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

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June 24, 2002

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Subject: *Pfeiffer v. Aberdeen Finance Corporation (In re Elsperger)*, Adversary No. 01-1018; Chapter 7; Bankr. No. 01-10166

Dear Counsel:

The matter before the Court is Trustee William J. Pfeiffer's complaint against Aberdeen Finance Corporation to avoid some alleged preferential and post-petition transfers. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the subject pre-petition transfers from Debtors to Defendant Aberdeen Finance Company are excepted from avoidance as preferential transfers under 11 U.S.C. § 547(c)(2). Further, any post-petition assignment to Defendant of wages earned post-petition by Debtor Kevin Elsperger are not avoidable under 11 U.S.C. § 549(a).

SUMMARY OF FACTS. By agreement of the parties, the matter was submitted to the Court on stipulated facts and briefs. The parties agreed that on or about August 28, 2000, Kevin J. and Tari A. Elsperger purchased a 1994 Dodge Caravan. Aberdeen Finance Corporation ("AFC") loaned them $23,597.04 to make this purchase and to consolidate some other debts, including the debt on an earlier car loan. As partial security for the debt, the Elspergers pledged the 1994 Caravan. Kevin Elsperger also agreed to give a wage assignment from each paycheck he received. The wage assignment totaled $442.20 per month and was received regularly by AFC from Kevin Elsperger's employer.

The Elspergers ("Debtors") filed a Chapter 7 petition on June 14, 2001. Within the ninety days before the petition date, AFC received six payments from Debtor Kevin Elsperger's employer that totaled $1,326.60. After the petition date, AFC received two more assignments that totaled $442.20. The parties had stipulated that the two post-petition payments are avoidable under 11 U.S.C. § 549(a). That left the issue of whether the six pre-petition transfers are avoidable under 11 U.S.C. § 547(b) or are an exception to a preference under § 547(c)(2). The parties also questioned whether the payments should be applied to the secured or unsecured portion of AFC's claim.

APPLICABLE LAW - PREFERENCE. 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).

Section 547(c) sets forth certain exceptions to the avoidable preference provision of § 547(b), whose two-fold purpose is to 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)*, 2002 WL 1060043, slip op. at *8 (8th Cir. May 29, 2002)(cites therein). The transferee 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)).

Under subsection (c)(2)(A), the transferee must show that the underlying debt was incurred in the ordinary course of business or financial affairs between that debtor and that transferee. *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*, 2002 WL 1060043, slip op. at *8; *Grove Peacock Plaza, Ltd. v. Resolution Trust Corp. (In re Grove Peacock Plaza, Ltd.)*, 142 B.R. 506, 518 (Bankr. S.D. Fla. 1992). The transferee 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 transferee must show that the subject payment or transfer was made in the ordinary course of business between the debtor and transferee. *Id.* There is no precise legal test for determining whether the subject transfer 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 transfer 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 (E.D. Mo. 1997) (cites therein).

Under subsection (c)(2)(C) of § 547, the Court must make an objective determination that the payment-transfer 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[-transferee] 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 - PREFERENCE. The Court is satisfied that the debt incurred by Debtors was in the ordinary course of AFC's business practice of lending and within the ordinary course of Debtors' financial practices of obtaining and utilizing consumer credit. AFC loaned secured and unsecured funds to Debtors, just as they do with their other patrons. Debtors borrowed funds from AFC just as they could borrow from other institutions. That this was a loan consolidation coupled with a replacement car loan does not alone render the agreement out of the ordinary for either Debtors or AFC. Thus, the requirement of § 547(c)(2)(A) has been met.

Further, the Court is satisfied that the payments made within the preference period were consistent with the payments that Debtors made before the preference period began. Neither the timing nor amount changed; instead the payments from Debtor Kevin Elsperger's wage assignment "reflected the normal operations" under Debtors' agreement with AFC. *Lovett*, 931 F.2d at 498. Thus, the requirement of § 547(c)(2)(B) has been met.

The remaining issue under § 547(c)(2) is whether the payments, which came to AFC through a wage assignment, were made according to ordinary business terms, as required by subsection (c)(2)(C). There is nothing in the stipulated record to indicate that the subject payments were anything but well within the broad range of terms found in credit agreements within the consumer lending industry. There was nothing idiosyncratic or unusual about them. Thus, the requirement of § 547(c)(2)(C) has also been met.

A collateral issue raised by the parties was whether the payments should be applied to the secured or unsecured portion of AFC's claim. AFC did not address the issue in its briefs. Nonetheless, that matter is better resolved through an objection to AFC's claim, if indeed Trustee Pfeiffer requests that creditors file proofs of claim in this case.

APPLICABLE LAW AND DISCUSSION - AVOIDABLE POST-PETITION TRANSFERS. The Court is unable to approve the parties' stipulation regarding the post-petition assignments to AFC. For a post-petition transfer to be avoided, the transfer must be of bankruptcy estate proeprty. 11 U.S.C. § 549(a). Any wages that Debtor Kevin Eslperger earned after the Chapter 7 petition date are not property of the bankruptcy estate. 11 U.S.C. § 541(a). Accordingly, any assignment of those post-petition wages to AFC could not be the subject of an avoidance action under § 549(a).

An order for AFC will be entered.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh
CC: adversary file (docket original; serve parties in interest)

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

JUN 24 2002

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

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.

JUN 24 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By_____

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