IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

HUDSON SHIPBUILDERS, INC. CASE NO. 8307199SC

C. THOMAS ANDERSON, TRUSTEE PLAINTIFF

vs. ADVERSARY NO. 880852SC

ROBERT J. CHENEY, JR. DEFENDANT

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION AND ORDER

Defendant, Robert Cheney, was retained by the debtor in September, 1982, to assist in preparation of bids for Navy and Coast Guard shipbuilding contracts. Payment to Cheney was made within 90 days of the bankruptcy petition filed by the debtor, thus the Trustee commenced this adversary proceeding seeking to avoid the allegedly preferential transfer based on §547

of the Bankruptcy Code. The Court has before it the Trustee's Motion for Summary Judgment.

Cheney has responded to the Motion for Summary Judgment arguing that the payments were made in the ordinary course of business thereby seeking to qualify for the "ordinary course of business" exception of 11 U.S.C. §547(c)(2).

On February 9, 1983, Hudson Shipbuilders ("Hudship") filed its petition under Chapter 11 of the U. S. Bankruptcy Code. The case was subsequently converted to Chapter 7 by order of this court on September 4, 1985, and C. Thomas Anderson was appointed Trustee.

Cheney provided services for the debtor from September 7, 1982, to October 12, 1982. For payment, Cheney submitted two invoices. The first, dated October 10, 1982, totalled $5,250.07 and covered services performed from September 7, 1982 to October 10, 1982. The second, dated November 2, 1982, totalled $390.79 and covered services performed on October 11, 1982 and October 12, 1982. Both invoices were paid by the debtor by check in the amount of $5,640.86 on December 13, 1982, less than 90 days prior to the filing of the debtor's bankruptcy petition on February 9, 1983.

Both at the time the bankruptcy petition was filed and the time the payments here in question were

made, the ordinary course of business exception of 11 U.S.C. §547(c)(2) upon which Cheney must rely provided as follows:

> 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 in the ordinary course of business ...; (B) made not later than 45 days after such debt was incurred; (C) made in the ordinary course of business...; and (D) made according to ordinary business terms.

See 11 U.S.C. §547(C)(2)(B)(1983).

The arbitrary 45 day cut-off was eliminated when the provision was amended by the 1984 Bankruptcy Amendments and Federal Judgeship Act, Public Law 98-353. The 1984 amendment applies to "cases filed 90 days after July 10, 1984." SEE notes following 11 U.S.C.A. §547 (1988) citing Public Law 98-353, Section 552, formerly Section 553. Further, the determinative date is the date the case was filed, not the date the adversary proceeding was filed. In re Chase and Sanborn Corp., 51 B.R. 736, 738 (Bankr.S.D.Fla. 1985) and In re Excel Enterprises, 83 B.R. 427 (Bankr.W.D.La. 1988). Hudship filed its petition for relief on February 9, 1983, thus the prior version of §547(c)(2), and its 45-day limit, apply to this proceeding.

Cheney's only defense is that the payments in question were made in the ordinary course of business. As set forth below, the 45-day limit of §547(c)(2) precludes such a defense.

The Fifth Circuit has held that "for purposes of the 'ordinary course of business' exception to avoidability created by Section 547(c)(2), a debt is incurred when the debtor becomes obligated to pay it, not when the creditor chooses to invoice the debtor for his work or goods." Sandoz v. Fred Wilson Drilling Co. (In Re of Emerald Oil), 695 F.2d 833, 837 (5th Cir. 1983). The invoices submitted to the debtor by Cheney clearly indicate that the work was completed, and the debt incurred, on October 12, 1982, over 60 days before payment.

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L Ed.2d 265 (1986), the Supreme Court set forth the following criteria regarding the entry of summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

477 U.S. at 322-323.

In the case at bar, the record reflects that the Trustee has established that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. He has established the elements necessary to avoid the transfer to the defendant under the provisions of the version of §547(b) of the Bankruptcy Code which is applicable to this case and he has established the amount of the transfer to be $5,640.86.

The defendant sought to avail himself of the exemption provided by §547(c)(2) of the Code. The burden is on the debtor to initially show that he comes within the exception. He has failed to make any showing that the payment which he received comes within 45 days of when the debt was incurred. In fact, the record clearly shows that the payment of $5,640.86 was made more than 45 days after the last services were rendered by the defendant and the last of the debt was incurred.

Because the full record shows that the Trustee has established the essential elements necessary to entitle him to a judgment in the amount of $5,640.86 and that the defendant has failed to establish one of the elements necessary to allow him to avail himself of the exception provided by §547(c)(2), then summary judgment should be granted for the

Trustee. Western Fire Insurance Co. v. Copeland, 651 F.Supp. 1051, 1053 (S.D.Miss), aff'd, 824 F.2d 970 (5th Cir. 1987).

The attorney for the trustee shall prepare an appropriate separate judgment consistent with this opinion as required by Bankruptcy Rule 9021. He shall submit it to the attorney for the defendant for signature indicating approval as to form.

ORDERED this the 7TH day of September, 1988.

Edward Ellington
UNITED STATES BANKRUPTCY JUDGE