

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
CONTEMPORARY INDUSTRIES, INC., ) CASE NO. BK98-80382  
)  
DEBTOR ) CH. 11

MEMORANDUM

Hearing was held on May 4, 1998, on an Emergency Motion for Authority to Reject Certain Non-residential Real Property Leases and Abandon of Certain Personal Property; Objection by G. Robert Bevan d/b/a Bevan Oil Co. Appearances: Kelly McEnaney for the debtor and Douglas Quinn for G. Robert Bevan. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

An order for relief under Chapter 11 of the Bankruptcy Code was entered for Contemporary Industries Corporation (hereafter "CIC") on February 17, 1998. CIC operated in excess of 100 convenience stores, in eleven states.

CIC filed a motion to reject non-residential real property leases and abandon certain personal property (filing no. 8). One of the leases rejected was for the location located at 1206 West 24<sup>th</sup> Street in Kearney, Nebraska. The location was leased from G. Robert Bevan (hereafter "Bevan"). In addition to the rejection of the lease, CIC sought to abandon the underground gasoline storage tanks (hereafter "tanks") located on the premisses, which were and are owned by CIC.

Bevan did not object to the rejection of the lease, but did object to the abandonment of the tanks. (Filing no. 96). Bevan asserts two grounds for objecting to the abandonment. First, Bevan asserts that the debtor-in-possession may only abandon property of the estate to a party that has an interest in the property. Second, Bevan asserts the abandonment would be in violation of environmental laws, thus falling within the exception to CIC's power to abandon property.

**Abandonment**

The Bankruptcy Code allows the bankruptcy estate to remove burdensome property from property of the estate. Section 554, in part, states:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 554.

The debtor-in-possession has most of the rights, powers and duties of a trustee, including the ability to abandon property pursuant to section 554. See 11 U.S.C. § 1107(a).

Bevan does not dispute that the property is of inconsequential value to the bankruptcy estate nor does he dispute that the property is burdensome.

### **Possessory Interest**

Generally, abandonment will be to a party with a possessory interest in the property to be abandoned. See e.g. ROBERT E. GINSBERG & ROBERT D. MARTIN, GINSBERG & MARTINE ON BANKRUPTCY § 5.06(B) (4<sup>TH</sup> ed. 1995, Supp. 1988); 5 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 554.02[3] (15<sup>TH</sup> ed. 1995, Supp. 1998).

### **Environmental Issues**

The United States Supreme Court in Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 88 L.Ed. 2d 859, 106 S.Ct. 755 (1986), *reh. den.* 475 U.S. 1090, 89 L.Ed. 2d 736, 106 S.Ct. 1482, created an exception the trustee's or debtor-in-possession's ability to abandon property under 11 U.S.C. § 554. The Supreme Court stated:

we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. [FN9] Accordingly, we affirm the judgments of the Court of Appeals for the Third Circuit.

FN9. This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.

Id. 474 U.S. at 506, 106 S.Ct. at 776.

Bevan asserts that the proposed abandonment would violate both federal and state environmental laws. Specifically, Bevan suggests that the abandonment will violate the regulations promulgated under RECREA, which require all existing storage tanks to be replaced, upgraded or closed by December 22, 1998. 40 C.F.R. § 280.21. Additionally, Bevan argues that the abandonment would violate the Nebraska Administrative Code Title 159, Chapter 10, § 001.04, which requires storage tanks which are out of service more than twelve months to be permanently closed.

Bevan's argument is unpersuasive. The exception to the Trustee's abandonment power created by the Supreme Court in Midlantic, by its own terms, is a narrow one. Speculative and future violations of environmental laws do not qualify for the exception. Likewise, the exception applies to imminent and identifiable harm to the public health or safety. Bevan has offered no evidence that any environmental harm will result from the abandonment.

#### Discussion and Decision

As noted above, when an estate abandons property, it usually abandons it to an entity that has a possessory interest in the property. However, there is no statutory requirement that abandonment occur in that manner. The Bankruptcy Code at 11 U.S.C. § 554(a) provides that, after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. That statutory provision does not direct abandonment to any particular entity. Similarly, Section 554(b) permits the court to order the trustee to abandon property of the estate that is burdensome or inconsequential, upon the request of a

party in interest. That statutory section does not direct abandonment to an entity with a possessory interest. However, Section 554(c) directs that property which is scheduled and not otherwise administered is, at the time of closing of a case, abandoned to the debtor. Subsection (c) contains the only provision in Section 554 that specifically directs to whom property of the estate is abandoned.

Outside of bankruptcy, if this debtor, as lessee of a retail gasoline station, and owner of underground tanks, breached its lease, closed the station, removed its signage, and left the area without removing the underground tanks, the landlord would have a cause of action for breach of contract, and perhaps for the tort of trespass or for negligence with regard to damages to the property caused by the potential leakage from the tanks. The landlord would not have a right to specific performance. That is, the landlord could not force the lessee to remove the tanks. Instead, the landlord would have a claim for monetary damages for the cost of removal and any environmental damage, plus monetary damages for breach of the lease.

The landlord's remedy in bankruptcy for the breach of the lease, trespass, or negligence, should not be enhanced, simply because of the bankruptcy filing. Under the Bankruptcy Code, a rejection of the lease by the debtor results in a prepetition claim for monetary damages. In addition, the landlord has a claim for the cost of removal of the tanks and any environmental damage caused by leakage of the tanks. Whether the monetary damage claim related to the tanks is deemed a prepetition claim or a post-petition administrative claim, is not before the court at this time.

Since the landlord retains the exact remedy in bankruptcy as the landlord would have had outside of bankruptcy, including the opportunity to obtain a monetary judgment, the abandonment should be and is hereby permitted and the objection of the landlord is overruled.

If it is the position of the landlord that the landlord is unlikely to collect from the estate for damages caused by the cost of removal of the tanks and environmental damages, the landlord is still in no different position than it would have had this activity occurred outside of bankruptcy. For example, if a lessee of a gas station goes out of business, liquidates or is judgment proof for any reason, the landlord,

although having the right to obtain a judgment for damages, may be unable to collect. Such a result is simply a part of doing business in this capitalist society.

The objection of the landlord to the abandonment of the fuel tanks is denied. The abandonment by the estate is authorized. The landlord may file an amended claim to reflect actual damages, or may file an administrative claim concerning the tanks, if that procedure is appropriate under the code or rules.

Separate journal entry to be filed.

DATED: August 13, 1998.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

MCENANEY, KELLY	617-542-2241
ROGERS, CLAY	392-1011
QUINN, DOUGLAS	341-0216

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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DEBTOR(S) )  
)  
) CH. 11  
) Filing No.  
Plaintiff(s) )  
vs. ) JOURNAL ENTRY  
)  
)  
)  
\_\_\_\_\_  
Defendant(s) ) DATE: August 13, 1998  
HEARING DATE: May 4,  
1998

Before a United States Bankruptcy Judge for the District of Nebraska regarding Emergency Motion for Authority to Reject Certain Non-residential Real Property Leases and Abandon of Certain Personal Property; Objection by G. Robert Bevan d/b/a Bevan Oil Co.

APPEARANCES

Kelly McEnaney, Attorney for the debtor  
Douglas Quinn, Attorney for G. Robert Bevan

IT IS ORDERED:

The objection of the landlord to the abandonment of the fuel tanks is denied. The abandonment by the estate is authorized. The landlord may file an amended claim to reflect actual damages, or may file an administrative claim concerning the tanks, if that procedure is appropriate under the code or rules.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
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