

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division**

IN RE:

LEVEL PROPANE GASES, INC., *et al.*

Debtors.

**IN PROCEEDINGS UNDER CHAPTER 11
(Jointly Administered)**

CASE NO.: 02-16172

ADV. NO.: 04-1246

JUDGE RANDOLPH BAXTER

LEVEL PROPANE GASES, INC., *et al.*,

Plaintiffs,

vs.

DONLEN CORPORATION,

Defendant.

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is defendant Donlen Corporation's motion to dismiss Counts I, II, III, and IV of Level Propane Gases' first amended complaint. On May 21, 2004, Level Propane Gases (Level Propane) filed its first amended complaint against Donlen Corporation (Donlen) seeking recovery of certain alleged preferential transfers. Counts I and II seek the return of \$880,538.36 in alleged preferential payments made by Level Propane within 90 days of Level Propane's June 6, 2002 petition filing date. Counts III and IV seek the return of \$28,496.14 made by EP Transport, Inc. (an affiliated debtor), within

90 days of the September 11, 2002 petition date¹. The Court acquires core matter jurisdiction over this proceeding under 28 U.S.C. 158 and General Order No. 84 of this District. Upon the conclusion of a hearing on Donlen's motion to dismiss and Level Propane's response thereto, and an examination of the parties' respective briefs, the following findings and conclusions of law are made:

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The first amended complaint was filed by Level Propane seeking avoidance of certain alleged preferential transfers made by it to Donlen. Donlen seeks dismissal of Counts I and II on the basis that the avoidance and recovery of the payments sought in Counts I and II arise from a certain pre-petition lease that was assumed and assigned by Level Propane, pursuant to the Court's Order entered on November 4, 2003. Donlen contends that because the transfers arise from an assumed lease, the preference claims should be dismissed. Donlen also seeks dismissal of Counts III and IV on the basis that the avoidance and recovery of payments were allegedly made, not by plaintiff Level Propane, but rather an affiliated entity. Thus, Donlen argues, Level Propane lacks standing.

Specifically, Donlen asserts that the lease which is at issue is the Motor Vehicle Lease Agreement (Lease) which was assumed. Donlen contends it is within this agreement that Level Propane agreed to "pay all costs and expenses of using and operating each Vehicle during the Lease Term, including without limitation, gasoline, oil, grease, anti-freeze, adjustments, repairs, tires, tubes, storage, parking, tolls, fines,

¹On September 11, 2002, additional debtors were added to the joint administration of the above-styled bankruptcy case. These debtors, known as the "September Debtors", include: EP Transport, Level Energy Distribution, Inc., Level Energy Transport, Inc., Lenergy Transport Leasing, Inc., WHM Carrier Services, Inc., WHM Management Services, Inc., and Amware Distribution Warehouses.

towing, and servicing.” Lease, ¶ 6. Donlen further contends that the fact that Level Propane had a separate maintenance agreement does not obviate the fact that the actual obligation to pay for said maintenance arose from the Lease. Therefore, Donlen contends that Level Propane would be in default of the lease terms under § 365 of the Bankruptcy Code.

Level Propane objects to dismissal of Counts I, II, III, and IV. Level Propane asserts that it and/or EP Transport had a lease with Donlen for the rental of crane trucks and bobtails. (Doc. 2053). The subject lease was assumed by this Court’s Order on November 4, 2003. Level Propane further asserts that it and/or EP Transport also had vehicle maintenance agreements with Donlen. Level Propane argues that, at the request of Donlen, the vehicle maintenance agreements were rejected by agreed order on October 17, 2002. (Doc. 511). Level Propane further contends that the complaint contains sufficient details to overcome a Rule 12(b)(6) defense. These details include: the nature of the debt, an itemization of the specific amounts and the dates of each transfer; and identification of the specific party making the transfers, and the wire transfer numbers and/or check numbers of each transfer on each date.

Level Propane asserts it advised Donlen’s counsel on June 2 or 3, 2004, that the preferential transfers that are the subject of the adversary proceeding were not made pursuant to the lease that was assumed. Instead, the transfers were made on maintenance agreements that were specifically rejected at Donlen’s request.

Regarding Counts III and IV, Level Propane asserts that it inadvertently omitted EP Transport, Inc. as a second plaintiff in the above-captioned adversary because it erroneously believed all of the cases had been substantively consolidated. It further asserts that it learned after June 9, 2002 that the cases were only procedurally consolidated. (See Plaintiff Level Propane Response at 2, ¶ 5).

Donlen does not object to Level Propane amending its complaint to add proper plaintiff, EP Transport, pursuant to Fed. R. Civ. P. 15(a). Donlen's acquiescence to allow Level Propane to amend the complaint resolves its objection to Counts III and IV.

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The dispositive issue is whether Level Propane's first amended complaint, as to Counts I and II, fails to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6)?

Rule 12 of the Federal Rules of Civil Procedure, provides in pertinent part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(6) failure to state a claim upon which relief can be granted,

Fed. R. Civ. P. 12(b)(6). The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief if all the facts and allegations in the complaint are taken as true. See Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993)(citing Nishiyama v. Dickson County, 814 F.2d 277, 279 (6th Cir. 1987)). To survive a motion to dismiss under Rule 12(b)(6), "a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir.1988) (citations and internal quotation marks omitted). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Rippy v. Hattaway, 270 F.3d 416, 419 (6th Cir. 2001)(citing Hartford Fire Insurance Co. v. California, 509 U.S. 764, 811, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)(quoting

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). See also Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1189 (6th Cir. 1996).

The Sixth Circuit has determined that in a Rule 12(b)(6) determination, “the factual allegations of the complaint must be accepted as true, Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 136 (6th Cir. 1988) and construed in the light most favorable to the plaintiff, Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). “A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Mertik v. Blalock, 983 F.2d 1353, 1356 (6th Cir. 1993) citing, Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984).

Here, plaintiff Level Propane has submitted exhibits to support the complaint allegations in Counts I and II. This Court’s duty is to accept the factual allegations as true, as supported by the attached exhibits. Donlen has failed to prove that Level Propane can prove no set of facts in support of its claim which would entitle it to relief, as required by Rule 12(b)(6). Indeed, the complaint, as Level Propane attests, contains sufficient information to overcome Donlen’s Rule 12(b)(6) defense. To dismiss Counts I and II, at this juncture, would be premature and would summarily dispose of the proceedings without a trial upon the merits.

Accordingly, Counts I and II of Level Propane’ first amended complaint should not be dismissed for failure to state a claim, pursuant to Rule 12(b)(6). Donlen’s motion to dismiss is hereby denied. The trial schedule shall proceed as scheduled. Each party is to bear its respective costs.

IT IS SO ORDERED.

**Dated this 6 day of
August, 2004**

/s/ Randolph Baxter

**RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT**

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JUDGMENT

At Cleveland, in said District, on this 6 day of August, 2004.

A Memorandum Of Opinion And Order having been rendered by the Court in this proceeding,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Donlen's motion to dismiss is hereby denied. The trial schedule shall proceed as scheduled. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter

**RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT**