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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	395-35704-elp7
SMITH'S HOME FURNISHINGS, INC.,)	
)	Adversary Proceeding No.
Debtor,)	97-3134-elp
_____)	
MICHAEL B. BATLAN, Trustee,)	MEMORANDUM OPINION
)	
Plaintiff,)	
)	
v.)	
)	
EQUIFAX CHECK SERVICES, INC.,)	
)	
Defendant.)	

This matter came before the court for trial on the trustee's action to recover three payments totaling \$90,806.95 as preferences under 11 USC § 547(b). Defendant raises affirmative defenses of ordinary course of business and contemporaneous or subsequent new value. It also alleges that the payments are subject to recoupment.

FACTS

Defendant provided check warranty services to debtor. Under the parties' Check Purchase Agreement, when a customer wanted to pay for a purchase by check, debtor would request an approval of the

1 check from defendant. Defendant would approve or decline the check
2 based on information in its database. If an approved check was
3 later dishonored or otherwise not paid, defendant was obligated to
4 purchase the check from debtor for its face amount up to \$5,000,
5 provided the check met certain specified criteria. Debtor would
6 submit claims monthly to defendant for checks defendant had approved
7 but that were not paid. Defendant paid on approved claims within 30
8 days.

9 Debtor paid fees for defendant's check authorization and
10 warranty services, which were based on numerous factors including
11 the face value of checks and the number of checks warranted or
12 declined. Defendant billed monthly, and issued invoices on the last
13 day of the month. According to the parties' agreement, debtor was
14 to pay the invoices within 30 days, but in no event more than 90
15 days after invoice. The agreement allowed defendant to offset
16 amounts it owed debtor for warranty claims against amounts debtor
17 owed it for the check authorization and warranty services.
18 Defendant never exercised its right to offset before debtor filed
19 bankruptcy.

20 During the 90 days before bankruptcy, debtor paid the
21 February 28, 1995 invoice for \$28,662.13 on June 26, 1995, 118 days
22 after invoice; the March 31, 1995 invoice for \$33,802.50 on July 3,
23 1995, 94 days after invoice; and the April 30, 1995 invoice for
24 \$28,341.97 on August 15, 1995, 107 days after invoice. Also during
25 that period, sometime after July 3 defendant paid debtor \$62,233.43
26 on claims for warranted checks. Although it had a right to offset

1 that amount, it did not exercise the right but instead made the
2 warranty claim payment. Defendant continued to provide check
3 authorization and warranty services to debtor through the preference
4 period and after debtor filed bankruptcy.

5 Debtor filed Chapter 11 on August 22, 1995. The case was
6 converted to Chapter 7 in October 1995.

7 ISSUES

8 1. Did debtor prove its prima facie case under
9 section 547(b)?

10 2. Did defendant prove its defenses under section 547(c)?

11 A. Were the payments made in the ordinary course of
12 business?

13 B. Did defendant give new value for the payments?

14 (i) Was defendant's \$62,233.43 payment to debtor
15 new value because defendant had a contractual
16 right to recoup amounts it owed to debtor
17 against amounts debtor owed to defendant?

18 (ii) Was defendant's continued provision of
19 services new value?

20 C. Is defendant entitled to retain the preferential
21 payments as a recoupment of its payments to debtor?

22 DISCUSSION

23 Section 547(b) provides that a trustee may avoid any transfer
24 of an interest of the debtor in property (1) to or for the benefit
25 of a creditor; (2) on account of an antecedent debt; (3) made while
26 the debtor was insolvent; (4) made within 90 days before the filing
of the petition; and (5) that enables the creditor to receive more
than the creditor would receive in a chapter 7 liquidation if the
transfer had not been made. The trustee has the burden to show that

1 the payments are avoidable, and the creditor has the burden to show
2 the applicability of the defenses set out in section 547(c). 11 USC
3 § 547(g).

4 The parties stipulate that all of the preference requirements
5 are met except that the payments were transfers of debtor's
6 property, or that the payments resulted in defendant receiving more
7 than it would receive in a Chapter 7 liquidation.

8 1. Prima facie case

9 Defendant argues that debtor's payments during the preference
10 period were not transfers of an interest of the debtor in property,
11 because defendant had a contractual right to recoup amounts it owed
12 debtor on warranty claims against amounts debtor owed it for
13 providing the check approval and warranty services. Essentially it
14 argues that the right to recoupment should be treated like a
15 security interest, and therefore defendant's right to the funds
16 debtor used to pay its obligation to defendant was superior to
17 debtor's right to those funds.

18 Debtor made the payments with checks drawn on its general
19 checking account. Even assuming that defendant had a right to
20 recoup the amount it owed against amounts debtor owed it, debtor's
21 payments from its general account were transfers of property
22 belonging to debtor.

23 Defendant also argues that the transfers did not allow it to
24 receive more than it would have received under a Chapter 7
25 liquidation, because it had a right to recoup those payments. That
26 argument is dependent on defendant's success on its recoupment

1 defense, which I will discuss later in this opinion.

2 2. Defenses

3 A. Ordinary course of business

4 An otherwise preferential transfer is not avoidable if it is
5 made in the ordinary course of business. 11 USC § 547(c)(2). The
6 ordinary course of business exception applies if the transferee
7 proves that (1) the debt was incurred in the ordinary course of
8 business of the debtor and the transferee; (2) payment on the debt
9 is ordinary in relation to past practices between the debtor and the
10 transferee; and (3) the payment is ordinary in relation to
11 prevailing business standards. In re Food Catering & Housing, Inc.,
12 971 F2d 396, 398 (9th Cir 1992). There is no dispute that the
13 charges in this case were made in the ordinary course of business.

14 (i) Past practices between debtor and creditor

15 In determining whether the payments are ordinary in relation
16 to past practices between the debtor and the creditor, courts
17 compare the payments at issue to the prior course of dealing between
18 the parties and consider various factors, including the method,
19 form, timing and amount of payment and whether the payment arises
20 out of unusual debt collection or payment practices. See Lovett v.
21 St. Johnsbury Trucking, 931 F2d 494 (8th Cir 1991); In re Powerine
22 Oil Co., 126 BR 790 (9th Cir BAP 1991); In re Morris, 53 BR 190
23 (Bankr D Or 1985). Delay in payment is particularly relevant. Food
24 Catering & Housing, Inc., 971 F2d at 398. Late payments can be
25 within the ordinary course of business if they are a few days late
26 and follow the prior practice between the parties. In re Grand

1 Chevrolet, Inc., 25 F3d 728 (9th Cir 1994); Lovett, 931 F2d at 498;
2 Powerine Oil Co., 126 BR at 795.

3 According to the stipulated facts, invoices were to be paid
4 within 30 days, but in no event later than 90 days after invoice.
5 The parties' payment history before the preference period shows that
6 payments were made anywhere from 58 to 91 days after invoice. Only
7 one payment was made 91 days after invoice. Most payments were made
8 within 70 days.

9 The payments at issue here were paid 118, 94, and 107 days
10 after invoice. Because the payment terms were that payment was to
11 be made at the latest 90 days after invoice, and debtor had paid
12 later than that on only one occasion before the preference period,
13 the payments during the preference period were not ordinary in
14 relation to past practices of the parties.

15 This conclusion is supported by defendant's demand after
16 receipt of the June 26 payment that future payments be made within a
17 time certain, setting dates for payment that were less than 80 days
18 after invoice. Although there is no evidence that defendant took
19 any further action when debtor failed to make the payments as
20 demanded, the demand itself indicates pressure on debtor to make
21 payments more timely and shows that defendant did not consider
22 payment more than 90 days after invoice to be ordinary.

23 (ii) Ordinary in the industry

24 In considering whether the payment is ordinary under
25 prevailing business standards, the court applies an objective test
26 to determine whether the transaction is ordinary according to the

1 practices common to businesses similarly situated to the creditor
2 and debtor. In re Loretto Winery, Ltd., 107 BR 707 (9th Cir BAP
3 1989).

4 Defendant's evidence does not show that payment more than 90
5 days after invoice is ordinary in the industry. Defendant is one of
6 two companies that dominate the check approval and guaranty
7 industry. According to the testimony, normal payment terms are 30
8 days after invoice. For larger customers, payment terms are
9 negotiated, and can provide for payment between 45 and 60 days after
10 invoice. No customers other than debtor had 90 days within which to
11 pay.

12 The provision allowing debtor 90 days after invoice to pay is
13 not ordinary in the industry. Therefore, the payments were not in
14 the ordinary course of business.

15 B. New value

16 Defendant argues that it gave new value, either
17 contemporaneously or subsequently to debtor's payment, by paying
18 debtor \$62,233.43 on warranty claims and by continuing to provide
19 services to debtor after the three preference period payments were
20 made.

21 A preferential transfer is not avoidable

22 "to the extent that such transfer was --

23 "(A) intended by the debtor and the creditor to or
24 for whose benefit such transfer was made to be a
25 contemporaneous exchange for new value given to the
debtor; and

26 "(B) in fact a substantially contemporaneous
exchange[.]"

1 11 USC § 547(c)(1). A transfer is also not preferential if, after
2 the debtor makes the transfer, the creditor gives

3 "new value to or for the benefit of the debtor --

4 "(A) not secured by an otherwise avoidable security
5 interest; and

6 "(B) on account of which new value the debtor did not
7 make an otherwise unavoidable transfer to or for the benefit
8 of such creditor."

8 11 USC § 547(c)(4). This latter exception contains two key
9 elements: (1) the creditor must give unsecured new value; and (2)
10 the new value must be given after the preferential transfer. In
11 re IRFM, Inc., 52 F3d 228, 231 (9th Cir 1995).

12 (i) \$62,233.43 payment by defendant to debtor

13 Defendant asserts that its July 3 payment to debtor of
14 \$62,223.43 on its warranty claims constituted new value, either
15 contemporaneous with the debtor's July 3 invoice payment or
16 subsequent to the first two payments made during the preference
17 period. Because the dispositive issue with relation to this
18 payment for both new value defenses is whether new value was
19 given, I will discuss the two defenses together.

20 New value is

21 "money or money's worth in goods, services, or new credit, or
22 release by a transferee of property previously transferred to
23 such transferee in a transaction that is neither void nor
24 voidable by the debtor or the trustee under any applicable
25 law, . . . but does not include an obligation substituted for
26 an existing obligation."

25 11 USC § 547(a)(2). The trustee argues that the warranty claim
26 payment was not new value, because it was like an insurance

1 payment, which is simply a benefit of the insurance coverage.
2 Defendant argues that it was new value because defendant had a
3 contractual right to recoup amounts it owed to debtor against
4 amounts debtor owed to defendant, so that its payment was like the
5 release of a security interest.

6 Payments by a debtor in exchange for a fully secured
7 creditor's release of its security interest constitutes new value.
8 In re E.R. Fegert, Inc., 887 F2d 955, 959 (9th Cir 1989);
9 Grassmueck v. Food Industries Credit Union, 127 BR 869, 873 (Bankr
10 D Or 1991). Those cases reason that the release of the lien
11 replenishes the estate to the benefit of all the creditors. 887
12 F2d at 959. Further, release of a lien on debtor's property falls
13 specifically within the definition of "new value" as the release
14 of property previously transferred. 127 BR at 873.

15 On the other hand, the majority of cases have held that
16 forbearance from exercising a previously existing right is not new
17 value within the meaning of section 547(a)(2). See, e.g., Drabkin
18 v. A. I. Credit Corp., 800 F2d 1153, 1157-58 (DC Cir 1986); In re
19 Cimmaron Oil Company, Inc., 71 BR 1005 (ND Tex 1987); In re Riggs,
20 129 BR 494, 496 (Bankr SD Ohio 1991); In re Control Electric,
21 Inc., 66 BR 624 (Bankr ND Ga 1986). The reasoning of these cases
22 varies. In some cases, the court points out that forbearance does
23 not replenish the estate to the benefit of other creditors. In re
24 Riggs, 129 BR at 497-98. In other cases, the forbearance arguably
25 does benefit the estate economically. In Drabkin, the creditor,
26 an undersecured insurance premium financier, effectively lost the

1 right to receive premium refunds by forbearing from canceling the
2 debtor's insurance policy. The court concluded that allowing an
3 undersecured creditor to treat forbearance from foreclosing on its
4 security interest as new value would be contrary to the bankruptcy
5 principle of equality of distribution, because it would give the
6 creditor too much leverage to demand payments, to the detriment of
7 other creditors. 800 F2d at 1159. In Control Electric and
8 Cimmaron Oil, as a result of the debtor's payment, the creditor
9 was deprived of an arguably valuable inchoate statutory lien. The
10 courts held that the failure to assert a statutory lien, which is
11 effectively forbearance, simply did not fit within the statutory
12 definition of new value. 66 BR at 627; 71 BR at 1009.

13 Some courts treat forbearance from asserting an inchoate
14 lien as new value if the estate is not diminished economically by
15 the debtor's payment. In re Johnson, 25 BR 889, 897 (Bankr ED
16 Tenn 1982) (construction lien). One bankruptcy court extended this
17 reasoning to a creditor that was deprived of a right to setoff as
18 a result of the debtor's payment. In re Mason and Dixon Lines,
19 Inc., 65 BR 973 (Bankr MDNC 1986). The court reasoned that the
20 relinquishment of the setoff right constituted new value because
21 it was involuntary:

22 "It appears [the debtor] believes that it could cut
23 off defendant's right of setoff prepetition by payment and
24 then recover that payment as preferential and extinguish
25 the creditor's right to setoff which would have arisen
26 absent payment. This appears to be convoluted reasoning.
If followed, this tactic would deny a creditor a right to
offset which section 553 of the Code says the bankruptcy
law does not affect. This Court finds it hard to believe
that defendants would have 'voluntarily' paid [the debtor]

1 if [the debtor] had not paid defendants' bills. No
2 factors were presented to the Court to suggest why [the
3 creditor] would have relinquished a right to offset had
4 [the debtor] not paid [the creditor]. The [common
5 carrier] regulations, common trade practice, and logic
suggest that the payments were reciprocal in nature and
that absent payments from [the debtor] the creditor would
have taken an offset and not 'voluntarily' relinquished
this right."

6 65 BR at 977-78. Unlike the creditor in Mason and Dixon,
7 defendant voluntarily relinquished its right of recoupment.
8 Consequently, the rationale of the Mason and Dixon decision
9 regarding why loss of the right of setoff is new value simply does
10 not apply to the facts of this adversary proceeding.

11 The differences in the cases can best be explained by the
12 fact that some focus on the statutory definition of new value and
13 others focus on the economic impact the transfer has on the
14 estate. I agree with the courts that have focused on the
15 statutory definition and have held that the definition of new
16 value contained in section 547(a)(2) is exclusive. In re Energy
17 Cooperative, Inc., 832 F2d 997 (7th Cir 1987); Cimmaron Oil
18 Company, Inc., 71 BR at 1005. As the court explained in Cimmaron
19 Oil,

20 "to reason that the list of what constitutes 'new value' is
21 not exclusive is to ignore the wording of the bankruptcy
22 statute. Congress apparently meant a precise definition when
23 it listed what constitutes new value. Congress could have
24 allowed courts to expand upon the doctrine of new value by
legislating that new value includes certain transactions.
Instead, Congress stated what new value means, which should
retard case law expansion."

25 71 BR at 1009. This approach is most consistent with the "plain
26 meaning" rule of statutory construction. In re Perroton, 958 F2d

1 889, 893 (9th Cir 1992).

2 A creditor's forbearance from exercising a right of
3 recoupment simply does not fit within the definition of new value.
4 A release of security is new value when the release is "by a
5 transferee of property previously transferred to such transferee
6 in a transaction that is neither void nor voidable by the debtor
7 or the trustee under any applicable law" 11 USC §
8 547(a)(2). When a creditor forbears from exercising an existing
9 right, either to foreclose a lien, to file a lien to which the
10 creditor has a right, or to exercise a right of recoupment, the
11 creditor does not release any property that was previously
12 transferred to the creditor.

13 Because defendant's forbearance from exercising its right
14 of recoupment does not fit within the definition of new value, it
15 does not provide a defense to the trustee's preference action.

16 (ii) Continued provision of services

17 Defendant also argues that it continued to provide check
18 authorization and warranty services to debtor after debtor made
19 the three invoice payments, and that those services constituted
20 new value. The trustee does not dispute that. The evidence at
21 trial established the following payments from debtor to defendant
22 and the value of services provided to debtor after those payments
23 were made:

DATE	DEBTOR'S PAYMENT	VALUE OF SERVICES PROVIDED
6/26/95	\$28,662.13	
6/26 to 6/30		\$ 4,231.32
7/1 to 7/3		3,698.51
7/3/95	33,802.50	
7/4 to 7/31		32,792.17
8/1 to 8/14		11,449.29
8/15/95	28,341.97	
8/15 to 8/22		6,759.76

In calculating the new value offset, subsequent advances of new value may be used to offset prior preferences. A creditor is permitted to carry forward preferences until they are exhausted by subsequent advances of new value. In re IRFM, Inc., 52 F3d at 232.

Using that method of calculation, all of the new value given by defendant offsets the payments debtor made during the preference period. That leaves recoverable preferential transfers of \$31,875.55.

C. Recoupment

Finally, defendant argues that it is entitled to retain the remainder of the preferential payments as a recoupment of its overpayments to debtor. As I understand the argument, defendant asserts that, by providing services to debtor through the preference period and after bankruptcy, it overpaid debtor and is entitled to recoup that overpayment by retaining the payments

1 debtor made for past-due services.

2 Recoupment involves a netting out of debt arising from a
3 single transaction. In re Harmon, 188 BR 421, 425 (9th Cir BAP
4 1995). It is the setting up of an obligation arising from the
5 same transaction as the plaintiff's claim as a means of reducing
6 or eliminating the claim. In re Photo Mechanical Services, Inc.,
7 179 BR 604, 612 (Bankr D Minn 1995). Recoupment has been applied
8 in bankruptcy proceedings. Newbery Corp. v. Fireman's Fund Ins.
9 Co., 95 F3d 1392, 1399 (9th Cir 1996).

10 Defendant is not entitled to recoupment for two reasons.
11 First, recoupment requires that the debts owed by each party to
12 the other arise out of the same transaction. In deciding whether
13 the claims arose from the same transaction, I consider whether
14 there is any logical relationship between the claims. Id. at
15 1402.

16 In this case, defendant's debt is its obligation to return
17 the payments that debtor made during the preference period. That
18 is a statutory obligation that arose pursuant to the Bankruptcy
19 Code. The obligation against which defendant seeks to set off
20 that obligation arose out of the parties' check warranty
21 agreement, in which debtor agreed to pay defendant for its
22 warranty services. As in In re Stoecker, 131 BR 979, 983 (Bankr
23 ND Ill 1991),

24 "[t]he Trustee is not asserting any contractual right or tort
25 claim against [defendant]. The Trustee's separate statutory
26 preference action against [defendant] and [defendant's] claim
against [debtor] do not arise from a single transaction or
contract."

1 There is no logical relationship between defendant's statutory
2 obligation to return the preference payment and debtor's
3 contractual obligation to pay for services provided.

4 More fundamentally, recoupment is not a valid defense to a
5 preference action. Congress has specifically enumerated the
6 defenses to a preference action in section 547(c). When Congress
7 specifically enumerates exceptions to a general prohibition, the
8 court should not infer additional exceptions absent evidence of
9 contrary legislative intent. Stoecker, 131 BR at 984; In re
10 Candor Diamond Corp., 26 BR 850, 851 (Bankr SDNY 1983); In re
11 Sterling Die Casting Co., Inc., 118 BR 205, 207 (Bankr EDNY 1990).

12 Defendant cites Visiting Nurse Ass'n of Tampa Bay, Inc.,
13 121 BR 114, 121 n4 (Bankr MD Fla 1990) and Electronic Metal
14 Products, Inc. v. Honeywell, Inc., 95 BR 768 (D Colo 1989) for the
15 proposition that recoupment is an appropriate defense to a
16 preference action, and attacks Stoecker as having "mechanically
17 concluded, without analysis," that recoupment is not a defense to
18 a preference action.

19 Defendant's arguments are not persuasive. Neither Visiting
20 Nurse Ass'n nor Electronic Metal Products addressed the issue of
21 the enumerated defenses set out in section 547(c). Visiting Nurse
22 Ass'n involved a creditor who was attempting postpetition to
23 recoup money owed to it by debtor. The court determined that such
24 an action would not constitute a preference. In Electronic Metal
25 Products, the court determined that the debts did not arise out of
26 the same transaction, and therefore recoupment was not allowed.

1 Therefore, any comment the court made about the applicability of
2 recoupment in a preference action was dicta.

3 As to defendant's criticism of Stoecker, the court in fact
4 did analyze the issue before it reached its conclusion. It cited
5 and agreed with cases that had held that the substantive
6 exceptions to preference actions enumerated in section 547(c) are
7 exclusive, and additionally reasoned that, under the rules of
8 statutory construction, where Congress has enumerated exceptions,
9 additional exceptions are not to be implied. I find this
10 reasoning persuasive.

11 Finally, as with setoff under section 553, a creditor
12 cannot recoup its liability for the return of the preferential
13 payments against the amount of the debtor's unsecured claim.

14 "The reasoning for this rule is that allowing the creditor to
15 offset the amount of the transfer would merely continue the
16 preference, thereby rendering the preference statute useless
because the preference would not become available for pro
rata distribution to all creditors."

17 5 Collier on Bankruptcy ¶ 553.03[3][e] (15th ed rev 1996)
18 (footnotes omitted). The same reasoning applies to recoupment.

19 Because defendant is not entitled to recoupment, its
20 argument that receipt of the payments did not result in its
21 receiving more than it would have received under a Chapter 7
22 liquidation fails.

23 CONCLUSION

24 The trustee is entitled to recover preferential transfers
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3 in the amount of \$31,875.55. Mr. Migchelbrink should submit the
4 order.

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ELIZABETH L. PERRIS
Bankruptcy Judge

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cc: Paul D. Migchelbrink
9 Robert J. Vanden Bos
10 Donald A. Workman

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