UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
RADNOR HOLDINGS CORPORATION, et al.,	Case No. 06-10894(PJW)
	(Jointly Administered)
Debtors.	
RADNOR HOLDINGS CORPORATION, et al., Debtors in Possession,	
Plaintiff,	
v.	Adv. Proc. No. 08-51184 (PJW)
PPT CONSULTING, LLC,	
Defendant.	

MEMORANDUM OPINION

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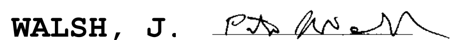
Dated: July 9, 2009

WALSH, J. 

This opinion is with respect to the motion for summary judgment brought by Radnor Holdings Corporation, et al. ("Plaintiff") as to its adversary proceeding seeking to avoid and recover five preferential transfers made to PPT Consulting, LLC ("Defendant"). (Adv. Doc. # 38.) For the reasons discussed below, I will grant Plaintiff's motion for summary judgment.

BACKGROUND

On August 21, 2006, Radnor Holdings Corporation and numerous related subsidiaries ("Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (Case No. 06-10894.) Prior to Debtors' filing, Defendant, an information technology and management consulting firm, provided Debtors with various consulting services. The parties agree that Debtors paid for and Defendant received payment as a creditor for some of these previously provided services within the ninety days preceding the petition date -- between May 23, 2006 and August 21, 2006 ("Preference Period"). (Adv. Doc. # 38, ex. A, ¶¶ 5, 9, and 10; Adv. Doc. # 42, p. 2.) Prior to the Preference Period, Defendant had provided Debtors with services for three and a half months ("Historical Period"). (Adv. Doc. # 38, p. 3.)

Pursuant to 11 U.S.C. § 547, Plaintiff, as Debtors in Possession, commenced this adversary proceeding to avoid and recover those payments made during the Preference Period.

Plaintiff initially identified five payments totaling $44,897.63. (Adv. Doc. # 38, p. 4.) Following Defendant's submission of its objection to the motion, Plaintiff agreed that one of the payments arguably could be protected by one of the exemptions to the avoidability of a preferential transfer outlined in 11 U.S.C. § 547(c) -- the June 12, 2006 payment of $9,897.63 as to a $9,897.63 invoice dated April 30, 2006 -- and withdrew its motion as to that payment. (Adv. Doc. # 43.) Accordingly, Plaintiff seeks to avoid and recover four payments totaling $35,000: (1) the June 27, 2006 payment of $5,000 in partial payment of a $66,991.49 invoice dated February 1, 2006; (2) the July 19, 2006 payment of $15,000 in partial payment of a $66,991.49 invoice dated February 1, 2006 and in partial payment of a $54,538.38 invoice dated April 30, 2006; (3) the August 3, 2006 payment of $10,000 in partial payment of a $54,538.38 invoice dated April 30, 2006; and (4) the August 11, 2006 payment of $5,000 in partial payment of a $54,538.38 invoice dated April 30, 2006.[1] (Id.)

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[1] Based on the exhibits attached to their respective briefs, Plaintiff and Defendant do not agree as to the exact dates of these four payments. For ease of analysis and as Plaintiff is bringing the motion for summary judgment, I will use the payment dates submitted by Defendant, two of which are before Plaintiff's submitted payment dates and two of which are after Plaintiff's submitted payment dates. The discrepancy between the submitted payment dates is one day as to two of the payments and two days as to the other two payments; such a small discrepancy does not impact my analysis. (Compare Adv. Doc. # 38, ex. 1 with Adv. Doc. # 42, ex. A.)

Based on these payment dates, the four payments sought to be avoided and recovered were made 146, 168 and 80,[2] 95, and 103 days, respectively, after the date of the applicable invoice, for an average of payment of 112.4 days after the date of the applicable invoice. During the Historical Period, Debtors paid an average of 60.8 days after the date of the applicable invoice, with payments made between 15 and 76 after the date of the applicable invoice. (Adv. Doc. # 38, ex. A, ¶ 18; Adv. Doc. # 43, ex. 2.)

Also of pertinence, during the Historical Period, Debtors made no payments in multiples of $5,000, and paid all but one invoice in full. (Adv. Doc. # 38, ex. A, ¶ 21.) Debtors' Chief Liquidation Officer, James P. Carrol, submitted an affidavit in which he stated that Debtors' payments came out of Debtors general bank accounts, that Debtors were insolvent throughout the Preference Period, and that in Debtors' bankruptcy case, unsecured creditors will receive less than a hundred percent payout. (Id. at ¶ 8, 11, 12, and 15.) Carrol also stated that Defendant did not extend any new value to Debtors; Defendant did not submit any evidence that it provided new value to Debtors. (Id. at ¶ 7 and 22, and ex. 1.) Defendant's President, Kathy Bellwoar, submitted an affidavit in which she stated that Defendant: engaged in no extraordinary collection activity during the Preference Period,

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[2] Chronologically, the second payment sought to be avoided and recovered was made in partial payment of two different invoices: see item (2) in the preceding paragraph.

assessed no late fees against Debtors during the Preference Period, continued to provide services to Debtors according to its standard terms during the Preference Period, and did not deviate from its prior billing and collection practices during the Preference Period. (Adv. Doc. # 42, p. 14, ¶¶ 6-8.)

Plaintiff asserts that these four payments are avoidable and recoverable pursuant to 11 U.S.C. § 547(b) and are not protected by any of the exemptions of 11 U.S.C. § 547(c). (Adv. Doc. # 38.) Defendant appears to agree that the payments meet the requirements of § 547(b). (Adv. Doc. # 42.) However, in its answer, Defendant asserts as affirmative defenses that the payments are protected by one or more of the following exemptions: new value pursuant to § 547(c)(4), ordinary course of business pursuant to § 547(c)(2)(A), and ordinary business terms pursuant to § 547(c)(2)(B). (Adv. Doc. # 5.) Of these defenses, Defendant focuses solely on ordinary course of business in its objection brief. (Adv. Doc. # 42.)

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56; see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); In re IT Group, Inc., 331 B.R. 597, 600 (Bankr. D. Del. 2005). The Court must view all factual inferences "in the light most favorable

to the nonmoving party." In re IT Group, 331 B.R. at 600 (citing Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-588 (1986)).

The moving party bears the burden of showing there are no genuine issues of material fact that would preclude summary judgment. Celotex, 477 U.S. at 325. Once the moving party has met this burden, the burden shifts to the non-moving party to show that a genuine issue of material fact exists. In re IT Group, 331 B.R. at 600.

DISCUSSION

In order for a transfer to be avoided as a preference pursuant to § 547, the debtor must possess an interest in the transferred property. See, e.g., Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1355-56 (5th Cir. 1986), reh denied 801 F.2d 398 (5th Cir. 1986); 11 U.S.C. § 547(b) (providing that "the trustee may avoid any transfer of an interest of the debtor in property"). Money paid from a bank account containing commingled funds under a debtor's control is presumptively property of the debtor. See, e.g., Cassirer v. Herskowitz, 234 B.R. 337, 343 (Bankr. S.D.N.Y. 1999) ("[T]he bankruptcy trustee carries her [or his] burden of proving that the account was property of the debtor by showing that the debtor had legal title to the account, and the account consists of commingled . . . funds."). As the instant

transfers of funds came from Debtors' general bank accounts, the transferred money is presumptively property of Debtors.

Section 547(b)'s Requirements

To be avoided as a preferential transfer, a payment must satisfy all of the requirements of § 547(b):

> (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 . . . on or within 90 days before the date of the filing of the petition; . . . 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. § 547(b). The trustee or debtor bears the burden of proving each of these elements. Id. at § 547(g).

All the elements are plainly satisfied. First, Defendant admitted that it benefitted from each payment as a creditor of Debtors. (Adv. Doc. # 38, ex. A, ¶ 9.) Second, Defendant also admitted that the payments were on account of antecedent debts. (Id. at ¶ 10.) Moreover, the payments cleared Debtors' bank accounts long after Defendant provided the corresponding services. Thus, the first and second elements are satisfied.

Third, for the purposes of § 547, a debtor is presumed insolvent ninety days before the petition date unless the party seeking to rebut this presumption introduces some evidence to show

that a debtor was solvent at the time of transfer. 11 U.S.C. § 547(f); see also Waslow v. Interpublic Group of Cos., Inc., 308 B.R. 697, 700 (Bankr. D. Del. 2004). Defendant has not offered any evidence to rebut this presumption, while Plaintiff's affiant specifically stated that Debtors were insolvent during the ninety days before the petition date. (Adv. Doc. # 38, ex. A, ¶ 12.) Therefore, the third element is satisfied.

The fourth element also is satisfied. For the purposes of a preference payment, a transfer made by check occurs on the date the check is honored. Barnhill v. Johnson, 503 U.S. 393, 394-95 (1992); Waslow, 308 B.R. at 700. Defendant admitted, and its exhibits demonstrate, that the payments were honored within the Preference Period. (Adv. Doc. # 38, ex. A, ¶ 14; Adv. Doc. # 42, ex. A.)

Finally, whether a transfer meets the requirements of § 547(b)(5) requires the formulation of a hypothetical chapter 7 distribution of a debtor's estate as it existed on the petition date to determine whether the creditor receiving the payment collected more pursuant to that transfer than it would have received in the hypothetical chapter 7 distribution. Waslow, 308 B.R. at 700. Courts consistently hold that "as long as the distribution in bankruptcy is less than 100 percent, any payment 'on account' to an unsecured creditor during the preference period will enable that creditor to receive more than [she or] he would

have received in liquidation had the payment not been made." Id. Plaintiff's affiant stated that unsecured creditors, such as Defendant, will not receive a full payout; thus, the fifth element is satisfied. Accordingly, Plaintiff has established that the identified payments are avoidable as preferential transfers.

Section 547(c)'s Exemptions

Even if a transfer satisfies all the elements of § 547(b), it nevertheless may not be avoided if the opposing party proves that the transfer satisfies one of the exemptions listed in § 547(c). Id. at 701. The party contending that the transfer falls under one of the exemptions bears the burden of proving that assertion by a preponderance of the evidence. 11 U.S.C. § 547(g); United States Trustee v. First Jersey Sec., Inc. (In re First Jersey Sec., Inc.), 180 F.3d 504, 512 (3d Cir. 1999). In the context of a motion for summary judgment, the burden of proof remains with the party asserting the nonavoidability of the transfer; Plaintiff simply needs to point to the absence of such proof to make its case. See, e.g., J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex, 477 U.S. at 323); In re CIS Corp., 214 B.R. 108, 119 (Bankr. S.D.N.Y. 1997).

Defendant's initial answer asserts that the transfers fall within the exceptions in § 547(c)(4), which makes unavoidable payments to the extent that new value was given, and § 547(c)(2),

which makes unavoidable payments in the ordinary course of business or according to ordinary business terms. (Adv. Doc. # 5.) However, Defendant has only briefed the argument that the transfers fall within the ordinary course of business exception of § 547(c)(2)(A). (Adv. Doc. # 42.) Relying on Fed. R. Civ. P. 56(e), courts have held that if a party asserts certain affirmative defenses but fails to subsequently brief and argue all of them, only those that are briefed and argued should be considered. See, e.g., In re CIS, 214 B.R. at 119 ("Although [the respondent]'s answer [to the instant motion for summary judgment] asserted five affirmative defenses, since [the respondent] has only briefed and argued one of them, the remainder must be considered to have been abandoned."). As Defendant has only briefed and thereby argued one of its affirmative defenses, I accordingly will consider the other asserted affirmative defenses to have been abandoned. However, if Defendant subsequently wishes to pursue its affirmative defenses as to new value and ordinary business terms, it may move for reconsideration and present evidence as to those defenses.

Ordinary Course of Business Exemption

Section 547(c)(2)(A) permits a "safe harbor" for a transferee of a preferential payment if "such 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 such transfer was -- (A) made in the ordinary course of business or

financial affairs of the debtor and the transferee . . . .” Whether payment was made in the ordinary course of business is a subjective inquiry as to the normal payment practices between the parties. In re First Jersey, 180 F.3d at 512; In re Cherrydale Farms, Inc., 2001 Bankr. LEXIS 156, at *9 (Bankr. D. Del. 2001). The purpose of the ordinary course of business exemption is to leave undisturbed normal relations between a debtor and a vendor. As such, even if a debtor’s business practices seem highly irregular, they are considered ordinary for the purposes of § 547(c)(2)(A). See In re Cherrydale Farms, 2001 Bankr. LEXIS at *9; In re Yurika Foods, 888 F.2d at 45. Accordingly, the relevant inquiry is whether transactions between Debtors and Defendant during the Preference Period differed notably from their transaction during the Historical Period.[3]

> Pertinent factors as to the inquiry include:
>
> (1) the length of time the parties have engaged in the type of dealing at issue; (2) whether the subject transfer was in an amount more than usually paid; (3) whether the payments were tendered in a manner different from previous payments; (4) whether there appears any unusual action by either the debtor or creditor to collect or pay on the debt; and (5) whether the creditor did anything to gain an advantage in light of the debtor’s deteriorating financial condition.

[3] Plaintiff argues that the Historical Period, which includes ten payments over two and a half months, is too limited to discern the normal practices between Debtors and Defendant. (Adv. Doc. # 38, pp. 12-13.) Though the history is limited, ten payments as to nine invoices over two and a half months provides enough information to establish a normal payment pattern.

In re Jolly "N", Inc., 122 B.R. 897, 906 (Bankr. D.N.J. 1991); see also Kleven v. Household Bank, 334 F.3d 638, 642 (7th Cir. 2003) (listing these five factors); In re CIS, 214 B.R. at 120 ("[I]t has been held that courts should examine several factors, including the prior course of dealing between the parties, the amount of the payments in question, the timing of the payments and the circumstances surrounding the payments."). Courts place particular importance on the timing of payment. In re ML & Assocs., Inc., 301 B.R. 195, 204 (Bankr. N.D. Tex. 2003); In re R.M.L., Inc., 195 B.R. 602, 614 (Bankr. M.D. Pa. 1996) ("[A]n analysis of past payment history serves as a significant factor and a guide post.").

Courts have found that small deviations in payment timing may not be so significant as to defeat the ordinariness of such payments. See In re Ice Cream Liquidation, Inc., 2005 WL 976935 (Bankr. D. Conn. 2005) (holding that a five day discrepancy between average days outstanding during the pre-preference period versus during the preference period did not make the payments out of the ordinary course of business); In re Valley Steel Corp., 182 B.R. 728 (Bankr. W.D. Va. 1995) (holding that a difference between approximately 54 days pre-preference average days to payment and approximately 67 days preference average days to payment did not make the payments out of the ordinary course of business); In re Bank of New England Corp., 161 B.R. 557 (Bankr. D. Mass. 1993) (holding that a difference between 38.4 days pre-preference average

number of days to payment and 54.7 days preference average number of days to payment did not make the payments out of the ordinary course of business). In contrast, courts have held greater deviations in payment timing sufficiently significant to defeat the ordinariness of such payments. See, e.g., In re Parkview Hospital, 213 B.R. 509 (Bankr. N.D. Ohio 1997) aff'd, 181 F.3d 103 (6th Cir. 1999) (holding that a debtor who paid large batches of invoices for medical supplies with payments 23 and 32 days after the average batch invoice date during the pre-preference period, and 50 and 72 days after the average batch invoice date during the preference period, made those payments that paid the batches of invoices 50 days after the average batch invoice date in the ordinary course of business, but that those payments that paid the batches of invoices 72 days after the average batch invoice date were not in the ordinary course of business).

In the instant case, the difference in the average number of days to payment during the Historical Period and the Preference Period is 51.8 days (112.4 days minus 60.8 days), which is nearly double the average number of days to payment during the Historical Period. Though I note that, in a few cases, a deviation as great as double the average number of days to payment during the pre-preference period was found not to be so significant as to make the payments out of the ordinary course of business, in those cases the numerical difference in the average number of days of payment was

much less than 51.8 days. See, e.g., id. (numerical difference of 18 to 27 days). Moreover, in the instant case, the earliest payment during the Preference Period occurred 4 days after the latest payment during the Historical Period (80 days minus 76 days) and the latest payment during the Preference Period occurred 92 days after the latest payment during the Historical Period (168 days minus 76 days). Further, during the Preference Period, as to the payments at issue, Debtors paid Defendant exclusively in multiples of $5,000 and always in partial payment of the applicable invoice. During the Historical Period, Debtors paid Defendant the exact applicable invoice amount as to all but one invoice and never in multiples of $5,000. The significant discrepancies evident in these differing payment practices -- spanning timing, payment amount, and full versus partial payment -- demonstrate convincingly that the disputed payments during the Preference Period were not in the ordinary course of business. That Defendant did not take advantage of Debtors' deteriorating financial condition or otherwise take unusual action as to collecting its debts does not negate the fact that Debtors' payment practices as to these four payments differed markedly from the payment practices during the Historical Period. Accordingly, I find that the four payments at issue were not in the ordinary course of business, and thus do not fall within § 547(c)(2)(A). The four identified payments are avoidable and recoverable as preferential transfers.

CONCLUSION

For the reasons stated above, Plaintiff's motion for summary judgment as to the four preferential transfers in a total amount of $35,000 is granted. As noted, Defendant may move for reconsideration as to the two affirmative defenses it initially asserted but failed to brief or argue. Pursuant to 28 U.S.C. § 1961, post-judgment interest is awarded from the date of this decision.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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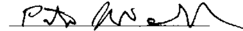
	)	
RADNOR HOLDINGS CORPORATION, et al.,	)	Case No. 06-10894(PJW)
	)	(Jointly Administered)
Debtors.	)	
_______________________________	)	
RADNOR HOLDINGS CORPORATION, et al., Debtors in Possession,	)	
Plaintiff,	)	
v.	)	Adv. Proc. No. 08-51184 (PJW)
PPT CONSULTING, LLC,	)	
Defendant.	)	

ORDER

For the reasons set forth in the Court's memorandum opinion of this date, Plaintiff's motion (Doc. # 38) for summary judgment is GRANTED.



Peter J. Walsh
United States Bankruptcy Judge

Dated: July 9, 2009