

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ODYSSEY GROUP, LLC,	)	CASE NO. 09-30111 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
REBECCA HOYT FISCHER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 09-3108
	)	
TRAVEL MANAGEMENT COMPANY, LTD.,	)	
	)	
DEFENDANT.	)	

Appearances:

Rebecca Hoyt Fischer, Esq., counsel for plaintiff, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601; and

J. Richard Ransel, Esq., counsel for defendant, Thorne Grodnik, LLP, 228 West High Street, Elkhart, Indiana 46516-3176.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 2, 2010.

Before the court is the Motion for Summary Judgment filed by plaintiff Rebecca Hoyt Fischer, Trustee (“Trustee” or “plaintiff”) of the chapter 7 debtor Odyssey Group, LLC (“debtor”), against the defendant Travel Management Company, Ltd. (“creditor” or “defendant”). The defendant filed its Response to the Motion, and the court took the matter under advisement. For the reasons that follow, the court grants the Trustee’s Motion for Summary Judgment.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and (b), and Northern District of Indiana Local Rule 200.1. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F).

## Background

After an involuntary chapter 7 petition was filed against Odyssey Group, LLC, on January 16, 2009, Rebecca Hoyt Fischer was appointed Trustee in the case. She commenced this adversary proceeding by filing a Complaint against the defendant, a company which had provided charter air service to the debtor. One charter trip was made on October 10, 2008, from Elkhart, Indiana to Knoxville, Tennessee. The invoice for that service, dated October 14, 2008, required payment of \$5,850.77 within ten days from completion of the flight. The debtor paid the invoice on December 10, 2008. The Trustee's Complaint alleged that the debtor made that payment to the defendant within the 90-day period prior to the bankruptcy filing, while the debtor was insolvent. It asserted that the payment, made on account of an antecedent debt owed to the defendant, enabled the defendant to receive more than it would have received if, as of the date of that payment, the debtor had commenced a case under chapter 7 and the defendant received payment to the extent provided under the Bankruptcy Code. The Trustee claimed that the payment was a preferential transfer, avoidable under 11 U.S.C. § 547 and recoverable under 11 U.S.C. § 550. The defendant's Answer admitted that Odyssey made the payment to it but denied that it was preferential.

After the telephonic pre-trial conference, the plaintiff filed a Motion for Summary Judgment and an Affidavit in Proof of Damages in support of the Motion. *See* R. 10. The Travel Management Invoice, attached to the Affidavit, recorded the costs of the chartered flight service on October 10, 2008, and required payment 10 days after completion of the flight. *See id.*, Aff., Ex. A. However, Odyssey's check to the defendant, paying the defendant in full for the charter service, was dated December 10, 2008, two months after the flight. *See id.*, Aff., Ex. B. The Trustee declared that there were insufficient funds in the bankruptcy estate to pay the other unsecured creditors in full. For that reason, she pointed out, the payment enabled Travel Management to receive more than it otherwise would have received as a creditor in the case. *See id.*, Aff. at ¶ 6.

In its Response to the Motion for Summary Judgment, the defendant acknowledged the underlying facts but argued, as an affirmative defense, that the transfer in question was made in the ordinary course of business or financial affairs of the debtor, pursuant to § 547. The Response included the Affidavit of John Reust, Chief Financial Officer of the defendant. He pointed out, from a spreadsheet appended as an exhibit to the Affidavit, that none of the six payments made by the debtor for the defendant's charter air services was made within the "net ten day" terms. He further noted that "[t]he Defendant made no out of the ordinary collection efforts to receive any of the payments." R. 13, Aff. at ¶ 5. The defendant asked the court to deny the Motion for Summary Judgment. On November 4, 2009, the court took the matter under advisement.<sup>2</sup>

#### Discussion

The Trustee moves for summary judgment on her Complaint, which seeks to avoid and recover a preferential transfer. The court renders summary judgment when 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); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Summary judgment must be granted "against a party who fails to make a showing

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<sup>2</sup> The Trustee's Reply, filed November 6, 2009, was untimely.

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In this case, the facts presented by the plaintiff and defendant are uncontested. The Trustee seeks to recover a single preferential payment made by the debtor to the creditor on December 10, 2008. Section § 547(b) of the Bankruptcy Code provides the Trustee with the power to avoid pre-petition transfers that fulfill the requirements set forth in that provision.<sup>3</sup> The purpose of the preference statute is "to promote equality of distribution among all creditors" and to "deter[] creditors from 'racing to the courthouse to dismember the debtor during [his] slide into bankruptcy.'" *Kleven v. Household Bank F.S.B.*, 334 F.3d 638, 641 (7th Cir.), *cert. denied*, 540 U.S. 1073 (2003) (quoting *Union Bank v. Wolas*, 502 U.S. 151, 161, 112 S. Ct. 527, 116 L.Ed.2d 514 (1991)). It also intends to prevent a debtor from trying to stave off bankruptcy "by giving preferential treatment to his most importunate creditors, who may sometimes be those who have been waiting longest to be paid." *Matter of Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993). The Trustee bears the burden of proving that the requirements of subsection (b) have been met in order to avoid the transfer as preferential. *See* § 547(g).

The Trustee has demonstrated that the payment at issue was made by the debtor for the benefit of the creditor defendant on account of an antecedent debt incurred when the defendant provided aircraft services to the debtor. The debtor was presumed to have been insolvent during the 90 days immediately

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<sup>3</sup> The statute allows the trustee to "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; . . . 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).

preceding the date of the filing of the petition, and the Trustee declared that it was insolvent then. *See* § 547(f). In addition, the payment at issue was made within that 90-day period before the petition was filed. Finally, the Trustee stated in her Affidavit that the transfer enabled the defendant to receive more than it would receive in a chapter 7 proceeding. She explained that the defendant was an unsecured creditor and that unsecured creditors in this case will receive less than 100% distribution. For that reason, she asserted, the defendant’s position was improved by virtue of receiving the payment. The defendant did not contradict the Trustee’s statements in her Affidavit. The court finds that the Trustee has met her burden of proving the required criteria of § 547(b). It determines, therefore, that the December 10, 2008 transfer from the debtor to the defendant is a preferential payment.

However, in subsection (c) of the statute, “Congress created exceptions protecting certain transfers from a trustee’s reach.” *Kleven*, 334 F.3d at 641. The “ordinary course of business” exception of § 547(c)(2), the defense raised by this defendant, “was designed to ‘leave undisturbed normal commercial and financial relationships and protect recurring, customary credit transactions which are incurred and paid in the ordinary course of business of both the debtor and the debtor’s transferee.’”<sup>4</sup> *Id.* at 642 (citation omitted); *see also Energy Cooperative, Inc. v. SOCAP Int’l, Ltd. (In re Energy Co-op)*, 832 F.2d 997, 1004 (7th Cir. 1987). A defendant asserting this defense must prove either the subjective prong of § 547(c)(2)(A) or the objective prong of § 547(c)(2)(B). This defendant focused on the subjective prong. “Courts have interpreted this requirement to be ‘subjective’ in nature insofar as it requires courts to consider whether the

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<sup>4</sup> The “ordinary course of business” exception provides:

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

...

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was –

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms[.]

11 U.S.C. § 547(c)(2).

transfer was ordinary in relation to the other business dealings between the debtor and that particular creditor.” *In re Patriot Seeds, Inc.*, \_\_\_ B.R. \_\_\_, 2010 WL 381612 at \*5 (Bankr. C.D. Ill. Jan. 20, 2010).

In making the determination whether the transfer was ordinary, the court considers the business practices between these particular parties and makes a factual inquiry into their prior dealings. The Seventh Circuit has presented a non-exhaustive list of factors to consider in this analysis:

- (1) the length of time the parties were engaged in the transaction at issue;
- (2) whether the amount or form of tender differed from past practices;
- (3) whether the debtor or creditor engaged in any unusual collection or payment activity; and
- (4) whether the creditor took advantage of the debtor’s deteriorating financial condition.

*Kleven*, 334 F.3d at 642 (citing *Barber v. Golden Seed Co.*, 129 F.3d 382, 390 (7th Cir. 1997)). The defendant bears the burden of proving the nonavoidability of a transfer under subsection (c). *See* § 547(g).

The court began its analysis by reviewing the history of dealing between the parties. The defendant’s business was providing chartered air services, and the debtor used those chartered services in its business. The “Transaction List by Customer,” Exhibit A of John Reust’s Affidavit, described all the transactions between the two parties. The defendant furnished chartered air services to the debtor six times, all in 2008. The defendant sent invoices on April 9, May 13, May 30, July 22, August 1, and October 15, 2008. The debtor paid each bill in full, and the defendant received the payment on May 5 (26 days after the invoice was sent), June 2 (20 days afterwards), June 26 (27 days afterwards), August 14 (23 days afterwards), August 22 (21 days afterwards), and December 11, 2008 (57 days afterwards). The evidence reflects that the debtor made none of the payments within the “net ten day” term required by the invoice. However, Mr. Reust stated that no out of the ordinary collection efforts were made to receive the payments.

The evidence demonstrates that the creditor required payment within ten days of service but that the debtor made all its payments to the creditor late. Prior to the preference period, the debtor’s payments were received between 20 and 27 days after the invoices were sent. Nevertheless, the history also reflects that, even though the payments were not made according to the “net ten-day” term of the parties’ agreement,

they were made and accepted without penalty within that 20-27 day period after the invoices were sent. The court therefore is persuaded that the ordinary practice, in the history of their dealings, was the routine payment of the invoice 20-27 days after the invoice was sent. *See Tolona Pizza Prods. Corp.*, 3 F.3d at 1032 (establishing that consistently late payments were the normal course of business between the parties); *Cox v. Interstate Packaging Group, Inc. (In re Meyer's Bakeries, Inc.)*, 400 B.R. 701, 705 (Bankr. W.D. Ark. 2009) (stating that payments made beyond invoice terms may still be considered ordinary if the late payments were the standard course of dealings between the parties) (citing cases).

In contrast with those patterns of pre-preference period payments, the sole payment made by the debtor during the preference period was made 57 days after the invoice was sent. The court finds that the agreement between the parties was modified by that changed performance. *See Kleven*, 334 F.3d at 643 (“In some instances, . . . the ordinary course of business may be established by the terms of the parties’ agreement, until that agreement is somehow or other modified by actual performance.”). The routine business practice between the parties was established in the first five payments, but the ordinary course of their business affairs changed in the preference period, when the debtor’s payment was not consistent with the pre-preference period payments.

Some courts, after considering the timing and the manner in which the transactions were paid, have found that the differences in the payment periods were not so significant as to take the preference period payments out of the ordinary course of business between the parties. *See, e.g., In re Meyer's Bakeries, Inc.*, 400 B.R. at 706 (comparing pre-preference payments made, on average, 70.2 days after invoice with preference payments made 71.5 days after invoice, finding difference insignificant); *Hovis v. Summit Security Servs., Inc. (In re Air South Airlines)*, 2000 WL 33710878 at \*5 (Bankr. D.S.C. March 6, 2000) (finding that a ten-day difference in pre-preferential and preferential payments was not significant enough to be out of the ordinary). Other courts have determined that the differences were large enough to treat the preference period payments as outside the ordinary course of dealing. *See, e.g., Official Plan*

*Comm. v. Expeditors Int'l (In re Gateway Pacific Corp.)*, 153 F.3d 915, 917-18 (8th Cir. 1998). In the *Gateway Pacific Corp.* case, the evidence had established that the median time that had elapsed between the date of the invoice and the date of the pre-preference payments was 35 days. However, during the preference period, the median time was 54 days, which was a 54% increase over the pre-preference period time. The Eighth Circuit upheld the bankruptcy court's determination that the preference period payments were not made in the ordinary course of business between the parties. *See id.* at 918.

In this case, the median time period for the pre-preference payments was 23.5 days, and the single preference payment, made 57 days after the invoice date, was more than double the length of time. The court finds that difference to be significant and concludes that the preference payment was not made within the ordinary course of dealing between the parties.

For these reasons, the court determines that the Trustee has met her burden of proof, under § 547(b), in establishing that a preferential payment was made from the debtor to the creditor defendant on December 10, 2008, in the amount of \$5,850.77. It further finds that the defendant has failed to establish the defense of ordinary course of business under § 547(c)(2). It concludes that the Trustee is entitled to avoid the December 10, 2008 payment as preferential under § 547(b) and to recover it, in the amount of \$5,850.77, from the defendant under § 550(a). Moreover, she is entitled to prejudgment interest from the date of her Complaint, which was a demand for return of the preferential transfer, calculated at the Federal Reserve Board rate of interest. *See Matter of P.A. Bergner & Co.*, 140 F.3d 1111, 1123 (7th Cir.), *cert. denied*, 525 U.S. 964 (1998); *Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir. 1997); *In re Patriot Seeds, Inc.*, \_ B.R. \_, 2010 WL 381612 at \*10-11. The court therefore grants the Trustee's Motion for Summary Judgment on her Complaint.

Conclusion

The Trustee's Motion for Summary Judgment is granted. Judgment is rendered in the amount of \$5,850.77; and prejudgment interest from the date of the Trustee's Complaint, calculated at the Federal Reserve Board rate of interest; and the costs of this adversary proceeding.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT