NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 15-024

Bankruptcy Case No. 09-02048-BKT
Adversary Proceeding No. 12-00167-BKT

PMC MARKETING CORP.,
Debtor.

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

v.

SANTA ROSA MALL, LLC,
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's April 10, 2015 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, Santa Rosa Mall, LLC ("Santa Rosa"), and denied her amended cross-motion.[1] For the reasons discussed below, we **REVERSE** the Order and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

Santa Rosa is the owner of Santa Rosa Mall, located in Bayamón, Puerto Rico. Pursuant to a certain lease agreement, the debtor, PMC Marketing Corp. (the "Debtor"), rented commercial space at Santa Rosa Mall, where it conducted business as a pharmacy called "Farmacias El Amal" until approximately May 2011.

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 Santa Rosa for "turnover of preferential transfers pursuant to § 547,"[2] alleging that the Debtor transferred $59,967.63 to Santa Rosa within 90 days of the petition date. The Trustee further alleged that the

[1] See p.11, *infra*, regarding the scope of our review.

[2] 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.

transfer:[3] (i) was made for or on account of an antecedent debt; (ii) was made while the Debtor was insolvent; and (iii) enabled Santa Rosa to receive more than it would if the payment had not been made. Accordingly, the Trustee requested judgment against Santa Rosa in the amount of $59,967.63, plus costs, expenses, and attorney's fees.

Santa Rosa answered the complaint, denying that the challenged transfer was for $59,967.63. However, it acknowledged that the Debtor made one rent payment of $18,589.21 on January 15, 2009, a partial rent payment of $250.00 on January 13, 2009, and another partial payment of $4,200.00 on February 28, 2009, all of which fell within the 90-day preference period. Santa Rosa further stated that in addition to the January and February 2009 rent payments, the Debtor made an $18,589.21 rent payment on December 10, 2008, which was outside the 90-day preference period and, therefore, § 547(b) did not apply. Santa Rosa asserted several affirmative defenses to the Trustee's preference claim, including that the challenged transfers were excepted from avoidance pursuant to § 547(c), because they were made as "part of the regular course of business between the parties, specifically as payment of the monthly rent for the leased premises . . . ."[4]

Santa Rosa explained in its answer that pursuant to the subject lease agreement, the monthly rent was $18,589.21. According to Santa Rosa, although the "[D]ebtor was in default of

[3] In the complaint, the Trustee alternately referred to "transfer" and "transfers," a seeming reflection of her uncertainty regarding the subject transaction(s).

[4] Other affirmative defenses included that: (1) the Trustee was negligent in commencing the subject 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." Ultimately, the exclusive focus of the litigation was whether the challenged transfer was in the ordinary course of business between the Debtor and Santa Rosa, and Santa Rosa did not pursue the remaining defenses.

rent payments, . . . it kept making regular payments to [Santa Rosa], in order to update the account and to avoid an eviction . . . ." Santa Rosa attached a single exhibit, a tenant ledger reflecting Farmacias El Amal's account history from November 1, 2008 through May 1, 2009.

Thereafter, in February 2013, Santa Rosa filed a motion for summary judgment (the "Summary Judgment Motion"), again acknowledging that the Debtor made three payments toward its rent obligation within 90 days of the petition date, but maintaining that those transfers were insulated from avoidance pursuant to § 547(c).

Santa Rosa's argument presented in its accompanying memorandum of law was three-fold: (1) the Trustee lacked sufficient evidence to prove her case; (2) the payments made by the Debtor to Santa Rosa during the 90-day preference period totaled $23,039.21, not $59,967.63, as alleged by the Trustee; and (3) "the payments made by [the] Debtor . . . were in the ordinary course of business by a tenant to the landlord." The thrust of Santa Rosa's "ordinary course of business" argument was that the challenged transfers were late rental payments and, as such, qualified as ordinary because they were "within the pattern of payments between the parties." It elaborated that the "Debtor's payment history . . . reflected repeated late payments," which Santa Rosa accepted "because they were made with the promise . . . to clear out the total amount owed." As evidence of the Debtor's payment history, Santa Rosa attached to the memorandum a 41-page Farmacias El Amal "tenant ledger," this one reflecting the Debtor's account history for the period from May 26, 1995, through July 31, 2011.[5] Lastly, Santa Rosa argued, without

[5] Santa Rosa also attached to its memorandum of law a copy of the lease agreement, and the sworn statement of Jose Aguilu Reyes, director of the Collection Department of Commercial Centers Management, Inc., administrative agent to Santa Rosa, wherein he averred, in relevant part: on January 15, 2009, the Debtor "made a rent payment of $18,589.21 to [Santa Rosa]. Debtor also made two partial rent payments: one on January 13, 2009 ($250.[00] for marketing fund charges), and another on February

elaboration, that in "the present case the five requirements established by [§] 547 . . . have not been met . . . ."

On March 7, 2013, the Trustee filed an opposition to the Summary Judgment Motion, which included a "Counter Motion" for summary judgment (collectively, the "Cross-motion"). In contrast to the allegations of her complaint, she maintained in the Cross-motion that the "Debtor made two preferential transfers to [Santa Rosa] for the amount of $22,789.21."[6] She stated further that Santa Rosa deposited the payments on January 15, 2009 and February 9, 2009.

The Trustee's challenge of Santa Rosa's "ordinary course of business" defense in the Cross-motion was two-fold. First, she argued that the defense must fail because Santa Rosa neither alleged nor demonstrated that the payments were made in accordance with the ordinary business terms of the industry. Second, she asserted that the payments were inconsistent with the terms of the contract between the parties, and, therefore, did not satisfy the ordinary course of business exception. In support of this contention, she maintained there was "no discernible pattern of payment except that the [D]ebtor was making late payments and accumulating arrears." She argued that a review of the Debtor's payment history revealed that the Debtor, "struggling" to make its rent payments, made late payments on different days of the month, no payments in some months, two payments in other months, and in February 2009, made only a partial payment. For the foregoing reasons, she asked the court to deny the Summary Judgment

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28, 2009 ($4,200.[00])." He further averred that the purpose of those payments was "to cover the monthly payment of . . . rent, in order to continue the operation of its pharmacy at Santa Rosa Mall."

[6] The Trustee appears to have omitted the January 13, 2009 $250.00 partial payment from the revised calculation of her claim.

Motion, grant the Cross-motion, and enter judgment in her favor in the amount of $22,789.21, plus attorney's fees and costs.

Contemporaneously with the Cross-motion, the Trustee filed her own 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 18 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 for different amounts**; 1 payment [o]n June 16, 08; 1 payment [o]n July 22, 08; **NO PAYMENT in August of 08**; 1 payment [o]n September 19, 08; 1 payment[ ] [o]n October 30, 08; **NO PAYMENT in November of 08;** 1 payment [o]n December 10, 08; 1 payment [o]n January 15, 09; and **a partial payment of $4,200.00 on February 28, 09**.

As "uncontested" facts, she asserted that the Debtor "made a transfer of funds in the form of two checks to [Santa Rosa] during the preference period," including one in the amount of $18,589.21, which Santa Rosa deposited or cashed on January 15, 2009, and another in the amount of $4,200.00, which Santa Rosa deposited or cashed on February 9, 2009. The Trustee attached copies of the checks and a statement of activity for a certain account of the Debtor (in Spanish and without any translation).

On April 15, 2013, thirty-nine days after filing the Cross-motion, the Trustee filed an amended opposition and "Counter Motion" for summary judgment (the "Amended Cross-motion"). The Trustee modified her original argument by, inter alia, deleting her assertions regarding the ordinary course of business in the industry, instead focusing on her contention that

the challenged transfers were not part of the ordinary course of business between the parties. She also referred to an 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 64.8 days and the median was 58 days, whereas the average lateness and the median during the preference period were both 101 days.

The Trustee also filed an amended counter-statement of facts (the "Amended Counter-statement"),[7] which included an altered analysis of the Debtor's payment history, demonstrating: "The average 'lateness' of the payments prior to the preference period was 73.9 days and the median was 69 days. On the other hand, the average 'lateness' of the payments during the preference period was 144 days and the median was 144 days." The Amended Counter-statement also included three new exhibits: the Trustee's unsworn declaration, in which she averred that the Debtor "made payments to [Santa Rosa] during the 90-day preference period," which "would enable [Santa Rosa] to receive more money than it would receive under a distribution if the payments had not been made"; a chart depicting the degree of lateness for each rental payment made during the period beginning March 2007 and ending February 2009; and a graph depicting the same data.

[7] Neither Santa Rosa 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 the Trustee's prior request 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).

Santa Rosa did not respond to the Amended Cross-motion (or, for that matter, its predecessor). On April 12, 2013, however, Santa Rosa filed an assented-to motion, seeking a continuance of the upcoming pretrial conference, pending a ruling on the Summary Judgment Motion. Several days later, the bankruptcy court granted the motion and vacated the scheduling of the pretrial conference. Nearly a year and a half later, on September 5, 2014,[8] the bankruptcy court issued an Opinion and Order (the "September 2014 Order"), without a hearing, indicating at the outset that it was considering the Summary Judgment Motion, the Cross-motion, the Counter-statement, the Amended Cross-motion, and the Amended Counter-statement.[9] After concluding that "all three payments [fe]ll squarely within" the preference period, the court denied the Summary Judgment Motion, reasoning:

> This Court has previously explained the ordinary course of business exception multiple times in prior Opinions involving this Debtor. The reader may refer to those Opinions. 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.
>
> Under the ordinary course of business exception, Defendant could also meet the exception's requirements under § 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.

[8] The reason for the delay is not apparent from the record.

[9] The court explicitly stated: "Before this court is Creditor/Defendant's Motion for Summary Judgment [Dkt. No. 25] and Trustee/Plaintiff's Opposition and Amended Opposition to Defendant's Motion for Summary Judgment and accompanying Response and Amended Response [Dkt. No. 28, 29, 32, 33]."

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 entry of the following minutes of proceedings and order:

> This is the same situation as prior case Adv. 12-0094. The Court will review the Opinion and Order and the counter motion. (Docket Nos. 33 and 36)[.] The pretrial report will supplement to add the form of exhibits (docket No. 43)[.]
>
> The Trial is set for April 16, 2015 at 9:00 A.M.

Then, on December 1, 2014, the court entered the following order, clarifying the September 2014 Order (the "Clarification Order"):

> 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. 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[10] was appropriate. A trial is scheduled for April 16, 2015 at 9:00 A.M.

(footnote added).

Six 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 November 20, 2014, the court scheduled this adversary for a trial following the denial of Defendant's Motion for Summary Judgment [See Dkt. No's 36, 45

[10] 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.

and 46].[11] The court has independently reviewed the similar issues raised in this adversary proceeding and two others, namely adversary 12-00071 and 12-00094.[12]

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[13] 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), and the court granted summary judgment in favor of Defendant Villa Blanca VB Plaza, LLC.

[11] Docket No. 25 is the Summary Judgment Motion; Docket No. 36 is the September 5, 2014 Opinion and Order denying the Summary Judgment Motion; Docket No. 46 includes the minutes of proceedings and order issued December 3, 2015.

[12] 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. 12-00094 is the subject of our opinion in Wiscovitch-Rentas v. Sur CSM Plaza, Inc. (In re PMC Mktg. Corp.), BAP No. PR 15-023, 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.

[13] 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 p. 15, *infra*.

> 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.

The Order did not explicitly address the Cross-motion or Amended Cross-motion.

The court entered a Judgment the same day, indicating it was reversing the September 2014 Order, granting the Summary Motion, and dismissing the adversary proceeding.[14] 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 expands the issues on appeal to include whether the bankruptcy court erred in denying the Amended Cross-motion. Because Santa Rosa likewise briefed the denial of the Amended Cross-motion, we include it within the scope of our review.[15] 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).

[14] 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.

[15] 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."

POSITIONS OF THE PARTIES

A. The Trustee

On appeal, the Trustee continues to argue that Santa Rosa 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, Santa Rosa 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 preference period, the average "lateness" was 73.9 days and the median was 69 days, while during the preference period the average "lateness" and the median were both 144 days. According to the Trustee, the record demonstrates that Santa Rosa made its payments on an "ad hoc" basis, rather than as a "set pattern." She notes that the bankruptcy court correctly concluded in the September 2014 Order (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 Santa Rosa failed to oppose the Amended Cross-motion, and that she established the elements required for a preference under § 547. Accordingly, the Trustee specifically asks the Panel to "grant summary judgment" in her favor.

B. Santa Rosa

Santa Rosa 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, Santa Rosa asserts that the size of the

payment was not unusual, arguing for the first time on appeal that: the $18,589.21 payment was "the exact same amount of the monthly rent charges invoiced to [the] Debtor and also was consistent with the amount of the payments made by [the] Debtor prior to the filing of its bankruptcy petition"; and the $250.00 payment was "consistent with the CAM charges invoiced" to the Debtor. 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).

Santa Rosa 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 Santa Rosa were never made [o]n the exact same dates nor [o]n a monthly consecutive basis." Santa Rosa 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 . . . ." Santa Rosa offers no analysis of that pattern, however, instead choosing to rely on the bankruptcy court's characterization of the Debtor's "payment relationship" with Santa Rosa as "a flexible one." In fact, Santa Rosa rejects the notion that it was required to establish a "baseline of dealings," arguing instead that its defense was sufficiently supported by the tenant ledger and the lease agreement.

Although Santa Rosa never raised the "contemporaneous exchange for value" defense in its answer, it argued in its appellate brief (as in the memorandum of law it filed in support of the Summary Judgment Motion), 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 Santa Rosa 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)]. Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "An order granting summary judgment, where no counts remain, is a final order."[16] 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.

[16] 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.

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. 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 and 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). "Essentially, if a non-movant fails to set forth specific facts that present a triable issue, its claims should not survive summary judgment." Goldberg v. Graybar Electric Co. (In re ACP Ameri-Tech Acquisition, LLC), Adv. No. 10-9029, 2012 WL 481582, at *1 (Bankr. E.D. Tex. Feb. 14, 2012) (citation omitted). 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. Santa Rosa'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 in another adversary proceeding brought in the same bankruptcy case.[17] 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, 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.
>
> 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

[17] 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.

> 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 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, Santa Rosa's argument suffers from the same flaws as Villa Blanca's. Santa Rosa, 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, Santa Rosa 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. Santa Rosa failed to offer any form of analysis of the parties' payment practices, leaving to the court the task of discerning the import of the 41-page tenant ledger. Moreover, Santa Rosa relied on the general assertion that the Debtor's rent payments were

"repeated[ly] late." 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). Rule 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, Santa

Rosa failed to raise a genuine, triable issue of fact with respect to the Trustee's claim.[18] Indeed, Santa Rosa 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 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 Santa Rosa'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 $22,789.21, plus interest and costs.

[18] 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 . . . .").