized by other creditors who are in some general way similar to the creditor; "only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C." Id., citations omitted.

The Third Circuit in In re Molded Acoustical Products, Inc.;

Fiber Lite Corporation v. Molded Acoustical Products, Inc., ___ F.3d ___, 1994 WL 72656 (3rd Cir. 1994), fine tuned the analysis by recognizing the interaction between subsections B and C resulting in a less cumbersome standard which is consistent with the purpose of the statute. Specifically, the Court reasoned, the longer the pre-insolvency relationship between the debtor and creditor, the more the creditor will be allowed to vary its credit terms from the industry norm. This is based on the conclusion that where an established business relationship is maintained between the parties for a considerable length of time prior to insolvency, there exists less likelihood that the transfer was the result of overreaching by a creditor to the disadvantage of all other creditors. Conversely, where the business relationship between the creditor and debtor is of recent origin, the credit terms under which the transfer was accomplished would require a rigorous comparison to the credit terms allowed in the relevant industry.

Although not yet addressed by the First Circuit, the results derived from application of the Third Circuit standard is not inconsistent with the test articulated in WJM. Rather, a new dimension is added which further facilitates the goals of a preference action. In light of these conclusions, this Court hereby adopts the application of the analysis in Molded Acoustical Products

to the test required by the First Circuit in WJM.

In the action before the Court, the trustee requests that debtor's transfers to Displays totalling seven thousand, five hundred and sixty-four dollars ($7,564.00)[2] be avoided since these monies were paid after the expiration of the 30 day term for payment as indicated in defendant's answers to interrogatories. See Trustee's Motion Requesting Summary Judgment, docket No. 9, exhibit E, p. 2 ¶ 8(a) of Answer to Interrogatories.

Defendant, a supplier of store display equipment purchased by various Kiddy outlets since 1987, submitted copies of the invoices showing that debtor's payments were almost never timely. In fact, defendant contends that after the first year of business, the regular course of business included Kiddy making payments more than 90 days after payment was due. See Defendant's Memorandum in Opposition..., docket No. 11, p. 3 ¶ 8 of Sworn Statement of Material Facts.

In its opposition, relying upon its answers to interrogatories,

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[2]The amounts and the dates of each transaction are not in dispute; these are as follows:

1/11/91	$ 592.00
1/31/91	$1,472.00
3/1/91	$2,000.00
3/8/91	$3,500.00
Total	$7,564.00

defendant alleges that the terms for payment were later changed from 30 to 90 days. See Trustee's Motion..., docket No. 9, exhibit E, p. 2 ¶ 8(c) of Answer to Interrogatories. In what appears to be totally contrary, as the trustee points out, defendant states the following in its statement of facts:

> We stated in our answer to the interrogatories the (sic) our usual business terms was (sic) net thirty days and with a fifty percent deposit 30, 60 and 90 days. That is our normal procedure with new clients but it was not the one followed with debtor.

Defendant's Memorandum in Opposition..., docket No. 11, p. 2 ¶ 3 of Sworn Statement of Material Facts. Accordingly, as the trustee maintains, the defendant concedes that these transactions were not made within the ordinary course of business.

The evidence submitted by the defendant raises the inference that the manner in which the parties have conducted their financial dealings throughout their years of doing business has included the making and accepting of late payment. However, the defendant has failed to address the third part of the analysis as required by subsection C. Defendant does not defeat the trustee's motion for summary judgment because it has not presented a singe iota of evidence regarding the ordinary business terms of the industry.

While some facts appear to be disputed, these are nevertheless immaterial due to defendant's failure to meet its burden by

presenting evidence on all the essential elements of its case for which it carries the burden at trial. Therefore, in consideration of the evidence presented, the only reasonable conclusion that could be reached by a finder of fact is that the challenged transfers are preferential and, therefore, avoidable. Accordingly, the trustee's motion for summary judgment is hereby granted.

IV. CONCLUSION

The motion for summary judgment filed by the trustee for debtor Kiddy Toys, Inc. against defendant Store Displays, Inc. is hereby granted. It is further ORDERED that creditor Store Displays, Inc. reimburse the estate of Kiddy Toys, Inc. the amount of seven thousand, five hundred and sixty-four dollars ($7,564.00).

The Clerk shall enter judgment accordingly.

SO ORDERED.

San Juan, Puerto Rico, this _____ day of May, 1994.

_____
ENRIQUE S. LAMOUTTE
Chief, U. S. Bankruptcy Judge