NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 15-023

Bankruptcy Case No. 09-02048-BKT
Adversary Proceeding No. 12-00094-BKT

PMC MARKETING CORP.,
Debtor.

NOREEN WISCOVITCH-RENTAS, Chapter 7 Trustee,
Plaintiff-Appellant,

v.

SUR CSM PLAZA, INC.,
Defendant-Appellee.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Brian K. Tester, U.S. Bankruptcy Judge)

Before
Feeney, Deasy, and Cary,
United States Bankruptcy Appellate Panel Judges.

Rafael A. González Valiente, Esq., on brief for Plaintiff-Appellant.
Maria Fernanda Velez Pastrana, Esq., on brief for Defendant-Appellee.

January 19, 2016

Feeney, U.S. Bankruptcy Appellate Panel Judge.

Noreen Wiscovitch-Rentas, the plaintiff and chapter 7 trustee (the "Trustee"), appeals from the bankruptcy court order (the "Order") relating to her complaint seeking to avoid and recover preferential transfers, whereby the court granted summary judgment in favor of the defendant-appellee, Sur CSM Plaza, Inc. ("CSM"),[1] and denied her amended cross-motion.[2] For the reasons discussed below, we **REVERSE** the Order and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

CSM is the owner of Centro del Sur Mall in Ponce, Puerto Rico. Pursuant to a certain lease agreement executed in April 1983, the debtor, PMC Marketing Corp. (the "Debtor"), rented commercial space at Centro del Sur Mall, where it conducted business as a pharmacy called "Farmacias El Amal."[3]

On March 18, 2009, the Debtor filed a petition for chapter 11 relief. The bankruptcy court converted the case to chapter 7 on May 20, 2010, and the Trustee was appointed the same day. On March 2, 2012, the Trustee filed a single-count complaint against CSM for "turnover of preferential transfers pursuant to § 547,"[4] alleging that the Debtor transferred $32,171.90 to

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[1] The successor in interest to Sur CSM Plaza, Inc. is Centro del Sur Mall, LLC.

[2] See p.10, *infra*, regarding the scope of our review.

[3] The lease was entered into by and between Real Investment, S.E. and Farmacias José Guillermo Inc., predecessors in interest to the Debtor and CSM, respectively.

[4] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure, and all references to "Rule" shall be to the Federal Rules of Civil Procedure.

CSM within 90 days of the petition date. The Trustee further alleged that the transfer:[5] (i) was made for or on account of an antecedent debt; (ii) was made while the Debtor was insolvent; and (iii) enabled CSM to receive more than it would if the payment had not been made. Accordingly, the Trustee requested judgment against CSM in the amount of $32,171.90, plus costs, expenses, and attorney's fees.

CSM answered the complaint, acknowledging that the Debtor made a rent payment within 90 days of the petition date, on January 9, 2009, in the amount of $16,085.95 (the "January 2009 Payment"). CSM asserted several affirmative defenses to the Trustee's preference claim, including that the challenged transfer was excepted from avoidance pursuant to § 547(c), because it was made as "part of the regular course of business between the parties, specifically as payment of the monthly rent for the leased premises . . . ."[6] CSM responded in its answer that the Debtor "remained in possession of the premises . . . at least until January 2010," and that the monthly rent was $16,085.95, due on the first day of each month. According to CSM, although the "[D]ebtor was in default of rent payments, . . . it kept making regular payments to CSM, in order to update the account and to avoid an eviction . . . ."

CSM further maintained that although the Debtor also made a separate $16,085.95 rent payment on December 8, 2008, that payment was outside the 90-day preference period and,

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[5] In the complaint, the Trustee alternately referred to "transfer" and "transfers," a seeming reflection of her uncertainty regarding the details of the subject transaction when she commenced the adversary proceeding.

[6] Other defenses included that: (1) the Trustee was negligent in commencing the adversary proceeding "almost two years after [the] Debtor's bankruptcy case was converted to Chapter 7"; (2) the Trustee's claims were "frivolous"; and (3) the allegations of the complaint "lack[ed] specificity." The ultimate focus of the litigation became the "ordinary course of business" defense and CSM did not pursue the remaining defenses.

therefore, § 547(b) did not apply. CSM attached a single exhibit, a tenant ledger reflecting Farmacias El Amal's account history from December 1, 2008, through July 2009.

Thereafter, in February 2013, CSM filed a motion for summary judgment (the "Summary Judgment Motion"), disputing in its "statement of uncontroverted relevant facts" the amount of the Trustee's claim, but conceding that the January 2009 Payment fell within the 90-day preference period. CSM reiterated, however, that § 547(c) insulated the January 2009 Payment from avoidance.

In its accompanying memorandum of law, CSM elaborated on its ordinary course of business defense, maintaining that the "Debtor's payment history with CSM reflected repeated late payments," and that CSM accepted those payments, "because they were made with the promise . . . to clear out the total amount owed." As evidence of the Debtor's payment history, CSM attached to the memorandum a 35-page "tenant ledger" for Farmacias El Amal, this one covering the period from May 24, 1995, through March 31, 2011.[7]

On March 5, 2013, the Trustee filed an opposition to the Summary Judgment Motion, which included a cross-motion for summary judgment (collectively, the "Cross-motion"). In it, she challenged CSM's ordinary course of business defense, but admitted there was only a single, $16,085.95 preferential transfer—the January 2009 Payment. As evidence of that payment, she referred to a $16,085.95 check dated October 31, 2008, from Farmacias El Amal made payable to

[7] CSM also attached to the memorandum of law a copy of the lease agreement, and the sworn statement of its "administrative agent," wherein he averred that on January 9, 2009, the Debtor "made a rent payment of $16,085.95 to CSM . . . to cover the monthly payment of . . . rent, in order to continue the operation of its pharmacy at Centro del Sur Mall."

CSM, which she contended was deposited on January 12, 2009,[8] and met all of § 547's requirements for a preferential transfer.

In furtherance of her contention that there was "no set [payment] pattern" which qualified as the ordinary course of business between the parties, the Trustee asserted that the Debtor was "struggling to make the [rent] payments," as evidenced by its irregular payment history. "During the 18 month[ ] period prior to the last payment: (1) Debtor made late payments on different days of the month; (2) in some months Debtor made no payments; and (3) in other months Debtor made 2 payments." With respect to industry practices, the Trustee claimed that CSM failed to establish that the industry accepts late payments, let alone payments as late as the Debtor's.

Contemporaneously with the Cross-motion, the Trustee filed her own counter-statement of uncontroverted facts (the "Counter-statement"), in which she chronicled the Debtor's payment history for the purpose of showing that "there was no set pattern for the payment of the rent, and [the] Debtor didn't pay its rent on a monthly basis." She stated, in pertinent part:

> Debtor made payments in the following manner in the 15 months prior to the last payment: 1 payment [o]n October 29, 07; **NO PAYMENT in November of 07**, 1 payment [o]n December 3, 07; 1 payment [o]n January 8, 08; 1 payment [o]n February 19, 08; 1 payment [o]n March 17, 08; 1 payment [o]n April 18, 08; **2 payments [o]n May 29, 08**; 1 payment [o]n June 16, 08; 1 payment [o]n July 22, 08; **NO PAYMENT in August of 08**; **NO PAYMENT in September of 08**; **2 payments in October of 08 (**one the 6th and the other the 16th); **NO PAYMENT**

[8] Throughout the proceedings below, the Trustee submitted a copy of the check dated October 31, 2008, (which was well before the preference period) as evidence of the challenged payment. However, she indicated, without opposition from CSM, that the Debtor cashed this check during the preference period, on January 9, 2009. See Barnhill v. Johnson, 503 U.S. 393 (1992) (stating for preference purposes, date of transfer is the date that check is honored); see also Pettie v. Hamilton (In re Park at Briarcliff, Inc.), Adv. No. 12-5069, 2013 WL 8214715, at *5 (Bankr. N.D. Ga. Aug. 6, 2013) (stating that for preference purposes, transfers were made when bank honored checks, not the dates of the checks or the dates of delivery).

in November of 08; 1 payment [o]n December 11, 08; and 1 payment [o]n January 9, 09.

On April 15, 2013, 41 days after filing the Cross-motion, the Trustee filed an amended opposition and cross-motion (the "Amended Cross-motion").[9] The Trustee modified her original argument by, inter alia, deleting the argument regarding the ordinary course of business in the industry, instead focusing on her contention that the challenged transfer was not part of the ordinary course of business between the parties. In support of the Amended Cross-motion, the Trustee also filed an amended counter-statement of facts (the "Amended Counter-statement").[10] The most significant addition to the Amended Counter-statement was the Trustee's analysis of the data concerning the Debtor's payment history, which, she maintained, demonstrated that the average lateness of rental payments prior to the preference period was 65 days and the median was 60 days, while the average lateness and the median during the preference period were both 101 days. To the Amended Counter-statement she also added three exhibits which were omitted from the original, including: the Trustee's unsworn declaration, in which she averred that the Debtor made payments to CSM during the 90-day preference period which would enable CSM "to receive more money than it would receive under a distribution if the payments had not been

[9] The bankruptcy court docket reflects that this is actually the second amended opposition and cross-motion filed by the Trustee. See U.S. Bank Nat'l Ass'n v. Blais (In re Blais), 512 B.R. 727 (B.A.P. 1st Cir. 2014) (stating "we may take judicial notice of the bankruptcy court's docket and imaged papers") (citation omitted). However, the Trustee did not include as part of the record the first amendment, which she filed on March 7, 2013.

[10] Neither CSM nor the bankruptcy court took issue with the filing of the Amended Cross-motion or the Amended Counter-statement without leave of court, and these submissions remained a part of the bankruptcy court's docket. Accordingly, the Amended Cross-motion superseded both of the Trustee's prior requests for summary judgment. We note that in stark contrast to the bankruptcy court's acceptance of the Trustee's amended submissions in the subject adversary proceeding, the bankruptcy court struck as unauthorized an amended motion for summary judgment in a similar adversary proceeding brought in the same bankruptcy case. See Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.), Adv. No. 12-00071, 2014 WL 6835409, at *1 (Bankr. D.P.R. Dec. 2, 2014).

made"; a chart depicting the degree of lateness for each rental payment made during the period from February 2007 through January 2009; and a graph depicting the same data.

CSM did not respond to the Amended Cross-motion (or, for that matter, either of its predecessors). On April 12, 2013, however, CSM filed an assented-to motion, seeking a continuance of the upcoming pretrial conference, pending a ruling on the Summary Judgment Motion. The bankruptcy court granted the motion and vacated the scheduling of the pretrial conference. Nearly a year and a half later,[11] on September 5, 2014, the bankruptcy court issued an Opinion and Order (the "September 2014 Order"), without a hearing, indicating that it was considering the Summary Judgment Motion, the Cross-motion, and both amendments to the Cross-motion.[12] The court denied the Summary Judgment Motion, reasoning:

> This Court has previously explained the ordinary course of business exception that [sic]: "[The exception] thrives from the core of bankruptcy preference law. As such, this exception cries [sic] to strike a dragon-fly landing-like balance between shielding payments received by creditors to the extent that those creditors who remain committed to a debtor during times of financial distress, and maintaining an elastic area of flexibility to creditors in dealing with the debtor so long as the steps taken are consistent with customary practice among specific industry participants." In re PMC Mktg. Corp., 499 B.R. 214, 219 (Bankr. D.P.R. 2013). "Under the first two prongs of §§ 547(c)(2) and 547(c)(2)(A), Defendant needs to demonstrate, by a preponderance of the evidence, that the specific transaction was ordinary as between the parties.[. . .] So while a late payment is usually non-ordinary, the defendant can rebut this presumption if late payments were the standard course of dealing between the parties." Id. at 220 (citations omitted). Therefore, "Defendant must establish a [']baseline of dealings[']between the parties to enable the court to compare the payment practices during the preference period with the prior course of dealing. Id. (citation and internal quotations omitted). As stated in Plaintiff's opposition to Defendant's summary judgment, there is no baseline of dealings between the two parties. In fact, during the 18

[11] The reason for the delay is not clear from the record.

[12] The court explicitly stated: "Before the court is Creditor/Defendant's Motion for Summary Judgment [Dkt. No. 25] and Trustee/Plaintiff's Opposition to Defendant's Motion for Summary Judgment and accompanying Responses [Dkt. No. 26, 27, 28, 29, 30, 32, 33]."

> months [sic] period prior to the last payment Debtor not only made late payments on different days of the month but Debtor also missed payments or made duo payments during several months.
>
> Under the ordinary course of business exception, Defendant could also meet the exception's requirements under 11 U.S.C. § 547(c)(2)(B). However, because the Defendant did not pose any contentions under this section, the court will not delve unnecessarily into such for judicial economy purposes.
>
> WHEREFORE, IT IS ORDERED that Defendant's Motion for Summary Judgment shall be, and it hereby is, DENIED. Clerk to schedule a pre-trial hearing.

The September 2014 Order was silent regarding the disposition of the Cross-motion and the Amended Cross-motion.

Thereafter, the bankruptcy court conducted a pretrial conference on November 20, 2014, which resulted in the December 3, 2014 entry of the following minutes of proceedings and order:

> The Defendant requested leave to supplement the Joint Exhibits in the Pretrial Report (docket No. 43). The Plaintiff informed that there was a counter motion filed in the opposition to the Motion for Summary Judgment (docket No. 28) and pending is the ruling. The Defendant stated understands [sic] was resolved with the Opinion and Order entered on 09/05/2014 (Docket No. 36)[.]
>
> The Court will review the Opinion & Order to see if it was addressed or not. The Defendant requested a brief period to address the motion if [sic] decides that the counter motion was not resolved. The Defendant to file [sic] any appropriate motion she understands as to this counter motion, however, this motion was filed since April 4, 2013.
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> If the matters are resolved, the Trial is set for April 15, 2015 at 9:00 A.M. . . . .

The court then entered following order, clarifying the September 2014 Order (the "Clarification Order"):[13]

> The court has reviewed the Opinion and Order filed on 9/5/2014 [Dkt. No. 36], the ("Opinion"), as requested by the Plaintiff at the hearing held on 11/20/2014.

[13] The Clarification Order is dated December 1, 2014, and was entered on the docket prior to the December 3, 2014 minutes of proceedings and order, an apparent error.

> The court determines that the Plaintiff's counter motion for summary judgment, included as part of the opposition to the Defendant's motion for summary judgment, although not specifically mentioned by title, was duly considered by the court in its Opinion. As such, the ruling of the court stands. Even though Defendant's motion for summary judgment was not granted, denial of the Plaintiff's counter motion[14] was appropriate. A trial is scheduled April 15, 2015 at 9:00 A.M.

(footnote added).

Five days prior to the scheduled trial, without a hearing, the bankruptcy court reconsidered and reversed sua sponte the September 2014 Order, and entered the Order which is the subject of this appeal, which stated, in relevant part:

> On December 3, 2014, the court scheduled this adversary for a trial following the denial of Defendant's Motion for Summary Judgment . . . . The court has independently reviewed the similar issues raised in this adversary proceeding and two others, namely adversary 12-00071 and 12-000167.[15]
>
> In adversary proceeding 12-00071, involving Defendant Villa Blanca VB Plaza, LLC, the court found that the Defendant had successfully proven by a preponderance of the evidence that the specific transaction was ordinary as *between the parties*. The Debtor's Tenant's Ledger revealed an inconsistent payment date and thus demonstrated that the lessor/lessee payment relationship between the Debtor and the Defendant seemed to be a rather flexible one. Pursuant to 11 U.S.C. § 547(c)(2)(A)-(B) transfers originally made in the ordinary course of business or financial affairs of the debtor and the transferee, or transfers originally made according to ordinary business terms are excepted from trustee's avoidance powers as preferential if the underlying debt was originally incurred in the ordinary course of business or financial affairs of the debtor and the transferee. Thus, the Defendant had met the burden for both § 547(c)(2) and § 547(c)(2)(A),

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[14] We construe the bankruptcy court's reference to the "counter motion" to mean the "Amended Cross-motion," as the original Cross-motion had been superseded and the court had indicated in the September 2014 Order that the Amended Cross-motion was before it.

[15] Adv. Pro. No. 12-00071 is the subject of our opinion in Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.), BAP No. PR 15-022, slip op. (B.A.P. 1st Cir. Jan. 19, 2016), and Adv. Pro. No. 12-00167 is the subject of our opinion in Wiscovitch-Rentas v. Santa Rosa Mall LLC (In re PMC Mktg. Corp.), BAP No. PR 15-024, slip op. (B.A.P. 1st Cir. Jan. 19, 2016). In both instances, we reversed the bankruptcy court's decision to grant summary judgment in favor of the defendant-creditor.

> and the court granted summary judgment in favor of Defendant Villa Blanca VB Plaza, LLC.[16]
>
> The court finds that the Opinion and Order described above [see Dkt. No. 42 in adversary case number 12-00071] is legally sound and applicable to this instant proceeding as the legal arguments and facts correlate closely. As such, the trial scheduled for April 15, 2015, is vacated and set aside. The court reverses its previous finding in the Opinion and Order [Dkt. No. 36], and instead GRANTS the Defendant's Motion for Summary Judgment. The Clerk shall enter the judgment.

(footnotes added). The Order did not explicitly dispose of the Amended Cross-motion.

The court entered a Judgment the same day, indicating it was vacating the September 2014 Order, granting the Summary Judgment Motion, and dismissing the adversary complaint.[17] This appeal ensued.

SCOPE OF REVIEW

In her notice of appeal, the Trustee specified only that she was appealing from the bankruptcy court order granting the Summary Judgment Motion. Similarly, in her statement of issues, the Trustee made no mention of the denial of the Amended Cross-motion. In her brief, however, the Trustee expanded the issues on appeal to include whether the bankruptcy court erred in denying the Amended Cross-motion. Because CSM likewise briefed the denial of the

[16] Although the parties have not raised as error the preponderance standard which the court referenced in the Order, in the context of our de novo review, we apply the summary judgment standard articulated by the First Circuit in Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 762 (1st Cir. 1994). See page 15, *infra*.

[17] Although the bankruptcy court did not explicitly state in the Judgment that it was denying the Amended Cross-motion, we construe the sua sponte reversal of the September 2014 Order and the concomitant dismissal of the adversary proceeding as tantamount to a denial of the Amended Cross-motion.

Amended Cross-motion, we include it within the scope of our review.[18] See Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 8 (1st Cir. 2005) (stating the First Circuit has been "liberal" in determining what is actually being appealed, and advising that "briefs . . . can be consulted" in this process).

POSITIONS OF THE PARTIES

A. The Trustee

On appeal, the Trustee argues that CSM did not satisfy its burden on summary judgment with respect to its ordinary course of business defense, insofar as it failed to: (1) provide an analysis of the Debtor's payment history; (2) allege that the *debt* was ordinary between the parties; and (3) demonstrate that the Debtor's payments followed a "set pattern." According to the Trustee, CSM merely provided a statement of accounts and "a bald statement that the payments were consistently late . . . ."

The Trustee reiterates the "average lateness" analysis she asserted in the proceedings below, arguing that "prior to the start of the preference period . . . the average [']lateness['] was 65 days and a median was 60 days," while during the preference period the average "lateness" and the median were both 101 days.[19] According to the Trustee, the record demonstrates that CSM made its payments on an "ad hoc" basis, rather than as a "set pattern." She notes that the

[18] In their briefs, the parties refer to the Trustee's request for the entry of summary judgment in her favor as the "Countermotion for Summary Judgment." We interpret these references to mean the "Amended Cross-motion."

[19] The Trustee notes in her appellate brief that this analysis is based on a 24-month, baseline period prior to the preferential period. In the proceedings below, however, she utilized an 18-month baseline period in the original Opposition and Cross-motion, and a 24-month period in the amended version.

bankruptcy court correctly concluded in the September 2014 Order[20] (which it subsequently reversed) that this payment history does not satisfy the requirements of the ordinary course of business defense. Additionally, the Trustee argues that CSM failed to oppose the Cross-motion, and that she established the elements required for avoidance of a preferential transfer under § 547. The Trustee specifically asks the Panel to "grant summary judgment" in her favor.

B. CSM

CSM counters that it should prevail on its ordinary course of business defense and urges the Panel to affirm the Order. In order to demonstrate that the challenged payment was within the ordinary course of business between the parties, CSM asserts that the size of the payment was not unusual, arguing for the first time on appeal that the payment was "the exact same amount of the monthly rent charges invoiced to [the] Debtor and also is consistent with the amount of the payments made by [the] Debtor prior to the filing of its bankruptcy petition." We need not dwell on this argument, because it is made for the first time on appeal. See Abdallah v. Bain Capital LLC, 752 F.3d 114, 120 (1st Cir. 2014) (citation omitted).

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[20] We note that in connection with this argument, the Trustee misquotes the conclusions of the bankruptcy court set forth in the September 2014 Order. She represents in her appellate brief that the bankruptcy court stated:

> As Plaintiff's amended opposition to Defendant's summary judgment correctly argues, there is no baseline of dealings between the two parties. In fact, during the 24 months [sic] period prior to the last payment Debtor not only made late payments on different days of the month but Debtor also missed payments or made partial payments during several months.

As we discussed, *supra*, the bankruptcy court actually indicated as follows in the September 2014 Order:

> As stated in Plaintiff's opposition to Defendant's summary judgment, there is no baseline of dealings between the two parties. In fact, during the 18 months [sic] period prior to the last payment Debtor not only made late payments on different days of the month but Debtor also missed payments or made duo payments during several months.

CSM maintains that the timing of the challenged payment was also consistent with the parties' ordinary course of dealings, arguing that the Debtor's "[r]ent payments to CSM were never made [o]n the exact same dates nor [o]n a monthly consecutive basis." CSM elaborates: "Late payments are considered to be made in [the] 'ordinary course of business' . . . if [they are] made within [the] pattern of payments between the parties . . . ." CSM offers no analysis of that pattern, however, instead choosing to rely on the bankruptcy court's characterization of the Debtor's "payment relationship" with CSM as "a flexible one." In fact, CSM rejects the notion that it was required to establish a "baseline of dealings," arguing that its defense was sufficiently supported by the tenant ledger and the lease agreement.

Although CSM never raised the "contemporaneous exchange for value" defense in its answer, in its appellate brief (as in the memorandum of law it filed in support of the Summary Judgment Motion), it argues without any elaboration that rent payments "qualify as a contemporaneous exchange for value and . . . as such, could not be voided by the Trustee." Because the "contemporaneous exchange for value" defense is both untimely and unexplained, we consider it waived. See Fed. R. Civ. P. 12(b) and 12(h) (specifying when defenses must be raised); see also United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (explaining failure to brief an issue in more than perfunctory manner results in waiver).

Lastly, although CSM never challenged the Amended Cross-motion in the proceedings below, in its brief it argues that the denial of the Amended Cross-motion was warranted, because the Trustee failed to satisfy her burden of establishing a voidable transfer.

JURISDICTION

A bankruptcy appellate panel is "duty-bound" to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998) (citation omitted) (internal quotations omitted). A panel may hear appeals from "final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998) (internal quotations omitted) (footnote omitted). "An order granting summary judgment, where no counts remain, is a final order."[21] Wiscovitch-Rentas v. Molina González (In re Morales García), 507 B.R. 32, 41 (B.A.P. 1st Cir. 2014) (citation omitted) (internal quotations omitted). Thus, we have jurisdiction.

STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010) (citation omitted). We review a grant of summary judgment de novo.

[21] While an order denying summary judgment is typically an interlocutory order, here it is clear from the bankruptcy court's decision to dismiss the subject adversary proceeding that the denial of the Amended Cross-motion, in combination with the granting of the Summary Judgment Motion, was the court's final act in the matter. See Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990) (holding that a "disposition is final if it contains 'a *complete* act of adjudication,' that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter") (quoting United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 234 (1958); Maddox v. Black, Raber-Kief & Assocs., 303 F.2d 910, 911 (9th Cir. 1962)) (footnote omitted). We note, further, that an appeal from a final judgment, such as the appeal from the order granting the Summary Judgment Motion here, subsumes all rulings producing the judgment. See Boyd v. Kmart Corp., No. 96-7065, 1997 WL 158183, at *6 (10th Cir. Apr. 2, 1997) (citation omitted). Accordingly, there is no doubt that we have jurisdiction over the decision denying the Amended Cross-motion.

Redondo Constr. Corp. v. Izquierdo, 746 F.3d 21, 26 (1st Cir. 2014) (citation omitted). De novo review means that "the appellate court is not bound by the bankruptcy court's view of the law." Harrington v. Donahue (In re Donahue), BAP No. NH 11-026, 2011 WL 6737074, at *8 (B.A.P. 1st Cir. Dec. 20, 2011) (citation omitted) (internal quotations omitted). "On an appeal from cross-motions for summary judgment, the standard of review does not change . . . ." Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013) (citation omitted).

DISCUSSION

I. The Summary Judgment Standard

"In bankruptcy, summary judgment is governed in the first instance by Bankruptcy Rule 7056." In re Varrasso, 37 F.3d at 762; see also Soto-Rios v. Banco Popular de P.R., 662 F.3d 112, 115 (1st Cir. 2011). "By its express terms, the rule incorporates into bankruptcy practice the standards of Rule 56 of the Federal Rules of Civil Procedure." In re Varrasso, 37 F.3d at 762 (citations omitted); see also Soto-Rios v. Banco Popular de P.R., 662 F.3d at 115; Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56. "It is apodictic that summary judgment should be bestowed only when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment as a matter of law." In re Varrasso, 37 F.3d at 763 (citation omitted). "As to issues on which the nonmovant has the burden of proof, the movant need do no more than aver an absence of evidence to support the nonmoving party's case." Id. at 763 n.1 (citation omitted) (internal quotations omitted). "The burden of production then shifts to the nonmovant, who, to avoid summary judgment, must establish the existence of at least one question of fact

that is both genuine and material." Id. (citations omitted) (internal quotations omitted). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). As the Supreme Court explained, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. at 250.

Where, as here, there are cross-motions for summary judgment, "we employ the same standard of review, but view each motion separately, drawing all inferences in favor of the nonmoving party." Fadili v. Deutsche Bank Nat'l Trust Co., 772 F.3d 951, 953 (1st Cir. 2014) (citation omitted).

II. CSM's Summary Judgment Motion

We recently had occasion to consider the requirements § 547(c)(2)(A)'s ordinary course of business defense at length, as memorialized in our opinion, Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.), *supra*, where we reviewed a nearly identical bankruptcy court order granting the defendant-creditor's summary judgment motion and denying the plaintiff-trustee's cross-motion for summary judgment in another adversary proceeding brought in the same bankruptcy case.[22] In that decision, we rejected the same argument presented here, namely, that a history of late payments, standing alone, is sufficient to satisfy § 547(c)(2)(A) and,

[22] Indeed, the bankruptcy court's reasoning in Villa Blanca—which we have rejected—formed the foundation of the Order which is the subject of this appeal.

in so doing, we reversed the grant of summary judgment in favor of the defendant-creditor. We wrote:

> While there is no "precise legal test" for establishing the ordinary course of business between the parties, the controlling factor is whether the transactions between the Debtor and Villa Blanca were consistent both before and during the 90-day preference period. See In re Healthco, 132 F.3d at 110. This determination requires, for starters, the establishment of a baseline period for comparison, reaching back to a period when the Debtor was financially healthy. Nothing in the record suggests that Villa Blanca addressed, or that the bankruptcy court even considered, the issue of the appropriate look-back period for this case; nor does the record otherwise disclose sufficient information from which the Panel might discern when the Debtor was financially sound for purposes of that determination.
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> Villa Blanca not only failed to establish a baseline period for comparison, but also neglected to point to and analyze evidence demonstrating that the timing of the January 2009 Payment was consistent with, or ordinary in relation to, payment practices during that period. Although it relied on a "lateness" theory, Villa Blanca never disclosed the degree of lateness of the challenged payment. We cannot even discern with certainty which month's rental obligation was discharged by the January 2009 Payment. Timing issues aside, Villa Blanca ignored other relevant factors prescribed for comparison by the First Circuit, including the amount transferred and the circumstances under which the transfer was effected. See In re Healthco, 132 F.3d at 109 (citations omitted). It simply furnished the bankruptcy court with a copy of a 32-page payment ledger, without any analysis of the data or application of the Healthco factors. Villa Blanca has provided no analysis from which we can determine that: the January 2009 Payment was consistent with past payments in form; it deviated from usual collection or payment activities; or, it did not take advantage of the Debtor's deteriorating financial condition. See In re Healthcentral.com, 504 F.3d at 790. As one court admonished in an analogous case, where the defendant creditor similarly presented without analyzing a table of payments, "'litigants should not seriously expect to obtain a remedy without doing the necessary leg work first.'" In re PMC Mktg., Corp., 526 B.R. at 447 (quoting Silverstrand Invs. v. AMAG Pharms., Inc., 707 F.3d 95, 107 (1st Cir. 2013)); see also Morales v. A.C. Orssleff's EFTF, 246 F.3d 32, 33 (1st Cir. 2001) (warning counsel, in the context of summary judgment, to avoid imposing upon the court "the daunting burden of seeking a needle in a haystack").
>
> Although courts have adopted varying mathematical approaches for evaluating the data concerning the parties' payment practices, they are in agreement that the "cornerstone of the inquiry is that the creditor must demonstrate some consistency

> with other business transactions between the debtor and the creditor." In re Affiliated Foods, 750 F.3d at 719 (citation omitted) (internal quotations omitted). Under no theory is the conclusory incantation "late payments are ordinary course," standing alone, sufficient to satisfy § 547(c)(2)(A). Rather, the consistency determination requires a "fine-grained analysis." See In re KLN Steel Prods. Co., 506 B.R. at 465. Villa Blanca's argument that the Debtor's rent payments were consistently late falls short of this mark. On this record, we cannot say whether the January 2009 Payment is an example of "the tottering [D]ebtor [deciding] to put one creditor ahead of the others" or a case of the Debtor simply "doing the same thing [it] had been doing before [it] began to totter." In re Xonics Imaging Inc., 837 F.2d 763, 767 (7th Cir. 1988).

Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.), BAP No. PR 15-022, slip op. at 27-29 (footnote omitted).

In the instant case, CSM's argument suffers from the same flaws as Villa Blanca's. CSM, like Villa Blanca, defends against the Trustee's preference complaint by arguing that the Debtor's chronically late rental payments reflected the ordinary course of business between the parties. Also like Villa Blanca, CSM failed to compare the degree of lateness of the payments during the preference and pre-preference periods, or to establish a baseline period for purposes of that analysis. CSM failed to offer any form of analysis of the parties' payment practices, leaving to the court the task of discerning the import of the 35-page tenant ledger. Moreover, CSM relied on the general assertion that the Debtor's rent payments were "consistently inconsistent." Accordingly, following our holding in Villa Blanca, *supra*, we conclude that the bankruptcy court erred in granting the Summary Judgment Motion.

III. The Trustee's Amended Cross-Motion

"[E]ven if unopposed," as in the instant case, a motion for summary judgment "can only be granted if the record discloses the movant's entitlement to judgment as a matter of law."

Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 583 n. 6 (1st Cir. 1994) (citation omitted); see also Fed. R. Civ. P. 56(e). Fed. R. Civ. P. 56(e) provides, in pertinent part, "[i]f a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]" Fed. R. Civ. P. 56(e)(2). The rule goes on further to state that the court under such circumstances may "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it[.]" Fed. R. Civ. P. 56(e)(3).

In her complaint, the Trustee alleged the existence of all of the necessary elements specified by § 547(b), namely, that the subject "transfer involved: (1) an interest of the [D]ebtor in property; (2) to or for the benefit of a creditor; (3) for or on account of an antecedent debt; (4) made while the [D]ebtor was insolvent; (5) made on or within ninety days before the date of filing bankruptcy; and (6) such transfer enable[d] the creditor to receive more than it would have in a chapter 7 liquidation." Riley v. Nat'l Lumber Co. (In re Reale), 584 F.3d 27, 31 (1st Cir. 2009) (citing Advanced Testing Techs., Inc. v. Desmond (In re Computer Eng'g Assocs., Inc.), 337 F.3d 38, 45 (1st Cir. 2003)). By its silence regarding the Amended Cross-motion, CSM failed to raise a genuine, triable issue of fact with respect to the Trustee's claim.[23] Indeed, CSM ignored the Cross-motion, and the Amended Cross-motion, at its peril and consequently "must bear the onus of that neglect." Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000) (holding that noncompliance with local rule prescribing contents of opposition to summary judgment "justifies the court's deeming the facts presented in the movant's statement of undisputed facts

[23] See also P.R. LBR 9013-1(c)(1) (indicating in the prescribed notice to be included in every motion that "[i]f no objection or other response is filed within the time allowed herein, the paper will be deemed unopposed and may be granted . . . .).

admitted and ruling accordingly") (citations omitted). Although we are mindful that the intensely factual nature of the "ordinary course" defense is reason to carefully scrutinize a motion for summary judgment, this case is appropriate for such a disposition, especially in light of CSM's brazen disregard of the Cross-motion and the Amended Cross-motion. Accordingly, we conclude that the bankruptcy court erred in denying the Amended Cross-motion.

CONCLUSION

We **REVERSE** the Order, and **REMAND** the matter to the bankruptcy court for the entry of judgment in favor of the Trustee in the amount of $16,085.95, plus interest and costs.