

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

IN RE:

IN BANKRUPTCY NO.:

FPI, INC., f/k/a Freedom Plastics, Inc.,

MM11-87-01346

Debtor.

IN ADVERSARY PROCEEDING NO.:

FPI, INC.,

90-0077-11

Plaintiff,

v.

CARDINAL CAROLINA CORP.,

Defendant.

**FILED**

**DEC 14 1990**

CLERK, U.S.  
BANKRUPTCY COURT  
CASE NO. \_\_\_\_\_

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW:

On October 24, 1990 a trial was held to determine whether transfers made to the defendant during the ninety days preceding the debtor's filing bankruptcy may be recovered by the debtor from the defendant pursuant to 11 USC §§ 547 and 550. Upon the evidence presented, I make the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. On May 18, 1987 FPI, Inc., formerly known as Freedom Plastics, Inc. (the "debtor"), filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. Cardinal Carolina Corp. ("Cardinal"), is and has been at all times relevant to this action, an unsecured creditor of the debtor.

3. On March 14, 1986 the debtor sent to its creditors, including Cardinal, a letter describing cash flow problems and suggesting an arrangement for continued business dealings. The

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letter stated in pertinent part:

As most of you are presently aware, Freedom Plastics is experiencing severe cash flow problems. It is our intent to work through this problem without experiencing bankruptcy proceedings.

In order to do so, we are operating in the following manner:

1. Creditors are being treated essentially as though we were operating within the bankruptcy rules. When we make a purchase, past invoices are being paid on a one for one basis.

. . .

3. As we return to profitability and as cash flow allows, we expect to set up payment plans for past debts.

4. By June 16, 1986 the debtor was sending its checks to Cardinal via Purolator Courier. The checks were thus delivered overnight. The debtor sent checks by Purolator Courier to several of its vendors in order to maintain balances as promised. Cardinal did not ask for or insist upon receipt of Purolated checks from the debtor.

5. By letter dated July 15, 1986, a representative of Cardinal authorized the debtor to apply its payments to Cardinal to the oldest outstanding invoices.

6. Both Cardinal and the debtor utilized FIFO (first in, first out) accounting, and applied the debtor's payments to Cardinal for bookkeeping purposes to the oldest debts.

7. During the summer of 1986, representatives of both Cardinal and the debtor met to discuss the debtor's credit indebtedness and the parties' future business relationship. At this meeting, the parties orally agreed that Cardinal would leave

owing for an indefinite period the debtor's \$150,000.00 indebtedness as long as the debtor paid for future shipments "on time." The debtor was to "stay current" on debt by paying for each future shipment in the amount of that shipment, thereby preventing Cardinal's total exposure from increasing beyond \$150,000.00.

8. Between January and May, 1987 Cardinal had similar oral agreements with one or two other accounts in financial difficulty. It is standard in the industry to have such oral agreements.

9. Although there was no discussion at the meeting as to how payments were to be made, it is apparent that payment "on time" meant payment according to invoice terms, i.e., "net 30 days" (30 days from ship date to due date). Accordingly, Cardinal expected to see \$150,000.00 in accounts receivable at the end of every month when it examined its receivables aging figures.

10. Payment terms of "net 30 days" generally applied to Cardinal's other accounts.

11. Payment terms of "net 30 days" are standard in the industry.

12. Between September 1, 1986 and the beginning of the preference period on February 17, 1987, Cardinal made approximately seventeen shipments of chemical compounds to the debtor. As it did for all of its customers, Cardinal made telephone calls to the debtor when shipments were to be made, informing the debtor of the amount of material shipped and the sum owing. Within days of each shipment, the debtor sent checks in payment for shipments either in the exact amount invoiced on the shipment, or in an amount which

varied only due to the addition of freight charges.

13. On February 18, 1987 Cardinal shipped, and on February 19, 1987 the debtor received, two shipments from Cardinal having an invoice total of \$23,677.20. The applicable invoices included payment terms of "net 30 days," with a stated due date of March 20, 1987.

14. By check dated February 20, 1987 the debtor transferred \$23,677.20 to Cardinal. On February 23, 1987 Cardinal received the check.

15. On March 4, 1987 Cardinal shipped, and on March 11, 1987 the debtor received, two shipments from Cardinal having an invoice total of \$6,403.11. The applicable invoices included payment terms of "net 30 days," with a stated due date of April 3, 1987.

16. By check dated March 6, 1987 the debtor transferred \$6,403.10 to Cardinal. On March 9, 1987 Cardinal received the check.

17. On March 18, 1987 Cardinal shipped, and on March 20, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$15,400.00. The applicable invoice included payment terms of "net 30 days," with a stated due date of April 17, 1987.

18. By check dated March 20, 1987 the debtor transferred \$15,400.00 to Cardinal. On March 23, 1987 Cardinal received the check.

19. On March 20, 1987 Cardinal shipped, and on March 23, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$21,967.00. The applicable invoice included payment terms

of "net 30 days," with a stated due date of April 19, 1987.

20. By check dated March 23, 1987 the debtor transferred \$21,967.00 to Cardinal. On March 24, 1987 Cardinal received the check.

21. The transfers in payment of the February 18, March 4, March 18, and March 20, 1987 shipments were made within the due date stated on the invoices pertaining to those shipments.

22. On March 30, 1987 Cardinal shipped, and on April 6, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$6,430.56. The applicable invoice included payment terms of "net 30 days," with a stated due date of April 29, 1987.

23. On April 10, 1987 Cardinal shipped, and on April 15, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$3,553.00. The applicable invoice included payment terms of "net 30 days," with a stated due date of May 9, 1987.

24. On April 16, 1987 Cardinal shipped, and on April 17, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$19,990.00. The applicable invoice included payment terms of "net 30 days," with a stated due date of May 15, 1987.

25. On April 17, 1987 Cardinal shipped, and on April 20, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$23,277.00. The applicable invoice included payment terms of "net 30 days," with a stated due date of May 16, 1987.

26. On May 5, 1987 Cardinal shipped, and on May 6, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$22,713.00. The applicable invoice included payment terms of

"net 30 days," with a stated due date of June 4, 1987.

27. On May 6, 1987 Cardinal's representative called the debtor's representative, Jo Marden, in order to notify her that payment had not been received for the March 30, 1987 invoice and for all April, 1987 invoices. Because Ms. Marden was not there, Cardinal's representative spoke with one of the debtor's accounts payable representatives.

28. In payment of the March 30, April 10, April 16, April 17, and May 5, 1987 shipments, by check dated May 6, 1987, the debtor transferred \$75,915.25 to Cardinal. On May 8, 1987 Cardinal received the check.

29. The \$75,915.25 transfer in payment of the March 30, April 10, April 16, April 17, and May 5, 1987 shipments was made within the stated due date of all the invoices pertaining to those shipments except that related to the March 30, 1987 shipment.

30. With respect to the \$75,915.25 payment a clerical error had occurred and the check request was not made until after Cardinal's May 6, 1987 call concerning payment of the March 30, 1987 shipment.

31. A reasonable explanation for the clerical error could be Jo Marden's having left employment with the debtor, and none of the debtor's remaining employees having noticed the delay in payment to Cardinal.

32. There was no intentional nonpayment of the March 30, 1987 and April, 1987 invoices by the debtor. There was no pressure by Cardinal to collect on the invoices.

33. On May 8, 1987 Cardinal shipped, and on May 11, 1987 the debtor received, a shipment from Cardinal having an invoice total of \$20,052.00.

34. In attempted payment of the May 8, 1987 shipment, the debtor transferred a check in the amount of \$20,052.00 to Cardinal. On May 13, 1987 Cardinal received the check, which was subsequently dishonored upon presentation to the bank at which the debtor maintained its account.

35. The parties have stipulated that all the transfers from the debtor to Cardinal which occurred between February 17, 1987 and May 18, 1987 qualify as preferences under 11 USC § 547(b).

36. The parties have stipulated that all the transfers occurring during the preference period were in payment of debts incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and Cardinal.

#### CONCLUSIONS OF LAW

1. Cardinal has the burden of proving the nonavoidability of the preferential transfers. 11 USC § 547(g).

2. The parties' stipulation that all the transfers occurring during the preference period were in payment of debts incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and Cardinal satisfies the requirements of 11 USC § 547(c)(2)(A).

3. "The course of conduct between the parties establishes what the ordinary course of business is between them." In re Writing Sales Limited Partnership, 96 BR 175, 178 (Bankr ED Wis

1989). There was some evidence presented that the debtor performed as if it had to pay for a shipment on notification that a shipment was being sent. This evidence was rebutted both by the typed-in invoice due dates<sup>1</sup> and the fact that Cardinal did not contact the debtor immediately when payment for the March 30, 1989 shipment was not forthcoming, but rather waited until after the April 29, 1987 stated due date to call the debtor concerning the missing payment. There was no meeting of the minds with respect to any contract modification shortening the payment due date from payment within 30 days to payment at time of shipment. In the absence of such a meeting of the minds, the "net 30 days" contract term remained effective to control the parties' course of conduct both prior to and during the preference period.

4. Payment terms of "net 30 days" are standard in the parties' industry, and constitute "ordinary business terms" within the meaning of 11 USC § 547(c)(2)(C).

5. The transfers relating to the February 18, March 4, March 18, and March 20, 1987 shipments were made in the ordinary course of the business or financial affairs of the debtor and Cardinal, were made according to ordinary business terms, and satisfy the requirements of 11 USC §§ 547(c)(2)(B) and (C). They are not

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<sup>1</sup>It is significant that the date payment was due was actually typed on each invoice. Cardinal did not simply fail to strike the "net 30 days" term following the parties' summer 1986 agreement to preserve the debtor's indebtedness while keeping payment for future shipments current, but rather affirmatively calculated the due date and typed it onto each invoice, both before and after the parties entered into the agreement.



avoidable by the debtor.

6. The \$75,915.25 transfer as it related to the April 10, April 16, April 17, and May 5, 1987 shipments was made in the ordinary course of the business or financial affairs of the debtor and Cardinal, was made according to ordinary business terms, and satisfies the requirements of 11 USC §§ 547(c)(2)(B) and (C).

7. The \$75,915.25 transfer as it related to the April 10, April 16, April 17, and May 5, 1987 shipments is not avoidable by the debtor.

8. "[T]he conduct of a debtor, after becoming insolvent, in failing to make payments within the time required by his contract with the creditor is presumptively nonordinary." In re Xonics Imaging Inc., 837 F2d 763, 767 (7th Cir 1988). The portion of the \$75,915.25 transfer which related to the March 30, 1987 shipment, i.e., \$6,430.56, is presumptively not ordinary, in that payment occurred after the stated due date on the related invoice. No evidence was presented which was sufficient to rebut the presumption.

9. The partial transfer of \$6,430.56 does not qualify for the exception under 11 USC § 547(c)(2).

10. The partial transfer of \$6,430.56 was not "in fact a substantially contemporaneous exchange," and thus does not satisfy 11 USC § 547(c)(1)(B).

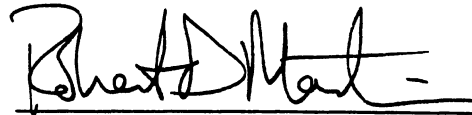
11. The partial transfer of \$6,430.56 does not qualify for the exception under 11 USC § 547(c)(1).

12. The debtor may avoid the \$75,915.25 transfer only to the

extent of \$6,430.56.

Judgment may be entered consistently with these findings of fact and conclusions of law.

Dated December 14, 1990.

A handwritten signature in black ink, appearing to read "Robert D. Martin", written over a horizontal line.

ROBERT D. MARTIN  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

IN RE:

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FPI, INC., f/k/a Freedom Plastics, Inc.,

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Defendant.

**FILED**

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ORDER:

The court having this day entered its findings of fact and conclusions of law in the above-entitled matter,

IT IS HEREBY ORDERED that the debtor may recover from Cardinal Carolina Corp. the sum of \$6,430.56.

Dated December 14, 1990.



ROBERT D. MARTIN  
UNITED STATES BANKRUPTCY JUDGE

IN RE:

IN BANKRUPTCY NO.:

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FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER:

CARDINAL CAROLINA CORP.,

Defendant.

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A copy of these findings of fact and conclusions of law and the accompanying order were mailed to the following parties on December 14, 1990:

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