

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

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

MEMORANDUM

Hearing was held on March 3, 1999, on First Omnibus Joint Objection to Claims of Certain Claimants, Joint Motion for Final Allowance or Disallowance of such Claims; Resistance by G. Robert Bevan d/b/a Bevan Oil Co. Appearances: Robert Ginn for the debtor and Douglas Quinn for Bevan Oil Co. 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)(B).

Background

On November 19, 1998, debtor Contemporary Industries Corporation ("CIC") and its Creditors Committee filed the First Omnibus Joint Objection to Claims of Certain Claimants, Joint Motion for Final Allowance or Disallowance of Such Claims and Request for Production of Documents From all Objecting/Resisting Claimants. G. Robert Bevan, d/b/a Bevan Oil Company ("Bevan") resisted CIC's objection, alleging damages in the approximate sum of \$14,000 due to CIC's abandonment of certain personal property on Bevan's property. Bevan contends that, rather than being disallowed, his claim should be allowed as an administrative expense.

Facts

In 1981, Bevan and Wymodak, Inc., a Florida corporation, entered into a lease agreement whereby Bevan, as lessor, would construct a gasoline retail store for lease by Wymodak. On April 1, 1988, Bevan and Wymodak amended the lease to provide that the lessee remove and dispose of, at its own cost, the gasoline dispensing equipment and storage tanks at the conclusion of the term of the lease, or any renewals or extensions thereof. Also on April 1, 1988, Bevan sold all interests in the gasoline dispensing equipment and storage tanks to Wymodak. Wymodak then assigned its lease with Bevan

to CIC and transferred all property interests in the gasoline dispensing equipment and storage tanks to CIC pursuant to an asset purchase agreement of March 3, 1988. After assignment, the written lease of the gasoline retail store was set to expire on December 14, 2001.

CIC filed bankruptcy under Chapter 11 on February 17, 1998, simultaneously filing an emergency motion to reject certain non-residential real property leases, including the lease with Bevan. The motion to reject leases was amended on March 10, 1998, and subsequently granted by the court on August 13, 1998, and filed the following day. Bevan contends that, despite the rejection of the lease, CIC is obligated to pay for the removal of the tanks and any remediation associated therewith.

#### Discussion

The Bankruptcy Code, at 11 U.S.C. § 365(d)(3), provides:

The trustee shall timely perform all the obligations of the debtor, except those specified in Section 365(b)(2), arising from and after the order for relief under any unexpired lease of non-residential real property, until such lease is assumed or rejected, notwithstanding Section 503(b)(1) of this Title.

The obligation to remove the tanks and equipment and remediate any contamination arises from the terms of the lease. However, according to the express terms of the lease, the only event which could trigger the obligation was "the conclusion of the term of [the] lease, or any renewals or extensions thereof." Because the lease was set to expire on December 14, 2001, the obligation had not been triggered at the time of the rejection of the lease by CIC.

Once the lease was rejected, any obligations arising under the lease fell under the purview of 11 U.S.C. § 365(g)(1) which provides that:

Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease -

(1) if such contract or lease has not been assumed under this section. . .immediately before the date of the filing of the petition. . . .

As a result, any failure by CIC to remove its tanks and equipment or perform any related remediation amounts to a breach of lease and is to be treated as a pre-petition claim. Bevan's exclusive remedy in this matter is to file an amended claim for monetary damages pertaining to CIC's failure to remove its tanks and equipment or perform remediation.

Conclusion

The Joint Objection to Claims and Motion for Final Allowance or Disallowance is granted in favor of the debtor with regard to the claim of Bevan, and Bevan's request that its claim be treated as an administrative expense is denied. The claim shall be treated as a prepetition claim.

Separate journal entry to be filed.

DATED: April 22, 1999

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

39 GINN, ROBERT  
14 QUINN, DOUGLAS

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

IN THE MATTER OF:	)	
CONTEMPORARY INDUSTRIES	)	
CORPORATION,	)	CASE NO. BK98-80382
	)	A
<u>DEBTOR(S).</u>	)	CH. 11
	)	Filing No. 402, 414
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: April 22, 1999
<u>Defendant(s)</u>	)	HEARING DATE: March 3,
	)	1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding First Omnibus Joint Objection to Claims of Certain Claimants, Joint Motion for Final Allowance or Disallowance of such Claims; Resistance by G. Robert Bevan d/b/a Bevan Oil Co.

APPEARANCES

Robert Ginn for the debtor  
Douglas Quinn for Bevan Oil Co.

IT IS ORDERED:

The Joint Objection to Claims and Motion for Final Allowance or Disallowance is granted in favor of the debtor with regard to the claim of Bevan, and Bevan's request that its claim be treated as an administrative expense is denied. The claim shall be treated as a prepetition claim. See memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

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