

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

S & Z, INC.
Debtor.

Bankruptcy No. 93-51548XS
Chapter 7

DONALD H. MOLSTAD, Trustee
Plaintiff

Adversary No. 94-5011XS

vs.

CITY OF AKRON
Defendant.

ORDER RE: COMPLAINT TO AVOID PREFERENCE

The matter before the court is the final trial of the trustee's complaint to recover a preference from defendant the City of Akron. The case was tried December 21, 1994 in Sioux City, Iowa. Donald H. Molstad appeared as attorney for the trustee. Darin J. Raymond appeared for the City of Akron. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) (F).

The City of Akron supplied the debtor, S & Z, Inc., with electric, water, sewer and garbage utility services. The trustee alleges that S & Z's payment to the City of \$1000 on September 14, 1993, three days before the bankruptcy filing, constituted a preference. The parties filed a stipulation of facts (doc. 14). The trustee submits the stipulation to establish the elements of a preferential transfer under 11 U.S.C. § 547(b). The City of Akron concedes that the payment was a preference, but argues that the transfer comes within the "ordinary course of business" exception to the trustee's avoidance powers in 11 U.S.C. § 547(c)(2). Under that section, the trustee may not avoid 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.

11 U.S.C. § 547(c)(2).

The trustee concedes that the debt for utility services was incurred in the ordinary course of S & Z's and the City's business. The City of Akron must prove by a preponderance of the evidence the statutory elements of §§ 547(c)(2)(B) and (C). Jones v. United Savings & Loan Ass'n (In re U.S.A. Inns of Eureka Springs, Arkansas, Inc.), 9 F.3d 680, 682 (8th Cir. 1993). The City must show that the payment was made in the ordinary course of business dealings between S & Z and the City, and that the payment was made according to ordinary business terms. "There is no precise legal test" for determining whether payments during the preference period were "made in the ordinary course of business"; rather, the court must engage in a peculiarly factual analysis." U.S.A. Inns of Eureka Springs, 9 F.3d at 682-83, quoting Lovett v. St. Johnsbury Trucking, 931 F.2d 494 (8th Cir. 1991). The inquiry under § 547(c)(2)(B) is to determine whether the allegedly preferential transfer conforms to the norm established by the City of Akron and S & Z in the period before the preference period. U.S.A. Inns of Eureka Springs, 9 F.3d at 684, quoting Matter of Tolona Pizza Products Corp., 3 F.3d

1029 (7th Cir. 1993). To establish that a payment was made according to ordinary business terms under § 547(c)(2)(C), a creditor must present objective evidence that the parties' dealings conformed to prevailing practices among similarly situated members of the relevant industry. U.S.A. Inns of Eureka Springs, 9 F.3d at 685.

Beth VanBeek, City Clerk for the City of Akron, testified for the defendant. VanBeek oversees collection of past due utility bills for the City. She is familiar with the City's billing system and S & Z's history of payments. The City's billing period is from the 15th of the month to the 15th of the next month. Bills are mailed on the 30th of the month and are due on the 20th of the next month. S & Z's billing history began in approximately October, 1991. VanBeek testified that for some time S & Z paid its utility bill in full in a lump sum. If the bill was paid late, a penalty was added which S & Z paid as it was billed. However, beginning in approximately March of 1993, S & Z began making two or three split payments per month. S & Z had asked the City if it would allow S & Z to make payments in this manner and the City agreed that S & Z could do so. S & Z would attempt to pay as much of the utility bill as possible before the due date in order to spread out the payments and reduce the penalty for late payment. During some months all the payments were made before the due date.

The parties attached to their stipulation of facts an Exhibit A, which includes the history of S & Z's payments from May 20, 1993 until the bankruptcy filing date. For the billing period April 15 to May 15, 1993, S & Z was billed \$843.65. On June 17, 1993, S & Z timely paid half of the bill, \$421.82. On June 29, it made a second payment of \$421.82. The bill for the May 15 to June 15 billing period was \$911.12. S & Z made a timely payment of \$455.56 on July 15 and the same amount on July 23. The bill for June 15 to July 15 was \$914.51. Payment for this bill was due August 20, 1993. S & Z did not make a payment in August, and the City of Akron added a penalty to the balance. VanBeek testified that in August, 1993, the City sent S & Z a delinquency notice as a "reminder." This was the first time the City had sent S & Z such a notice.

Charges for utilities during July 15 to August 15 were \$993.95. On approximately August 30, 1993, the City sent S & Z a bill for \$1,921.98, which included both the new and past due charges. VanBeek testified that in September the City sent S & Z a second delinquency notice which set a certain date by which the utility services would be discontinued. VanBeek also said that she telephoned the manager of S & Z to discuss the importance of keeping current with the bill to avoid having services disconnected. On September 14, 1993, S & Z made a payment of \$1,000 by certified check. On September 17, 1993, S & Z filed a Chapter 7 bankruptcy petition.

The court finds and concludes that the payment of \$1000 was not made in the ordinary course of business between the City and

S & Z. Early in S & Z's history of utility payments, its usual practice was to pay its bill on time in a single lump sum. Beginning in approximately March of 1993, S & Z's practice was to make split payments. The payments were made on different dates in relation to the date of the bill and in varying amounts, but the bill was paid in full, generally within 30 days of receipt. A debtor may establish an "ordinary course of business" of making payments which are irregular in time and amount. U.S.A. Inns of Eureka Springs, 9 F.3d at 681-82 & n.1. So although the payments made by S & Z during the latter part of June and during July were also preferential, they come within the "ordinary course of business" exception because of the parties' established practice of making and accepting partial and late payments over the course of the month. The \$1,000 payment on September 14, 1993, however, was outside this course of dealing between the parties. S & Z had made no payments in August. It finally made a payment on the eve of bankruptcy under threat of loss of essential services. The City argues that it followed the usual collection steps it would take with any of its customers, and that its collection practices are consistent with those of other city utility services. This may be some evidence that the payment was made according to ordinary business terms, the third element of the "ordinary course" exception in § 547(c)(2)(C). However, the test under

§ 547(c)(2)(B) is whether the transfer was made in the ordinary course of business. The evidence shows that the payment of \$1,000 was inconsistent with the established course of dealings between the parties. The transfer should be avoided.

ORDER

IT IS ORDERED that the September 14, 1993 payment by S & Z, Inc. to the City of Akron is avoided as a preferential transfer.

IT IS FURTHER ORDERED that plaintiff Donald H. Molstad shall recover from the City of Akron the sum of \$1,000. Judgment shall enter accordingly.

SO ORDERED ON THIS 22nd DAY OF DECEMBER, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: U. S. Trustee, Donald Molstad and Darin J. Raymond.