

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF SOUTH DAKOTA**  
ROOM 211  
FEDERAL BUILDING AND U.S. POST OFFICE  
225 SOUTH PIERRE STREET  
PIERRE, SOUTH DAKOTA 57501-2463

**IRVIN N. HOYT**  
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560  
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October 7, 2002

Patrick T. Dougherty, Esq.,  
Counsel for Plaintiff-Trustee John S. Lovald  
Post Office Box 1004  
Sioux Falls, South Dakota 57101-1004

Swaney Trucking Company  
Attention: Ms. Mary Kay Swaney  
Post Office Box 626  
King City, Missouri 64463

Subject: *Trustee John S. Lovald v. A.J. Transportation, Inc., et al. (In re Hagen Transportation Services, Inc.), Adversary Proceeding No. 02-4013; Chapter 7, Bankr. No. 00-40682*

Dear Mr. Dougherty and Ms. Swaney:

The matter before the Court is the Motion for Summary Judgment filed by Plaintiff-Trustee John S. Lovald and the response filed by Defendant Swaney Trucking Company.<sup>1</sup> This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the Motion shall be granted.

SUMMARY. Hagen Transportation Service, Inc., ("Debtor") filed a Chapter 7 petition on August 14, 2000. John S. Lovald was appointed to serve as the case trustee. On February 6, 2002, Trustee Lovald commenced an adversary proceeding against several of

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<sup>1</sup> Defendant Swaney Trucking Company has not appeared through counsel. See 28 U.S.C. § 1654; Fed.R.Bankr.P. 9010(a); and *Ackra Direct Marketing Corp. v. Fingerhut Corp.*, 86 F.3d 852, 857 (8th Cir. 1996).

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Debtor's previous creditors, including Swaney Trucking Company ("Swaney"). Trustee Lovald alleged that each of the creditors, within 90 days prior to Debtor's bankruptcy petition, had received preferential payments on claims that could be avoided by the Court under § 547(b) of the Bankruptcy Code. Regarding Swaney in particular, Trustee Lovald alleged that Debtor wrote a check to Swaney for \$525 on April 11, 2000, and that the check was cashed by Swaney on May 22, 2000.

Swaney answered the Complaint on March 4, 2002. Swaney denied everything alleged by Trustee Lovald except that its business name was Swaney Trucking Company. Swaney's Answer also included an affirmative defense that the debt had been paid in the ordinary course of business.

Trustee Lovald moved for summary judgment regarding several defendants. He filed an affidavit that stated each of these defendants, including Swaney, had rendered services and billed Debtor on an unspecified date before Debtor wrote a check to each creditor for payment. He further stated that each check was not cashed until sometime later. In particular, Trustee Lovald stated that Debtor wrote a check to Swaney on April 11, 2000, but that Swaney did not cash the check until May 22, 2000. Swaney responded to the summary judgment motion stating it had been paid in the ordinary course of business.

APPLICABLE LAW-SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986)(cites therein)). The non moving party is entitled to all reasonable inferences that can be drawn from the evidence without resorting to speculation. *P.H. v. School District of Kansas City, Missouri*, 265 F.3d 653, 658 (8th Cir. 2001)(quoting therein *Sprenger v. Fed. Home Loan Bank of Des*

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*Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001) (internal quotation omitted)). Only disputes over facts that might affect the outcome of the suit under the applicable law properly preclude the entry of summary judgment. *P.H. v. School District*, 265 F.3d at 658.

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he identifies that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance *specific facts* to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (emphasis added) (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d at 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

APPLICABLE LAW - PREFERENTIAL TRANSFERS. Under 11 U.S.C. § 547(b), a trustee may avoid a transfer to a creditor that occurred within ninety days before the petition date if the transfer was for a debt that preceded the transfer, the debtor was insolvent at the time of the transfer, and the transfer enabled the creditor to receive more than it would have under a Chapter 7 liquidation. *Buckley v. Jeld-Wen, Inc. (In re Interior Wood Products Co.)*, 986 F.2d 228, 230 (8th Cir. 1993). The trustee bears the burden of proof on each element of a preference under § 547(b). 11 U.S.C. § 547(g). The purpose of § 547(b) is to restore the bankruptcy estate to its pre-preferential transfer condition. *Halverson v. Le Sueur State Bank (In re Willaert)*, 944 F.2d 463, 464 (8th Cir. 1991), and to prevent the debtor from favoring one creditor over others by transferring property shortly before filing bankruptcy. *Begier v. IRS*, 496 U.S. 53, 58 (1990).

APPLICABLE LAW - ORDINARY COURSE OF BUSINESS DEFENSE. If a case trustee establishes under § 547(b) that a preferential transfer occurred, the creditor who received the transfer can raise several defenses under § 547(c). The two-fold purpose of these exceptions is to

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encourage creditors to continue dealing with troubled debtors and to promote equality in the distribution of assets. *Harrah's Tunica Corp. v. Meeks (In re Armstrong)*, 291 F.3d 517, 527(8th Cir. 2002)(cites therein). The creditor who received the preferential transfer bears the burden of establishing an exception by a preponderance of the evidence. 11 U.S.C. § 547(g); *Jones v. United Savings and Loan Association (In re U.S.A. Inns of Eureka Springs, Arkansas, Inc.)*, 9 F.3d 680, 682 (8th Cir. 1993); *Concast Canada, Inc. v. Laclede Steel Co. (In re Laclede Steel Co.)*, 271 B.R. 127, 130 (B.A.P. 8th Cir. 2002).

Those preferential transfers that may not be avoided by the trustee include those in which 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 [creditor]; ... made in the ordinary course of business or financial affairs of the debtor and the [creditor]; and ... made according to ordinary business terms.

11 U.S.C. § 547(c)(2). The specific purpose of this "ordinary course of business" exception at § 547(c)(2) is to

leave undisturbed the 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.

S.Rep. No. 95-989 at 88 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5874; H.R. Rep. 95-595 at 373 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6329 (quoted in *Central Hardware Co. v. Sherwin-Williams Co. (In re Spirit Holding Co., Inc.)*, 153 F.3d 902, 904 (8th Cir. 1998)). The ordinary course of business exception has three elements that must each be established.

Under subsection (c)(2)(A), the creditor must first show that the underlying debt was incurred in the ordinary course of business or financial affairs between that debtor and that creditor. *U.S.A. Inns*, 9 F.3d at 682. The focus is on the purpose or nature of the original transaction creating the debt. *Armstrong*, 291 F.3d at 527; *Grove Peacock Plaza, Ltd. v. Resolution Trust Corp. (In re Grove Peacock Plaza, Ltd.)*, 142 B.R. 506, 518 (Bankr. S.D. Fla.

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1992). The creditor needs to show that the underlying debt agreement was made between unrelated parties and for general business purposes. *Ferrer v. Prusa Distributing Corp. (In re Kiddy Toys, Inc.)*, 178 B.R. 928, 933 (Bankr. D. P.R. 1994); compare *Friedman v. Ginsburg (In re David Jones Builder, Inc.)*, 129 B.R. 682, 696-97 (Bankr. S.D. Fla. 1991) (new loan made to debtor by bank chairman to avoid problem with examiners regarding a large overdraft by the debtor was not a debt incurred in the ordinary course of business or financial affairs of the bank and debtor). Even first time or only time transactions may qualify. *Grove Peacock Plaza*, 142 B.R. at 519.

Under subsection(c)(2)(B), the creditor must next show that the subject payment was made in the ordinary course of business between the debtor and transferee. *Id.* There is no precise legal test for determining whether the payment was made in the ordinary course of business. *Spirit Holding Co. Inc.*, 153 F.3d at 904. Instead, the Court "must engage in a "peculiarly factual" analysis.'" *Id.* (quoting *Lovett v. St. Johnsbury Trucking*, 931 F.2d 494, 497 (8th Cir. 1991) (itself quoting *In re Fulghum Construction Corp.*, 872 F.2d 739, 743 (6th Cir. 1989) (itself quoting *In re First Software Corp.*, 81 B.R. 211, 213 (Bankr. D. Mass. 1988)))).

"[T]he cornerstone of this element of a preference defense is that the creditor needs [to] demonstrate some consistency with other business transactions between the debtor and the creditor."

*Spirit Holding Co. Inc.*, 153 F.3d at 904 (quoting *Lovett*, 931 F.2d at 497 (itself quoting *In re Magic Circle Energy Corp.*, 64 B.R. 269, 272 (W.D. Okla. 1986))). The focus is "not narrowly on the collection effort by the creditor but broadly on the consistency between the [payment] at issue and other business transactions between the debtor and the creditor." *Spirit Holding Co. Inc.*, 153 F.3d at 905 (citing *Lovett*, 931 F.2d at 497-99). Factors to consider include: (1) the length of time the parties were engaged in the transaction at issue; (2) whether the amount or form of tender differed from past practices; (3) whether the debtor or the creditor engaged in any unusual collection or payment activity; and (4) whether the creditor took advantage of the debtor's deteriorating financial condition. *Central Hardware Co. v. Sherwin-Williams Co. (In re Spirit Holding Co. Inc.)*, 214 B.R. 891, 897 (F.D. Mo. 1997) (cites therein).

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Under the third element found at subsection (c)(2)(C) of § 547, the Court must make an objective determination that the payment was ordinary in relationship to the standards prevailing in the relevant industry. *U.S.A. Inns*, 9 F.3d at 683. What constitutes these ordinary business terms will vary widely from industry to industry. *Id.* at 685. However, this element of § 547(c)(2)

does not require a creditor to establish the existence of some uniform set of business terms within the industry in order to satisfy its burden. ...[T]he focus of subsection (c)(2)(C) should be on whether the terms between the parties were particularly unusual in the relevant industry, and that evidence of a prevailing practice among similarly situated members of the industry facing the same or similar problems is sufficient to satisfy subsection (c)(2)(C)'s burden. We agree with the Seventh Circuit's formulation that "'ordinary business terms' refers to the range of terms that 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)."

*Id.* (quoting in part *In re Tolona Pizza Products Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993)).

DISCUSSION. The record before the Court establishes Debtor incurred a debt to Swaney sometime before April 11, 2000, that Swaney did not cash the check it received from Debtor until May 22, 2000, and that Debtor was insolvent at the time Swaney cashed its check. Thus, Trustee Lovald has established the elements for a voidable preferential transfer under § 547(b), and he has established that he is entitled to summary judgment on his Complaint. As the applicable law discussed above provides, Swaney then had to go forward and identify the admissible evidence it has that will refute the Trustee's showing of a voidable preference. Alternatively, Swaney had to go forward and identify the admissible evidence it has that will establish that the debt was incurred in the ordinary course of business between Debtor and Swaney, that the payment was made in the ordinary course of business between Debtor and Swaney, and that the transfer was within the accepted standards for the trucking industry. Swaney fulfilled neither alternative in

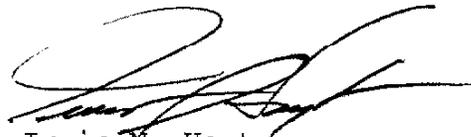
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its response to Trustee Lovald's summary judgment motion. Accordingly, under Fed.R.Bankr.P. 7056 and the supporting case law, Trustee Lovald's summary judgment motion must be granted.

As noted above, a preferential transfer is one in which one creditor, by getting an existing debt paid just before a debtor files bankruptcy, receives more than he would have if he were paid through the bankruptcy case. That is what has happened here. Debtor paid Swaney on an earlier debt shortly before Debtor filed bankruptcy. The date that Debtor issued the check did not control; it was the date the check was cashed. *Barnhill v. Johnson*, 503 U.S. 393, 112 S.Ct. 1386 (1992). Therefore, this payment must now be recovered by the case trustee under § 547(b) of the Bankruptcy Code so that the Trustee can make a more equal distribution of Debtor's assets among all unsecured creditors, including Swaney.

Counsel for Plaintiff may submit an appropriate order.

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

INI:sh

CC: adversary file (docket original; serve copy on parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

OCT 08 2002

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota  
By: MIN

NOTICE OF ENTRY  
Under F.R.Bankr.P. 9022(a)  
Entered

OCT 08 2002

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