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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-16-1272-LKuF
)		
EVERGREEN OIL, INC.,)	Bk. No.	8:13-bk-13163-SC
)		
Debtor.)	Adv. No.	8:15-ap-01163-SC
)		
MONTEREY MECHANICAL CO.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
OVERSIGHT COMMITTEE,)		
)		
Appellee.)		

Argued and Submitted on March 23, 2017
at Pasadena, California

Filed - April 10, 2017

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

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding

Appearances: Donald W. Reid argued for Appellant Monterey
Mechanical Co.; Russell H. Rapoport argued for
Appellee Oversight Committee.

Before: LAFFERTY, KURTZ, and FARIS, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 **INTRODUCTION**

2 On April 2, 2013, seven days before filing its chapter 11¹
3 case, Evergreen Oil, Inc. ("Evergreen") wire transferred
4 \$120,390.44 to Monterey Mechanical Co. ("Monterey") in payment of
5 an invoice for millwright services dated December 18, 2012 (the
6 "Transfer"). Evergreen's confirmed chapter 11 plan of
7 reorganization appointed an Oversight Committee to recover
8 preferential and fraudulent transfers; the Oversight Committee
9 sued Monterey to avoid the Transfer as preferential under
10 § 547(b) and to recover the Transfer for the benefit of the
11 estate under § 550.

12 Monterey did not dispute that the elements of a preferential
13 transfer had been met but asserted the affirmative defense under
14 § 547(c) that the Transfer was made in the ordinary course of
15 business. After trial, the bankruptcy court found that Monterey
16 had not met its burden to show that the Transfer was either made
17 in the ordinary course of business or financial affairs of the
18 debtor and transferee or made according to ordinary business
19 terms. Therefore, the bankruptcy court entered judgment in favor
20 of the Oversight Committee. Monterey timely appealed. We
21 AFFIRM.

22 **FACTS²**

23 Monterey is an industrial contractor and metal fabricator.
24 Monterey also has a millwright division, which provides machine

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

28 ² In this factual recitation, we borrow heavily from the
bankruptcy court's memorandum decision.

1 maintenance services to local industrial businesses, including
2 Evergreen, a waste oil refinery located in Newark, California.

3 Monterey first provided millwright services to Evergreen in
4 January 2010, and the two companies did business at least 11
5 times prior to December 2012. From November 30, 2012 to December
6 12, 2012, Monterey provided maintenance services for Evergreen.
7 On December 18, 2012, Monterey sent an invoice in the amount of
8 \$120,390.44 to Evergreen for these services (the "Invoice"). The
9 Invoice, like all of Monterey's invoices, stated that the terms
10 were "net-30," meaning that payment is due 30 days after the date
11 of the invoice.

12 On February 5, 2013, 49 days after the Invoice date,
13 Monterey's Chief Financial Officer, Paul Moreira, sent an e-mail
14 to Evergreen's Chief Financial Officer, William Scottini,
15 inquiring about the status of the payment. Over the course of
16 the next two months, the parties exchanged emails and phone
17 calls. In the course of those communications, Scottini explained
18 to Moreira that Evergreen was having cash flow issues but assured
19 Moreira that he intended to get the invoice paid.

20 On April 2, 2013, 105 days after the date of the Invoice,
21 Evergreen transferred \$120,390.44 to Monterey by way of a wire
22 transfer. One week later, on April 9, 2013, Evergreen filed a
23 chapter 11 bankruptcy petition. It was undisputed that for the
24 90 days prior to filing bankruptcy, Evergreen was insolvent.

25 On September 13, 2013, Evergreen's Third Amended Plan of
26 Reorganization was confirmed. Pursuant to the confirmed plan,
27 the Oversight Committee was appointed to pursue causes of action
28 under Chapter 5 of the Bankruptcy Code. On April 6, 2015, the

1 Oversight Committee filed an adversary proceeding seeking
2 avoidance of the Transfer as preferential under § 547 and
3 recovery under § 550 and disallowance of any claim asserted by
4 Monterey in Evergreen's bankruptcy case. Monterey asserted two
5 affirmative defenses: (1) that the transfer was made in the
6 "ordinary course of business" pursuant to § 547(c)(2)(A), and
7 (2) that the transfer was made according to "ordinary business
8 terms" pursuant to § 547(c)(2)(B). At trial, Monterey's counsel
9 conceded that all the elements of § 547(b) were met; thus, the
10 ordinary course defense was the only issue litigated at trial.
11 Direct testimony was by declaration; the witnesses were Scottini,
12 Moreira, Jim Troup (President of Monterey), and Joe Petrovich
13 (Manager of Monterey). The trial declarations of Troup,
14 Petrovich, and Moreira were substantively identical. Although
15 Petrovich and Moreira were available at trial, only Scottini and
16 Troup were cross-examined.

17 After trial, the bankruptcy court issued written findings
18 and conclusions, ruling that Monterey had not met its burden to
19 prove either defense, and entered judgment in favor of the
20 Oversight Committee in the amount of \$120,390.44. Monterey
21 timely appealed.

22 **JURISDICTION**

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
24 §§ 1334 and 157(b)(2)(F). We have jurisdiction under 28 U.S.C.
25 § 158.

26 **ISSUES**

27 Did the bankruptcy court err in finding that Monterey failed
28 to meet its burden to show that the Transfer was made in the

1 ordinary course of business?

2 Did the bankruptcy court err in finding that Monterey failed
3 to meet its burden to show that the Transfer was made according
4 to ordinary business terms?

5 **STANDARDS OF REVIEW**

6 Whether the bankruptcy court applied the correct legal
7 standard is a question of law that we review de novo. See Bell
8 Flavors & Fragrances, Inc. v. Andrew (In re Loretto Winery,
9 Ltd.), 107 B.R. 707, 709 (9th Cir. BAP 1989). Whether a payment
10 is made according to ordinary business terms is a question of
11 fact reviewed for clear error. Arrow Elecs., Inc. v. Justus (In
12 re Kaypro), 230 B.R. 400, 403 (9th Cir. BAP 1999), aff'd in part,
13 rev'd in part, 218 F.3d 1070 (9th Cir. 2000). A finding is
14 clearly erroneous when, although there is evidence to support it,
15 the reviewing court on the entire evidence is left with the
16 definite and firm conviction that a mistake has been committed.
17 United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).
18 Regardless of whether we would have weighed the evidence
19 differently, if the trial court's account of the evidence is
20 plausible in light of the record viewed in its entirety, the
21 appellate court may not reverse it. Anderson v. City of Bessemer
22 City, 470 U.S. 564, 573 (1985).

23 **DISCUSSION**

24 The Bankruptcy Code authorizes a trustee to avoid:
25 any transfer of an interest of the debtor in property--

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

27 (2) for or on account of an antecedent debt
28 owed by the debtor before such transfer was
made;

1 (3) made while the debtor was insolvent;

2 (4) made--

3 (A) on or within 90 days before the date
4 of the filing of the petition; or

5 (B) between ninety days and one year
6 before the date of the filing of the
7 petition, if such creditor at the time of
8 such transfer was an insider; and

9 (5) that enables such creditor to receive
10 more than such creditor would receive if--

11 (A) the case were a case under chapter 7
12 of this title;

13 (B) the transfer had not been made; and

14 (C) such creditor received payment of
15 such debt to the extent provided by the
16 provisions of this title.

17 § 547(b).

18 However, the trustee may not avoid such a transfer:

19 to the extent that such transfer was in payment of a
20 debt incurred by the debtor in the ordinary course of
21 business or financial affairs of the debtor and the
22 transferee, and such transfer was--

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

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

28 § 547(c)(2).

To establish this "ordinary course" defense, the creditor has the burden to demonstrate (1) that the transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; **and** (2) that it was (a) made in the ordinary course of business or financial affairs of the debtor and the transferee; **or** (b) made according to ordinary business terms.

1 See Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.),
2 315 F.3d 1192, 1197 (9th Cir. 2003), amended by In re Jan Weilert
3 RV, Inc., 326 F.3d 1028 (9th Cir. 2003).

4 The ordinary course defense is intended to "protect
5 recurring, customary credit transactions which are incurred and
6 paid in the ordinary course of business of the debtor and the
7 transferee." Energy Coop., Inc. v. SOCAP Int'l, Ltd. (In re
8 Energy Coop., Inc.), 832 F.2d 997, 1004 (7th Cir. 1987). The
9 purpose of the defense is "to leave undisturbed normal financial
10 relations because it does not detract from the general policy of
11 the preference section to discourage unusual action by either the
12 debtor or his creditors during the debtor's slide into
13 bankruptcy." Sigma Micro Corp. v. Healthcentral.com (In re
14 Healthcentral.com), 504 F.3d 775, 789 (9th Cir. 2007) (citations
15 omitted).

16 The bankruptcy court found that Monterey had established
17 that the debt was incurred in the ordinary course of business
18 between Evergreen and Monterey: the Invoice was for annual
19 maintenance for Evergreen, and the evidence at trial established
20 that this was normal; the parties also stipulated that the amount
21 of the Transfer was the reasonable value of Monterey's work.

22 However, the bankruptcy court found that Monterey had not
23 met its burden to show that either the Transfer was in the
24 ordinary course of business between Monterey and Evergreen or
25 that the Transfer was made according to ordinary business terms.
26 Monterey challenges both of these findings.

27 ///

28 ///

1 **A. The bankruptcy court did not err in finding that the**
2 **Transfer was not in the ordinary course of business between**
3 **Monterey and Evergreen.**

4 To establish that a payment was made in the ordinary course
5 of business between the transferor and transferee, the creditor
6 must demonstrate that the alleged preferential transfer was
7 ordinary in relation to past practices between the parties. Id.
8 at 790. The creditor must show (1) the baseline of past
9 practices between itself and the debtor; and (2) that the
10 relevant payments were ordinary in relation to those past
11 practices. Id.

12 In determining whether a payment is ordinary in relation to
13 past practices, courts consider (1) the length of time the
14 parties were engaged in the transactions at issue; (2) whether
15 the amount or form of tender differed from past practices;
16 (3) whether the debtor or creditor engaged in any unusual
17 collection or payment activity; and (4) whether the creditor took
18 advantage of the debtor's deteriorating financial condition.
19 Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys., Inc.), 482
20 F.3d 1118, 1129 (9th Cir. 2007) (citing Sulmeyer v. Suzuki (In re
21 Grand Chevrolet, Inc.), 25 F.3d 728, 732 (9th Cir. 1994)).

22 The bankruptcy court found that although Monterey
23 demonstrated that it did not engage in unusual collection
24 activities or take advantage of Evergreen's deteriorating
25 financial condition, the timing, amount, and form of tender of
26 the Transfer was "a significant divergence from Monterey and
27 Evergreen's established baseline of past practices."

28 At trial, Monterey presented a summary of invoicing and

1 payment history between the parties. The summary listed
2 Monterey's invoices and Evergreen's payments for invoices dated
3 between January 4, 2010 through December 18, 2012, including the
4 Invoice.³ Although the term of each invoice was "net 30," all
5 but one payment was made more than 30 days after the invoice
6 date. The earliest payment Evergreen made to Monterey during the
7 relevant period was 19 days after the December 22, 2010 invoice,
8 while the latest payment was made 232 days after the March 16,
9 2010 invoice. The bankruptcy court found that for the "entire
10 history" between Monterey and Evergreen, each payment, not
11 including the payment for the Invoice, was late by a weighted
12 average of 61 days, or 91 days after the invoice.

13 Single invoice amounts ranged from \$2,307.00 to \$156,234.90.
14 But because two of the invoices (including the \$156,234.90
15 invoice) were paid in installments, the Transfer (\$120,390.44)
16 was the largest single payment amount: the payments on the other
17 invoices ranged between \$2,307.00 and \$55,607.51. The
18 \$156,234.90 invoice, the closest in amount to the Invoice, was
19 paid in seven installments: five installments of \$25,000, one
20 installment of \$15,207.50, and one installment of \$16,027.40.
21 Those installments began 37 days after the invoice date, and the
22 final installment was paid 75 days after the invoice date. The
23 \$25,007.44 invoice was paid in three installments of \$12,000 (202
24 days after the invoice date), \$6,500.00 (216 days after the

26 ³ For reasons that were not explained, the summary splits
27 the Invoice into two amounts, \$120,262.00 and \$128.44; for ease
28 of reference, we continue to refer to the Invoice in the
singular.

1 invoice date), and \$6,507.44 (232 days after the invoice date).

2 The rest of the invoices were paid in lump sums.

3 The bankruptcy court acknowledged that late payments do not
4 necessarily establish that a transaction falls outside the
5 ordinary course, where "the prior course of conduct between the
6 parties demonstrates that those types of payments were ordinarily
7 made late." In re Grand Chevrolet, 25 F.3d at 732 (citations
8 omitted). The bankruptcy court calculated that the Transfer,
9 which was made 105 days after the invoice date, was made about
10 two weeks later than the average period of 90.42 days after the
11 invoice date, but that the Transfer fell within the previously
12 established range of payments. However, the bankruptcy court
13 concluded that "no clear pattern of payments" was apparent from
14 the summary.⁴

15 The bankruptcy court placed great weight on the fact that
16 the Transfer was much larger than any previous payment made by
17 Evergreen to Monterey and that the payment was made by wire
18 transfer rather than by check, which was the payment method used

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20 ⁴ The court seemed troubled by the fact that there was a
21 23-month gap when Monterey and Evergreen did no business, noting
22 that in the pre-preference period the longest time between
23 invoices was eight months. The bankruptcy court thus concluded
24 that the "the timing factor alone might render the Transfer
25 outside the ordinary course of business." Scottini testified
26 that Evergreen's Newark facility had suffered fire damage in
27 March 2011 but that the damage was repaired as of September 29,
28 2012, after which Evergreen continued to operate in the ordinary
course through confirmation of its plan of reorganization. This
testimony suggests that Evergreen did not complete its annual
maintenance at the end of 2011 due to the fire. However, this
factor was not the primary basis for the court's ruling; instead,
the court found that the amount and form of tender of payment
took the Transfer outside of the ordinary course.

1 by Evergreen in all past transactions between the parties. The
2 largest payment prior to the Transfer was \$55,607.51; the
3 Transfer (\$120,390.44) was more than twice that amount.

4 Regarding form of tender, the bankruptcy court acknowledged
5 that the wire transfer was not a per se indication that the
6 payment was made out of the ordinary course of business, but
7 noted that Monterey had not provided "any evidence to show that
8 either it routinely accepted wire transfers in this circumstance,
9 or that Evergreen routinely paid its invoices in the form of wire
10 transfers." On cross-examination, Scottini testified that he
11 decided to pay the Invoice by wire because "I was getting [undue]
12 pressure, because Evergreen and the cash flow situation the
13 company was under, to make a wire, because I was getting phone
14 calls and/or e-mails regarding payment."

15 Monterey argues that the bankruptcy court applied an
16 incorrect legal standard by focusing solely on the necessary
17 showing for a baseline of past practices and concluding that
18 there was no clear pattern of payments. Monterey contends that
19 the Ninth Circuit does not require such a restrictive showing for
20 a baseline of past practices. Monterey also contends that, while
21 the amount of the Transfer was greater than any prior single
22 payment and that the form of the Transfer differed from past
23 practices, these facts alone do not defeat the ordinary course of
24 business defense because no one factor is conclusive, citing
25 In re Healthcentral.com, 504 F.3d at 791.

26 The bankruptcy court applied the correct legal standard.
27 The bankruptcy court's finding that there was no clear pattern of
28 payments was not dispositive. Further, although Monterey is

1 correct that no one factor is necessarily conclusive, the Ninth
2 Circuit has instructed that "all evidence shedding light on the
3 practices between the parties, past and present, should be
4 considered." Id. The bankruptcy court considered the evidence
5 and weighed that evidence as it deemed appropriate. The
6 bankruptcy court's account of the evidence is plausible; thus,
7 regardless of whether we would have weighed the evidence
8 differently, we cannot reverse the court's findings. Anderson,
9 470 U.S. at 573. Viewing all of the evidence submitted by
10 Monterey in support of its defense, we cannot conclude that the
11 bankruptcy court applied an incorrect legal standard or clearly
12 erred in finding that the Transfer was not made in the ordinary
13 course of dealings between these parties. The amount and method
14 of the Transfer stands out as an aberration from the past
15 dealings of the parties; thus there is evidence to support the
16 bankruptcy court's findings.

17 **B. The bankruptcy court did not err in finding that Monterey**
18 **failed to establish that the Transfer was made according to**
19 **ordinary business terms.**

20 As an alternative to establishing that a transaction falls
21 within the ordinary course of dealings between the parties, a
22 creditor may show that the parties' dealings were "ordinary in
23 relation to prevailing business terms." In re Healthcentral.com,
24 507 F.3d at 791. The standard is an objective one: the defendant
25 must first "establish the 'broad range' of business terms
26 employed by similarly situated debtors and creditors, including
27 those in financial distress, during the relevant period." Id.
28 (citing In re Jan Weilert RV, Inc., 315 F.3d at 1197). Second,

1 the creditor must show that the transfer was ordinary in relation
2 to the established prevailing business terms. Id. "Only a
3 transaction that is so unusual or uncommon as to render it an
4 aberration in the relevant industry falls outside the broad range
5 of terms encompassed by the meaning of 'ordinary business
6 terms.'" In re Jan Weilert RV, Inc., 315 F.3d at 1198 (citation
7 omitted).

8 Troup testified that, based on his 25 years in the
9 construction industry, most companies in Monterey's industry
10 receive payment well after the typical net-30 contract term.
11 Troup explained that this is because (1) Monterey's millwright
12 customers are typically large corporations with bureaucratic
13 purchasing departments that need multiple approvals to get
14 invoices paid and/or use their leverage to stretch payment terms
15 to 90-120 days; and (2) engineering firms usually acquiesce to
16 longer payment terms to encourage repeat business and because
17 payment is usually assured because the manufacturers tend to be
18 financially stable, the engineering firms can exercise mechanic's
19 lien rights if they are not paid, and the engineering firms
20 recognize that the manufacturer cannot operate without working
21 machinery. The Petrovich and Moreira declarations contained the
22 same recitations, which were based on the declarants' "extensive
23 experience in the industry" and "personal interactions with
24 Monterey's customers and competitors."

25 Troup (and Petrovich and Moreira) also provided a summary of
26 invoicing and payment history for some of Monterey's other
27 customers--C&H Sugar, Coca Cola, Foster's Group, and Pacific
28 Steel Casting--to show that the payment history for Evergreen was

1 consistent with the payment history of those other customers.
2 That table showed payments made ranging from a low of 82 days
3 after invoicing to a high of 168 days after invoicing (both by
4 Coca Cola). As noted above, the Transfer was made 105 days after
5 the invoice date. Troup also noted that it was customary for
6 Monterey's customers to make lump sum payments for the invoiced
7 amounts and that it frequently received payments exceeding
8 \$100,000.

9 The bankruptcy court found that the declarations were
10 insufficient to establish prevailing business terms. The court
11 concluded that Monterey's evidence "failed to provide a complete
12 picture of what ordinary business practices are for the
13 industry." We agree. Other than the conclusory statements
14 contained in the trial declarations that late payments were the
15 norm in the industry, no specific evidence was presented as to
16 the practices of other companies providing millwright services.
17 And no evidence was introduced to show that the customers listed
18 in Monterey's summaries were similarly situated to Evergreen.
19 According to the declaration testimony, C&H Sugar, Coca Cola, and
20 Foster's Group were financially stable, and Pacific Steel Casting
21 was financially distressed. However, the evidence showed that
22 Pacific Steel Casting never made a late, large lump-sum payment
23 comparable to the Transfer: according to the summary, during 2011
24 and 2012, Pacific Steel Casting made five payments ranging from
25 \$2,320.50 to \$14,651.33, and payments were made anywhere from 88
26 to 101 days after the invoice date.

27 The bankruptcy court thus concluded that Monterey had failed
28 to establish what is ordinary in the millwright industry or that

1 a lump-sum transfer in excess of \$100,000 is ordinarily paid at
2 or around 105 days after invoicing by any company, let alone a
3 financially distressed company such as Evergreen. The evidence
4 supports this conclusion; we find no clear error in the
5 bankruptcy court's finding.

6 **CONCLUSION**

7 For these reasons, the bankruptcy court did not err in
8 finding that Monterey failed to meet its burden to prove the
9 ordinary course of business defense. Accordingly, we AFFIRM.

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