

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In Re:)
)
SUBMICRON SYSTEMS)
CORPORATION.) Chapter 11
)
Debtors.) Case Nos. 99-2959
_____) through 99-2962-SLR
)
HOWARD COHEN,)
)
Plaintiff,) Civil Action No. 02-743-SLR
)
v.) Adv. Proc. No. A-01-4043-SLR
)
E & S TECHNOLOGIES, INC.)
)
Defendant.)

O R D E R

At Wilmington this 3rd day of March, 2003, having reviewed defendant's motion for summary judgment;

IT IS ORDERED that said motion (D.I. 16) is denied, for the reasons that follow:

1. A court shall grant summary judgment only 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." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

2. Subject to certain exceptions, 11 U.S.C. § 547(b) allows

a trustee or plan administrator to avoid transfers of an interest of a debtor in property that are:

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer is made;
- (3) made while the debtor is insolvent;
- (4) made-
 - (A) on or within 90 days of the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enable such creditor to receive more than such creditor would receive if-
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. 547(b).

3. A creditor's defenses to a trustee's preference avoidance powers are enumerated in 11 U.S.C. § 547(c). The defenses are designed to encourage creditors to continue dealing with troubled businesses by eliminating concerns that a subsequent bankruptcy filing might require a creditor to forfeit to a bankruptcy trustee an earlier received payment. See Barnhill v. Johnson, 503 U.S. 393, 402 (1992). For example, § 547(c)(2) provides that a trustee may not avoid a transfer to the extent that such transfer was made in the ordinary course of business. To prevail under the ordinary course of business exception, a creditor must establish that:

a. The transfer was made in payment of debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

b. The transfer was made in the ordinary course of business of financial affairs of the debtor and the transferee; and

c. The transfer was made according to ordinary business terms.

11 U.S.C. § 547(c)(2). In applying § 547(c)(2), the United States Court of Appeals for the Third Circuit has explained that,

when the relationship in question has been cemented long before the onset of insolvency-- up through and including the preference period -- we should pause and consider carefully before impairing a creditor whose confident, consistent, ordinary extension of trade credit has given the straitened debtor a fighting chance of sidestepping bankruptcy and continuing in business. Bankruptcy policy, as evidenced by the very existence of § 547(c)(2), is to promote such continuing relationships on level terms, relationships which if encouraged will often help businesses fend off an unwelcome voyage into the labyrinths of a bankruptcy.

In re Molded Acoustic Products, Inc., 18 F.3d 217, 225-26 (3d Cir. 1994).

4. In the case at bar, defendant bases its motion for summary judgment on the affidavit of its Chief Financial Officer, Don Goduti, who avers that, although defendant provided goods to Submicron on a "1% 10 net 30" days basis, "[t]hroughout the

account history of Submicron, Submicron regularly paid its invoices outside of 30 days from the date of the invoice.” (D.I. 18, §§ 7,8) Defendant concludes that payments made within 30 days of the invoice date cannot be avoided by plaintiff because they were made according to the payment terms and, therefore, were made in the ordinary course of business. Defendant further asserts that payments made outside of thirty days were also made in the ordinary course of business because the account history of Submicron establishes that payments made outside of the thirty day terms (between 0 and 75 days) were within the ordinary course of business between these two companies.¹

5. Plaintiff asserts in response that by 1999, the “aging and credit practices” were different from the practices in earlier years, e.g., “the invoices paid outside of invoice terms during the Preference Period averaged only 6.6 days, significantly less than those of the previous three years.” (D.I. 21 at 12) Most significant is the fact that, one day before the petition date, a wire transfer in the amount of \$47,535.50 was made by debtor to defendant.

6. Based on the evidence of record, the court finds there are genuine issues of material fact as to whether the 1999 course of dealing was consistent with the parties’ ordinary course of

¹Although defendant asserts that it gave new value subsequent to the disputed transfers, plaintiff responds that such value has been accounted for.

business. Therefore, defendant's motion for summary judgment is denied.

Sue L. Robinson
United States District Judge