UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
EXPRESS FACTORS, INC.,	02-66992-MGD
Debtor,	
TAMARA MILES OGIER, As Chapter 7 Trustee for the Estate of Express Factors, Inc.,	ADVERSARY CASE NO. 04-06076
Plaintiff,	
v.	
MARY M. TRAUTMAN,	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendant.	

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This above-referenced adversary proceeding is before the Court on a Motion for Summary Judgment (A.P. Docket Nos. 13-17) filed by Tamara Miles Ogier, as Chapter 7 Trustee for the Estate of Express Factors, Inc. ("Plaintiff"). Mary M. Trautman ("Defendant") filed a response to Plaintiff's Motion for Summary Judgment (A.P. Docket Nos. 27-29), and a Cross-Motion for Partial Summary Judgment (A.P. Docket Nos. 30-31). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157(b)(1) and 28 U.S.C. § 1334. The Court has reviewed the record in the case and the matters currently before it and has determined that a hearing is not necessary to resolve the matter. For the reasons set forth below, Plaintiff's Motion for Summary Judgment is ***granted in part and denied in part*** and Defendant's Cross-Motion for Partial Summary Judgment is ***granted***.

FACTS

Express Factors, Inc. ("Debtor") was in the factoring business. (Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute, ¶5). Debtor's president, Ulys Randall Riner ("Riner"), met with Defendant at Debtor's office in April 1999. (Affidavit of Mary M. Trautman, ¶3). During the meeting, Riner solicited a loan in the amount of $500,000 from Defendant for purposes of expanding his factoring business to finance more accounts receivable. (*Id.*). Thereafter, Defendant loaned Debtor $500,000 to be used as capital in Debtor's factoring business, and on May 14, 1999, Debtor executed a Promissory Note ("Note") in the principal amount of $500,000 at an interest rate of 10.75 percent to be adjusted on January 1 and July 1 each year to its stated maturity date of May 13, 2002. (*Id.*, ¶4). Pursuant to the terms of the Note, all accrued interest was to be paid at maturity. (*Id.*, ¶7). After September 11, 2001, Defendant contacted Riner and requested to be paid back at that time. (Deposition of Riner, p. 68). Defendant had to be reminded that the Note was a three year agreement. (*Id.*).

On May 10, 2002, Riner informed Defendant that Debtor was unable to pay the entire amount due on the Promissory Note by May 16, 2002. (Affidavit of Mary M. Trautman, ¶10). The stated maturity date of the Note was May 13, 2002. The Note further provides: "During the term of this Note, the Payee may deposit additional Principal under this Note or may withdraw Principal from this Note; provided, however, the Principal may not be reduced below $500,000.00. (Five Hundred Thousand Dollars) without the approval of EXPRESS FACTORS, INC.; as further provided, that EXPRESS FACTORS, INC. may, at its option, delay the payment of any Principal withdrawal for three business days; and further provided, that in the event of the death of the Payee, the Executor of the Estate of the Payee may, upon ninety (90) days written notice to EXPRESS FACTORS, INC., withdraw all or any portion of the then Principal Amount." The parties dispute whether the Note therefore includes a three-day grace period.

However, Riner stated that Debtor would timely pay one-half the amount due

($250,000) by way of wire transfer with the balance including accrued interest to be paid within thirty days (June 13, 2002) as funds were collected. (*Id.*). Repayment to Defendant would come from collections of outstanding factored accounts, and Debtor did not want to endanger the business by withdrawing the entire amount without first securing a replacement lender. (Defendant's Amended Response to Plaintiff's First Interrogatories, ¶8). To raise funds, Debtor procured an investment of $250,000 from a family member, Warren Berry ("Berry"), the uncle of Riner's wife. (Deposition of Riner, p. 69). Berry had previously invested other amounts which had been repaid. (*Id.*). Defendant was unaware of Berry's investment. Defendant agreed in principle, but first desired to discuss the offer with her attorney. (Affidavit of Mary M. Trautman, ¶10).

On May 13, 2002, Defendant's attorney, Rex Cornelison ("Cornelison"), spoke with Riner and requested assurance that the payments would be made and explored the possibility of interim payments. (*Id.*, ¶11). Cornelison specifically requested that Defendant receive financial statements of Debtor and a personal guaranty from Riner. (*Id.*). Riner responded that since the payments were being made from collection of receivables that it was not necessary to wait a full thirty days, and offered to pay $50,000 in two weeks, and an additional $50,000 one week later, with the balance due by June 13, 2002, all via wire transfer. (*Id.*).

Later that day when Cornelison called Riner back to announce Defendant's acceptance of the offer, Riner instructed Cornelison to speak with his attorney, James Alexander ("Alexander"), as to the personal guaranty or financial statements. (*Id.*, ¶ 12). When Cornelison spoke with Alexander, Alexander refused to provide personal guaranties or financial statements or do anything more than the agreed scheduled payment of $250,000 plus the two $50,000 payments via wire transfer. (*Id.*, ¶ 13). On May 15, 2002, Debtor paid Defendant $250,000. (Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute, ¶12). Defendant had no knowledge of the source of the $250,000 payment. (Affidavit of Mary M. Trautman ¶ 15).

Ultimately, Alexander declined to provide any personal guaranty or financial statements. (Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute,

¶14). Defendant threatened legal action on May 21, 2002. (*Id.*, ¶15). Defendant's counsel drafted a Complaint against Debtor, a Motion for Expedited Discovery, a Memorandum of Law in Support of Plaintiff's Motion for Expedited Discovery, a Notice of Deposition, a Notice to Produce, a Motion for Temporary Restraining Order and a Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order. (*Id.*).

Defendant received two additional transfers of $50,000 each from Debtor on May 24, 2002 and May 31, 2002. (*Id.*, ¶16). Debtor filed a petition under chapter 7 of the Bankruptcy Code on June 27, 2002.

During the ninety days preceding the filing of Debtor's bankruptcy, Debtor paid Defendant the total sum of $350,000. (*Id.*, ¶17). Debtor's transfer of $350,000 to the Defendant, a creditor, was in partial satisfaction of the antecedent debt established by the aforementioned Note. (*Id.*, ¶18). The transfer of the $350,000 enabled the Defendant to receive more than she would have under chapter 7 of the Bankruptcy Code, if the transfer had not been made and if such creditor received payment of such debt to the extent provided by the provisions of title 11 of the United States Code. (*Id.* ¶19).

PROCEDURAL POSTURE

Plaintiff commenced this adversary proceeding on March 10, 2004, by filing a complaint alleging that Defendant was the recipient of a preferential payment as defined by 11 U.S.C. § 547(b). Plaintiff contends that she is entitled to avoid the transfers pursuant to § 547 and preserve said transfers for the Estate pursuant to § 551.[1] Defendant filed a timely answer to the complaint asserting two affirmative defenses. Defendant contends that the payments made by Debtor to her were made in the ordinary course of business as described by § 547(c)(2). Defendant also asserted that the payments made by Debtor to Defendant fall

[1]In her Motion for Summary Judgment, Plaintiff contends that Defendant is liable to the Estate for the value of the transfers pursuant to § 550.

within the exception in § 547(c)(1), contemporaneous exchanges for new value.

Plaintiff's Motion for Summary Judgment sets forth the contention that all elements of a preferential transfer have been met and that Defendant's two affirmative defenses are both without merit. Defendant filed a response in opposition to Plaintiff's motion which relies entirely upon the ordinary course of business defense to the preference charge. Defendant also moved for partial summary judgment, arguing that the $250,000 payment was in partial satisfaction of the Note entered into between the parties and was made in the ordinary course of business. Plaintiff filed a timely response, and the matter has been submitted for the Court's determination.

STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the non-moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). "The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact .... If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts." *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or

other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

DISCUSSION

Section 547(b) of the Bankruptcy Code, 11 U.S.C. § 547(b), provides in part as follows:

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;...
(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

The purpose of this section of the Bankruptcy Code is to ensure that creditors are treated equitably, both by deterring a failing debtor from giving preferential treatment to its most obstreperous and demanding creditors in an effort to stave off a hard ride into bankruptcy, and by discouraging creditors from racing to dismantle the debtor. *Bohm v. Golden Knitting Mills, Inc. (In re Forman Enters.)*, 293 B.R. 848, 855 (Bankr.W.D.Pa. 2003) (internal citations omitted). In the instant case, there appears to be no genuine dispute that the payments totaling $350,000 from Debtor to Defendant constitute preferential transfers if not for the affirmative defense put forth by Defendant. (*See* Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute, ¶¶ 18-19). However, Defendant asserts an ordinary course of business defense, pursuant to 11 U.S.C. § 547(c)(2). The Court will now address the applicability of Defendant's affirmative defense as it applies to the purportedly preferential transfers.

Ordinary Course of Business Defense

11 U.S.C. § 547(c) provides:

The trustee may not avoid under this section a transfer –
(2) to the extent 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 legislative history of § 547(c)(2) indicates that the purpose of the section is "to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." *Central Hardware Co. v. Sherwin-Williams Co. (In re Spirit Holding Co.)*, 153 F.3d 902, 904 (8th Cir. 1998) *citing* S.Rep. No. 95-989 at 88 (1979), reprinted in 1978 U.S.C.C.A.N. 5787, 5874; H.R.Rep. No.95-595 at 373 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6329; also *Marathon Oil Company v. Flatau (In re Craig Oil Company)*, 785 F.2d 1563, 1566 (11th Cir. 1986).

Section 547(c)(2) provides that a debtor's otherwise preferential payments may not be avoided if three conditions are satisfied. The payments must be (1) made as a payment incurred in the ordinary course of the debtor's business; (2) made in the ordinary course of business between the debtor and the creditor; and (3) made according to ordinary business terms. *Craig Oil Company*, 785 F.2d at 1564-65; *Logan v. Basic Distribution Corp. (In re Fred Hawes Org., Inc.)*, 957 F.2d 239, 243 (6th Cir. 1992); *Brizendine v. Barrett Oil Distribs., Inc. (In re Brown Transport Truckload, Inc.)*, 152 B.R. 690, 691-92 (Bankr.N.D.Ga. 1992); *Ellenberg v. Tulip Prod. Polymerics (In re T.B. Home Sewing Enters.)*, 173 B.R. 782, 787 (Bankr.N.D.Ga. 1993). A creditor asserting that a transfer falls within § 547(c)(2) bears the burden of proving each of the three elements of the defense. *See* § 547(g) and *Miller v. Florida Mining & Materials (In re A.W. & Assocs.)*, 136 F.3d 1439, 1441 (11th Cir. 1998). Each

element must be established by a preponderance of the evidence. *Official Comm. Of Unsecured Creditors of Toy King Distribs. v. Liberty Sav. Bank, FSB (In re Toy King Distribs.),* 256 B.R. 1, 113 (Bankr.M.D.Fla. 2000).

It seems clear that § 547(c)(2) should protect those timely payments which do not result from "unusual" debt collection or payment practices. To the extent an otherwise "normal" payment occurs in response to such practices, it may be outside the scope of § 547(c)(2). Thus, whenever the bankruptcy court receives evidence of unusual collection efforts, it must consider whether the debtor's payment was in fact a response to those efforts. *Craig Oil Company*, 785 F.2d at 1566.

With respect to Plaintiff's Motion for Summary Judgment, the burden is on Plaintiff to show that the undisputed facts in the record preclude the ordinary course of business defense as to the transfers between Debtor and Defendant. Likewise, for the Court to grant Defendant's Motion for Partial Summary Judgment, Defendant must demonstrate that even if the Court views the evidence in a light most favorable to Plaintiff, there is no genuine issue of fact as it pertains to a potential granting of its affirmative defense.

As mentioned *supra,* a creditor must establish three elements in order for the "ordinary course of business" exception to be applicable. First, the transfer must have been made on account of a debt incurred in the ordinary course of business of the debtor and transferee. The second prong, examining whether the payment was made in the ordinary course of business between the debtor and the creditor, is a subjective test and reviews the dealings between the parties. Finally, the Court must conclude that the transaction was made according to ordinary business terms, or objective industry standards.

Regarding the underlying debt in question, the Court concludes that the first element has been satisfied. Debtor's president Riner procured a $500,000 loan from Defendant. The funds were used as capital in Debtor's factoring business to help fund its purchase of receivables. The parties executed a promissory note that specified the terms of the transaction.

Debtor was to be paid interest at a rate that was by all accounts commercially reasonable,[2] on a date established by the Note.[3] The record indicates that this was a loan entered into by Debtor and Defendant on commercial terms for a business purpose.

The Plaintiff contends that this transfer was not incurred in the ordinary course by the parties due to the fact that it was, based upon her review, the only note executed by Debtor to an investor with a specific due date. According to her affidavit filed with the Court, all other notes reviewed by Plaintiff were demand notes. The Court considers this to be a distinction without a difference. The focus in the analysis is on the *nature of the original transaction creating the debt. Toy King Distribs.*, 256 B.R. at 114 (internal citations omitted) (emphasis added). "[c]ourts generally are interested in whether or not the debt was incurred in a typical, arms-length commercial transaction that occurred in the marketplace, or whether it was incurred as an insider arrangement with a closely-held entity." *Huffman v. New Jersey Steel Corp. (In re Valley Steel Corp.)*, 182 B.R. 728, 735 (Bankr.W.D.Va. 1995) *cited in Toy King Distribs.*, 256 B.R. at 114. Subsection (c)(2)(A) "is required merely to assure that neither the debtor nor the creditor do anything abnormal to gain an advantage over other creditors, an extensive showing that such transactions occurred often, or even regularly, is not necessary. The transaction need not have been common, it need only be ordinary." *Valley Steel Corp.*, 182 B.R. at 735 *citing Campbell v. Cannington (In re Economy Milling Co.)*, 37 B.R. 914, 922 (D.S.C. 1983). Nothing in the record contradicts the fact that this was an arms-length transaction with a legitimate business purpose.

Having concluded that the transfer was made on account of a debt incurred in the ordinary course of business of the debtor and transferee, the Court will now focus on the second and third prongs of the ordinary course of business analysis. The Court will discuss

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[2]There is nothing in the record to suggest it was not a commercially reasonable rate.

[3]The parties are in agreement that the Note states that the date of maturity is May 13, 2002. However, Defendant contends that a three-day grace period was incorporated in the Note and understood by the parties. This is a point of dispute between the parties.

these separately as they pertain to: (1) the two $50,000 payments, and (2) the $250,000 payment.

1. The two $50,000 payments

The second element requires a creditor to demonstrate that a debtor's transfer to it was made in the ordinary course of both its business and the debtor's business. This subjective element focuses on the parties' relationship with one another. *Howard v. Bangor Hydro Elec. Co. (In re Bangor & Arrostook R.R. Co.)*, 324 B.R. 164, 168 (Bank.D.Me. 2005). The two $50,000 payments fail to meet this requirement.

The Note's terms provide for a maturity date of May 13, 2002, and while it is a point of dispute between the parties whether there is a three-day grace period for payment, it was only on May 24, 2002 and May 31, 2002 when Debtor paid Defendant the two payments of $50,000. Previously, Debtor had contacted Defendant and informed her that it would be unable to pay the amount due on May 13, 2002.[4] While a $250,000 payment was eventually made[5] on May 15, 2002, representing partial performance on the Note, the two payments of $50,000 were paid in a manner that suggested a potential restructuring of the obligation.

Under § 547(c)(2)(B), the court must make a subjective inquiry about whether the payment of a debt was made in ordinary course of business of the debtor and the transferee. *T.B. Home Sewing Enters.*, 173 B.R. at 787. Among factors that bankruptcy courts consider in deciding whether an alleged preferential payment was made "in the ordinary course of business" of a debtor and a transferee, are prior course of dealing between parties, amount of payment, timing of payment, and circumstances surrounding payment. *Id.*

Pertaining to the timing of the payment, the Eleventh Circuit has held that lateness is

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[4]See Affidavit of Mary M. Trautman, at ¶ 10.

[5]The applicability of the ordinary course of business defense to the $250,000 payment will be addressed below.

an important factor in deciding whether payments should be protected by the ordinary course of business exception. *Craig Oil Company*, 785 F.2d at 1567. Late payments are presumed to be outside the ordinary course of business, although such presumption can be overcome by a showing that late payments were in the ordinary course of the parties' business. *Grant v. Suntrust Bank, N.A. (In re L. Bee Furniture Co.),* 203 B.R. 778, 782 (Bankr.M.D.Fla. 1996) (Internal citations omitted). In this case, there is no prior dealing between the parties. While a late payment can actually be considered ordinary if it is within the pattern of payments between the parties[6] no pattern exists in the instant case. The payments were eventually made on May 24, 2002 and May 31, 2002, after the date contemplated by the Note, after a substantial repayment had been made, and in amounts dramatically less that what had come due under the Note.

In addition to the lateness and amount of the two $50,000 payments, they were made under what has to be described as atypical circumstances. The Eleventh Circuit has stated that payments made in response to unusual debt collection practices by the creditor are outside the scope of the ordinary course of business exception. *Craig Oil Company*, 785 F.2d at 1566; *Moltech Power Sys. v. Tooth Indus. (In re Moltech Power Sys.)*, 327 B.R. 675, 683 (Bankr.N.D.Fla. 2005). With regard to the two $50,000 payments, both Defendant and Debtor had involved their respective attorneys; financial statements and personal guaranties were requested and refused; and litigation was threatened. Even after construing all facts in the light most favorable to Defendant, the Court determines that the subjective requirement specified in § 547(c)(2)(B) has not been satisfied, and accordingly, summary judgment is appropriate for Plaintiff on the two $50,000 payments. Having reached this conclusion, the Court need not discuss whether the payment was made under objective ordinary business standards as Defendant must satisfy all three parts of the ordinary course of business test for the defense to be applicable.

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[6] See *Miller v. Perini Corp. (In re A.J. Lane & Co.)*, 164 B.R. 409 (Bankr.D.Mass. 1994) at 414-415 for a list of cases that describe a late pattern of payments between creditor and debtor considered ordinary.

2. The $250,000 payment

On May 10, 2002, Riner contacted Defendant and informed her that Debtor would be unable to pay the entire amount due on the Note by May 16, 2002. Riner had stated that Debtor could timely pay $250,000 and the balance with accrued interest within thirty days. On May 15, 2002, a payment of $250,000 was made to Defendant. Plaintiff argues that even if the facts are construed in a light most favorable to Defendant, the ordinary course of business defense does not apply to the $250,000 payment and therefore it is recoverable as a preferential transfer. Conversely, Defendant, in her Motion for Partial Summary Judgment, contends that even if the facts are construed in a manner most advantageous to Plaintiff, it is deserving an award of summary judgment regarding the applicability of the ordinary course of business defense as it would apply toward the $250,000 payment.

In some ways, application of the rigid analysis of § 547(c)(2) to the repayment of a single payment promissory note is like fitting a round peg into a square hole. It must be assumed that the payment of a promissory note according to its terms would fall within the ordinary course of business. Indeed, the Court is not aware of a single case in which such a payment was ever challenged by a trustee. The only factual difference in this case is that not all of the dollars that were loaned to Debtor were repaid at the time called for by the Note. It would seem to be wholly at odds with preference policy to find that the receipt of $250,000 by Defendant was a preference when a payment of the full $500,000 under the exact same facts would not be a preference. If anything, such a rule would increase the incentive for creditors to pressure a financially distressed debtor to abide by the terms of an instrument rather than work with a debtor to avoid a bankruptcy scenario. On that basis alone, the Court would find that the $250,000 payment is within the ordinary course of business exception.

However, the Court also finds that the tests of § 547(c)(2) are met. To satisfy her burden under § 547(c)(2)(B), Defendant must prove that the $250,000 transfer at issue was subjectively ordinary as between the parties. In determining what is *ordinary* factors such as timing, amount and manner in which a transaction was paid are considered relevant. *United*

States Trustee v. First Jersey Sec., Inc. (In re First Jersey Sec., Inc.), 180 F.3d 504, 512 (3rd Cir. 1999) *citing In re Yurika Foods Corp.*, 888 F.2d 42, 45 (6th Cir. 1989). This prong of the ordinary course of business test is a fact-intensive inquiry by nature. *Moltech Power Sys.*, 327 B.R. at 680. Courts have noted that, in general, the defense provided by § 547(c)(2) is not suitable for determination by summary judgment. *Ice Cream Liquidation, Inc. v. Niagara Mohawk Power Corp. (In re Ice Cream Liquidation, Inc.)*, 320 B.R. 242, 250 (Bankr.D.Conn. 2005) (internal citation omitted). However, the Court finds there to be a sufficient basis in the record for a granting of summary judgment as to the applicability of the ordinary course of business defense pertaining to the transfer of $250,000.

The Court finds it highly relevant that the payment was made to Defendant without the application of any pressure. The record reflects that Debtor's president, Riner, contacted Defendant and informed her about the fact that Debtor would not be able to pay the full amount of the Note by the due date. While Defendant informed Riner that she would have to consult with her attorney about the payment proposal suggested by Riner, it is dispositive that the $250,000 was paid prior to the involvement of the attorneys and threat of litigation.

Plaintiff argues that the payment was made late regarding the stated terms on the Note. There is nothing in the record to suggest that the timing of the payment (2 days after the maturity date as stated on the Note) evidenced any intent to prefer Defendant over other creditors. *See Speco Corp. v. Canton Drop Forge (In re Speco Corp.)*, 218 B.R. 390, 400 (Bankr.S.D.Ohio 1998). The Court does not view the two-day period as determinative. The Note does not require that payment be made in cash or by cashier's check and it also does not contain a "time is of the essence" clause. If Debtor had mailed or even given Defendant a check on the maturity date of the Note, it is in the normal course for Defendant to not have the proceeds in her bank account until at least two days later. This was not an invoice payable in ten days, where a two-day delay might be seen as significant. This was a promissory note with a three year term.

The Court notes that most of the reported cases addressing the ordinary course of business defense involve situations where there is ongoing trade credit and where the transferee

and transferor have a history of dealing with each other. Neither situation exists in the case at hand. Clearly, this is not a trade credit situation. In this instance, Defendant and Debtor executed a one time promissory note. Importantly, the statutory text provides no support for the contention that § 547(c)(2)'s coverage is limited to short term debt, such as commercial paper or trade debt. *Union Bank v. Wolas*, 502 U.S. 151, 155-156 (1991). "Instead of focusing on the term of the debt for which the transfer was made, subsection (c)(2) focuses on whether the debt was incurred, and payment made, in the 'ordinary course of business or financial affairs' of the debtor and transferee." *Id.* at 155.

Additionally, the transaction at issue appears to be the only time Defendant lent money to Debtor. As a result there is no *baseline of dealings* because this was a one time situation. Requiring a baseline of dealings would bar first time lenders from benefitting under the defense. Some courts have held that the "ordinary course of business" exception can never be applied to the first transaction between debtor and creditor, since there is no prior course of dealings from which the subjective "ordinary course" can be determined. *Tomlins v. BRW Paper Co. (In re Tulsa Litho Co.)*, 232 B.R. 240, 247 (Bankr.N.D.Okla. 1998). Courts that have rejected the first time transaction have held that we should examine the conduct of the parties to determine whether either of them did anything unusual or extraordinary with respect to the transfer made in payment of the underlying debt. If nothing unusual or untoward occurred, there is no good reason to conclude that the transfer was out of the ordinary. *Forman Enters.*, 293 B.R. at 858 (internal citations omitted). As stated by the Sixth Circuit, "every borrower who does something in the ordinary course of her affairs must, at some point, have done it for the first time." *In re Finn*, 909 F.2d 903, 908 (6th Cir. 1990). Eliminating the "ordinary course of business" defense for an entity who does business with a debtor for the first time does nothing to promote Congress' intent behind the defense; namely, to encourage entities to do business with the financially troubled debtor. *Tulsa Litho Co.*, 232 B.R. at 247.

The fact that a payment may be late in a trade credit scenario is completely different from a single payment note, as in the instant case. The payment of $250,000 from Debtor to Defendant does not stand out as aberrant in a history of dealing amongst the parties. Rather,

it represents what the record appears to indicate to be a good faith attempt by Debtor to comply with a Note that had been executed years earlier. As such, the record reflects that the transaction between the parties appears in every way to be a subjectively ordinary one.

Regarding subsection (C), Defendant must demonstrate that the transaction comports with the accepted standard conduct of business within the industry. *Official Comm. Of Unsecured Creditors v. Charleston Forge, Inc. (In re Russell Cave Co.)*, 259 B.R. 879, 883 (Bankr.E.D.Ky. 2001). Ordinary business terms has been defined to describe a transaction that is not so unusual as to render it an aberration in the relevant industry. *Id* citing *Luper v. Columbia Gas (In re Cerled, Inc.)*, 91 F.3d 811, 818 (6th Cir. 1996). "The term 'ordinary business terms' within the relevant industry is not limited to a 'single, uniform set of business terms' but encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C." *A.W. & Assocs.*, 136 F.3d at 1443 citing *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993); also see *Ice Cream Liquidation, Inc.*, 320 B.R. at 250.

In this case however, the question is what is the industry? Here the parties executed a routine, straightforward promissory note. The purpose was for Debtor to obtain more capital for its factoring business, and for Defendant to further her investment goals. Ultimately, this was a transaction between a business lender and a business borrower. The record reflects that this was an arrangement ordinary in every conceivable way. The Court is puzzled as to what industry standards could be demonstrated to reflect that the transaction was any more ordinary. These sort of transactions form the basis for working capital in countless small businesses all throughout the country. As such, the Court concludes that the record reflects that this was a contract based upon ordinary business terms and as such complies with the requirements of § 547(c)(2)(C).

CONCLUSION

For the aforementioned reasons, the Court has determined that there are no genuine

issue of material fact as to whether the ordinary course of business defense is applicable to the transfers made by Debtor to Defendant. The ordinary course of business defense, as specified in 11 U.S.C. § 547(c)(2), is applicable to the transfer by Debtor to Defendant in the amount of $250,000. The defense is not applicable to the two later transfers of $50,000, and as such these are deemed preferential transfers as specified in 11 U.S.C. § 547(b). Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that Defendant's Cross-Motion for Partial Summary Judgment is **GRANTED**.

Separate Judgments will be entered contemporaneously with this Order.

The Clerk is directed to mail a copy of this Order to counsel for Plaintiff and counsel for Defendant.

IT IS SO ORDERED.

At Atlanta, Georgia, this the 30th day of September, 2005.

Mary Grace Diehl

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE