

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ALVIN GUTMAN, LTD.

Case No. 91-12591 K

Debtor

MARK S. WALLACH, Trustee

Plaintiff

-vs-

AP 93-1010 K

EMANON GOLD, INC.

Defendant

Mark S. Wallach, Esq., Trustee
Penney, Maier, Mandel, Wallach & Crowe
169 Delaware Avenue
Buffalo, New York 14202

Harvey M. Greene, Esq.
220 East 42nd Street
20th Floor
New York, New York 10017

Attorney for the Defendant

DECISION AND ORDER

This is a proceeding by a Chapter 7 Trustee to recover preferences under 11 U.S.C. § 547. It is a "core" proceeding. 28 U.S.C. § 157(b)(2)(F). It has been submitted on agreed facts, and presents a single issue -- When the transferee defends a preference action on the grounds that the transfers were transfers "in the ordinary course of business," is it the "ordinary course of

business" between the debtor and transferee that alone controls the inquiry, or is the "ordinary course of business" on an industry-wide basis also a necessary component of the inquiry?

This Court concludes that evidence of the industry-wide standard, if any, is necessary, and that since the Defendant here has offered no evidence of such standard, it has failed to carry the burden of defense under 11 U.S.C. § 547(g).

Judgment will be entered for the Trustee, as set forth below.

AGREED FACTS

During the 90 days preceding the Debtor's July 24, 1991 Chapter 11 petition (converted to Chapter 7 on February 27, 1992) the Debtor paid \$26,563.72 to the Defendant by means of five checks. A May 2, 1991 check paid March 5, 1991 invoices;¹ a May 9, 1991 check paid invoices of February 11, 1991, March 7, 1991 and March 11, 1991; a May 17, 1991 check paid March 15, 1991 invoices; a May 24, 1991 check paid March 19, 1991 invoices; and a May 31, 1991 check paid invoices of March 11, March 20 and April 1, 1991.

The agreed billing terms were "NET - 30," but the above pattern of 60 to 90 days was typical of this Debtor's dealings with this Defendant over a considerable period of time.

¹\$20 of this check also paid a February 7, 1991 invoice.

ANALYSIS

The defendant relies exclusively on the above showing and offers no evidence of an industry standard for payment of such invoices. The Defendant does not make even an unsubstantiated claim as to an industry-wide standard.²

Although this Judge of the Court has not yet considered the question at Bar, the question has been addressed by this Court. Thus, in *In re Kayak Manufacturing Corp., Mark S. Wallach, Trustee v. Hinspergers Poly Industries, Ltd.*, 90-12981M, A.P. 92-1149M, the Hon. Beryl E. McGuire, U.S.B.J. (now Retired) ruled that the Defendant "must present some evidence beyond the terms provided between Defendant and [this Debtor] alone." (A copy of that decision is attached.)

That ruling is entirely consistent with the weight of authority. For example, in *Matter of Tolona Pizza Products Corp.*, 3 Fed.3rd 1029 (7th Cir. 1993) the Seventh Circuit stated "If the debtor and creditor dealt on terms that the creditor testifies were normal for them but that are wholly unknown in the industry, this casts some doubt on his (self-serving) testimony. ...[Furthermore, evidence that the terms are consistent with industry standards serves to] allay the concerns of creditors that one or more of

²The Debtor was a local chain of women's apparel stores. The Defendant supplied costume jewelry.

their number may have worked out a special deal with the debtor, before the preference period, designed to put that creditor ahead of the others in the event of bankruptcy."

That Circuit concluded that "the creditor must show that the payment he received was made in accordance with the ordinary business terms in the industry."³

CONCLUSION

Emanon Gold has, by introducing no evidence of actual payment practices in the industry despite "NET-30" terms stated on the invoices, failed to sustain its burden under 11 U.S.C. § 547(g).

Judgment shall be entered for the Trustee.

SO ORDERED.

Dated: Buffalo, New York
December , 1993

/s/Michael J. Kaplan

U.S.B.J.

³See also Judge Blackshear's analysis in *In Re Rave Communications, Inc.*, 128 B.R. 369 (Bankr. S.D.N.Y. 1991) wherein he noted that "to the extent that subsection (c)(2)(C) [of 11 U.S.C. § 547] requires any comparison with the industry, testimony indicated that late payment was not only the usual practice between the parties, but was the normal practice of [the Defendant] with its other customers, as well as the norm of the industry. ...This testimony was not refuted."