

Menotte v. Oxyde Chemicals, Inc. (In re JSL Chemical Corp.)

Case No: 07-16145

Adv No: 09-01615

Defendant supplied chemicals to Debtor. Over the years, Defendant issued thirty invoices to Debtor. Twenty-seven were paid during the pre-preference period, one was paid during the preference period (the “Payment”), and two remained unpaid as of the Petition Date. Debtor rarely paid the invoices on time. Trustee initiated an adversary proceeding pursuant to 11 U.S.C. § 547(b) to avoid and recover the Payment made to Defendant during the preference period. It was undisputed that the elements of § 547(b) were met. Defendant, however, argued that pursuant to § 547(c), the Payment was not avoidable because it was made in the ordinary course of business.

The Payment was made late. Trustee and Defendant both acknowledged that late payments may be “in the ordinary course of business” in certain circumstances but disagreed over how to calculate “lateness” for purposes of comparing pre-preference and preference payments. The Court concluded that the appropriate measure of calculating lateness is to compare the invoice date to the date of delivery of the check—not the date the check was issued—and come up with a “range of lateness,” disregarding the average lateness, for the pre-preference payments. Furthermore, if a check is initially dishonored, the Court concluded that in determining the range of lateness, it is appropriate to use the date that check is actually paid. Using this methodology, the Court determined that the Payment, though late, was within the range of Debtor’s ordinary course of late payments.

However, the Court ultimately held that the Payment was not made in the ordinary course of business—and thus avoidable and recoverable under § 547(b)—because the Payment was made as a result of “unusual collection activity.” In so holding, the Court rejected Defendant’s argument that an element of coercion is a prerequisite to concluding that a payment is not in the ordinary course of business based upon unusual collection activity.

Finally, the Court rejected Defendant’s contention that it was entitled to “set off” for two remaining unpaid invoices if the Court found the Payment to be avoidable and recoverable. The Court noted that it is well-settled that a creditor may not defend against the receipt of otherwise voidable preferences by asserting the right of set-off.