UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

American Coal Corporation,
Debtor.

CHAPTER 7

Bky. Case No. 94-34865

Molly T. Shields, Trustee of the Bankruptcy Estate of American Coal Corporation,
Plaintiff,

Adv. No. 95-3250

vs.

Sextet Mining Corporation,
Defendant.

ORDER DENYING SUMMARY JUDGMENT

This matter is before the Court on motion of Defendant Sextet Mining Corporation ("Sextet") for summary judgment in this preference action brought by Molly T. Shields, as Trustee of the Bankruptcy Estate of American Coal Corporation. The motion was heard on June 16, 1996; appearances are as noted in the record at the hearing; and, the Court now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
UNDISPUTED FACTS

Sextet is a Kentucky corporation whose principal office is located in Madisonville, Kentucky. The company is in the business of mining and selling coal. In 1994, Sextet operated underground mining operations at its West Hopkins Mine in Hopkins County, Kentucky, and its Dorea Mine in Webster County, Kentucky.

American Coal Corporation ("American") is a Minnesota corporation whose principal office was located in Minneapolis, Minnesota. American's primary business was the mining, sale, and distribution of coal. The company was formed in December

of 1992 by Edward Pappas. American began business operations in approximately August of 1993, upon purchasing the major assets from its predecessor, Centran Corporation ("Centran"). Centran had been involved in the coal industry dating back to the early 1980's, and was in bankruptcy when its assets were purchased by American.

Centran and its related corporation, A.B. Enterprises, Inc., had periodically purchased coal from Sextet to supply coal for Centran contracts. When American began operations in 1993, it also purchased coal periodically from Sextet to fulfill blending requirements on American's contracts. The coal was purchased from Sextet on an as-needed, or spot, basis and was shipped by barge up river to destinations outside of Kentucky. There were no written contract documents between Sextet and American for the purchases. Sextet did, however, issue written invoices for each of the transactions. The invoices were issued by Sextet upon loading the coal for delivery, and stated that payment was due in thirty days.

At no time during the business dealings between the parties from October, 1992, through October of 1994, did American (or Centran) pay for coal purchased from Sextet within 30 days of of the invoices. During the two year course of dealing, payments were received on invoices on a range of 32 to 77 days. During the period of October 6, 1992, through June 30, 1994, Sextet issued 13 invoices for 13 coal purchase transactions with American (or Centran).

Sextet Inv. Number	Invoice Date	Check Issuance Date	Number of Days	Pay.Rcpt Date	Number of Days
(Centran) 357	10/06/92	11/30/92	55	12/04/92	59
(Centran) 369	05/31/93	06/30/93	30	07/06/93	36
(Centran) 370	06/30/93	07/29/93	29	08/02/93	33
(Centran) 371	07/31/93	08/30/93	31	09/01/93	32
(American) 372	08/31/93	10/13/93	43	10/18/93	48
(American) 373	09/30/93	11/04/93	35	11/11/93	43
(American) 374	10/31/93	12/07/93	37	12/13/93	43
(American) 379	11/30/93	01/03/94	34	01/07/94	38
(American) 384	12/31/93	02/15/94	46	02/19/94	50
(American) 386	01/31/94	03/07/94	35	03/14/94	42
(American) 389	02/28/94	04/28/94	59	04/29/94	60
(American) 391	05/31/94	08/10/94	71	08/16/94	77
(American) 392	06/30/94	08/19/94	50	08/22/94	53

The last two payments are at issue here.

In May of 1994, Sextet sold 224 tons of coal to American that was invoiced on May 31, 1994. American paid for the coal by check dated August 10, 1994, received by Sextet on August 16, 1994, (77 days after the date of invoice) in the amount of $4,716.60.

During the month of June, 1994, Sextet sold 843.71 tons of coal to American, which was invoiced by invoice number 392 on June 30, 1994. American paid for this coal by check dated August 19, 1994, in the amount of $17,717.91, which was received by Sextet on August 22, 1994 (53 days after date of invoice).

American filed for relief under 11 U.S.C. Chapter 11 on October 24, 1994. The case was subsequently converted to Chapter 7 on April 7, 1995. The Chapter 7 Trustee filed this

adversary proceeding seeking to avoid the payment of invoice numbers 391 and 392 as preferential transfers, under 11 U.S.C. Section 547(b). Discovery has been completed, and Sextet now seeks summary judgment in its favor based on the "ordinary course" defense provided in 11 U.S.C. Section 547(c)(2). The Trustee opposes the motion, arguing that issues of material fact remain unresolved. The Court agrees with the Trustee.

II.
DISCUSSION

Summary judgment is appropriate when the moving party establishes those elements, upon which it would carry the burden of proof at trial, that are essential to its case. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). Sextet premises its motion on an affirmative defense, upon which Sextet carries the burden of proof. For the reasons discussed below, Sextet has not shown all elements that are essential to its case. The burden of proof has not been met, and summary judgment would be inappropriate.

11 U.S.C. Section 547(b) provides:

(b) 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; or

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

(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.

11 U.S.C. Section 547(c)(2) provides:

(c) The trustee may not avoid under this section a transfer --

(2) 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;

Ordinary Course Debts Shown.

The Trustee argues that the debts, represented by the invoices, have not been shown to have been incurred in the ordinary course because the underlying transactions were not based on written contracts. Substantially all other similar business transactions by the Debtor and Sextet with third parties, were based on written contracts. According to the Trustee, the lack of written contracts for these transactions suggests that they do not meet the requirements of 11 U.S.C. Section 547(c)(2)(A). The Trustee's argument is not persuasive.

When examining transactions between a debtor and a transferee to determine whether they are ordinary course dealings between the parties, similar transactions with third parties are normally irrelevant. See, Jones Truck Lines, Inc. v. Full Service Leasing Corporation, 83 F.3d 253, 257 (8th Cir. 1996) (contention that the court should have focused 11 U.S.C. Section 547(c)(2)(B) inquiry on late payments of the debtor and transferee by considering third party transactions was wrong). There exists nothing in the record to suggest that the obligations underlying the two invoices in dispute here, were not incurred in the ordinary course of business between American and Sextet. To the contrary, the purchase and sale of coal constituted the business of the parties; the obligations were clearly ordinary course purchase and sales, as between the parties; and, the requirements of Section 547(c)(2)(A) have been met as a matter of law.

Ordinary Course Payments Not Shown.

Sextet argues that the last two payments were clearly in the ordinary course of business and financial affairs of the Debtor and Sextet, when compared with the history of payments. Sextet cites Lovett v. St. Johnsbury Trucking, 931 F.2d 494 (8th Cir. 1991) as a preemptive strike against the anticipated assertion by the Trustee that the payments were not in the ordinary course because they were outside the thirty day stated terms on the invoices. The Lovett Court held that late payments can be ordinary course payments that satisfy Section 547(c)(2)(B). See, Lovett v. St. Johnsbury, at 498. The Trustee attempts to distinguish Lovett, and to lay claim to the holding as supporting the Trustee's position. The Trustee argues:

Analyzing the 11 pre-Preference Period payments from Debtor to Sextet yields the fact that such payments were made,on average, 44 days after the invoice date, the

> median payment being made 43 days after invoice date. Thus, this pre-Preference Period activity comports with expert Natta's testimony that payments made within 30-45 days after invoice date are ordinary. See Ewald Aff., Exhibit G, Natta Depo. p.28. The preferential payment made 77 days after invoice date on August 16, 1994, however, clearly falls outside the parties' pre-Preference Period history and was, in fact, the latest payment ever made to Sextet. Likewise, the preferential payment made 53 days after the invoice date on August 22, 1994,falls well outside the average, and only 3 payments were ever made later to Sextet. These facts strongly support the Trustee's position, create a factual controversy and demonstrate that Sextet cannot meet its burden under Section 547(c)(2)(B) for purposes of this motion....
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> Sextet relies on Lovett, 931 F.2d at 494, in its Memorandum of Law in support of its improper motion. Of course, Lovett is clearly distinguishable in that the bankruptcy court at trial examined over 700 invoices from the pre-Preference Period and over 100 invoices from the Preference Period, "detailed information . . . which the Trustee [did] not challenge [ ] . . ." Id. at 498. This sharply contrasts the instant case where the modest payment history precludes the Court from prematurely crafting a legal conclusion, especially in light of the Trustee's strong challenge to the unusual nature of the transactions set out elsewhere in this Memorandum. Furthermore, the Eighth Circuit's Lovett analysis actually supports the Trustee's action. In Lovett, the court found that a 16% difference in pre-Preference Period payments (averaging 62 days) and Preference Period payments (averaging 52 days) did not enable that trustee to avoid the transfers. Id. at 498. However, in the instant case, there is a 32% difference between the pre-Preference Period payments(averaging 44 days) and the Preference Period payments (averaging 65 days). Thus, on a percentage basis, Sextet received preferential payments on average twice as late as the payments received by the creditor in Lovett. Under Lovett, which states that Section 547(c)(2) issues are "peculiarly factual", the (c)(2)(B) issues in this case surrounding the parties' ordinary course of business demand resolution in a trial setting.
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> Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment, May 30, 1996, at 12 and 13.

The argument presents distinctions without significant differences and, standing alone, does not present an issue of material fact.

However, the Trustee also argues that a fact issue arises regarding the ordinary course nature of the payments, because Mr. Pappas was being "dunned" by Sextet to bring the account current or face cut-off of further purchases during the period in which the payments were made. The Trustee cites the Affidavit of Edward Pappas, May 29, 1996.(FN1) According to the Trustee, payments made on a delinquent account under threat of future cut-off, are not ordinary course transactions. The Trustee cites Lovett, which distinguished its facts from the

facts in In re Seawinds Ltd., 888 F.2d 640 (9th Cir. 1989), where the Ninth Circuit held payments not to be ordinary course when made under "economic pressure to obtain payment as soon as possible." Lovett v. St. Johnsbury Trucking, supra, at 499.

Sextet does not address the Pappas affidavit, or the Trustee's argument. Sextet simply states in its brief, filed in support of the summary judgment motion, that:

> American was not pressured to make these payments and the payments were made in the ordinary course of business and financial affairs of American and Sextet in accordance with ordinary business terms consistent with custom and practice between the parties and in the Western Kentucky coal industry. Defendant's Memorandum Of Law In Support Of Motion For Summary Judgment, May 1, 1996, at 4.

Whether the payments were made under undue economic pressure brought to bear by Sextet, is relevant to the determination whether the payments were ordinary course payments. That is a question of material fact which remains unresolved regarding the issue. Accordingly, Sextet has not shown that the requirement of Section 547(c)(2)(B) has been met. Summary judgment is inappropriate.

Payment According To Ordinary Business Terms Not Shown.

The Trustee argues that Sextet has not shown that the payments were made according to ordinary business terms. The Trustee first focuses on the absence of a written contract, arguing that: virtually all similar purchase and sale transactions by both Sextet and American with third parties involved written contracts; written contracts are standard in the industry for these types of transactions; and, the absence of written contracts between the parties suggests that the payments were not according to ordinary business terms. At the very least, according to the Trustee, a question of material fact remains regarding the issue. The argument is not persuasive.

Unlike the "ordinary course of business" test of Section 547(c)(2)(A) and (B), the "ordinary business terms" test of Section 547(c)(2)(C) relates to objective industry standards. But, the question is whether the terms of payment were according to ordinary business terms, not whether the underlying obligation was incurred according to ordinary business terms.(FN2) The fact that terms of payment are not memorialized in written sales contracts has no bearing on whether the terms themselves are ordinary business terms.

The Trustee next argues that differences of the parties' experts leave a question of material fact unresolved. Sextet presents the opinions of two experts, who testified in deposition that payment up to 80 days on thirty day invoices are common in the coal industry, depending on delivery of the coal. The experts testified that: purchasers pay upon receipt; the thirty day term begins to run upon receipt; and, it is not uncommon that purchasers receive shipments under circumstances where payment is made, within ordinary business terms, up to 80 days post-invoice date. The Trustee's expert testified, in deposition, that payment, as within ordinary business terms, is questionable when over 45 days post-invoice; and, payment is definitely not within ordinary business terms

when made 60 days or longer than invoice date.

Sextet acknowledges the conflicting testimony. But, the Defendant argues that the Court should decide the question in the context of this motion anyway, simply by choosing the more credible expert testimony. According to Sextet, none of the experts would testify differently at trial, and testimony of all three would probably be submitted through these same depositions. In short, according to Sextet, in the event of trial, there likely would be no other testimony of experts to consider.

Determination of the issue in the context of this motion would not result in Sextet's prevailing on the Section 547(c)(2)(C) "ordinary business terms" issue, even if the testimony of Sextet's experts was accepted over the testimony of the Trustee's expert. The burden of proof on the 11 U.S.C. Section 547(c)(2) preference exception is with the transferee who asserts it. Jones v. United Sav. and Loan Ass'n, 9 F.3d 680, 682 (8th Cir. 1993). Sextet must prove, by preponderance, that the payments at issue were made according to ordinary business terms. The burden has not been met on this record by Sextet.

Simply because payments within 80 days of invoice can be ordinary business terms in the industry, does not mean that the payments at issue here were according to ordinary business terms. Sextet's experts testified that such payments could be within ordinary business terms, depending upon circumstances of the shipment and receipt of the coal. Sextet has pointed to nothing in the record regarding the shipment or receipt of the coal for invoice numbers 391 and 392. Accordingly, Sextet has offered no evidence concerning the transactions from which a determination can be made; and, the Defendant has failed to carry its burden of proof on the issue.

III.
DISPOSITION

Based on the forgoing, it is hereby ORDERED that Sextet Mining Corporation's motion for summary judgment is denied.

Dated: August 23, 1996 By The Court:

DENNIS D. O'BRIEN
CHIEF U.S. BANKRUPTCY JUDGE

(FN1). Mr. Pappas states in his affidavit: "During the period of Debtor's operation, I received phone-calls from then-Sextet employee Ron Underwood, asking me to bring accounts for coal purchased current or no more coal would be sold to Debtor".

(FN2). Congress chose not to impose the requirement that the debt itself be incurred according to ordinary business terms in order to qualify for the Section 547(c)(2) preference exception. 11 U.S.C. Section 547(c)(2)(A) requires only that the debt incurred in the ordinary course of of business between the debtor and the transferee. The standard is is a subjective one, and is applied in the context of the dealings of the parties between themselves, without regard to industry standards. See, Jones Truck Lines, Inc. v. Full Service Leasing Corporation, 83 F.3d 253, 257 (8th Cir. 1996). The subjective versus objective discussion in Jones related to Sections 547(c)(2)(B) and (C), the same reasoning that the Circuit Court applied to Section 547 (c) the Circuit Court applied to Section 547 (c)(2)(B), is applicable to Section 547(c)(2)(A). Both speak to "ordinary course of business or

financial affairs of the debtor and the transferee."