THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 96-52229
PERMOLD CORPORATION, INC.,	)	
DEBTOR.	)	CHAPTER 7
	)	
	)	ADVERSARY PRO. 99-5115
PERMOLD CORPORATION, INC.,	)	
PLAINTIFF,	)	JUDGE MARILYN SHEA-STONUM
	)	
v.	)	ORDER DENYING PLAINTIFF
	)	PERMOLD CORPORATION'S
SLYMAN INDUSTRIES, INC.,	)	MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT AND
DEFENDANT.	)	DETERMINING APPLICABLE
	)	CHOICE OF LAW

This matter is before the Court on a Motion for Partial Summary Judgment (the "Motion") filed on behalf of Brian A. Bash, Liquidation Trustee (the "Trustee") for the Plaintiff Permold Corporation, Inc. ("Permold"), the Response of Defendant Slyman Industries, Inc. ("Slyman"), the Trustee's Reply and Slyman's Surreply. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b).

The Complaint in this adversary proceeding, filed August 2, 1999, alleges that

since 1987 Permold has maintained on its books an account receivable (the "Receivable") from Slyman consisting of various expenses incurred by Permold for the benefit of Slyman and its subsidiaries other than Permold and other monies retained by Slyman and owed to Permold. The Trustee alleges that the amount of the Receivable as of the filing date is $1,173,858.89[1] plus interest and that Slyman has been unjustly enriched in that amount as a result of Permold bearing the expenses included in the Receivable. The Trustee also alleges in his Complaint that no portion of the Receivable has been paid and, therefore, Slyman is liable for the full amount of the Receivable plus interest under applicable law.

In his Motion for Partial Summary Judgment, filed February 14, 2000, the Trustee contends that exhibits attached to the Motion and the testimony of Slyman's Chief Financial Officer, James J. Richter, provide evidence that $816,891.83 of the Receivable comprises costs for equipment purchased by Permold for Slyman, loans made to Slyman, Slyman's use of Permold's airplane, and tax refunds and rents due Permold from Slyman. Specifically, the $816,891.83 claim consists of $84,691.83 in past due rent, a tax refund in the amount of $146,200 and an intercompany receivable in the amount of $586,000.

I. BACKGROUND

The following facts have either not been disputed or have been stipulated to:

1. Permold filed a petition for relief under chapter 11 of the Bankruptcy Code on September 24, 1996. The Unsecured Creditor's Committee was appointed in this case on

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[1] From the Complaint, it is not clear to the Court if this total includes interest accrued and accruing on the books or if it represents a principal amount

or about October 1, 1996.

2. Permold was formerly known as Quality Machines, Inc. ("Quality Machines") and from 1985 until 1988 was a wholly owned subsidiary of Slyman. Quality Machines was an Illinois corporation which operated in Chicago, Illinois. On December 1, 1988, Quality Machines purchased all the assets of the Permold Division of Lamson & Sessions and changed its corporate name to Permold. Permold became qualified as a foreign corporation in Ohio.

3. James J. Richter is the Chief Financial Officer of Slyman and has held that position continuously since 1985. From 1985 until the present, Richter has been the person responsible for maintaining the financial books and records of Slyman, including maintaining all accounts payable and receivable. From 1995 to October 31, 1998 Richter also served as Controller of Permold. As Permold's Controller, Richter, or persons acting at his direction, maintained Permold's financial books and records, including all accounts payable and receivable.[2]

4. The Permold Balance sheet, dated December 31, 1996, provides that $1,049,849.00 of the Receivable was incurred as follows: (A) 1985 – Purchase of Cleveland (ADC) equipment for Slyman $281,987.00; (B)1986 – Paid payroll for Slyman $82,386.00; (C) 1987 – Tax refund due from Slyman $288,014.00; and (D) 1988 – Transfer balance from Milwaukee Die Casting Co., at the request of First Bank $397,502.00. These four items were incurred and booked by Quality Machines prior to the time it purchased the assets of the Permold Division of Lamson & Sessions, Inc.

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[2] The record is silent on what, if any, changes occurred in Permold's incorporation after 1988.

5. From 1985 until 1998, Slyman filed consolidated tax returns in which Slyman included the activities of each of Slyman's subsidiaries, including Quality Machines and Permold. For the period between 1985 and 1998, Slyman received various tax refunds, of which portions were due and payable to Quality Machines or Permold. In addition to the tax refund referred to above, Slyman has retained additional tax refunds due and payable to Permold in the amount of $146,200.

6. Prior to December 31, 1996, Slyman leased approximately 700 square feet of space from Permold on Permold's premises in Ohio, at a rate of approximately $17,000 per year. Slyman has failed to pay Permold rents due in the sum of $84,691.83.

II. DISCUSSION

A. Standard for Summary Judgment

A court shall grant a party's motion for summary judgment "if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 285; *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992).

B. Statute of Limitations

In his Motion, the Trustee contends that the totally uncontested facts demonstrate that Slyman has been unjustly enriched by at least $816,891.83 of the Receivable and, thus, the Trustee is entitled to partial summary judgment in that amount. Of that amount,

Slyman has stipulated that $84,691.83 is owed on account of rent due to Permold and that Slyman has retained additional tax refunds due and payable to Permold in the amount of $146,200. In addition, Richter testified at deposition that the remaining $586,000, which includes $288,014.00 for the 1987 tax refund, is owed to Permold.

Slyman defends by noting the absence of promissory notes to evidence the debts due to Permold and asserting that no demands were ever made for payment of the debts.[3] Slyman further asserts that all the Trustee's claims are barred by what it argues is the applicable nonbankruptcy statute of limitations under Ohio Rev. Code ("ORC") § 2305.07 which governs implied or quasi contracts.[4] ORC § 2305.07 provides in pertinent part that:

> an action upon a contract not in writing, express or implied, or upon liability created by statute other than a forfeiture or penalty, shall be brought within six years after cause thereof accrued.

Slyman contends that pursuant to 11 U.S.C. § 108(a), the Trustee may only seek an extension of time to commence an action if the applicable nonbankruptcy statute of limitations has not expired. Slyman argues that the $586,000 intercompany receivable the Trustee is attempting to collect was incurred between 1985 and1988 and therefore, under ORC § 2305.07, the latest date that an action to recover on this debt could have been brought was 1994. In his response, the Trustee argues that Slyman is estopped from asserting the statute of limitations as a defense by the doctrines of equitable estoppel

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[3] This despite the fact that Permold had no working capital at the time of filing.

[4] Slyman asserts quasi or implied contract theory in spite of the fact that the receivables were on Permold's books as owed to it, and on Slyman's books as owing to Permold.

3. The Trustee also contends that under ORC § 2305.08, the defendant acknowledged the debt owed to Permold thereby saving the plaintiffs claim from the six year statute of limitations. However, ORC § 2305.08 provides for acknowledgment of partial payments. In this case it is

and/or adverse domination.[5]

The Trustee has not disputed that ORC § 2305.07 is the applicable nonbankruptcy statute of limitations pertaining to the intercompany receivable were that portion of the Receivable to be controlled by Ohio law. However, the Trustee argues that "to the extent the transactions are governed by the domestic law of the creditor corporation [i.e., Illinois law], the doctrine of adverse domination applies." *See* Trustee's Reply Brief in Support at 5. The Trustee states that under the doctrine of adverse domination, recognized by Illinois law, the statute of limitations is tolled during the time that the corporation is adversely controlled by wrongdoers and recovery will not be barred by the statue of limitations if evidence shows that the doctrine applies in this case. *Id.* at 4. Thus, choice of law is an issue to be determined before the Court can consider evidence concerning the Trustee's theories of recovery.

C. Choice of Law

A federal court sitting in diversity jurisdiction applies the choice of law rules of the forum state. *Miller v. State Farm Mutual Automobile Insurance Co.*, 87 F.3d 822, 824 (6th Cir. 1996). However, the rule in diversity cases does not necessarily apply to federal question cases such as bankruptcy. *Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996). The *Lindsay* court held that in federal question cases with exclusive jurisdiction in federal court such as bankruptcy, the court should apply federal, not forum state, choice of law rules.

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admitted by both parties that no payments have been made. Therefore, ORC § 2305.08 is inapplicable to this case.

[6] The Court reasoned that the risk of forum shopping was not an issue since the case could only be litigated in federal court. *Id.*

Id.[6]

There are, however, circumstances under which a bankruptcy court applying federal choice of law rules may choose to defer to state rules. *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.,* 642 F.2d 744, 748 (5th Cir. 1981). One of those circumstances is when the case, as this case, arises out of federal question jurisdiction but "could have been heard independently in a state court forum and is not reliant on federal bankruptcy law principles." *Id.*, citing *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 161 (1946). *Vanston* also stands for the proposition that the determination of which state's law should apply where transactions have multistate contacts, "requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states." *Vanston* at 162. This balancing of interests analysis has been utilized in both Ohio and Illinois cases. *See, e.g., Esser v. McIntryre,* 169 Ill. 2d 292, 297-98 (1996)("Illinois applies the most-significant-contacts rule embodied in the American Law Institute's second Restatement on the subject (Restatement (Second) of Conflict of Laws (1971))"); *Morgan v. Biro Mfg. Co., Inc.* (1984), 15 Ohio St. 3d 339, 341-42(adopting the significant relationship test of the Restatement (Second) of Conflict of Laws). However, under Ohio choice of law rules, if an action is based in contract, then section 188 of the Restatement applies and the law of the state where the contract was made presumptively controls. *Nationwide Mut. Ins. Co. v. Ferrin,* 21 Ohio St.3d 43, 44 (1986)(*per curiam).* In order to adequately address the

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[6] The Court reasoned that the risk of forum shopping was not an issue since the case could only be litigated in federal court. *Id.*

choice of law issue, the Court must examine the individual claims which comprise the total $816,891.83 claim addressed in the Motion for Partial Summary Judgment.

1. The Intercompany Receivable: 1985-1988

Richter testified that $936,566.76 is reflected on the books and records of Permold as owed to it for intercompany transfers made before Quality Machines' name was changed to Permold. The transactions which make up the amount owed include a tax refund owed to Quality Machines for 1987, loans made by Quality Machines to Slyman, purchases of equipment for Slyman, the use of Quality Machines' airplane by Slyman, and payment of Slyman's payroll. Stipulation 5 above; Richter Dep. at 13-14. Richter further testified that $350,000 of the intercompany receivable was actually a receivable Slyman owed to another of its subsidiaries, Milwaukee Die Casting, which was transferred to the books of Quality Machines/Permold for internal business reasons. Richter Dep. at 15-16.[7] Removal of this amount leaves a receivable of approximately $586,000 which Richter testified is owed to Permold. *Id.* at 17. [8]

With respect to this intercompany receivable, the parties stipulated that all of the relevant transactions occurred between 1985 and 1988, prior to the time Quality Machines purchased the assets of the Permold Division of Lamson and Sessions, Inc. and changed its name to Permold. It is undisputed that Quality Machines was an Illinois corporation and that it operated in Chicago, Illinois. There is nothing to show that Quality Machines

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[7] The Trustee has not sought summary judgment at this time for this transfer and has reserved his right to pursue these funds in a subsequent motion for summary judgment or at trial. Motion for Partial Summary Judgment at 2.

[8] Richter testified that this number may be "either $5,000 lower or $5,000 higher." Richter Dep. at 17. For the sake of simplicity, the Court will use the $586,000 number.

had any Ohio contacts prior to the purchase of Permold's Medina, Ohio facility. Utilizing the interests analysis rule of both Illinois and Ohio as discussed above, the Court concludes that Illinois law controls the Trustee's claim to the intercompany receivable.

2. Tax Refunds

A tax refund of $288,014.00, received by Slyman from taxing authorities in 1987, was stipulated to as appearing on the Permold Balance Sheet dated December 31, 1996. With respect to the additional $146,200 in tax refunds owed to Permold, Richter testified that the refund is on the books as owed to Permold and that his only doubt as to this debt is whether the amount is correct or is "off" by "a couple hundred dollars." Richter Dep. at 20. The date of this tax refund is not on the record but Richter estimated that it was in "the 1990's." *Id.* In addition, Peter Slyman, President of Permold testified that the tax refund is on the books of Permold as owed to it but that no payment has been made. P. Slyman Dep. at 7-8. Both witnesses admit that the debt is owed to Permold from Slyman. However, the exact amount of the debt and the date or dates of the debt are not on the record. Slyman appears to assume that this tax refund also falls under ORC § 2305.07 although it states no reason for this assumption other than that it appears to be part of the accounts receivable.

"[W]hat entity is entitled to ultimately receive the benefit of a consolidated tax refund is a matter which is not addressed in the Internal Revenue Code." *Jump v. Manchester Life and Casualty Mgmt. Corp.* 579 F.2d 449, 452 (8th Cir. 1978). IRS regulations provide that under Treas. Reg. §1.502-77 the parent company is the agent for each subsidiary in the group, but the agency relationship is for the "protection of IRS only and does not extend further." *Id.* The *Jump* Court held that "[i]n the absence of controlling federal law, state law governs the rights and responsibilities as between a

parent corporation and its subsidiaries." *Id.*

Neither party states whether there is or was a tax allocation agreement, although there may be a written agreement when a parent files a consolidated tax return under 26 U.S.C. § 1501 of the Internal Revenue Code, since each subsidiary must consent to the consolidation. In the absence of a tax allocation agreement to the contrary, principles of unjust enrichment dictate that a loss corporation is entitled to receive the tax refund resulting from carryback of net operating loss against taxable income attributable to the subsidiary. *U.S.A. v. Revco D.S., Inc. (In re Revco)*, 111 B.R. 631, 638 (Bankr. N.D. Ohio 1990); *Nisselson v. Drew Ind., Inc. (In re White Metal Rolling and Stamping Corp.)*, 222 B.R. 417, 424 (Bankr. S.D. N.Y. 1998)(citing *Capital Bancshares, Inc. v. U.S.*, 957 F.2d 203 (5th Cir. 1992)).

The *Revco* Court, relying on *Western Dealer Management, Inc. v. England (In re Bob Richards Chrysler-Plymouth Corp.)*, 473 F.2d 262 (9th Cir.), *cert. denied*, 412 U.S. 919 (1973), held that the refund, although payable to Revco, "is subject to a constructive trust in favor of [the subsidiary] and to permit Revco to receive any portion of the Refund would unjustly enrich Revco." *Revco* at 637. In *Western Dealer Management*, the court held that absent an agreement that the parent corporation had the right to retain the refund, the parent corporation was acting as a "trustee of a specific trust and was under a duty to return the tax refund to the estate of the bankrupt." *Id.* at 265.

The record is silent on the presence or absence of an allocation agreement for any of the tax refunds, and the record also does not reflect the exact dates or amounts of the refunds and the conditions under which the tax returns were filed. Further evidence is needed to determine which state law controls. Although Slyman is incorporated in Delaware, the record does not reflect its principal place of business, the place in which the

tax refund was paid to Slyman, or the place of the bank in which the funds were deposited. *See Jump* at 452. Under the interests analysis test, applied by Ohio and Illinois as stated above, and as adopted by Delaware, *see, e.g., Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 40 (Del. Super. 1991), the choice of law will depend on these, and perhaps other, factors.

3. Rents

As to the rent owed, it appears to have been for space leased at Permold's Medina, Ohio facility sometime during 1989 to 1996. There is no evidence on the record as to any documentation of this lease, only Slyman's broad assertion that there are "no promissory notes . . . to evidence the debts due to Quality Machine/Permold." Defendant's Brief in Opposition at 2. No mention is made of whether the lease was, or was not, ever in writing. As above concerning the tax returns, Slyman assumes that ORC § 2305.07 applies to the rent claim, but states no reason other than that it is part of the accounts receivable. It appears that Ohio law applies to this claim but further evidence is necessary to determine what statute of limitations, if any, may apply to this claim and from what date or dates the measurement should be determined.[9]

III. CONCLUSION

Based upon the foregoing, **IT IS HEREBY ORDERED:**

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9 As an addendum, the Court notes that by whatever theory the Trustee pursues his claims, it defies common sense that Slyman should be able to conduct business in the fashion it has and then rely on the statute of limitations to shield monies from creditors when one of its wholly-owned subsidiaries files for bankruptcy. According to the stipulations and the testimony of corporate officers, Slyman used Permold to purchase equipment for it, to supply it transportation in the form of an airplane and to pay its payroll, all with no reimbursement to Permold. In addition it obtained loans from Permold with no promissory notes and made no attempts at repayment, retained tax refunds due to Permold, and leased space from Permold and failed to pay rent for five years. Permold's officers took no action to recover the debts owed to it. These actions do not look like ordinary business practices.

Moreover, Slyman represented each year that it was indebted to Permold by carrying the Permold accounts payable on its books, and Permold represented each year that it was owed the monies by carrying the accounts receivable on its books. Further, Slyman's and Permold's chief financial officer admits that the debts are due and owing to Permold, and Permold's present President admits that the receivables appear on Permold's books.

THIS OPINION IS NOT INTENDED FOR PUBLICATION

1. That the Motion is **DENIED**, being that the Court is precluded from entering a final partial summary judgment under Rule 56(d). However, an interlocutory order in the nature of a pretrial order is being entered in order to conserve judicial time and resources concerning the choice of law on two issues raised by the Trustee. The Trustee's claim to the intercompany receivable will be determined by Illinois law and the Trustee's claim to the rents owed to Permold will be determined by Ohio law;

2. That a pre-trial conference shall be held on **September 15, 2000 at 10:30 p.m.** in Room 240, U.S. Court House, 2 Main Street, Akron, Ohio, on all matters arising from the Trustee's Complaint.

MARILYN SHEA-STONUM
United States Bankruptcy Judge

DATED: 9/8/00