UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 07-51884
	)	
Akron Thermal, Limited Partnership,	)	CHAPTER 11
	)	
DEBTOR.	)	
	)	
----------	)	ADVERSARY NO. 07-5132
	)	
Akron Thermal, Limited Partnership,	)	JUDGE MARILYN SHEA-STONUM
	)	
PLAINTIFF,	)	
	)	**MEMORANDUM OF OPINION**
v.	)	**AND ORDER GRANTING**
	)	**DEFENDANTS' MOTION FOR**
Akron Professional Baseball, Inc. and City of Akron, Ohio.	)	**SUMMARY JUDGMENT**
	)	
DEFENDANTS.	)	
	)	

This matter comes before the Court on motion by Defendant Akron Professional Baseball, Inc. ("Akron Baseball") and the City of Akron (the "City") and motion by Plaintiff Akron Thermal, Limited Partnership ("ATLP). These parties move for summary judgment on the complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure, which is made applicable to these proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure.

I. Jurisdiction

This Court has jurisdiction pursuant to the Standing Order of Reference entered in this District on July 16, 1984 and 28 U.S.C. § 1334(b) giving the bankruptcy court jurisdiction over all "core" proceedings as well as those that are "related" to the bankruptcy case.

A bankruptcy court has jurisdiction to render final orders and judgments in core proceedings. *See* 28 U.S.C. §157(b). In otherwise related proceedings, the bankruptcy court instead submits proposed findings of fact and conclusions of law to the district court unless the parties to the otherwise related proceeding consent to the bankruptcy court's jurisdiction to enter final orders and judgments. *See* 28 U.S.C. §157(c)(1) and (2).

All parties have averred in their respective pleadings that this matter is a core proceeding. See Second Am. Complaint ¶2 (Docket #59); Second Am. Answer by Akron Baseball ¶2 (Docket #61); Am. Answer by City of Akron ¶ 2 (Docket #60). To the extent that this matter is not a "core" proceeding, all parties have nonetheless consented to the jurisdiction of this Court to enter a final judgment. See *DuVoisin v. Foster (In re Southern Indus. Banking Corp.)*, 809 F.2d 329, 331 (6th Cir. 1987).

II. Background

ATLP filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on June 18, 2007 (the "Petition Date"). On July 3, 2007, ATLP filed the complaint in this matter, seeking turnover of property from Akron Baseball. At the first pre-trial conference in this adversary proceeding, the Court ordered ATLP to add the City of Akron (the "City") as a defendant "merely as a procedural step in an effort to expedite the prosecution of this and the related adversary proceedings." Order and Memorandum of Pre-Trial Conference (Docket #13). ATLP subsequently filed First and Second Amended Complaints (Docket #14 & #59), both naming the City as a defendant without asserting a claim against the City. Akron Baseball included in its Answers (Docket #7, #19, & #61) a third-party complaint against the City, stating that the City was liable for the debt sought in ATLP's complaint. The City asserted in its Answers (Docket #21 & #60) that it has a valid setoff claim against ATLP.

Two motions for summary judgment are now before the Court. The first is filed jointly by both defendants (Docket #84) and the second by ATLP (Docket #86).

ATLP, Akron Baseball, and the City have filed joint stipulations (Docket #72) stating the following:

1. ATLP is an Ohio public utility that operates a district energy system generating and distributing steam and hot water throughout the downtown of the City. Stip. ¶1.

2. Akron Baseball is a corporation organized and existing under the laws of the State of Ohio, having a principal place of business at 300 S. Main St., Akron, Ohio 44306 ("Canal Park"). Akron Baseball operates the Akron Aeros, an AA minor league professional baseball team. Stip. ¶2.
3. The City is a municipal corporation organized under the laws of the State of Ohio. Stip. ¶3.
4. ATLP operated two steam generation plants and eighteen miles of distribution piping, which ATLP lease from the City. Stip. ¶4.
5. On November 5, 2000, Akron Baseball and ATLP executed a contract for Steam and Hot Water Services (the "Steam Agreement") for the supply of steam by ATLP to Canal Park. Stip. ¶5.
6. ATLP sends invoices for steam supplied to Canal Park to Akron Baseball at Canal Park. Stip. ¶6.
7. ATLP does not send an invoice to the City for steam supplied to Canal Park by ATLP. Stip. ¶7.
8. Prior to May 8, 2007, Akron Baseball did not pay for the monthly invoices submitted to it by ATLP for the period from January 4, 2007 through March 29, 2007 (the "Relevant Period"). Stip. ¶9.
9. Akron Baseball does not dispute the rate ATLP charged for steam during the Relevant Period. Stip. ¶10.
10. The aggregate amount of the invoices ATLP delivered to Akron Baseball for the Relevant Period was $91,650.04 (the "Account"). Stip. ¶ 11

11. On November 22, 1994, the City and Akron Baseball entered into a Stadium Lease Agreement (the "Stadium Lease"). The Stadium Lease was subsequently amended on five separate occasions prior to the Petition Date. Stip. ¶13.
12. The parties submitted a true and accurate copy of the Stadium Lease to the Court. Stip. Exhibit B.
13. On May 9, 2007, Akron Baseball paid Akron Thermal $45,825.02 on the Account. Stip. ¶14.

Additionally, the Court notes that the parties have not disputed the following:

1. ATLP, as an Ohio public utility, is subject to the regulatory jurisdiction of the Public Utilities Commission of Ohio (the "PUCO"). Defendants' Mtn. for S. Judgment ¶15.
2. The PUCO approved a tariff that took effect prior to the execution of the Steam Contract ("Tariff I"). Defendants' Mtn. for S. Judgment ¶¶ 16-17.
3. The PUCO approved a second tariff ("Tariff II"), authorizing a rate increase, in September 2005. Defendants' Mtn. for S. Judgment ¶19. The Tariffs are substantially similar.
4. True and accurate copies of Tariffs I & II were submitted to the Court. Defendants' Mtn. for S. Judgment Exhibits 5 & 9. Although the defendants quote the Tariffs as containing a comma disputed by ATLP (ATLP Mem. In Opp. ¶1 (Docket #91)), the Tariffs submitted as exhibits by Akron Baseball do not show a comma. The Court therefore concludes that Akron Baseball does not dispute the fact that § 104.7 of both Tariffs reads: "Regardless of any occupancy, all payment

arrangements must be in writing, signed by both the Tenant Customer and the Owner, or the Owner of the Premises and approved in writing by ATLP."

5. A true and accurate copy of the Steam Agreement was submitted to the Court. ATLP Mtn. for S. Judgment Exhibit 1.
6. The City has not paid or credited any steam bill that ATLP delivered to Canal Park. ATLP Mtn. for Summary Judgment ¶7 (Docket #86).
7. Because of a steam leak on the property, unusually high amounts of steam were delivered to Canal Park during the winter of 2007. ATLP Mtn. for Summary Judgment ¶12.

The Court also notes that ATLP has not disputed the defendants' assertion that the City possesses a valid claim against ATLP in the main bankruptcy case, against which it would be able to offset any City liability arising from the Account.

III. Summary Judgment Standard

The court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that 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). However, the ultimate burden of demonstrating the existence of a genuine issue of material fact lies with the non-moving party. *Celotex Corp.* at 323. The non-movant must "come forward with 'specific facts showing there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986).

IV. Analysis

In this case, the plaintiff ATLP argues that the Steam Agreement imposes liability on Akron Baseball for all steam service to Canal Park. Akron Baseball and the City argue that the Steam Agreement is unlawful. Alternatively, they assert that the Steam Agreement imposes liability on the City. They argue that the City possesses a valid setoff claim in the ATLP bankruptcy which exceeds the amount claimed for the Account and ATLP therefore has no right to recover from the City.

First, the Court must determine what, if any, liability is imposed by the Steam Agreement. Second, it must consider the argument that the Steam Agreement is unlawful. Because the question before the Court on these cross-motions for summary judgment is only whether ATLP is entitled to turnover of funds from Akron Baseball, the Court will not make any determinations as to claims or potential claims that may be asserted by or against the City.

A. Construction of the Steam Agreement

ATLP argues that the liability for steam service provided to Canal Park is governed by the Steam Agreement. The Steam Agreement is a form that has been filled out so as to read "*Akron Professional Baseball, Inc* (hereinafter called Customer),

Owner/Tenant of the premises located at *300 South Main St*, Akron, Ohio, (hereinafter called the Premises)" (emphasized portions are handwritten). The Steam Agreement also provides, *inter alia*, as follows:

1. In consideration of the furnishing of steam and/or hot water service, the Customers agrees [*sic*] to pay for all of said services[.] Steam Agreement ¶1.
2. The Owner of the Premises to which service is provided shall be held liable for all steam, hot water, and/or other charges against the Premises. Steam Agreement ¶4.
3. Customer shall comply with [Tariff I]. Steam Agreement ¶6.

The Steam Agreement appears to be signed by ATLP and Akron Baseball representatives.

Akron Baseball is not the owner of Canal Park. The introductory clause is part of a form and apparently allows for the agreement to be entered by either an owner or tenant. In keeping with this understanding, the Steam Agreement imposes liability on the "Customer" and the "Owner of the Premises" in separate provisions. Therefore, regardless of whether the owner or tenant of a property enters into this form agreement, the property owner's liability is preserved. The Steam Agreement imposes liability on Akron Baseball, but does not relieve the City of its own liability as property owner.

B. Effect and Construction of the Tariffs

Akron Baseball argues that the Steam Agreement is unlawful pursuant to O.R.C. § 4905.31, titled "Reasonable arrangements allowed; variable rate," which provides:

> Chapters 4901 [et al.] of the Revised Code do not prohibit a public utility from […] entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees, and do not

> prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:
>
> A. The division or distribution of its surplus profits;
>
> […]
>
> E. Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, […]
>
> *No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.*

O.R.C. § 4905.31 (emphasis added). The parties dispute whether the emphasized section is a continuation of subsection (E) and therefore applicable only to electric distribution utilities. This argument is irrelevant. Assuming, *arguendo,* that the emphasized section applied to the "reasonable arrangements" named in the first paragraph, it still appears that this section would apply only to arrangements that are not within the scope of the Tariffs. The Tariffs are filed with the PUCO and approved by the PUCO. Presumably, individual customer accounts conducted in accordance with the provisions of the Tariffs do not constitute separate arrangements that must be independently filed and approved; indeed, this is the purpose of filing and approving the Tariffs. As the Ohio Supreme Court held in interpreting an earlier version of this law:

> Public utility service in this state is regulated by statute and no contract for service may be made by a public utility except as provided by statute. The only contract which a public utility is authorized to enter into with a customer for service must conform to the schedule filed by such utility …. A petition for damages for the breach of a contract for public utility service

> which does not allege or show that such contract conforms to the rates and conditions prescribed in the schedule filed as aforesaid is demurrable.

Bell v. N. Ohio Tel. Co., 158-59 43; c*f. Cookson Potter v. Public Util. Comm'n*, 161 Ohio St. 498, 120 N.E.2d 98 (1954) (holding effective certain actions by public utility attempting to alter its rate schedule); *Lake Erie Power & Light Co. v. Telling-Belle Vernon Co.*, 57 Ohio App. 467, 14 N.E.2d 947 (Ohio App. 1937) (refusing to enforce contract that charged rates not filed with the PUCO). Ohio law permits public utilities to enter into contracts that conform to their filed tariffs; contacts are only unenforceable where they contradict the provisions of a tariff.

ATLP's Tariffs specifically provide for cosignatory arrangements. There would be no purpose in making such a provision in the Tariffs if each individual cosignatory agreement was also required to be filed. Rather, it appears that § 4905.31 was meant to apply primarily to arrangements that contradict tariffs approved by the PUCO and does not, therefore, render the Steam Agreement unlawful or unenforceable.

C. Applicable Bankruptcy Law

ATLP, acting as a debtor-in-possession, is entitled to turnover of all mature debts that are property of the estate and not subject to setoff under 11 U.S.C. § 553, which allows a creditor of a bankruptcy estate to offset mutual debts with the debtor provided that the creditor's claim is an allowed claim that has not been transferred or incurred in certain circumstances not suggest by the evidence in this case. There is no requirement that the creditor be solely liable for the debt.

ATLP is therefore only entitled to turnover of the funds if no entity that is liable on the Account has any valid setoff claim.

V. Conclusion

Akron Baseball and the City are both liable on the Account. ATLP has not disputed, in its pleadings, that the City possesses a valid setoff claim, which the City has asserted in its pleadings. The City's liability on the Account establishes that ATLP is not entitled to an order (1) requiring turnover of funds and (2) declaring any attempted set off asserted by the City of Akron impermissible. Summary judgment is therefore granted in favor of the defendants. An order consistent with this Opinion will be entered separately in this case.