NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. SC-04-1539-BMoBu
JOHN C. HENBERGER CO., INC.	Bk. No. 01-06696
Debtor.	Adv. No. 03-90135
JAMES L. KENNEDY, Trustee,	
Appellant,	
v.	**M E M O R A N D U M**[1]
3M CORPORATION,	
Appellee.	

Argued by Telephone Conference
and Submitted on July 29, 2005

Filed - September 12, 2005

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Before: BRANDT, MONTALI, and BUFFORD,[2] Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Samuel L. Bufford, United States Bankruptcy Judge for the Central District of California, sitting by designation.

On cross-motions for summary judgment on trustee's complaint seeking avoidance of preferential transfers under § 547,[3] the bankruptcy court denied the trustee's motion and granted defendant's motion, dismissing all claims.

The trustee appealed, arguing that the bankruptcy court erred in its application of the ordinary course defense. We AFFIRM.

I. FACTS

On 22 June 2001 an involuntary chapter 7 petition was filed against John C. Henberger Company, Inc. ("debtor"); the order for relief was entered 31 July 2001. Appellant James L. Kennedy ("trustee") was appointed chapter 7 trustee.

Appellee 3M Corporation ("3M") had been one of debtor's suppliers since 1977; debtor regularly purchased traffic control materials from 3M for at least seven years prior to filing. During the 90 days prior to filing, 3M negotiated checks from debtor totaling $393,172.89, as follows:

10 April 2001	$119,783.72
2 May 2001	$120,941.44
16 May 2001	$57,712.00
24 May 2001	$94,735.73

3M subsequently shipped items to debtor worth $255,680.54, for which it did not receive payment. Apparently some of 3M's new value shipments were made after the involuntary petition was filed and after the order for relief. We express no opinion whether that would affect application of the new value defense, as trustee has not contended that it would.

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[3] Absent contrary indication, all section and chapter references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. "Rule" references are to the Federal Rules of Bankruptcy Procedure, and "FRCP" references are to the Federal Rules of Civil Procedure.

On 24 April 2003 the trustee filed an adversary proceeding against 3M seeking avoidance of those transfers as preferential under § 547(b). 3M did not dispute that the transfers were preferential, but asserted the contemporaneous exchange, ordinary course, and new value defenses under §§ 547(c)(1),(2), and(4).

The parties cross-moved for summary judgment. After hearing oral argument, the bankruptcy court denied trustee's motion and granted 3M's, dismissing all claims. The trustee timely appealed. The bankruptcy court did not enter a separate judgment as required under Rule 9021; we issued an order providing for waiver of this requirement if the parties did not obtain a separate judgment. As they did not, the requirement is deemed waived.[4]

Appellee has moved for sanctions under Rule 8020.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(F), and we do under 28 U.S.C. § 158(c).

III. ISSUES

A. Whether the bankruptcy court erred in granting summary judgment dismissing the trustee's preference claims.

B. Whether the Panel should award appellee its attorney's fees and double costs under Rule 8020.

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[4] Rule 9021, incorporating FRCP 58, requires a separate judgment or order. The purpose of this rule is to clarify when the time for an appeal begins to run; the rule is not jurisdictional and may be waived. In re Woosley, 117 B.R. 524, 528-29 (9th Cir. BAP 1990) (citing Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 (1978)). Judgment is deemed entered 150 days after entry on the docket. FRCP 58(b)(2)(B).

IV. STANDARD OF REVIEW

We review summary judgment de novo. In re Baldwin, 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 912 (9th Cir. 2001). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there is any genuine issue of material fact, and whether the trial court correctly applied relevant substantive law. In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 819 F.2d 214, 215 (9th Cir. 1987).

V. DISCUSSION

A. Merits

To avoid a transfer as preferential under § 547(b), the trustee must prove by a preponderance of the evidence that the transfer was made

(1) to or for the benefit of a creditor;

(2) on account of an antecedent debt;

(3) while the debtor was insolvent;

(4) on or within 90 days before the date of the filing of the petition, or, if the creditor was an insider, between 90 days and one year before the date of the petition; and

(5) enabled the creditor to receive more than it would have had the transfer not been made and the case liquidated under chapter 7. In re Kaypro, 218 F.3d 1070, 1073 (9th Cir. 2000).

The facts are not in dispute, and 3M concedes that the pre-petition payments at issue were preferential transfers. At issue is the application of the new value and ordinary course defenses.

1. Subsequent New Value Defense - § 547(c)(4)

> The trustee may not avoid an otherwise preferential transfer to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--
> (A) not secured by an otherwise unavoidable security interest; and
> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor[.]

§ 547(c)(4).

Successful assertion of this defense requires the creditor to show (1) that it gave unsecured new value to or for the benefit of the debtor (2) after the preferential transfer; and (3) the debtor did not repay the new value by an otherwise unavoidable transfer. In re IRFM, Inc., 52 F.3d 228, 231-32 (9th Cir. 1995). This defense is intended to encourage creditors to continue working with financially troubled companies without concern that any payments received would be avoidable in a subsequent bankruptcy. In re Lee, 179 B.R. 149, 164 (9th Cir. BAP 1995), aff'd, 108 F.3d 239 (9th Cir. 1997). It is "grounded in the principle that the transfer of new value to the debtor will offset the payments, and the debtor's estate will not be depleted to the detriment of other creditors." In re Laguna Beach Motors, Inc., 148 B.R. 322, 324 (9th Cir. BAP 1992) (citation omitted).

The trustee does not dispute that the new value defense applies, and that 3M is entitled to a new value credit of $255,680.54. The trustee asserts, however, that the new value credit should be applied first to the older invoices, leaving only the remaining invoices subject to analysis under the ordinary course defense. To illustrate:

Check No.	Date Negotiated	Amount	Defense
77979	10 April 2001	$119,783.72	New value
78138	2 May 2001	$120,941.44	New value
78216	16 May 2001	$ 57,712.00	Partially subject to new value defense; $42,745.62 subject to ordinary course analysis
78269	24 May 2001	$ 94,735.73	Ordinary course analysis

The trustee cites no authority for this approach, the effect of which is to eliminate from the ordinary course analysis the payments covered by new value. Nothing in the structure of the statute suggests application of the defenses in a particular sequence, or that a transfer cannot be protected by more than one defense. As discussed below, under the ordinary course defense, the bankruptcy court is to consider the payment history as a whole. Eliminating payments subject to another defense would skew that analysis.

2. Ordinary Course Defense - § 547(c)(2)

Section 547(c)(2) prohibits the trustee from avoiding an otherwise preferential transfer

> to the extent that such transfer was--
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms[.]

To qualify for this exception, the creditor must show "by a preponderance of the evidence that 1) the debt and its payment are ordinary in relation to past practices between the debtor and the creditor; and 2) the payment was ordinary in relation to prevailing

business standards." In re Grand Chevrolet, Inc., 25 F.3d 728, 732 (9th Cir. 1994) (citation omitted).

The parties do not dispute that the debt was incurred in the ordinary course of business, but disagree as to whether payments were made in the ordinary course, and whether the payments were made according to ordinary business terms.

a. Payments made within ordinary course between the parties

There is no precise test for determining whether payments made by the debtor during the preference period were in the ordinary course; "rather, the court must engage in a peculiarly factual analysis." Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991) (citations omitted). The creditor must "demonstrate some consistency with other business transactions" between the parties. Id. at 497-98 (citations omitted).

Factors to be considered in this determination include:

> 1) the length of time the parties were engaged in the transactions 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.

Grand Chevrolet, 25 F.3d at 732 (citation omitted). Late payments may fall within the exception if the prior course of conduct between the parties indicates that those types of payments were ordinarily made late. Id.; see also In re Xonics Imaging Inc., 837 F.2d 763, 766-67 (7th Cir. 1988).

The payment history provided in the excerpts of record shows that as a general rule several invoices were paid with one check, that both 30- and 60-day invoices were paid on the same check, and that invoices

were paid both early (i.e., before the invoice due date) and late. The history suggests that once the balance outstanding reached a certain level, a check would be cut. This is true of both the pre-preference and preference periods. See Declaration of Julie McCarthy.[5]

Nevertheless, the trustee concludes that payments of at least $90,708.73 were made outside the ordinary course, relying principally upon In re R.M. Taylor, Inc., 245 B.R. 629 (Bankr. W.D. Mo. 2000). Taylor involved four payments by the debtor to its insurer for worker's compensation premiums. The bankruptcy court analyzed the early payments separately from the late ones. It concluded that the timing of the early payments made during the preference period varied so significantly from the timing of early payments made in the pre-preference period (two days early in the pre-preference period versus 11, 39, and 60 days early during the preference period) that they were not in the ordinary course. In contrast, the court found that the two late payments were in the ordinary course (15 days late during the preference period versus 8, 5 and 14 days late during the pre-preference period). Although the court noted that the payments were made, on average, 11.7 days later during the preference period, it did not find this difference sufficiently inconsistent to be outside the ordinary course.

Based on Taylor, the trustee argues that early and late payments should be analyzed separately, and any payments that average more than 11.7 days earlier or later than those made during the pre-preference period are outside of the ordinary course. Using the trustee's analysis, during the year prior to the preference period, late payments averaged 26 days late, while early payments averaged 15 days early. The

[5] In her declaration, Ms. McCarthy indicates she originally prepared the table used by the trustee.

trustee concedes that $42,756.62 paid late is subject to the ordinary course defense, but the remaining late payments were all made more than 11.7 days earlier than the 26-day average and thus were not within the ordinary course. As for early payments, only one, for $3856, falls outside 11.7 days (it was 3 days early), but the trustee has chosen not to pursue this payment as outside the ordinary course.

3M argues that the issue of whether early payments should be considered separately from late payments is not properly before us because it was not addressed by the bankruptcy court. This is incorrect. The trustee argued this analysis before the bankruptcy court and thus did not waive it. In any event, the standard of review on summary judgment is de novo, and we need not resolve the issue to dispose of this appeal, as the payments fall into the ordinary course either way.

Analyzing the payments together, 3M's comparison looks like this:

3M'S ANALYSIS		
	12 months pre-preference	**Preference period**
Range	46 days early - 155 days late	31 days early - 23 days late
30-Day Invoices - average	25 days late	9 days late
60-Day Invoices - average	7 days early	11 days early
Deviation from average	37% more than a week earlier; 39% within a week; 24% more than a week later; 5% of payments 58 or more days late; 5% of payments paid more than 23 days early	26% more than a week earlier; 51% within a week; 23% more than a week later; Only one $23.50 invoice received in outer 10% of pre-preference period (31 days early)

In his reply brief, the trustee points out that even under 3M's analysis, the latest payment during the preference period was 132 days earlier than the latest payment made during the pre-preference period, and that 80% of payments were made outside the range of 2 to 13 days.

The trustee's approach is hypertechnical and loses sight of the goal of the analysis: to determine whether payments made during the preference period are so inconsistent with pre-preference transactions as to be outside the ordinary course of dealings between the parties. A bright-line rule that any variation more than 11.7 days renders a payment outside the ordinary course does not accomplish this goal. Rather, a review of the parties' transaction history as a whole is appropriate. See, e.g., Lovett, 931 F.2d at 498. While mathematical formulations provide guidance, it is not useful to apply them rigidly across dissimilar cases. Viewed as a whole, the payment history does not show significant deviations between the pre-preference and the preference periods.

Considering the Grand Chevrolet factors, we cannot conclude that the bankruptcy court erred in finding that the transactions at issue occurred in the ordinary course of dealings between debtor and 3M.

First, the parties had a lengthy history, during which invoices were consistently paid "in bulk" so that some invoices were paid late while others were paid early; second, payments were consistently made by check, and the variation in amounts was consistent both before and during the preference period; third, there was no evidence of any unusual collection activity, and any inconsistencies in timing are, on the whole, insignificant; finally, there is no evidence that 3M took advantage of debtor's deteriorating financial condition.

b. Ordinary business terms

To satisfy this requirement, the creditor must show that the payments were ordinary in relation to prevailing business standards. In re Jan Weilert R.V., Inc., 315 F.3d 1192, 1197 (9th Cir. 2003), amended by 326 F.3d 1028 (9th Cir. 2003). It is not enough to prove what past practices were between that particular creditor and the debtor. See In re Loretto Winery, Ltd., 107 B.R. 707, 709 (9th Cir. BAP 1989).

The trustee contends that 3M did not provide any evidence regarding prevailing business standards. However, 3M submitted the declaration of Julie McCarthy, who indicated that she had been a credit analyst with 3M for nine years, and in the course of her employment had become familiar with the standard credit terms and payment times acceptable within the traffic control materials industry. She testified that 30- and 60-day invoice terms are common. Because purchasers ordinarily group payment of invoices, it is common for the timing of individual invoice payments to fluctuate greatly between very early and very late payments, as much as 31 days early to 23 days late.

The trustee notes that the bankruptcy court found "strange" her testimony that payments made 23 days late on 30-day invoices conformed to industry standards. Transcript, 26 August 2004, page 10. From this, he concludes that 3M did not meet its burden to show the payments were ordinary in relation to prevailing business standards. However, the trustee presented no controverting evidence. His argument that 3M failed to meet its burden on this prong of the defense is without merit, as is his argument in his reply brief that there is a genuine issue of fact as to this issue. He did not make this argument below and has thus waived it. Stewart v. U.S. Bancorp, 297 F.3d 953, 957 n.1 (9th Cir. 2002).

B. Motion for Rule 8020 Sanctions

3M has moved to recover its attorney's fees and double costs from the trustee under Rule 8020, which provides:

> [i]f a . . . bankruptcy appellate panel determines that an appeal from an order, judgment or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion . . . and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Because Rule 8020 mirrors FRAP 38, cases examining the latter may guide decisions about the former. In re Weinstein, 227 B.R. 284, 297 (9th Cir. BAP 1998). Sanctions under FRAP 38 are appropriate when the result is obvious or appellant's arguments are wholly without merit. In re Nat'l Mass Media Telecomm. Sys., Inc., 152 F.3d 1178, 1181 (9th Cir. 1998). Bad faith is not a prerequisite to sanctions under this rule, In re Becraft, 885 F.2d 547, 549 (9th Cir. 1989), but courts may take into account whether the appeal was taken in bad faith for purposes of delay or harassment. Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1081 (9th Cir. 1989).

We conclude that sanctions are not warranted. While the trustee's arguments on the merits may be a strained interpretation of the case law, they are not frivolous. There is no controlling case law as to whether early and late payments should be analyzed separately, or as to the order in which preference defenses should be applied. The trustee is entitled to argue in the alternative. Although he erroneously stated in his brief that 3M presented no evidence as to industry standards, he acknowledged McCarthy's declaration. And his argument regarding application of accounting principles in applying preference defenses is far from frivolous. On the whole, the trustee's arguments are not so completely without foundation as to be sanctionable. See Abernathy v. Southern California Edison, 885 F.2d 525, 531 (9th Cir. 1989).

VI. CONCLUSION

The trustee has not shown that the bankruptcy court erred in its application of preference defenses. Accordingly, we AFFIRM.

As the trustee's appeal was not frivolous, we DENY 3M's motion for Rule 8020 sanctions.