IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9113
(Summary Calendar)

IN THE MATTER OF: DESKTOP ENGINEERING SOLUTIONS INC., d/b/a COMPRO COMPUTER,

Debtor.

GREGG PRITCHARD, Trustee for Debtor
Desktop Engineering Solutions, Inc.,

Appellant-Cross Appellee,

versus

HENRY B. RANSOM,

Appellee-Cross Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(3:93-CV-1544-T)

(July 19, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In this suit to recover preferential transfers, Trustee-Appellant Gregg Pritchard (the trustee) appeals the bankruptcy court's final take-nothing judgment in favor of Defendant-Appellee Henry Ransom, who received the alleged "preferential transfers" as an insider (in the court's opinion), primarily in the form of monthly payments from his employer, the debtor, Desktop Engineering Solutions, Inc. (Desktop), in partial repayment of a loan made by Ransom to Desktop. Ransom cross-appealed, arguing that he was not an insider. The district court affirmed, and both parties appeal to this court. We affirm.

I

FACTS AND PROCEEDINGS

Desktop, d/b/a Compro Computer, employed Ransom in 1989. That same year, Ransom loaned money to Desktop. On appeal, none dispute that Desktop was in fact insolvent at the time.[1] On November 13, 1989, Desktop executed a promissory note to Ransom in the original principal amount of $150,000, bearing 18% interest per annum. As additional consideration for granting the loan, Ransom also received 5,000 shares in stock in the corporation.

The express terms of the note provide that

> [t]his Promissory Note shall be payable in twelve (12) equal monthly installments of . . . $13,752 beginning December 14 . . ., 1989, continuing on the first day of each month thereafter through and including November 14. . ., 1990

[1]Ransom was informed otherwise, however. He testified that he made the loan because he was told that Desktop had done too well, i.e., it had sold too much inventory, and that its income was tied up in receivables.

(`Maturity Date').[2]

To secure repayment, Robert Archer, the president and majority shareholder of Desktop, executed a security agreement with Ransom, which agreement granted Ransom a security interest in 45,000 Desktop shares held by Archer. Archer also executed an irrevocable stock power on the 45,000 shares (about half of the issued and outstanding shares in the corporation). Finally, Ransom, Archer, and Archer's wife, who also held shares in Desktop, executed a shareholders' agreement in which Archer and his wife agreed to vote their shares to elect Ransom to Desktop's board of directors if Desktop defaulted on the note.

Desktop made the following payments on the note before filing for Chapter 11 protection on August 1, 1990:

12/14/89	$13,752
1/22/90	$13,752
2/19/90	$13,752
3/25/90	$13,752
4/20/90	$13,752
5/14/90	$13,752
6/15/90	$13,752
TOTAL	$96,264

Desktop made additional payments to Ransom within the one-year period prior to filing its petition. These payments were to repay factoring loans from Ransom, i.e., funds advanced by Ransom on a short-term basis so that Desktop would be able to pay certain

[2]The trustee does not contest the bankruptcy court's finding that the security agreement signed in connection with the note expressly provided for a thirty-day grace period. The court found that the grace period was included because the two signatories on Desktop's account, Robert Archer and his wife, were occasionally out of town at the same time.

invoices for computer equipment:

12/19/89	$1,080.21
6/14/90	$5,354.32
7/10/90	$5,568.49

Ransom's employment with Desktop ended in August 1990, the same month that Desktop filed its voluntary petition under Chapter 11.

On September 16, 1991, the trustee made demand for return of the payments made by Desktop to Ransom under 11 U.S.C. § 547(b), and brought this adversary proceeding on October 29, 1991. A trial was held in February 1993. The trustee sought to recover all payments as preferences. Ransom defended on two grounds: (1) he was not an insider, therefore the trustee could only recover preferential payments to him made on or within 90 days of filing of the petition; and (2) the loan repayments were not preferences because they were made in the ordinary course of business. Ransom thereby invoked the ordinary course of business exception[3] as a defense to the trustee's claim for preferential payments.

The bankruptcy court initially entered judgment for the trustee. It determined that Ransom was an insider to Desktop, that Desktop was insolvent when the payments were made to Ransom, and that the trustee was entitled to recover as preferences the monthly payments made on the $150,000 promissory note between January 22, 1990 and June 15, 1990, together with interest from September 16, 1991, the date demand was made. The foundation of the bankruptcy court's determination was its finding that such payments were made late, i.e., not on the first of each month per the terms of the

[3]11 U.S.C. § 547(c)(2).

note, and that such late payments did not meet the requirements of the ordinary course of business exception, specifically 11 U.S.C. § 547(c)(2)(B) or (C).[4]

Ransom timely moved for new trial on the issue whether the payments were timely made: he argued that the issue had not been raised in the first trial, and that the finding of untimeliness was erroneous. The court granted a new trial solely on this issue, which trial was held in June 1993. The court found that the term in the note reflecting a due date of "the first of each month" did not accurately reflect the agreement of the parties and that the payments were actually due on the 14th of each month. Accordingly, the court reversed its judgment in favor of the trustee, went with Ransom on the ordinary course of business exception, and ordered that the trustee take nothing by way of its claims against Ransom.

The parties appealed to the district court, which affirmed the judgment of the bankruptcy court in favor of Ransom. The parties continue their appeal to this court. The trustee contends that the bankruptcy court erred in concluding that (1) the loan repayments were incurred or made by Desktop to Ransom in the ordinary course of business of those two parties; (2) the payments were timely, and thus were made according to ordinary business terms; and (3) the note was ambiguous and the incorrect payment due date expressed in the note resulted from the mutual mistake of the parties. The

[4]The bankruptcy court held that Ransom had carried his burden on § 547(c)(2)(A), i.e., that the transfers were made "in payment of a debt incurred in the ordinary course of business or financial affairs" of Desktop and Ransom.

trustee also argues that the bankruptcy court abused its discretion in granting Ransom's motion for new trial. Ransom cross-appeals, arguing that he was merely an employee and a three percent shareholder of Desktop; and that as he (1) was not an officer or director, (2) never attended board meetings, (3) had no signatory authority on any accounts, and (4) never made an attempt to exercise any control over Desktop, he was not an insider.

II

ANALYSIS

A. Standard of Review

The bankruptcy court's findings of fact are reviewed under a clearly erroneous standard; its conclusions of law are reviewed de novo.[5]

B. Ordinary Course of Business Exception

The Bankruptcy Code, specifically 11 U.S.C. § 547(b), allows a trustee to avoid any transfer of an interest of the debtor in property if five conditions are met, and none of seven exceptions apply. A voidable preference is one that (1) benefits a creditor; (2) is on account of antecedent debt; (3) is made while the debtor is insolvent; (4) is made within ninety days before bankruptcy to a creditor, or within one year before bankruptcy to a creditor who is an insider; and (5) enables the creditor to receive a larger share of the bankruptcy estate than if the transfer had not been

[5]Matter of Consolidated Bancshares, Inc., 785 F.2d 1249, 1252 (5th Cir. 1986).

made.[6] Of these five elements of a voidable preference, the parties contest only whether Ransom is simply a creditor or is also an insider.

The primary question on appeal is whether a particular exception applies in this case. The code excepts transfers made, inter alia, in the ordinary course of business. The so-called "ordinary course" exception, 11 U.S.C. § 547(c)(2), limits the trustee's ability to avoid transfers that were

> (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 purpose of this exception 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."[7] It is designed to (1) benefit all creditors of a debtor by deterring a race to the courthouse, thereby enabling the struggling debtor to continue operating its business while working itself out of a difficult financial situation; and (2) ensure equality of distribution among creditors of the debtor.[8] Payments on either short- or long-term debt may qualify for the ordinary

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[6]11 U.S.C. § 547(b); Union Bank v. Wolas, ___ U.S. ___, 112 S. Ct. 527, 116 L. Ed. 2d 514, 520 (1991).

[7]Wolas, 116 L. Ed. 2d at 523 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977)).

[8]Id. at 524.

course of business exception to the trustee's power to avoid preferential transfers.[9]

The trustee describes the first issue as whether the bankruptcy court erred in determining that the payments made from Desktop to Ransom were incurred and made in the ordinary course of business of the debtor and of Ransom, but this is actually a two-fold inquiry.

1. Debt Incurred in Ordinary Course of Business or Financial Affairs of Desktop and Ransom

First, the trustee asserts that as the $150,000 loan was the first loan by Ransom to his employer, Desktop,[10] the loan was not incurred in the ordinary course of business or financial affairs of Desktop and Ransom. The trustee ignores direct testimony by Ransom that the $150,000 loan was the second such transaction between the parties. Although Desktop was the first employer to whom Ransom had ever loaned money, the $150,000 loan was his second to his then-employer Desktop. He testified that his first loan to Desktop was in May 1989 in the principal amount of $40,000. The promissory note and the security agreement documenting that loan were admitted

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[9] Id. at 525.

[10] Trustee cites the following passage from the transcript of the trial as support for his assertion:

Q. I want to turn your attention briefly back to the hundred and fifty thousand dollar note. Whenever you entered the loan transaction that's at issue here today with Desktop, that's the first time you had ever loaned money to your employer, isn't it?

A. Yes.

Tr. at 67. From Ransom's complete answer, however, it is clear that Ransom was not answering the question that Trustee asserts was answered. Ransom's complete answer was as follows:

A. Yes, prior to that I worked for Texas A&M.

into evidence. Ransom also testified that he had made a total of four loans to various computer-type businesses. And Desktop twice borrowed money from an employee, albeit the same employee))Ransom. Thus the bankruptcy court's finding that the loan was incurred in the ordinary course of business and financial affairs of Desktop and Ransom is not clearly erroneous.[11]

2. Payments were Timely Made

None dispute that if the loan repayments were not timely made, the transfers do not satisfy the ordinary course exception.[12] They disagree, however, on when the periodic repayments on the loan were due. Again, the express terms of the note provide that

> [t]his Promissory Note shall be payable in twelve (12) equal monthly installments of . . . $13,752 beginning December

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[11]We need not decide whether the debt must have been incurred in the ordinary course of business of Debtor and of Ransom, or must have been incurred in the ordinary course of business between Debtor and Ransom.

[12]Some courts have considered the timeliness of payments relevant to the issue of whether the payments were "made according to ordinary business terms"; others consider it relevant to the inquiry whether payments were "made in the ordinary course of business and financial affairs." Cf. Matter of Xonics Imaging Inc., 837 F.2d 763 (7th Cir. 1987) and In re Presidents Mortgage Indus. Bank, 110 B.R. 508 (D. Colo. 1989) with In re Fred Hawes Org., Inc., 957 F.2d 239 (6th Cir. 1992) and Matter of Tolona Pizza Products Corp., 3 F.3d 1029 (7th Cir. 1993). Still others simply state that late payments are not ordinary. In re Craig Oil Co., 785 F.2d 1563 (11th Cir. 1986).

The trustee asserts that because the payments were not timely, the payments from Desktop to Ransom were not "made according to ordinary business terms." Ransom notes that the bankruptcy court considered the timeliness of payments relevant to both § 547(c)(2)(B) and (C), i.e., whether the payments were "made according to ordinary business terms" and whether payments were "made in the ordinary course of business and financial affairs" of Desktop and Ransom. We simply decide that the payments were timely, regardless of the relevance of this inquiry.

> 14 . . ., 1989, continuing on the first day of each month thereafter through and including November 14 . . ., 1990 (`Maturity Date').

Gary Bolding, the trustee's expert witness, testified that all payments under the note were made in accordance with the terms of the note))including, presumably, the repayment terms set forth above. Ransom's testimony, of course, is consistent. Thus neither party raised an issue at trial whether the payments were timely made. But initially the bankruptcy court sua sponte found that the payments were not made timely. In his motion for new trial, Ransom argued that the court's finding was erroneous. Ransom maintained that the non-numerical due date in the promissory note))"the first of each month"))was incorrect and that it represented a mutual mistake and a scrivener's error. The bankruptcy court agreed with Ransom, granted the motion for new trial,[13] and subsequently reversed its earlier ruling, holding that the payments were timely made and thus made in the ordinary course of business and made according to ordinary business terms.

The trustee does not contend on appeal that the bankruptcy court's finding was improper based on the evidence admitted; rather, he contends that the court improperly considered Ransom's

[13]The trustee also contends that the bankruptcy court abused its discretion by granting Ransom's motion on the basis of "newly discovered evidence." We find no abuse of discretion. At trial, the trustee never contested the timeliness of the payments. Both parties testified that payments were made according to the terms of the note. Ransom had no apparent reason to offer evidence of specific payment due dates under the contract when both parties offered testimony that payments were made according to the terms of the note. As it had made an erroneous factual finding, the bankruptcy court properly granted Ransom's motion for new trial.

testimony. The trustee maintains that such testimony was offered to vary the payment terms of the note and was thus inadmissible under the parol evidence rule. The trustee cherry-picks the phrase "the first of each month" out of the contract and asserts that it is not ambiguous, and that the court improperly considered parol evidence to determine the agreement of the parties.[14]

Even assuming that the parol evidence rule applies under these circumstances, reading "the first of each month" in context, it is apparent that the contract is ambiguous. First, the specific due dates listed are December 14 and November 14))clearly not "the first [calendar day] of each month." Second, as the bankruptcy court found, a due date of "the first of each month" and the stated interest rate are inconsistent.[15] Either one or the other is incorrect. Thus the bankruptcy court properly considered testimony which indicated that the due date of each payment was not "the first of each month"))the interest rates and payment amounts would only be accurate if the numerical dates were correct, not the

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[14]The trustee also argues that a court cannot determine that an agreement is ambiguous if it is not asked to do so in the pleadings on file. We find this argument to be without merit under these circumstances.

[15]If payments were made as Trustee contends they were to be made, at least two payments of $13,752 would cover only a two-week period rather than a one-month period. The following chart reflects the payment dates and the amount paid under Trustee's proposed interpretation of the note:

12/14/89 . . . $13,752	9/01/90 . . . $13,752
1/01/90 . . . $13,752	10/01/90 . . . $13,752
2/01/90 . . . $13,752	11/10/90 . . . $13,752

written date of "the first of each month."[16] The bankruptcy court specifically found that the note was "internally inconsistent in that the interest rate to be paid and the due dates of the first of the month are not mathematically consistent." Moreover, the bankruptcy court's finding that payments were due on the 14th of each month is consistent with the testimony offered by both the trustee's expert and Ransom, and with the interpretation given through performance by the parties to the note as to when payments were to be made.[17]

3. Payments made According to Ordinary Business Terms

It is not clear whether the requirement that payments be made according to ordinary business terms refers to (1) what is ordinary between this debtor and this creditor,[18] or (2) what is ordinary in

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[16]When the parties modified their agreement to change initial and final payment dates from December 1 and November 1 to December 14 (the date the agreement was executed) and November 14, they did not change the corresponding "first of each month" language. Transcript of June 22, 1993 Hearing at 15. ([W]hatever date we executed [the agreement] on, basically thirty days thereafter there would be twelve equal monthly payments, and each time we updated it, that was the intent. This last time that we updated it, the only omission was the written part. You can see the numerical part we did update, but we omitted updating the written part.").

[17]In fact, customarily late payments may even qualify as payments made in the ordinary course of business of a debtor and creditor or made according to ordinary business terms! In re Yurika Foods Corp., 888 F.2d 42, 45 (6th Cir. 1989); In re Mindy's, Inc., 17 B.R. 177 (Bankr. S.D. Ohio 1982).

[18]This construction is believed by some courts to reflect the inquiry under § 547(c)(2)(B), and is referred to as the "subjective prong." Other courts believe that it is the sole pertinent inquiry under § 547(c)(2)(C). See In re U.S.A. Inns of Eureka Springs, Arkansas, Inc., 9 F.3d 680 (8th Cir. 1993) and its discussion of cases addressing the issue.

the market or industry in which they operate.[19] But as the payments made by Desktop to Ransom were))under either of the proposed constructions))"made according to ordinary business terms," we need not decide this issue.

With respect to what is ordinary as between Desktop and Ransom, clearly the payments were made according to ordinary business terms between these two parties. The transaction is consistent with the prior course of dealing between them, which course of dealing the trustee chooses to ignore. As for the ordinariness of the payments in the market or industry in which Desktop and Ransom operate, the trustee contends that the industry norm for this business was floor plan financing and factoring, not employee financing. Although there was testimony that floor planning was a "normal" financing method, that does not preclude supplemental financing))by someone who happens to be an employee))in accordance with industry standards.[20] The loan was evidenced by a promissory note and secured by a security agreement. Regular monthly payments were made on the note. Ransom testified that the second loan transaction was in all respects similar to other financing transactions within the computer industry. Indeed, aside

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[19]See Matter of Tolona Pizza Products Corp., 3 F.3d 1029, 1031 (7th Cir. 1993) (discussing circuit split on this issue); In re SPW Corp., 96 B.R. 683, 686-87 (Bankr. N.D. Tex. 1989) (holding that a court must examine both the standard in the industry as well as the parties' course of dealing).

[20]See In re Finn, 909 F.2d 903, 908 (6th Cir. 1990) (noting that, "subject to the individual factfinding powers of the district court in a specific inquiry, a transaction can be in the ordinary course of financial affairs even if it is the first such transaction undertaken").

from investing in the stock market, Ransom had made a total of four loans to computer-type businesses! And the trustee presented no evidence that financing of the nature provided by Ransom was not a customary alternative to other methods of financing, or that floor planning was the only method of financing used in the relevant industry. Given this evidence, the finding of the bankruptcy court that the payments were made according to ordinary business terms was not clearly erroneous.

C. Insider Status

Whether Ransom was an insider to Desktop is a question of fact.[21] As we conclude that the trustee is not entitled to recover any loan repayments made by Desktop to Ransom, regardless of whether made within one year or ninety days of the filing for protection, we need not consider whether the bankruptcy court's finding that Ransom was an insider was clearly erroneous. Any error in that regard is of no consequence whatever and was thus harmless.

AFFIRMED.

[21] Matter of Fabricators, Inc., 926 F.2d 1458, 1466 (5th Cir. 1991).