IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re:

GRAHAM GULF, INC., Case No. 15-3065

Debtor.

LYNN HARWELL ANDREWS,

Plaintiff,

v. Adversary Case No. 17-00077

BLAKELEY BOATWORKS, INC.,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Graham Gulf, Inc. filed chapter 11 bankruptcy on September 18, 2015. The case was later converted to chapter 7. This adversary proceeding is a "preference action" brought by the chapter 7 trustee to recover a payment made by the debtor to a creditor within 90 days of the bankruptcy. The court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the order of reference of the District Court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F), and the court has authority to enter a final order. The parties also agreed on the record to the entry of a final order by this court. (*See* scheduling order, doc. 35, at ¶7).

This matter is before the court on defendant Blakeley Boatworks, Inc.'s motion for summary judgment (doc. 56). Under Federal Rule of Civil Procedure 56, made applicable here by Federal Rule of Bankruptcy Procedure 7056, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court views the evidence and draws all reasonable factual

inferences in favor of the nonmovant. *See Boyle v. City of Pell City*, 866 F.3d 1280, 1288 (11th Cir. 2017).

"Once the movant submits a properly supported motion for summary judgment, the burden shifts to the nonmov[ant] to show that specific facts exist that raise a genuine issue for trial." *Id.* (citation and quotation marks omitted). "If the nonmov[ant] presents evidence that is merely colorable or not significantly probative, summary judgment is appropriate." *Id.* (citation and quotation marks omitted). The court must ultimately "decide whether the record, taken as a whole, could lead a rational trier of fact to find a genuine issue for trial." *See Apcoa, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610, 611 (11th Cir. 1990).

The court has carefully reviewed the briefing and evidence and considered the oral argument held on February 22, 2019. Having done so, the court finds that Blakeley's motion should be granted.

Analysis

The trustee's amended complaint (doc. 8) contains several causes of action. However, the trustee's counsel stated at oral argument that the trustee is only proceeding on the preference claim under 11 U.S.C. § 547 and the derivative § 502(d) claim, and the trustee did not address the other claims in response to the motion for summary judgment. Under § 547, the trustee "can seek the return of certain transfers to creditors during the 90 days preceding the filing of the bankruptcy petition" pursuant to § 547(b). *See In re Issac Leaseco, Inc.*, 389 F.3d 1205, 1209 (11th Cir. 2004). However, under the ordinary course of business defense set forth in § 547(c)(2),

> the trustee may not avoid a transfer that is a preference under § 547(b) to the extent that the transfer was (1) in payment of a debt incurred by the debtor in the ordinary course of business of the debtor and the transferee and *either* (2) made in

> the ordinary course of business of the debtor and the transferee or (3) made according to ordinary business terms.

In re Bender Shipbuilding & Repair Co., 479 B.R. 899, 903-04 (Bankr. S.D. Ala. 2012). The creditor "against whom recovery or avoidance is sought has the burden of proving" that the ordinary course of business defense applies. *See* 11 U.S.C. § 547(g).

Graham Gulf provided offshore support services to the oil and gas industry through its operation of approximately eleven vessels. The transfer at issue was in payment of a debt incurred by Graham Gulf for repair work performed by Blakeley at its shipyard in Mobile, Alabama on one of Graham Gulf's vessels and reflected on an invoice dated May 25, 2015 (hereinafter "the invoice") in the amount of $92,160.10. Graham Gulf paid the invoice by check, which cleared the bank on June 25, 2015, 27 days after Graham Gulf received the invoice and 85 days before Graham Gulf filed for bankruptcy. *See Barnhill v. Johnson*, 503 U.S. 393, 394-95 (1992) (for preference purposes, transfer made by check is deemed to occur on the date drawee bank honors the check).

The trustee is not challenging the first element of the ordinary course of business defense, *i.e.*, that Graham Gulf's payment to Blakeley was in payment of a debt *incurred* by Graham Gulf in the ordinary course of business of Graham Gulf and Blakeley. Only the second and third elements of the defense, often referred to as the subjective and objective prongs, respectively, are at issue. The court finds that summary judgment in Blakeley's favor is warranted on both prongs, even though one prong would be sufficient. *See, e.g.*, *In re Bender Shipbuilding*, 479 B.R. at 904.

A. The subjective prong

"In many 'ordinary course of business' cases, the parties at issue have had significant business dealings with one another prior to the transaction or transactions in question." *In re*

Bender Shipbuilding & Repair Co., No. 09-12616-MAM, 2012 WL 5360986, at *4 (Bankr. S.D. Ala. Oct. 15, 2012). "In those cases, courts review the prior dealings and compare them to the allegedly preferential dealings to determine whether the latter dealings comport to the ordinary course of business between the parties." *Id.*

Here, Graham Gulf and Blakeley did not have a long history of transactions prior to the transfer at issue. A lack of prior dealings, though, "is not necessarily fatal to" the ordinary course of business defense. *See id.* "Where parties have no extensive history of credit transactions to which a disputed payment can be related, their express agreement furnishes the most informative evidence left to consider of the ordinariness of a transaction from the parties' perspective." *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1298 (11th Cir. 2009) (citation and quotation marks omitted);[1] *In re Nobles*, No. 09-5106, 2010 WL 3260128, at *4 (Bankr. M.D. Ga. Aug. 18, 2010).

Blakeley supported its summary judgment motion with a declaration and deposition testimony from Jerry Harrington, Blakely's managing director of finance since December 2014. Harrington oversees the timekeeping, payables, accounts receivable, and billing for Blakeley. Harrington generated the invoice on May 29, 2015 and emailed it to Graham Gulf that same day, per Blakeley's normal practice. The invoice – which the parties agree is the only agreement pertaining to the transfer – states in pertinent part: "Accounts are due upon receipt. Invoices not paid within 30 days or not paid in accordance with contractual agreement are subject to the greater of 1 1/2% or the highest legal interest rate allowed per month."

[1] The Eleventh Circuit decided *In re Globe Manufacturing* under the old version of § 547(c)(2), *see* 567 F.3d at 1297 n.4, which required proof of both the subjective and objective elements. Nonetheless, the analysis of those elements remains good law.

Harrington testified that this language "is the standard language for the Cooper family group of companies [of which Blakely is a part] that they have on their invoices." (*Id.* at 55:6-25; *see also id.* at 58:20-59:1). He further testified about that language:

> Q: Okay. And it is your understanding that that means that on the 31st day after the invoice date, Blakeley will begin to charge interest on that balance?
>
> A: We have the opportunity to if we choose to do that.
>
> . . .
>
> Q: Okay. Isn't it correct, though, that [the invoice] states that the invoice is due upon receipt?
>
> A: It states that the invoice is due upon receipt, and that you have 30 days to pay it or you could be subject to additional charges. . . .
>
> Q: Are you suggesting that due upon receipt is effectively the same as net 30? . . .
>
> A: Our invoice states that it's due upon receipt, and you have 30 days to make the payment or you are subject to additional charges.

(*See id.* at 59:2-7, 60:21-61:13).

Harrington would not contact a customer about payment unless an invoice had not been paid in 40 to 45 days. (*See id.* at 70:21-71:15). Because Graham Gulf paid the invoice within 30 days, Blakeley took no action to collect the invoice beyond sending it on May 25, 2019. (*See* Harrington decl., doc. 56-1, ¶8; *see also* Harrington dep., doc. 69-1, 58:10-19, 70:6-71:15).

The trustee contends that the court should deny the summary judgment motion because (1) the invoice by its terms required immediate payment and Graham Gulf's payment 27 days later was thus late and (2) the payments terms on the invoice are ambiguous at best. Turning to the trustee's first argument, Harrington's deposition and declaration testimony was sufficient to shift the burden to the trustee to show that specific facts exist that raise a genuine issue for trial. However, the trustee did not offer any evidence, such as from a Graham Gulf employee or other

witness, that Blakeley's invoice required immediate payment. The trustee cannot even define what "immediate payment" would require – only that it would be less than 27 days.

The court recognizes that it must draw all reasonable factual inferences in the light most favorable to the trustee and that the trustee is not required to come forward with evidence of its own if those inferences establish that a genuine issue remains for trial. However, the court finds it unreasonable to infer that the invoice required immediate payment, especially where the evidence is undisputed that Blakeley does not even contact a customer about payment unless an invoice has not been paid in 40 to 45 days (*i.e.*, after 30 days).

Even so, "[w]here the judge is also the ultimate trier of fact [as here], and where a trial would not enhance the court's ability to draw inferences and conclusions from undisputed facts, then the court is free to draw such inferences and conclusions within the context of a motion for summary judgment." *See Matter of Lanting*, 198 B.R. 817, 821 (Bankr. N.D. Ala. 1996). The trustee's counsel informed the court at the summary judgment hearing that the trustee did not intend to present evidence from any other witness at the trial and that Harrington would be the only witness. In this respect, the court does not believe that a trial would enhance its ability to draw inferences and conclusions related to the conflicting interpretations of the invoice from the underlying facts of this case, all of which are undisputed.

The trustee's second argument regarding the second prong is that the invoice payment terms are ambiguous. Interpretation of the invoice is a matter of Alabama state law.[2] *See, e.g.*, *In re Rosenberg*, 414 B.R. 826, 840 (Bankr. S.D. Fla. 2009) ("In a bankruptcy case, 'the interpretation of private contracts is ordinarily a question of state law.'") (citation omitted).

[2] The parties have not argued that the law of any state other than Alabama applies or that the subject contract (the invoice) was made anywhere other than in Alabama.

Under Alabama law, accepting the trustee's position that the invoice is ambiguous, the court is permitted to look beyond the invoice itself to determine the intent of the parties. *See, e.g.*, *Walls v. Bank of Prattville*, 575 So. 2d 1081, 1083 (Ala. 1991) ("If the language of a contract is ambiguous or uncertain, the surrounding circumstances, including the construction placed on the language by the parties, are taken into consideration so as to carry out the intention of the parties."). Again, though, the only evidence before the court is Harrington's testimony that the invoice terms mean payment is required within 30 days, and the trustee has confirmed that that would be the only evidence on this point at trial. As discussed above, the court does not believe that a trial would enhance its ability to draw inferences related to resolving any purported ambiguity in the invoice. The court will therefore grant summary judgment in favor of Blakeley on the subjective prong of its ordinary course of business defense.

B. The objective prong

The objective prong "requires the bankruptcy court to examine industry standards." *See In re A.W. & Assocs., Inc.*, 136 F.3d 1439, 1442 (11th Cir. 1998). However, "[i]ndustry standards do not serve as a litmus test by which the legitimacy of a transfer is adjusted, but function as a general backdrop against which the specific transaction at issue is evaluated." *See id.* at 1442-43. "'[O]rdinary business terms' refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of" the objective prong. *See id.* at 1443 (citation and quotation marks omitted); *see also In re Craig Oil Co.*, 785 F.2d 1563, 1566 (11th Cir. 1986) (section "547(c)(2) should protect those payments which do not result from 'unusual' debt collection or payment practices").

"Expert testimony is unnecessary to establish a defense [of ordinary course of business] as long as the testimony of the [creditor's] witness is based on personal experiences." *See In re Samy Santa Flooring Depot, Inc.*, No. 09-81413-MHM, 2011 WL 873440, at *4 (Bankr. N.D. Ga. Mar. 14, 2011). But "the creditor must characterize the payment practices of its industry with specificity, and present specific data to support its characterization." *See In re Globe Mfg.*, 567 F.3d at 1299.

Blakeley's evidence on the objective prong, like the subjective prong, consisted of Harrington's testimony. Harrington correctly defined the relevant industry as the ship repair industry, and the trustee has not suggested that the court should examine some other industry standard. (*See, e.g.*, Harrington decl., doc. 56-1, ¶¶ 2, 6; Harrington dep., doc. 69-1, 32:20-34:13); *see In re A.W. & Assocs.*, 136 F.3d at 1443 (discussing the objective prong as requiring evidence of "practices in which *firms similar in some general way to the creditor in question* engage") (emphasis added).

Harrington obtained an associate degree in accounting in 1986 and has over 30 years of experience in the ship repair industry, and specifically in the areas of timekeeping, payables, accounts receivable, and billing. He was the manager of marine accounting at Signet Maritime at Signet's Pascagoula, Mississippi shipyard from June 2010 until he joined Blakeley as its managing director of finance in December 2014. Prior to his tenure at Signet, he was employed by Colle Towing Company in Pascagoula from 1986 until June 2010. He started at Colle doing payables and billing and progressed through the years to become a controller.

Harrington testified in his declaration:

> In my experience, payment terms in the industry range from pre-payment, on the short side, to agreed-to installment plans, on the long side. That said, the most common term is to require payment within thirty-days after the invoice is

> received, and these payments terms are common or standard in the ship repair industry.

(Harrington decl., doc. 56-1, ¶6; *see also id.* at ¶7). He then expanded on this testimony in his deposition:

> Q: And just so I understand, when you say that the most – that payment within 30 days after the invoice is received is the most common, would I be correct in assuming . . . that, in fact, it is probably the overwhelming majority of all the invoices issued by Blakeley?
>
> A: Yes.
>
> Q: And probably the overwhelming majority of all the invoices issued by Signet Maritime?
>
> A: My tenure at Signet Maritime, the terms were net 30.
>
> Q: And what about Colle Towing?
>
> A: They were also net 30.

(Harrington dep., doc. 69-1, 39:17-40:4).

> Q: Okay. When the ship repair industry has been at a low point, . . . is there an impact or have you witnessed an impact on payment practices and terms?
>
> A: For work performed, no. I mean, the payment is still within 30 days and . . . that normal practice has been abided by, you know.
>
> Q: Meaning payment terms haven't varied, in your experience; is that correct?
>
> A: That's correct. Payment terms I'm familiar with are within 30 days[.] . . . Through my experience, that's what has been followed from a payment standpoint.

(*Id.* at 86:3-19).

> Q: The 30-day payment term, was that also similar with your time at Colle and with your time at Signet and consistent with your time at Blakeley?
>
> A: It is.

(*Id.* at 92:2-5). He also testified that Blakeley contractors that Blakeley brought in to assist with ship repair used the 30-day payment term. (*See id.* at 78:17-79:8).

The trustee argues that Harrington's testimony does not satisfy Blakeley's summary judgment burden. The court is not persuaded by the trustee's argument that Harrington's testimony is irrelevant because he was not working at Signet and Colle at or around the time of the transfer in May 2015. Harrington started work at Blakeley approximately 6 months prior to the time of the transfer, and he testified that in his personal experience of over 30 years in the ship repair industry, the 30-day payment term was consistent.[3] *See, e.g.*, *Mossay v. Hallwood Petroleum, Inc.*, No. 3:96-CV-2898, 1997 WL 222921, at *5 (N.D. Tex. Apr. 28, 1997).

The court likewise rejects the trustee's argument that Harrington's testimony lacks an objective basis. The 30-day payment term is not complicated, and Harrington characterized the industry payment terms with specificity – payment within 30 days, a.k.a. net 30 – throughout his testimony. His personal knowledge of the payment terms used at Signet and Colle was sufficient data to support that characterization. In contrast to the witnesses in *In re Globe Manufacturing* who did not have "much to say about payment norms within the industry[,]" *see* 567 F.3d at 1299, Harrington testified about his 30+ years of experience not only in the ship repair industry, but also his particular experience in that industry in positions specifically dealing with payables, accounts receivable, and billing. *Cf. id.* (finding witness testimony on objective prong insufficient where one witness "admitted that he was not responsible for issuing invoices and processing payments, and had nothing at all to say about how [the creditor]'s practices compared

[3] The trustee also contends that Harrington's testimony about Blakeley contractors does not establish that similarly-situated parties in the ship repair industry utilized the 30-day payment term. The court need not address this argument because it finds that Blakeley met its summary judgment burden through Harrington's other testimony, as discussed herein.

with industry norms" and the other witness "admitted that he was not involved in sending out invoices or processing payments, that he did not know when invoices were actually paid, and that he would become aware of payment issues only when someone told him that there was a problem"). This is simply not a situation with the creditor has "presented nothing but the bottom line conclusion of a witness who admits that he has no real familiarity with industry payment practices." *See id.* at 1300.

Harrington's testimony based on his extensive experience in the ship repair industry was enough to shift the summary judgment burden to the trustee. The trustee did not produce any evidence to dispute that testimony, did not claim that there was an alternative industry standard at the time of the transfer, and did not otherwise establish that specific facts exist that raise a genuine issue for trial on the objective prong. *See, e.g.*, *Mossay*, 1997 WL 222921, at *5. The trustee has not offered any evidence that would create a genuine issue about whether the payment here was so idiosyncratic that the court should deem it extraordinary and outside the scope of the objective prong. Because it is undisputed that Graham Gulf's payment was made within the industry standard of net 30 days, the court finds that Blakeley is also due summary judgment on the objective prong of its ordinary course of business defense.[4]

Conclusion

To the extent the court has not specifically addressed any of the parties' arguments related to the § 547 preference claim, it has considered them and determined that they would not

[4] The court agrees with Blakeley that the trustee's argument that the "due upon receipt" language in Blakeley's invoice conflicts with the 30-day payment industry standard to which Harrington testified conflates the subjective and objective tests. *See, e.g.*, *In re Bender Shipbuilding*, 479 B.R. at 904 ("It is significant that the second and third requirements [the subjective and objective prongs of the defense] are stated in the disjunctive."). Even so, as discussed above in relation to the subjective prong, the trustee has not shown that genuine issues of fact remain related to the invoice terms.

alter the result. The trustee's § 502(d) claim is contingent on her § 547 claim and necessarily also fails for that reason. The court previously stayed the case as to the related issues of Graham Gulf's solvency and whether Blakeley received more through the alleged preferential transfer than it would have received in a chapter 7 bankruptcy had the transfer not been made. (*See* order, doc. 65). Because the court finds that summary judgment is appropriate on Blakeley's ordinary course of business defense, it need not address the other issues raised in Blakeley's motion. For the reasons discussed herein, the court grants defendant Blakeley Boatworks, Inc.'s motion for summary judgment (doc. 56). The court will enter a separate final judgment of dismissal.

Dated: March 14, 2019

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE