THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-16204
	)	
LAICH INDUSTRIES CORP.,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
LAICH INDUSTRIES CORP.,	)	Adversary Proceeding No. 05-1529
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FAMILY DOLLAR STORES, INC.,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

The debtor Laich Industries Corp. filed this complaint asking that the defendant Family Dollar Stores, Inc. (Dollar) be ordered to turn over property of the estate. Specifically, the debtor alleges that Dollar owes it $304,007.76 for goods delivered both pre- and postpetition. Dollar denies liability and filed a counterclaim for indemnification based on the debtor's alleged failure to reimburse it for product liability claims. The debtor now moves for summary judgment on both its complaint and Dollar's counterclaim.[1] Dollar opposes the motion.[2] For the reasons stated below, the motion is denied.

[1] Docket 25, 26, 31.

[2] Docket 30.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. The debtor's complaint seeks turnover of a matured debt which is estate property and is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(E) and 11 U.S.C. § 542(b). Dollar filed a claim in the chapter 11 case.[3] Its counterclaim essentially requests a determination on that claim and it is also a core proceeding. *See* 28 U.S.C. § 157(b)(2)(B).

DISCUSSION

I. SUMMARY JUDGMENT

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v.*

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[3] *See* claim register, claim no. 92-1 (asserting an unliquidated unsecured and secured claim with the security being a right of setoff).

American Eng'g Co., 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)). The court must evaluate each summary judgment motion on its merits and "draw all reasonable inferences against the party whose motion is under consideration." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).

II. THE COMPLAINT

The debtor filed its chapter 11 case on May 5, 2005. The debtor alleges in the complaint that it sold goods to Dollar from March 1, 2005 to June 10, 2005, including resin chairs, and that Dollar failed to pay for the goods. The debtor billed Dollar $36,115.17 for goods shipped and received prepetition and $267,892.59 for goods shipped and received postpetition. Dollar denies that any amount is owed to the debtor and asserts a number of defenses including setoff and recoupment.

The bankruptcy code provides that any entity that owes a debt that is property of the estate that is "matured, payable on demand, or payable on order" shall pay such debt to the debtor in possession. 11 U.S.C. § 542(b). *See also* 11 U.S.C. § 1107(a) (providing that a debtor in possession has the rights of a trustee). One exception to the turnover requirement is if the party owing the debt to the debtor has a valid right to setoff. *See* 11 U.S.C. § 542(b). Setoff rights in bankruptcy are governed by § 553 of the bankruptcy code which provides (in relevant part) that:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that

> arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case[.]

11 U.S.C. § 553(a). This section does not create setoff rights, but instead preserves any right to setoff that otherwise exists. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 19 (1995). Therefore, to come within § 553, a creditor must show:

1. the claim made by the creditor arose before the bankruptcy case was filed;

2. the debt owed to the debtor by the creditor arose before the bankruptcy case was filed;

3. the claim and the debt are mutual obligations; and

4. state law (or other non-bankruptcy law) provides a right to setoff.

See 11 U.S.C. § 553(a).[4]

The parties agree that Ohio law provides for setoff. Under Ohio law, setoff is "that right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to setoff their respective debts by way of mutual deduction." *Witham v. South Side Bldg. & Loan Assoc. of Lima, Ohio*, 15 N.E.2d 149, 150 (Ohio 1938). *See also, Walter v. Nat'l City Bank*, 330 N.E.2d 425, 427 (Ohio 1975). They disagree as to the other elements of § 553.

As noted above, a right of setoff is not available under § 553 unless Dollar's claim and the debt it owes to the debtor both arose before the petition was filed. The parties agree that Dollar's claim against the debtor arose prepetition; however, they dispute the status of Dollar's

[4] Section 362(a)(7) stays the unilateral setoff of such debt once the case is filed. *See* 11 U.S.C. § 362(a)(7).

debt to the debtor as prepetition. There are a number of tests used by courts to determine when a debt owed to a debtor arises for purposes of § 553. The Sixth Circuit has not yet addressed the issue, and the parties believe that different tests support their positions. The debtor argues that a debt only arises prepetition when it is absolutely owed at the time a debtor files its petition and cites case law to support that argument. *See for example, United States v. Myers (In re Myers)*, 362 F.3d 667 (10th Cir. 2004); *United States v. Gerth*, 991 F.2d 1428 (8th Cir. 1993). Dollar argues that the determination of when the debt arose requires a comprehensive analysis of the facts. Dollar points to a number of tests which courts have developed to determine whether a debt arises prepetition to support its position. *See Roberds, Inc. v. Lumbermen's Mut. Cas. Co. (In re Roberds, Inc.)*, 285 B.R. 651, 657 (Bankr. N.D. Ohio 2002) (discussing the conduct test, the relationship test, and the foreseeability test).

In addition to a legal dispute regarding setoff, the parties disagree as to the material facts on that issue. They disagree as to the terms of their agreement. The debtor argues that the bulk of its right to payment from Dollar arose postpetition when the goods were delivered and cites evidence in support. Dollar, on the other hand, argues that its obligation to pay the debtor arose prepetition because the debtor accepted the purchase orders and was committed to manufacture and supply the goods before the formal invoice was issued. And while the debtor acknowledges that the portion of the debt which Dollar owes to it is for goods which were delivered before the petition date, and therefore eligible for setoff, there is a factual dispute as to that amount. *See* debtor's reply, docket 31 at n. 1. Also, the debtor's claim that it is owed a total amount of $304,007.76 is challenged by Dollar which asserts that the amount is $301,094.24.

An additional factual dispute exists regarding Dollar's defense of recoupment for late charges and handling fees which would entitle it to a reduction in the debtor's claim against it. Dollar asserts that it is entitled to recoup $2,260.96. The debtor disputes both the amount and the validity of its claim to those charges.

Based on the existence of these issues of material fact, summary judgment for the plaintiff on the complaint is not appropriate.

III. THE COUNTERCLAIM

Dollar's counterclaim is based in part on two documents executed in 1996: an indemnity agreement and a vendor agreement.[5] Dollar alleges that third parties have made tort claims against it based on defects in chairs sold to it by the debtor and that Dollar is entitled under the indemnity agreement to setoff those amounts against any amount it might owe on the unpaid invoices. Dollar also claims that the debtor failed to comply with contract terms under the vendor agreement regarding shipping dates and that as a result it suffered damages.

Although the debtor requested summary judgment in its favor on the counterclaim, its motion does not address the counterclaim and it now appears to have withdrawn that request as its reply brief only requests partial summary judgment on the issue of setoff. *See* debtor's reply brief at 9, docket 31. In any case, summary judgment on the counterclaim is clearly not appropriate as there are material issues of fact regarding the terms of the indemnity and vendor agreements as well as the effect of the debtor's asserted termination of the agreements.

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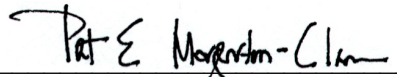
[5] Dollar breaks its claims out into eight causes of action: First Count (breach of indemnity agreement), Second Count (common law indemnity), Third Count (breach of vendor agreement), Fourth Count (breach of implied contract), Fifth Count (breach of expressed warranty), Sixth Count (breach of implied warranty of merchantability), Seventh Count (product liability or negligent manufacturing), and Eighth Count (negligent failure to warn).

CONCLUSION

For the reasons stated, the debtor's motion for summary judgment is denied. A separate order reflecting this decision will be entered.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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Plaintiff,	)	
	)	
v.	)	
	)	
FAMILY DOLLAR STORES, INC.,	)	**ORDER**
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the debtor-plaintiff's motion for summary judgment on its complaint as well as on the counterclaim filed by the defendant Family Dollar Stores is denied. (Docket 25, 26, 31).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge