



IT IS ORDERED as set forth below:

Date: January 18, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
SUDCO, INC.,	:	BANKRUPTCY CASE
	:	NO. 04-17205-WHD
Debtor.	:	
_____	:	
	:	
JANET WATTS, Trustee,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 05-1134
v.	:	
	:	
PRIDE UTILITY CONSTR., INC.,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is a Motion for Clarification and/or Reconsideration filed by Janet Watts (hereinafter the "Trustee"). The Motion seeks clarification or

reconsideration of this Court’s order denying summary judgment to the Trustee and to Pride Utility Construction Company (hereinafter the “Defendant”) with regard to the Trustee’s complaint to avoid and recover a preferential transfer. Accordingly, this matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(F).

FINDINGS OF FACT AND PROCEDURAL HISTORY

This litigation arises from a contractual relationship between Sudco, Inc. (hereinafter the “Debtor”) and the Defendant. The Debtor subcontracted with the Defendant to perform gas line work on the Debtor’s project for the City of Manchester, Georgia (hereinafter the “Project”). The Debtor and the Defendant had a prior relationship, as the Defendant had acted as a subcontractor for the Debtor on a project for the City of Gainesville, Georgia. The Debtor paid the Defendant \$16,100 on July 23, 2003 in satisfaction of an invoice dated May 29, 2003 with regard to the Gainesville project. Trustee’s Statement of Material Facts, ¶ 16; Defendant’s Response to Trustee’s Statement of Material Fact, ¶ 16. The Debtor also worked as a subcontractor on a project of the Defendant, for which the Defendant paid the Debtor \$45,991 on July 22, 2002, pursuant to an invoice dated May 29, 2002. Trustee’s Statement of Material Facts, ¶ 17; Defendant’s Response to

Trustee's Statement of Material Fact, ¶ 17.

With regard to the Project, the Defendant performed its work under its subcontract with the Debtor from July 2003 through October of 2003. Defendant's Statement of Material Facts, ¶ 2; Trustee's Response to Defendant's Statement of Material Facts, ¶ 2. During the Project, the Debtor invoiced the City for the Defendant's work as it was completed. Trustee's Statement of Material Facts, ¶ 21.

The City made periodic payments to the Debtor for these invoices. Trustee's Statement of Material Facts, ¶ at 24. While the Debtor received regular payments from the City for work performed on the Project, the Debtor did not pay the Defendant in full for its work on the Project. Defendant's Statement of Material Facts, ¶ 3; Trustee's Response to Defendant's Statement of Material Facts, ¶ 3. The Defendant completed the work under the subcontract on October 13, 2003 and sent the Debtor a final invoice for the amount of \$4,016.25 on October 20, 2003. Defendant's Statement of Material Facts, ¶ 4; Trustee's Response to Defendant's Statement of Material Facts, ¶ 4; Trustee's Statement of Material Facts, ¶ 20; Defendant's Response to Trustee's Statement of Material Fact, ¶ 20.

Specifically, the Debtor made various payments to the Defendant for the Defendant's work. Trustee's Statement of Material Facts, ¶ 25; Defendant's Response to Trustee's Statement of Material Facts, ¶ 25. According to the Trustee's

Statement of Material Facts, ¶ 38, the Affidavit of Michael Suddeth, and the checks and invoices submitted, the payment history between the Debtor and the Defendant was as follows:

7/10/03- Defendant's Invoice #5570	\$28,570.00	
7/17/03- Defendant's Invoice #5573	\$ 1,428.50	
7/17/03- Defendant's Invoice #5574	\$30,817.50	
7/24/03- Defendant's Invoice #5583	\$22,622.25	
7/24/03- <i>Debtor Payment to Defendant-</i>	\$28,570.00	(Invoice #5570)
7/30/03- Defendant's Invoice #5586	\$14,621.25	
8/8/03- Defendant's Invoice #5597	\$30,654.75	
8/19/03- Defendant's Invoice #5602	\$33,594.75	
8/29/03- Defendant's Invoice #5616	\$30,518.25	
9/4/03- Defendant's Invoice #5617	\$21,204.75	
9/4/03- Defendant's Invoice #5618	\$21,635.25	
9/12/03- Defendant's Invoice #5638	\$20,354.25	
9/16/03- <i>Debtor Payment to Defendant-</i>	\$42,580.00	
9/19/03- Defendant's Invoice #5651	\$21,714.00	
9/23/03- <i>Debtor Payment to Defendant-</i>	\$32,246.00	(Invoices #5573 & 5574)
10/10/03- Defendant's Invoice #5673	\$ 8,604.75	
10/20/03- Defendant's Invoice #5678	\$ 4,016.25	
11/7/03- <i>Debtor Payment to Defendant-</i>	\$25,000.00	
12/17/03- <i>Debtor Payment to Defendant-</i>	\$10,000.00	
2/18/03- <i>Debtor Payment to Defendant-</i>	\$194,540.50	

As of December 1, 2003, the Debtor owed the Defendant \$204,540.50. The Debtor made a payment to the Defendant on or about December 17, 2003, which reduced the outstanding balance to \$194,540.50. Trustee's Response to Defendant's Statement of Material Facts, ¶ 5. This balance resulted from invoices from the

Defendant to Debtor dated August 8, 2003 through October 20, 2003. Trustee's Statement of Material Facts, ¶ 26. After making this December 2003 payment, the Debtor lacked the funds from its operating revenues to make any further payments. Affidavit of Michael Suddeth, ¶ 27.

Because the Project was for a public entity, the Defendant had no lien rights that could be asserted in the event of nonpayment. Defendant's Statement of Material Facts, ¶ 7; Trustee's Response to Defendant's Statement of Material Facts, ¶ 7. For this reason, a payment bond was issued for the protection of subcontractors working on the Project. Defendant's Statement of Material Fact, ¶ 8; Trustee's Response to Defendant's Statement of Material Fact, ¶ 8; Trustee's Statement of Material Facts, ¶ 13. Two to three weeks prior to February 18, 2004, the Defendant informed the Debtor that, unless full payment of the outstanding balance was forthcoming, the Defendant would make a demand against the payment bond. Defendant's Statement of Material Facts, ¶ 9; Trustee's Response to Defendant's Statement of Material Facts, ¶ 9; Trustee's Statement of Material Facts, ¶ 35; Defendant's Response to Trustee's Statement of Material Fact, ¶ 35. The Debtor's principal was concerned about the possibility of having a claim made against the payment bond because of the impact it would have on the Debtor's ability to obtain future public contracts. Trustee's Statement of Material Facts, ¶ 36; Affidavit of

Michael Suddeth, ¶ 30. Rather than have the Defendant make a claim against the payment bond, the Debtor made a final and full payment to the Defendant by check on February 17, 2004. Defendant's Statement of Material Fact, ¶ 12; Trustee's Response to Defendant's Statement of Material Fact, ¶ 12; Trustee's Statement of Material Facts, ¶ 3. The check cleared the Debtor's bank account on February 25, 2004. Trustee's Statement of Material Facts, ¶ 4.

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on April 8, 2004. The Trustee was appointed as the trustee of the Debtor's bankruptcy estate. On September 6, 2004, the Trustee filed a complaint seeking to avoid and recover the \$194,540.50 payment made by the Debtor to the Defendant.

The Trustee and the Defendant filed cross motions for summary judgment. The Court held oral argument on the cross motions and entered an order denying both motions. In its previous order, the Court found that the Trustee had failed to demonstrate that no genuine issues of material fact remained as to the issue of whether the funds transferred were property of the Debtor. Additionally, the Court declined to consider the issue of whether the Defendant could succeed on its ordinary course of business defense because of conflicting evidence within the submitted affidavits with regard to whether the transfer had been made according to ordinary business practices in the parties' industry. In the instant motion, the Trustee seeks

clarification as to whether the Court considered her position that, as a matter of law, the Defendant would be unable to prove its ordinary course of business defense due to the lack of evidence that the transfer was ordinary as between the parties.

CONCLUSIONS OF LAW

The Court's previous order denying the Trustee's motion for summary judgment was not a final order in that it did not adjudicate finally any part of the claims at issue. *See* FED. R. BANKR. P. 7054. Accordingly, the Court's previous order is "subject to revision until another decision adjudicating all the claims, rights, and liabilities of the parties has been made." *Matter of Wade*, 969 F.2d 241 (7th Cir. 1992); *see also Mugno v. Casale*, 1997 WL 152793 (E.D. Pa. 1997) ("Here, the bankruptcy court's previous orders with respect to Casale's motions for summary judgment were interlocutory and, consequently, it was well within the court's power to subsequently reverse its decision.").

In its original order, the Court considered only whether the Defendant or the Trustee would be entitled to summary judgment on the complaint as a whole. The Court did not consider whether the Trustee is entitled to summary judgment as to the discrete issue of whether the Defendant's ordinary course of business defense must fail due to its failure to meet one of the required elements of the defense. If the Court

finds that the Defendant's ordinary course of business defense is not tenable, summary judgment would be proper with regard to that issue only, as the Trustee would still be required to demonstrate at trial that the funds transferred were property of the Debtor. However, as the Trustee has pointed out in her Motion, a ruling that the undisputed facts do not support an ordinary course of business defense would narrow the issues that must be tried and, for that reason, would assist the parties and the Court in resolving this matter and would result in a cost savings to the Debtor's estate. For this reason, the Court will revise and supplement its original order.

A. Summary Judgment Standard

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, a party moving for summary judgment is entitled to prevail only 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 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322. The moving party bears the initial burden of establishing that no genuine factual issue exists. *See Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir.1991). The movant must

point to the pleadings, discovery responses, or supporting affidavits which tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

The Court must construe this evidence in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir.1987). If the moving party satisfies its burden to show an absence of a genuine issues of material fact, no burden of going forward arises for the opposing party, and the non-moving party must designate “specific facts showing that there is a genuine issue for trial.” *Clark*, 929 F.2d at 608; *Celotex*, 477 U.S. at 324.

C. Section 547(c)

Once a trustee has established that a transfer of property of the debtor meets the requirements of section 547(b) and is, therefore, a preferential transfer, section 547(c) provides several affirmative defenses to the avoidance of the transfer. The defendant bears the burden of proving, by a preponderance of the evidence, that such a defense applies. See 11 U.S.C. § 547(g); *In re Arrow Air Inc.*, 940 F.2d 1463 (11th Cir. 1991); *In re Jet Florida Systems, Inc.*, 861 F.2d 1555, 1558 (11th Cir. 1988); *In re General Time Corp.*, 328 B.R. 243, 247 (Bankr. N.D. Ga. 2005) (Mullins, J.).

At issue here is whether the Defendant can prove that it is entitled to an “ordinary course of business” defense. Under section 547(c)(2), the trustee may not avoid a preferential transfer "to the extent 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; . . . made in the ordinary course of business or financial affairs of the debtor and the transferee; and . . . made according to ordinary business terms.” 11 U.S.C. § 547(c)(2).¹ To prevail, the Defendant must prove all three elements of the defense. *See In re Issac Leaseco, Inc.*, 389 F.3d 1205 (11th Cir. 2004); *In re Globe Holdings*, 366 B.R. 186 (Bankr. N.D. Ala. 2007).

The Trustee focuses particularly on the second element – that the transfer was “made in the ordinary course of business or financial affairs of the debtor and the transferee.” 11 U.S.C. § 547(c)(2)(B). Specifically, the Trustee contends that the record permits sufficient findings of fact to conclude that, as a matter of law, the transfer was not made in the ordinary course of business or financial affairs of the Debtor and the Defendant.

¹ The payment at issue in this case occurred in February 2003, the Debtor filed its voluntary petition on April 8, 2004, and the Trustee filed the instant adversary proceeding on September 6, 2005. Accordingly, the Court applies section 547(c)(2) as it existed prior to the amendments made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *See* Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23 (“BAPCPA”); *In re Globe Holdings*, 366 B.R. 186 (Bankr. N.D. Ala. 2007).

Section 547(c)(2)(B) is a “subjective” inquiry. *See In re Gem Const. Corp. of Virginia*, 262 B.R. 638 (Bankr. E.D. Va. 2000). In conducting this analysis, courts “generally compare the parties' pre-preference period course of conduct with the parties' course of conduct during the preference period.” *In re Brown Transport Truckload, Inc.*, 161 B.R. 735, 739 (Bankr. N.D. Ga. 1993) (Drake, J.) (citing *Marathon Oil Co. v. Flatau (In re Craig Oil Co.)*, 785 F.2d 1563 (11th Cir.1986)); *see also In re Healthcentral.com*, 504 F.3d 775 (9th Cir. 2007) (defendant must establish a base line of past practices between itself and the debtor and then show that the payment at issue was “ordinary in relation to these past practices”). Four factors are generally considered in this regard: “1) the length of time the parties were engaged in the transactions at issue; 2) whether the amount or the 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.” *In re Cocolat, Inc.*, 176 B.R. 540 (Bankr. N.D. Cal. 1995) (citing *In re Grand Chevrolet, Inc.*, 25 F.3d 728 (9th Cir. 1994)). The fact that payment is made in response to unusual collection practices tends to demonstrate that the transfer was outside the ordinary course of business. *See In re Gem Const. Corp. of Virginia*, 262 B.R. 638 (Bankr. E.D. Va. 2000) (payment was not made in the ordinary course of business of the debtor and creditor because the

payment was made in response to the creditor's filing of a mechanic's lien, and the creditor had never before filed a mechanic's lien in 20 years of dealings between the parties); *In re Accessair, Inc.*, 314 B.R. 386 (8th Cir. BAP 2004) (payments made in response to threat by creditor to cease providing software support were not made in the ordinary course).

In this case, the Trustee points primarily to the fact that the Debtor made the payment at issue in direct response to the Defendant's threat to make a claim on the payment bond. The Defendant does not dispute this fact. Instead, the Defendant asserts that such a threat is not an "unusual collection practice" in the industry and, therefore, does not take the payment outside the ordinary course of business or financial affairs of the Debtor and the Defendant.

The Debtor and the Defendant do not have an extensive history of doing business together. The Debtor previously worked for the Defendant on one occasion, and the Defendant worked for the Debtor as a subcontractor on one other job. When the Debtor worked for the Defendant, the Defendant paid the Debtor in full for an invoice within 54 days from the date of the invoice. When the Defendant previously worked for the Debtor, the Debtor paid the Defendant in full for an invoice 55 days from the date of the invoice. However, these jobs were clearly not as large as the one at issue in this case. The fact that the Debtor was able to pay the Defendant in full

for a \$16,000 bill within less than two months of the invoice date does not necessarily shed any light on whether it was customary for the Debtor to take longer to pay a much larger amount due. Additionally, there is no evidence in the record that either the Debtor or the Defendant threatened to make a claim against a bond or file a lien on either of these previous projects in order to recover payment.²

With regard to the Project, the Court cannot ascertain from the undisputed facts the exact payment history between the Debtor and the Defendant. Not all of the checks submitted as Exhibit C to the affidavit of Michael Suddeth reference an invoice number, the payment amounts do not necessarily correspond to the amount of the invoices submitted as Exhibit A to the affidavit, and the affidavit does not clarify which invoices were paid with which check.

That being said, the invoices and checks that do correlate show that, at the beginning of the Project, it took the debtor only 68 days or less to pay the Defendant's invoices in full. For instance, the Defendant billed the Debtor \$28,750 on July 10, 2003 (invoice number 5570), and the Debtor paid that invoice in full fourteen days later on July 24, 2003. The Defendant issued invoice numbers 5573

² In fact, it is undisputed that the Debtor had never before received such a threat from any creditor, which would support a finding that the Defendant had not previously made such a threat to the Debtor. *See* Trustee's Statement of Undisputed Facts, ¶ 47; Affidavit of Michael Suddeth, ¶ 34.

and 5574, which totaled \$32,246 on July 17, 2003, and the Debtor paid these invoices in full 68 days later on September 23, 2003. Check number 2499, a payment for \$42,580, references the payment of invoice number 5575, which is not included in Exhibit A. It would appear, however, that this missing invoice was paid in full on September 16, 2003 and was issued at some time between July 17, 2003 (the date of invoice number 5574) and July 24, 2003 (the date of invoice number 5583).³ Based on that, the Court can conclude that it took the Debtor approximately 54 to 60 days to pay invoice number 5575 in full. Following the Debtor's payment of invoice numbers 5573 and 5574 on September 23, 2003, the Debtor's next payment was in the amount of \$25,000 (check number 2764) and was made on November 7, 2003. The payment does not reference an invoice number, and the payment amount does not correspond to any of the invoices or any combination of invoices.⁴ Assuming the Debtor paid the next oldest invoice with check number 2764, the Debtor would have paid invoice number 5583 in the amount of \$22,622.25. Invoice number 5583 was issued July 24, 2003, or approximately 62 days prior to the

³ The Trustee notes that this invoice was not produced by the Defendant. *See* Trustee's Statement of Material Facts, ¶ 43; Defendant's Response to Trustee's Statement of Material Facts, ¶ 43.

⁴ At that time, however, the Debtor's outstanding balance owed to the Defendant was approximately \$229,540. *See* Trustee's Statement of Material Facts, ¶ 41; Defendant's Response to Trustee's Statement of Material Facts, ¶ 43.

payment date.

The Debtor made only one other payment outside the preference period. This payment was made on December 17, 2003 in the amount of \$10,000 (check number 2934). According to the check reference, this amount was a partial payment of invoice number 5586, which was issued on July 30, 2003 in the amount of \$14,621.25. Therefore, by December 17, 2003, the Debtor had taken 140 days to pay a portion of the next oldest invoice.

The payment that the Trustee seeks to avoid was made on February 18, 2003. It satisfied the outstanding balance of \$194,540, which remained due after the Debtor's previous payment in December 2003. This balance represented invoices dated from August 8, 2003 through October 29, 2003. Accordingly, the time between the invoice date and the payment date ranged from 112 days to 194 days. This payment differs substantially from the previous payments made by the Debtor to the Defendant outside the preference period. First, with the exception of the \$10,000 payment made in December, the time between the invoice date and the payment date for payments made outside the preference period was significantly shorter. Second, the February payment was substantially larger than any of the payments made outside the preference period, and the February payment satisfied in full nine separate invoices, whereas outside the preference period, the largest number

of invoices paid at one time was two. Finally, it is undisputed that the Debtor borrowed the funds to make this payment,⁵ and there is no evidence to suggest that the Debtor borrowed funds to make any of the previous payments to the Defendant.⁶

All of these distinctions between the payments made outside the preference period and the payment made during the preference period demonstrate that the Debtor's financial condition was worsening throughout the Fall of 2003, culminating in the Debtor's borrowing funds to make one final payment of the balance owed to the Defendant in order to avoid the Defendant's making a claim against the performance bond. The evidence submitted by the Trustee, specifically the Suddeth Affidavit, confirms this conclusion, and the Defendant has pointed to no evidence that would call it into doubt. Rather than question the Trustee's contention that the Debtor made the payment in response to the Defendant's threat to make a claim on the bond, the Defendant argues that this threat was not an "unusual collection practice" in this industry.

The Court need not determine whether the threat to collect against the bond

⁵ As noted in the Court's earlier order, there remains a question of fact as to whether the Debtor borrowed the funds from James Pitts or from Robert Carden. That dispute, however, is not material to the issue before the Court in this Motion.

⁶ The deposition testimony of James Pitts and Robert Carden supports a finding that the Debtor regularly borrowed money from various sources for purposes of paying payroll obligations and purchasing equipment, but does not specifically indicate that the Debtor borrowed the funds used to make any payment to the Defendant.

was an unusual collection practice. All of the facts and circumstances surrounding the February payment support the conclusion that the payment was not made in ordinary course of business. Even if the Court were to find that making such a threat was not unusual in the industry, the numerous distinctions between the February payment and the previous payments between these parties would require a finding that the February payment, nonetheless, was unusual between these parties and, therefore, was not made in the ordinary course of business of the Debtor and the Defendant. For this reason, the Court finds that the Trustee has pointed to sufficient evidence to establish that the Defendant cannot maintain an ordinary course of business defense. The Defendant has pointed to no evidence that would rebut this conclusion. Accordingly, the Trustee is entitled to summary judgment on this point.

CONCLUSION

For the reasons stated above, the Trustee's Motion for Reconsideration is **GRANTED**. The Court finds that the undisputed facts do not support an ordinary course of business defense and that the Trustee is entitled to summary judgment as to the Defendant's ordinary course of business. At further trial on the Trustee's complaint, the issues will be limited to whether the Trustee can establish an avoidable preference under section 547(b) and, if so, whether the Defendant can

establish a defense under section 547(c)(1).

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