UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MOMENTUM MANUFACTURING CORPORATION

CASE NO.90-0l090

Chapter 11

Debtor

APPEARANCES:

HANCOCK & ESTABROOK, ESQS.
Attorneys for Debtor
MONY Tower I
P.O. Box 4976
Syracuse, New York l322l-4976

CAMILLE A. WOLNIK, ESQ.
Of Counsel

NORMAN L. MASTROMORO, ESQ.
Attorney for Donald J. Reile
P.O. Box 332
Herkimer, New York l3350

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter is before the Court by way of an Objection filed by Momentum Manufacturing Corporation ("Debtor") to the amended proof of claim filed in this Chapter 11 case by Donald J. Reile ("Reile").

A hearing on the Objection was held before this Court on March 24, l992 at which time both the Debtor and Reile appeared.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b), l57(a), (b)(l) and (2)(B).

FACTS

Debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on May 3, l990. On December 2l, l990, this Court entered an Order fixing January l8, l99l as the last date to file claims.

On January l8, l99l, Reile filed a Proof of Claim (designated by the Clerk of this Court as Claim E300) seeking allowance of a priority claim in the sum of $350,000. On February 2l, l99l, Reile filed an Amended Proof of Claim (designated by the Clerk of this Court as Claim E300A) seeking allowance of his priority claim in the sum of $500,000.

In support of his Amended Proof of Claim, Reile alleges that between l97l and l988 he operated a scrap and salvage business in Herkimer, New York, and that during that period, he purchased scrap material from the Debtor, as well as its predecessor and its affiliates, which he thereafter deposited on his real property in the Village of Herkimer.

In or about l988, Reile received an "Inactive Hazardous Waste Disposal Report" issued by the New York State Department of Environmental Conservation ("NYDEC") notifying him that the site upon which he deposited the scrap material purchased from Debtor and others contained hazardous waste, which had contaminated its soil, surface water and ground water. (See Exhibit A attached to Reile's Answering Papers.)

There is no indication that as of the date Reile filed his Amended Claim, he has actually incurred any expense pursuant to a state or federal statute or any directive of NYDEC or a federal agency, or that he has voluntarily undertaken a clean-up of the site either pre or post-petition.

ARGUMENTS

Reile contends that as a result of his purchase of scrap materials from the Debtor and others, and the subsequent deposit of that material upon his property, a hazardous waste site has been created. Reile also alleges that he is presently unable to sell his property due to the presence of hazardous waste and that the property has decreased dramatically in value.

Reile estimates that the cost of "cleaning up" the property pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §960l et seq.), will be approximately $2,000,000. He asserts a claim against the Debtor for pro-rated "response costs", which he apparently contends is equal to the decrease in the value of his real property

due to the presence of hazardous waste. (See Proof of Claim E300A). Finally, Reile contends that his claim is entitled to a priority pursuant to Code §507(a)(7).

The Debtor argues that Reile's claim must be disallowed in accordance with Code §502(e)(l)(B) because it is a contingent claim for reimbursement of response costs pursuant to CERCLA.

The Debtor also rejects the contention that if Reile's claim is not subject to disallowance pursuant to Code §502(e)(l)(B), that it is entitled to priority under Code §507(a)(7). Debtor asserts that a Code §507(a)(7) claim can only be filed by a governmental entity to recover unsecured pre-petition taxes and Reile's claim meets neither of those criteria.

DISCUSSION

While it is not clear that Reile's claim seeks reimbursement for the cost of cleaning up the hazardous waste site located on his Herkimer, New York property, the Court will initially consider the claim as such and address Debtor's opposition based upon Code §502(e)(l)(B).

Bankruptcy Judge Paskay set out the so-called three-prong test to determine the applicability of Code §502(e)(l)(B) in In re Provincetown-Boston Airlines, Inc., 72 B.R. 307, 309 (Bankr. M.D.Fla. l987). In order to disallow a claim pursuant to that section, (l) the claim must one for reimbursement or contribution; (2) the entity asserting the claim must be liable with the Debtor on the claim of a creditor; and (3) the claim must be contingent at the time of its allowance or disallowance. See also In re A & H, Inc., l22 B.R. 84, 85 (Bankr. W.D.Wis. l990).

In enacting Code §502(e)(l)(B), Congress intended to disallow only those claims for reimbursement or contribution which are contingent or unliquidated at the commencement of the case and upon which the claimant is said to be "liable with the debtor on or has secured the claim of a creditor." See 11 U.S.C. §502(e)(l)(B).

As observed at 3 COLLIER ON BANKRUPTCY ¶502.05 (l5th ed. l99l)

> While Section 502(e)(l)(B) facially would seem at war with Section 502(c) dealing with estimation for purposes of allowance of contingent claims, it must be viewed from the standpoint of the surety or person secondarily liable with which it deals rather than from the standpoint of the debtor's creditor with which Section 502(c) obviously deals.

It is apparent that where the claim, under attack by a debtor, is concededly one for reimbursement or contribution and contingent in nature, a court must examine the relationship between the claimant and the debtor in order to determine whether or not Code §502(e)(l)(B) applies or whether the claim should be estimated or liquidated and allowed pursuant to Code §502(c).

There is no real dispute that Code §502(e)(l)(B) is not intended to disallow direct contingent claims such as where there is no potential third party liability to be assessed against the debtor. See In re Allegheny Intern, Inc., l26 B.R. 9l9, 922 (W.D.Pa. l99l).

The District Court in In re Allegheny Intern, Inc., supra, was considering a claim filed in a Chapter ll case by a creditor who alleged that the debtor was liable for response costs incurred pursuant to CERCLA. The District Court analyzed whether the creditor's claim was a direct claim for reimbursement of costs incurred by the creditor in the toxic waste cleanup pursuant to the applicable provisions of CERCLA or whether the claim sprang from the co-liability of the creditor and the debtor to the Environmental Protection Agency ("EPA") for the response costs.

The District Court concluded at page 923,

> AL Tech does not seek to recover sums owed to a third party such as the EPA or DEC but instead seeks to recover sums it has personally expended and will personally expend in the future to remediate hazardous waste at the Dunkirk and Watervliet sites. Debtor argues that AL Tech's claim "springs from the co-liability AL Tech and [debtor] ultimately have to the EPA and the DEC ..." However, although both debtor and AL Tech are liable for the waste remediation, should AL Tech undergo the cleanup itself, debtor is liable directly to AL Tech pursuant to §9607(a). Contrary to debtor's contention, for purposes of §502(e)(l)(B), the distinction between a cleanup performed by AL Tech and a cleanup performed by the EPA is crucial.

A similar conclusion was reached in In re Hemingway Transport, Inc., l05 B.R. l7l (Bankr. D.Mass. l989) where the bankruptcy court in considering the

trustee's motion for summary judgment seeking disallowance of a creditor's claim for response costs under Code §502(e)(l)(B) observed at page l75,

> In the context of this case, it is possible to view Juniper both as a direct creditor of Hemingway and as an entity jointly liable with the Debtor. To the extent Juniper undertook or undertakes remedial action to reduce or eliminate the threat of hazardous wastes it can recover those response costs from the person ultimately responsible. In this case, that person allegedly is Hemingway. Section 502(c) then would appear to apply, if at all, to that type of claim for direct response costs. However, section 502(e)(l)(B) would appear to apply for claims for compensation or reimbursement for response costs incurred by the EPA for which Juniper might ultimately be adjudged liable.

In the instant case, while Reile attaches to his "Answering Papers" an Inactive Hazardous Waste Disposal Report" allegedly issued by New York State in l988, there is no indication that any action has been commenced by NYDEC or EPA pursuant to CERCLA or any pertinent state statute to recover cleanup costs. In fact, on page 6 of the Report, under the heading "Legal Action" it is indicated "Negotiation in Progress."

Thus, at this juncture, it does not appear that the claim being asserted by Reile results from any action undertaken against him by NYDEC or EPA. If anything, it appears that Reile may be alleging a direct claim against the Debtor pursuant to 42 U.S.C. §9607(a)(4)(B) (CERCLA) for cleanup costs he will incur personally. See In re Dant & Russell, Inc., 95l F.2d 246, 248-49 (9th Cir. l99l). However, a close reading of Reile's Claim E300A leads one to the conclusion that he is actually asserting a claim for "response costs" which he contends encompasses a significant loss in the value of his property, rather than the cost of cleaning it up, the former being a claim that clearly falls outside Code §502(e)(l)(B) and is one more appropriately addressed under Code §502(c). In either case, Code §502(e)(l)(B) is not applicable and Reile's claim may not be disallowed on the basis of that section.

Finally, the Court must reject Reile's contention that his claim against the Debtor based either on actual cleanup costs or depreciation of property value, or a combination of both, is entitled to priority status under Code §507(a)(7).

While a court may grant priority status to a claim for cleanup costs under the appropriate circumstances, a plain reading of Code §507(a)(7) indicates

that it does not provide a statutory basis for such a claim. Code §507(a)(7) affords priority status solely to pre-petition taxes and penalties levied thereon by governmental units.

Cleanup and/or response costs can be allowed as an administrative priority claim pursuant to Code §§503(b)(l) and 507(a)(l) where they are incurred post-petition and result in some benefit to the debtor's estate. See In re Dant & Russell, Inc., 853 F.2d 700, 709 (9th Cir. l988).

In the case, sub judice, even assuming that a cleanup or distressed sale of Reile's property occurs at some point in the future and thus, post-petition, there can be no showing that it would in any way benefit the Debtor's estate.

As observed by the Ninth Circuit in In re Dant & Russell, Inc., supra, at page 709,

> Although Burlington Northern asserts that public policy considerations entitle its claims for cleanup costs to administrative expense priority, we acknowledge that Congress alone fixes priorities. 3 COLLIER ON BANKRUPTCY ¶507.02, at 507-l7 (l5th ed. l987). Courts are not free to formulate their own rules of super or sub-priorities within a specifically enumerated class.

Based upon the foregoing, it is

ORDERED, that Debtor's Objection to Claim E300, as amended by Claim E300A, filed by Reile, based upon Code §502(e)(l)B) is denied, and it is further

ORDERED, that pursuant to Code §502(c), a hearing on Debtor's Objection to Claim E300, as amended by Claim E300A, is scheduled to commence at the U.S. Bankruptcy Court, U.S. Courthouse, Utica, New York on September 28, l992 at l0 a.m.

Dated at Utica, New York
this day of July, l992

STEPHEN D. GERLING
U.S. Bankruptcy Judge