UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	) CASE NO. 01-54821
Grand Eagle, Inc., et al.,	) CHAPTER 11
DEBTORS.	) JUDGE MARILYN SHEA-STONUM
Glenn C. Pollack, Chapter 11 Trustee,	) Adv. Pro. No. 03-5015
Plaintiff,	) ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S CROSS-MOTION AND SCHEDULING FURTHER PRE-TRIAL CONFERENCE
v.	
S.D. Myers, Inc.,	
Defendant.	

This matter is before the Court on Defendant S.D. Myers, Inc.'s (the "Defendant") Motion for Summary Judgment [docket # 28], the Plaintiff Glenn C. Pollack's (the "Plaintiff" or the "Trustee") Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment (the "Response and Cross-Motion") [docket # 29] and the Defendant's Reply to the Response and Cross-Motion [docket # 31].

The Defendant argues that the Trustee is barred from asserting a preference claim against Defendant on behalf of the Debtors' (defined below) estate because of the indemnification provision contained in section 7.2 of the APA (defined below). In response, the Trustee argues that, as a matter of law, the Defendant's failure to provide written notification of its claim for indemnification within 12 months of the closing date as required by section 7.2 of the APA relieves the Debtors of their indemnification obligation. In the

alternative, the Trustee argues that a genuine issue of material fact exists with respect to whether the preference litigation is a claim "relating to the conduct of the Business of Sellers" such that it triggers the Debtors' indemnification obligation under section 7.2 of the APA.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). Based upon the facts of record in this case, the pleadings on file in this adversary proceeding, the Joint Stipulations of Fact filed on March 5, 2004 [docket # 26] (the "Stipulations"), the Affidavit of Michael Fixler, a director of Candlewood Partners, LLC, the financial advisor to the Trustee, and the Affidavit of Dale Bissonette, the treasurer of the S.D. Myers, Inc. and its affiliate SDM Acquisition , LLC n/k/a Ohio Transformers, LLC, the Court notes the following facts and reaches the following conclusions of law.

UNDISPUTED FACTS

On December 7, 2001 (the "Petition Date"), Grand Eagle, Inc. and its wholly owned subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. *See* Stipulations, ¶ 1. During the ninety (90) days before the Petition Date the Debtors made a transfer to Defendant for $122,170.00 (the "Transfer"). *Id.* at ¶2. The Transfer was made to Defendant by Debtors' check no.184669 drawn on the Grand Eagle Inc. bank account 5590026836 at La Salle National Bank ("Bank Account"). *Id.* Check number 184669 was dated September 28, 2001 and cleared the Bank Account on October 2,

2001. *Id.* The Defendant received the check on October 1, 2001. *Id.* The Transfer was on account of antecedent debts owed by the Debtors before the Transfer was made. *Id. at* ¶3. The Transfer was made to Defendant in its capacity as an unsecured creditor of Debtors. *Id.*

The Transfer paid the following two invoices: Invoice # 0178299, dated August 16, 2001, for $4,200 ("Repair Invoice"); and Invoice # 0178529, dated August 29, 2001, for $117,970 ("Reclaimer Invoice"). *Id.* at ¶ 4. The Reclaimer Invoice related to the sale of a 3000 # Fluidex oil reclaiming system ("Reclaimer System"). *Id.* The Repair Invoice was paid 46 days after invoice date. *Id.* The Reclaimer Invoice was paid 33 days after invoice date. Defendant's preprinted invoice forms indicate "terms are net 30 days." *Id.* From July 1999 through September 6, 2001, (the "Pre-preference Period") Debtors paid 56 invoices issued by Defendant. *Id.* at ¶ 7. In each case, the payment was made more than 30 days after the invoice date. *Id.*

On February 21, 2002 Plaintiff entered into an Asset Purchase Agreement ("APA") with SDM Acquisition, LLC ("Buyer"), an affiliate of the Defendant, to sell certain of the Debtors' assets, namely the transformer division. *See* Stipulations, ¶ 8; *See* Affidavit of Dale Bisonette at ¶¶ 5 & 6. The APA states that it:

> is made and entered into ... by and between SDM Acquisition LLC, an Ohio limited liability company ("Buyer"), and Glenn C. Pollack ("Trustee") solely in his capacity as Chapter 11 Trustee for and on behalf of Grand Eagle, Inc., a Delaware corporation, Grand Eagle Services, Inc., a Delaware corporation, Grand Eagle Distribution, Inc., a Delaware corporation, Grand Eagle Services North America, Inc. a Georgia corporation, North American Coil Corporation, a Delaware corporation, and Ohio Transformer, Inc., an Ohio corporation, debtors (collectively, the "Sellers").

Section 1.2 of the APA excludes from the sale "all preference or avoidance claims and

actions of Sellers, including, without limitation, any such claims and actions arising under Sections 544, 547, 548, 549 and 550 of the Bankruptcy Code." *See* Stipulation, ¶ 10.

Section 7.2 of the APA provides:

> 7.2 Sellers' Indemnification. Effective as of the Closing Date, Sellers agree to jointly and severally indemnify, defend (with counsel reasonable satisfactory to Buyer), protect, save and hold harmless Buyer and its affiliates, shareholders, agents and other representatives from and against any and all claims, damages, expenses and liabilities not otherwise assumed hereunder (including reasonable attorneys' fees) ("Losses") arising from breach of Sellers' representations, warranties and covenants under this Agreement or otherwise relating to the conduct of the Business of Sellers on or prior to the Closing Date. The indemnification obligation of Sellers hereunder shall survive the Closing and apply to claims for indemnification asserted by Buyer in writing within the twelve (12) month period ending on the first anniversary of the Closing Date.

Section 7.3 of the APA provides:

> 7.3 Buyer's Indemnification. Effective as of the Closing Date, Buyer agrees to indemnify, defend (with counsel reasonable satisfactory to Sellers and the Trustee), protect, save and hold harmless Sellers and the Trustee and their respective affiliates, officers, directors, shareholders, employees, agents and other representatives from and against any and all ("Losses") arising from breach of Buyer's representations, warranties and covenants under this Agreement or otherwise relating to the conduct of the Business by Buyer after the Closing Date. The indemnification obligation of Buyer hereunder shall survive the Closing and apply to claims for indemnification asserted by Sellers or the Trustee in writing within the twelve (12) month period ending on the first anniversary of the Closing Date.

The Closing Date for the transaction contemplated by the APA was February 28, 2002 (the "Closing Date"). *See* Stipulation, ¶ 13.

The Stipulations were silent as to choice of law. However, the Court notes that section 9.16 of the APA, which was filed with the Court in Main Case No. 01-54821 on February 22, 2002 [Docket No. 184] provides that the APA shall be governed and construed by Ohio law.

On September 09, 2002, Plaintiff demanded that Defendant return the Transfer. *See* Stipulation, ¶ 14. On January 30, 2003, one month prior to the anniversary of the Closing Date, Plaintiff filed this avoidance action against Defendant pursuant to Sections 547 and 550 of the Bankruptcy Code. *See* Stipulation, ¶ 15. After the first anniversary of the Closing Date, by letter dated May 8, 2003, Defendant, through its counsel, notified Plaintiff that pursuant to Section 7.2 of the APA Plaintiff was obligated to indemnify Defendant from Plaintiff's claims in this preference action. *See* Stipulation, ¶ 17.

DISCUSSION

Summary Judgment Standard

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.

> Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

DiCarlo v. Potter, 358 F.3d 408, 414 (6th Cir. 2004). 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, the court should draw all reasonable inferences in favor of the nonmoving party. *DiCarlo v. Potter,* 358 F.3d at 414; *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a

resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On cross-motions for summary judgment, "the Court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *BF Goodrich Co. v. United States Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001).

Timing of Notification

Under Ohio law, a clear and unambiguous contract should be enforced as written. *See Medical Billing, Inc. v. Medical Management Sciences, Inc.*, 212 F.3d 332, 336-37 (6th Cir. 2000). "Words in a contract must be given their plain and ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall content of the document." *Id.* at 337. In this instance the language of the APA is clear: the indemnification obligation applies to claims for indemnification asserted in writing within 12 months of the Closing Date. In reliance on *Koblitz v. American Credit Indemnity*, 92 Ohio St. 272, 279, 110 N.E. 919, 920 (1915), the Defendant argues that notice was not necessary. The Court in *Koblitz*, however, made a determination as to the sufficiency of the form of a timely notice, not as to the timing of the notice. *Id.* The court found that timely notice provided in a form other than that required by the parties agreement constituted notice. *Id.*

In this instance, timing of the notice is at issue. The APA clearly limits the Sellers' indemnification obligation to those claims made within 12 months after the Closing Date. Generally, the Court cannot rewrite a clear and unambiguous APA to excuse one party from

its failure to act. *See Medical Billing, Inc. V. Medical Management Sciences, Inc.*, 212 F.3d 332, 336-37 *citing Hybud Equipment Corp. v. Sphere Drake Insurance Company, Ltd.*, 597 N.E.2d 1096, 1102 (Ohio 1992); *see also Pierson Sand & Gravel, Inc. v. Pierson Township et al.*, 851 F.Supp. 850, 859 (W. D. Mich. 1994)(finding a contractual indemnification claim barred by a three year statute of limitations contained in the asset purchase agreement giving rise to the indemnification obligation). Further, the Court notes that the APA was the result of the negotiations of sophisticated parties who were represented by competent counsel. Thus, the typical reasons a court may be reluctant to require strict compliance with notice provisions are not persuasive here. *Id.* at fn. 7 (noting that where the claimant is a sophisticated corporation that has been well-represented by counsel, this concern about strict application of the notice requirement is less compelling).

However, the United States Court of Appeals for the District of Colombia addressed, under Ohio law, a purchaser's failure to comply with notice requirements contained in an indemnification provision of an asset purchase agreement. *See LTV Corp. v. Gulf States Steel, Inc. of Alabama*, 969 F.2d 1050 (D.C. Cir. 1992). The Court of Appeals wrote:

> **Under Ohio law, a notice provision in an indemnity agreement is considered to be "of the essence of the contract" and is regularly enforced.** *Thomas v. Studley*, 59 Ohio App.3d 76, 571 N.E.2d 454, 620 (1989); *Patrick v. Auto-Owners Ins. Co.*, 449 N.E.2d 790, 791, 449 N.E.2d 790 (1982); *Zurich Ins. Co. v. Valley Steel Erectors, Inc.*, 13 Ohio App.2d 41, 233 N.E.2d 597, 598 (1968). Ohio has rejected, however, the traditional view that treats strict compliance with the terms of a notice provision as a condition precedent to the indemnification contract; instead, **the failure to comply with the notice provision must cause prejudice to the indemnitor before it is relieved of its obligation to defend or indemnify**.

Hardin, 571 N.E.2d at 452. ...

> Under Ohio law, prejudice to the indemnitor is presumed when the delay in giving notice is "unreasonable." This presumption may be rebutted by the presentation of evidence that the indemnitor was not, in fact, prejudiced by the delay. *Ruby*, 532 N.E.2d at 732; *Patrick*, 449 N.E.2d at 791; *see also Imperial Casualty & Indem. v. Buckeye Union Ins. Co.*, No. CA-7989, 1990 WL 41695 at *3, 1990 Ohio App. LEXIS 1420 (Ohio Ct.App. Apr. 9, 1990) at *8 (when notice is unreasonably delayed, burden shifts to claimant to rebut presumption that indemnitor was prejudiced by delay). [FN omitted]

Id. at 1057 (**emph. added**). The Court finds the issues addressed by the *LTV* court to be relevant to its determination of the Defendant's Motion for Summary Judgment and the Plaintiff's Response and Cross-Motion. Because neither party addressed these issues, particularly, the presumption which arises under Ohio law, the Court finds that summary judgment is inappropriate. Genuine issues of material fact remain undetermined. Therefore, the Court denies both the Defendant's Motion for Summary Judgment and the Plaintiff's Response and Cross Motion.

A further pre-trial conference in this adversary proceeding shall be held on **August 18, 2004 at 3:00 p.m.**

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of July, 2004, the foregoing Order was sent via regular U.S. Mail to:

Dorothea Polster
2711 Landon Road
Shaker Heights, Ohio 44122

Roger Stevenson
ROETZEL & ANDRESS
222 South Main Street
Akron, Oho 44308

Stephanie Norman
DEPUTY CLERK