

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
DIAMOND K CORPORATION and	§	Case No. 04-50356
R&K ENERGY, INC.,	§	(Jointly Administered)
	§	
Debtors.	§	
_____	§	
	§	
DIAMOND K CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 06-5011
	§	
JP MASONRY, INC.,	§	
	§	
Defendant.	§	

EOD
08/08/2007

**MEMORANDUM OPINION AND ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding was commenced by Diamond K Corporation (the "Plaintiff") to recover an allegedly preferential transfer from JP Masonry, Inc. (the "Defendant") pursuant to 11 U.S.C. §§ 547 and 550. In particular, the Plaintiff seeks to recover from the Defendant the funds represented by a check issued by Hooks Independent School District in the amount of \$34,048.30 and payable, jointly, to the Plaintiff and the Defendant. The Defendant asserts, among other things, that it received this payment in the "ordinary course of business" within the meaning of 11 U.S.C. § 547(c)(2).

This matter is now before the Court on the Plaintiff's motion for summary judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, as adopted and applied to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). The parties in this case share the burden of proof, with the Plaintiff bearing the burden to present a *prima facie* case for a preference recovery, and the Defendant bearing the burden of proof on its "ordinary course of business" defense. *See* 11 U.S.C. §547(g). As such, the Plaintiff is entitled to a summary judgment only if there is no genuine issue of material fact as to each element of a preferential transfer, and if the Defendant has failed to produce sufficient evidence to create a factual issue regarding its affirmative defense of an ordinary course payment.

A plaintiff must prove six elements to successfully establish and recover a preferential transfer under 11 U.S.C. §§ 547(b) and 550. Those elements are: (1) a transfer of an interest of the debtor in property; (2) to or for the benefit of a creditor; (3) for or on account of antecedent debt; (4) made while the debtor was insolvent; (5) made on or within 90 days before the date of the filing of the

bankruptcy petition; and (6) that enabled the creditor to receive more than it would otherwise have received if the transfer had not been made and the case had proceeded under Chapter 7. *See Union Bank v. Wolas*, 502 U.S. 151, 154-55 (1991). If a plaintiff successfully establishes these elements, the transfer need not be returned to the extent such transfer was --

(2) [I]n payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and transferee, and such transfer was;

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(B) made according to ordinary business terms.

11 U.S.C. § 547(c)(2).¹

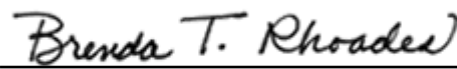
In this case, having considered the Plaintiff's motion for summary judgment, the Defendant's response, and the proper summary judgment evidence, the Court finds that the Plaintiff has failed to meet its burden to demonstrate that there is no genuine issue as to any material fact as to the presence of the elements of a preferential transfer. Genuine issues of material fact exist as to, among other things, whether the payment to the Defendant involved an interest of the Debtor in property within the meaning of 11 U.S.C. § 547(b). *See, e.g., Georgia Pacific*

¹ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") includes a substantial broadening of the ordinary course of business defense set forth in 11 U.S.C. § 547(c)(2). The pre-BAPCPA version of this statute is applicable here. Although this adversary proceeding was filed after the effective date of the BAPCPA, the underlying bankruptcy case was commenced prior to the BAPCPA's effective date of October 17, 2005. BAPCPA, 109 P.L. 8 § 1501(b)(1) ("the amendments made by this Act shall not apply with respect to *cases commenced* under title 11, United States Code, before the effective date of this Act.") (emphasis added); *see also, In re Kilroy*, 354 B.R. 476, 496-97 (Bankr. S.D. Tex. 2006).

Corp. v. Sigma Service Corp., 712 F.2d 962 (5th Cir. 1983); *In re Mastercraft Metals, Inc. (Strauss v. Mastercraft Metals, Inc.)*, 114 B.R. 183 (Bankr. W.D. Mo. 1990); *In re Sun Belt Electrical Constructors, Inc.*, 56 B.R. 686 (Bankr. N.D. Ga. 1986). *See also* TEX. PROP. CODE ANN. § 162.001, *et seq.* Additionally, the Defendant has produced some evidence to support a finding that the payment was made in the ordinary course of business under 11 U.S.C. § 547(c)(2), which the Court must view in the light most favorable to the Defendant as the party opposing the Plaintiff's motion. *See, e.g., Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000).

IT IS THEREFORE ORDERED that the Plaintiff's Motion and Supporting Brief for Summary Judgment against JP Masonry, Inc. for Avoidance and Recovery of Preferential Pre-Petition Transfers [Dkt. No. 13] shall be, and it is hereby, **DENIED**.

Signed on 8/8/2007

 MD
HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE