

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
HAROLD L. HENNESSEY and ) Under Chapter 12  
PRISCILLA A. HENNESSEY, )  
) No. BK 89-50721  
Debtor(s))  
)  
HAROLD L. HENNESSEY, )  
)  
Plaintiff) Adv. No. 91-5096  
v. )  
)  
FIRST NATIONAL BANK OF )  
HIGHLAND, )  
)  
Defendant)

OPINION

Harold Hennessey (plaintiff) and Priscilla Hennessey, husband and wife (debtors), entered into a sale contract with the First National Bank of Highland (defendant) in August, 1986. Under the terms of the contract, plaintiff and Priscilla Hennessey agreed to buy from defendant certain farmland, materials for completion of a house, farm equipment and haylage<sup>1</sup> for the sum of \$275,000.00, with defendant financing the sum of \$274,000.00.<sup>2</sup> Debtors' payment of the \$274,000.00

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<sup>1</sup>The sale contract itself is silent on the purchase of haylage. As evidence of the haylage contract, plaintiff has attached as an exhibit to the complaint a promissory note and security agreement dated November 19, 1986. The note and security agreement give defendant a security interest in, inter alia, a number of tons of haylage in exchange for a loan in the amount of \$14,450.00. For purposes of this motion, the Court will assume, as alleged in the complaint, that the parties entered into a contract for haylage as part of the sale in August, 1986.

<sup>2</sup>The sale was financed through a contract for deed which was paid off when debtors entered into a note, security agreement and mortgage dated December 23, 1988 obligating them to repay defendant \$221,486.55.

was secured by the farmland, by debtors' dairy cattle, and by all of their dairy and farm equipment.

Unfortunately, after the Hennesseys took possession of the property on October 11, 1986, they found that, with respect to the farm equipment and haylage, the completed sale was not all they had hoped it would be. As a result, more than five years later, on November 19, 1991, plaintiff filed a cause of action in the Circuit Court for the Third Judicial Circuit in Madison County, Illinois charging defendant with breach of contract.

The five year lapse does not reflect a period of total inactivity or indifference by the debtors concerning the contract with defendant. To the contrary, on December 7, 1989, the Hennesseys filed for protection under chapter 12 of the Bankruptcy Code and their dispute with defendant was brought up in the bankruptcy case. Defendant filed a claim against the estate on February 27, 1990,<sup>3</sup> and, after the give and take of negotiations, a plan was confirmed on October 12, 1990 and subsequently amended. Debtors continue to make payments under the plan today. Accordingly, when plaintiff sued defendant for breach of contract in state court, defendant removed the lawsuit to the Bankruptcy Court and filed the motion to dismiss the complaint which is

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<sup>3</sup>Defendant's proof of claim reveals a claim in the amount of \$403,456.77 plus accruing interest and attorney fees representing an amalgam of various mortgages, notes and security agreements collateralized by, among other things, debtors' farmland and all of debtors' now owned and after acquired machinery, equipment, feed and grain and any and all proceeds of the collateral. The obligation to pay defendant under the note, security agreement and mortgage dated December 23, 1988, see supra note 2, represents part of the claim.

the subject now at hand.<sup>4</sup>

Defendant raises several arguments in support of dismissal of the complaint. These are: (1) defendant did not breach the equipment contract because it fully performed the equipment contract by tendering to plaintiff all "sweep arms, augers, motors and related equipment" as promised; 2) defendant did not breach the haylage contract because there was no contract for the sale of haylage but only a loan and security agreement with the haylage as collateral; (3) the complaint is barred by the four year statute of limitations applicable to the sale of goods under Article 2 of Illinois' Uniform Commercial Code (UCC), Ill. Ann. Stat. ch. 26, para. 2-725(1) (Smith-Hurd 1963); (4) the complaint is barred by equitable estoppel because defendant detrimentally relied on plaintiff's failure to disclose or assert his breach of contract claims during the pendency of the Hennesseys' bankruptcy case; (5) the complaint is barred by judicial estoppel because plaintiff's complaint is contrary to his treatment of the cause of action as undisputed during the pendency of the Hennesseys' bankruptcy case; (6) the complaint is barred by the doctrine of res judicata because plaintiff failed to reserve the cause of action in the Hennesseys' confirmed plan of reorganization which is a final judgment; and (7) the complaint is barred by the five year statute of limitations for oral contracts, Ill. Ann. Stat. ch. 110, para. 13-205 (Smith-Hurd 1984).

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<sup>4</sup>Defendant moves for dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure and Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

The Court construes a motion to dismiss as a motion for summary judgment when matters outside the pleadings are presented to and not excluded by the Court. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b). In addressing several of defendant's arguments for dismissal, both parties have asked the Court to take judicial notice of documents filed in debtors' bankruptcy case leading up to and following the confirmation of debtors' chapter 12 plan of reorganization. Additionally, plaintiff has moved for leave to supplement the record with a letter dated October 29, 1990 written by defendant's former counsel to the Hennesseys' former counsel, and the Court today, over defendant's objection, grants plaintiff's motion. Accordingly, since matters outside the pleadings will be considered by the Court, defendant's motion to dismiss shall be treated as one for summary judgment and disposed of as provided in Rule 56 of the Federal Rules of Civil Procedure.<sup>5</sup> Moreover, since, as will be discussed below, the Court has determined that defendant is entitled to summary

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<sup>5</sup>Rule 12(b) of the Federal Rules of Civil Procedure provides that when a motion to dismiss is treated as a motion for summary judgment, the parties shall be given reasonable opportunity to present all pertinent material. However, from the inception of this matter, both parties have presented matters outside the pleadings and these matters have not been excluded by the Court. Furthermore, the parties have dealt with the motion as a motion for summary judgment, plaintiff has, in fact, referred to the motion as one for summary judgment (letter from R. Dan Winnett to the Court of March 17, 1992, at 2), there are no "potentially disputed material issues of fact," Farries v. Stanadyne/Chicago Div., 832 F. 2d 374, 377-78 (7th Cir. 1987), and the Court can conceive of no harm or surprise to either party that would result from conversion of the motion to one for summary judgment. See, e.g., 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1366, at 506 & n.26 (1990). Accordingly, the Court concludes that the parties have been afforded the reasonable opportunity contemplated by Rule 12(b).

judgment because the confirmed plan has res judicata effect and bars the complaint, the Court will address hereafter only those facts and arguments directed to this issue.<sup>6</sup>

The complaint before the Court is in two counts. In the first count, plaintiff alleges that defendant breached the contract described above by failing to provide "certain items of personalty and chattel . . ." pursuant to a clause in the contract which states, in pertinent part: "All sweep arms, augers, motors and related equipment owned by seller will remain." Specifically, plaintiff alleges that when the Hennesseys took possession of the farm, there was a Hercules unloader in the harvester silo rather than the rebuilt Goliath unloader defendant had represented would be there. Similarly, there was no swing arm assembly at all when the Hennesseys took possession although defendant had represented that there was a complete swing arm assembly in the harvester silo.

In Count II, plaintiff alleges that defendant further breached the contract described above by failing to provide the Hennesseys at possession with the quantity of haylage agreed to by the parties in their contract. Plaintiff contends that the amount of haylage in the silos fell substantially short of the amounts set forth in the

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<sup>6</sup>As a preliminary matter, at the hearing on the motion to dismiss, the Court granted both parties five days to submit additional authority to support their respective positions. Plaintiff's memorandum was submitted for filing two days late. The Court granted plaintiff's motion to file the memorandum instanter prior to receiving defendant's objection to the late filing. However, the Court finds that defendant is not prejudiced by the Court's consideration of the memorandum and overrules defendant's objection.

contract.

Defendant argues that plaintiff's complaint is barred by the doctrine of res judicata because the confirmed plan, and subsequent amendments approved by the Court, operate as a final judgment as to all matters which were, or could have been, litigated between the parties. Since the right to pursue the litigation over the unloader, the swing arm assembly and the haylage was not reserved by debtors in the confirmed plan or in post-confirmation amendments, it is precluded. Plaintiff, however, contends that the parties did, in fact, intend to reserve debtors' right to litigate over non-delivered farm equipment but neglected, through inadvertence, to include the necessary provision in the confirmed plan.

A reference to the dispute with defendant over the unloader appears on schedule A-2 of debtors' bankruptcy schedules. There, debtors state that defendant's claim in the amount of \$403,556.77 [sic] secured by land, equipment, machinery, inventory and livestock is in dispute "as to silage unloader from sale." Debtors never mention disputes over the swing arm assembly and haylage in their schedules.<sup>7</sup>

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<sup>7</sup>In fact, debtors fail to mention the cause of action on their schedules of assets where they are called upon to list, inter alia, all "[c]ontingent and unliquidated claims of every nature, including counterclaims of the debtor" and "(p)roperty of any kind not otherwise scheduled."

Debtors' failure to advise defendant of the impending lawsuit over the swing arm assembly and the haylage is grounds to grant the motion for summary judgment on the basis of equitable estoppel and judicial estoppel as to these items. E.g., Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 416-20 (3rd Cir.), cert. denied, 488 U.S. 967 (1988); In re Hoffman, 99 B.R. 929, 934-36 (N.D. Iowa 1989); In re Wickersheim, 107 B.R. 177, 182 (Bankr. E.D. Wis. 1989).

The only other mention of the dispute in the record is in a plan provision dealing with the treatment of defendant's claim which states, in pertinent part: "It is unclear at this time to what extent the Bank is obligated to the Debtor for a silage unloader missing from the farmstead at the time Debtor acquired the property from the Bank." This statement appears in debtors' Chapter 12 Plan of Reorganization filed March 8, 1990, was objected to by defendant on April 3, 1990,<sup>8</sup> reappears in debtors' Amended Chapter 12 Plan of Reorganization filed June 20, 1990 and in their Second Amended Chapter 12 Plan of Reorganization filed August 3, 1990, was objected to by defendant on August 15, 1990,<sup>9</sup> and is absent from debtors' Corrected Second Amended Chapter 12 Plan of Reorganization filed October 10, 1990.<sup>10</sup> Debtors' Corrected Second Amended Chapter 12 Plan of Reorganization was

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<sup>8</sup>Paragraph 8 of defendant's objections states: "The [First National Bank of Highland] has no obligation to Debtors for any salvage unloader."

<sup>9</sup>Paragraph 4(c) of defendant's objections states: "The Bank takes exception and objects to the narrative portion related to the UCC-2 claim on the grounds that the Bank is not obligated to Debtors with respect to any 'missing' unloader."

<sup>10</sup>The Corrected Second Amended Chapter 12 Plan of Reorganization states as to defendant's UCC-2 claim: "See paragraphs 4 and 5 of attached Stipulation, Exhibit A." It states as to defendant's UCC-3 claim: "See attached Stipulation which is agreed to by the parties which is attached hereto and incorporated by reference as Exhibit A to this Corrected Second Amended Plan of Reorganization." The Stipulation and Agreed Order (Exhibit A), filed with the Court on October 12, 1990, is silent as to the dispute over the unloader. On October 12, 1990, the Court approved the Stipulation and Agreed Order and ordered as follows: "The above-referenced Stipulations shall be and are hereby made a part of the Plan, which shall, in all other respects, remain unchanged."

confirmed by order entered October 12, 1990. Thereafter, debtors moved two times to modify the confirmed plan. However, neither amendment had anything to do with the dispute over the unloader, or for that matter, with the swing arm assembly or haylage.<sup>11</sup> In fact, there are no references whatsoever in any version of the plan, or its post-confirmation amendments, to disputes over a swing arm assembly or haylage.

Plaintiff, however, to support his argument that the parties intended to reserve debtors' right to litigate over non-delivered farm equipment, directs the Court to the inclusion of the provision dealing with the unloader in the three versions of the plan leading up to the fourth, confirmed version and to a letter dated October 29, 1990 from defendant's former counsel to debtors' former counsel. This letter discusses counsels' negotiations over defendant's objections to the third version of the plan (the Second Amended Chapter 12 Plan) which culminated in the fourth, confirmed version. In the letter,

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<sup>11</sup>On October 24, 1990, debtors filed a motion to amend the confirmed plan and the Stipulation and Agreed Order entered October 12, 1990 to correct matters which they alleged failed to accurately reflect their agreement with defendant. Defendant's objection to the amendment was resolved at a hearing on November 15, 1990 and an Amended Stipulation and Agreed Order was entered on December 19, 1990. Neither the motion to amend nor the Amended Stipulation made any reference to correcting the plan to include the provision dealing with the dispute over the unloader.

On April 16, 1991, debtors again moved to modify the confirmed plan. Defendant's objection to the amendment was resolved at a hearing on May 23, 1991 and a First Amended Stipulation and Agreed Order was entered on June 24, 1991. Again, no reference was made in the motion to amend or in the First Amended Stipulation to the dispute over the unloader.

defendant's former counsel states:

[Debtors' counsel] and I were negotiating from the standpoint that the Second Amended Chapter 12 Plan would remain unchanged except to the extent it would be modified by our Stipulation. This is borne out by Paragraph A of the Order stating that the plan "shall, in all other respects, remain unchanged."

Plaintiff argues that this letter reveals the parties' intent that the provision dealing with the unloader be retained in the confirmed plan and raises a question of fact precluding summary judgment.<sup>12</sup> But, notably, debtors have never moved for postjudgment relief to correct what they claim was an inadvertent omission from the confirmed plan.

Rule 7056 of the Federal Rules of Bankruptcy Procedure, incorporating Rule 56(c) of the Federal Rules of Civil Procedure, states that summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Every reasonable factual inference is made in favor of the party opposing summary judgment, CropMaker Soil Services, Inc. v. Fairmount State Bank, 881 F.2d 436, 438 (7th Cir. 1989) (citing In re Wildman, 859 F.2d 553, 556 (7th Cir. 1988)), and all reasonable doubt about the existence of genuine issues of material fact is resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The motion is granted only if the

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<sup>12</sup>Plaintiff never addresses the question of whether the parties intended the disputes over the swing arm assembly and the haylage to be reserved for future litigation.

instruments offered the court fail to show a genuine issue of material fact. CropMaker Soil Services, Inc. v. Fairmount State Bank, 881 F.2d at 438 (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Nonetheless, the simple assertion of a factual dispute cannot defeat the motion. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242).

Here, plaintiff contends that a genuine issue of material fact precludes summary judgment because the parties are in dispute over whether or not the provision dealing with the unloader controversy was intentionally or inadvertently omitted from the confirmed plan. However, the Court finds that the assertion of this dispute is of no consequence. As discussed below, the Court holds today that defendant is entitled to summary judgment because plaintiff never bothered to correct any omission from the confirmed plan and that plan has res judicata effect as to all matters which were or could have been litigated prior to confirmation.

In reaching this conclusion, the Court first must determine whether state or federal res judicata law applies. To this end, the Court looks to the forum in which the initial litigation was brought. Where the prior adjudication was in federal court, federal res judicata law is controlling. In re Energy Co-op., Inc., 814 F.2d 1226, 1230 (7th Cir.), cert. denied, 484 U.S. 928 (1987). Here, of course, the original litigation was in the Bankruptcy Court.

The Court of Appeals for the Seventh Circuit holds that res judicata applies when three requirements are met: "(1) an identity of the parties or their privies; (2) an identity of the causes of actions

[sic]; and (3) a final judgment on the merits. Id.

Clearly, there is no question that the first element is satisfied here. Nor is there a sound basis to dispute that the confirmed plan, as modified, constitutes a final judgment on the merits. 11 U.S.C. S 1227(a).<sup>13</sup> See, e.g., Eubanks v. F.D.I.C., 970 F.2d 1389, 1392-93 (5th Cir. 1992); In re Hoffman, 99 B.R. at 936; In re Miller, 140 B.R. 499, 501 (Bankr. E.D. Ark. 1992); In re Wickersheim, 107 B.R. at 181; In re Cooper, 94 B.R. 550, 552 (Bankr. S.D. Ill. 1989); In re Grogg Farms, Inc., 91 B.R. 482, 485 (Bankr. N.D. Ind. 1988). See also 5 Collier on Bankruptcy ¶1227.01, at 1227-1 to 1227-2 (15th ed. 1992). The plan was confirmed on October 12, 1990. An order approving its last modification was entered on June 24, 1991. No appeal was taken and no motions for post-judgment relief have been filed. The order of confirmation and all post-confirmation modifications became final ten days after entry, Fed. R. Bankr. P. 8001(a), 8002, and are not subject to collateral attack. E.g., In re Miller, 140 B.R. at 501; In re Wharry, 91 B.R. 31, 33 (Bankr. N.D. Ohio 1988). See also 5 Collier on Bankruptcy, supra, ¶1227.01, at 1227-2. As a result, the intent of the parties as to the omission or inclusion of the unloader provision does not constitute a material question of fact. Plaintiff, having failed

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<sup>13</sup>Section 1227(a) provides in pertinent part:

[T]he provisions of a confirmed plan bind the debtor . . . [and] each creditor . . . whether or not the claim of such creditor . . . is provided for by the plan, and whether or not such creditor . . . has objected to, has accepted, or has rejected the plan.

to appeal the confirmed plan, or to modify or correct its terms to preserve the provision at issue, may not make a collateral attack on the confirmed plan in this adversary proceeding. See In re Miller, 140 B.R. at 501; In re Martin, 130 B.R. 951, 960-61 (Bankr. N.D. Iowa 1991).<sup>14</sup>

The third element required for the plan to have res judicata effect is identity of the causes of action. The Seventh Circuit has adopted the "same transaction" test to determine whether two suits involve the same cause of action for purposes of res judicata. E.g., In re Energy Co-op., Inc., 814 F.2d at 1230-31; Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986) (quoting Alexander v. Chicago Park Dist., 773 F.2d 850, 854 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986)). Under this test, a "cause of action" consists of "'a single core of operative facts' which give rise to a remedy." Car Carriers, Inc. v. Ford Motor Co., 789 F.2d at 589 (quoting Alexander v. Chicago Park Dist., 773 F.2d at 854 (quoting Mandarino v. Pollard, 718 F.2d 845, 849 (7th Cir. 1983), cert. denied, 469 U.S. 830 (1984))). Simply changing the legal theory does not create a new cause of action. Id. (citing Alexander v. Chicago Park Dist., 773 F.2d at 854).

In the instant case, defendant filed a claim against the estate based, in part, on the debt arising from the sale of the farmland, the

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<sup>14</sup>Moreover, assuming arguendo that there is ambiguity or a mistake in the language of the confirmed plan, that language must be construed against the debtors as the drafters of the plan. E.g., In re Wickersheim, 107 B.R. at 181.

farm equipment and, as alleged by plaintiff, the haylage. The allegations of plaintiff's breach of contract action are but counterclaims which seek to recover from defendant those damages which plaintiff alleges debtors incurred as a result of defendant's breaches in failing to deliver as specified under the sale contract. As such, plaintiff's cause of action is part of the same transaction that gave rise to defendant's claim against the estate based on the sale. It puts into issue the same facts which determined the treatment and amount of the debt arising from that sale owed to defendant under the confirmed plan. Eubanks v. F.D.I.C., 970 F.2d at 1393-97; Sure-Snap Corp. v. State Street Bank and Trust Co., 948 F.2d 869, 874-75 (2nd Cir. 1991); In re Howe, 913 F. 2d 1138, 1144-45 (5th Cir. 1990); In re Hoffman, 99 B.R. at 936-37; Oneida Motor Freight v. United Jersey Bank, 75 B.R. 235, 238-39 (D. N.J. 1987), aff'd, 848 F.2d 414 (3rd Cir.), cert. denied, 488 U.S. 967 (1988). In other words, that portion of defendant's claim in the bankruptcy proceeding arising from the sale and plaintiff's cause of action alleging breaches of the sale contract both "seek to reconcile the parties' obligations under their contract . . . ." In re Energy Co-op., Inc., 814 F.2d at 1231.

And, in fact, plaintiff recognizes that the instant lawsuit stems from the same "core of operative facts" as the proceedings in bankruptcy which led up to plan confirmation. His argument opposing summary judgment is directed not at proving the dissimilarity of the litigation but at proving the existence of a question of fact. He concedes that debtors raised the issue of the unloader dispute in the bankruptcy case and that, in several versions of the plan, they

attempted to reserve the right to litigate the dispute outside the plan. However, in the end, the provision allowing further litigation of the dispute was absent from the confirmed plan. And plaintiff's argument that the intent of the parties was to include the provision lacks merit in the face of debtors' failure to seek post-judgment relief to correct any omission.

But what of the disputes over the swing arm assembly and the haylage? These were never mentioned in the bankruptcy proceeding. Nonetheless, these disputes are barred today. The "same transaction" test requires "that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future." Shaver v. F. W. Woolworth Co., 840 F.2d 1361, 1365 (7th Cir.), cert. denied, 488 U.S. 856 (1988). "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or be lost." Car Carriers, Inc. v. Ford Motor Co., 789 F.2d at 593. "Therefore, prior litigation acts as a bar not only to those issues which were raised and decided in the earlier litigation but also to those issues which **could** have been raised in that litigation. Id.

Plaintiff's disputes with defendant over the sweep arm assembly and the haylage arise from the same factual core as the unloader dispute - the sale from defendant to debtors and the alleged breach by defendant of certain terms of that sale. They too are counterclaims which debtors could, and should, have asserted in the bankruptcy proceeding prior to plan confirmation to offset some part of

defendant's claim against the estate.<sup>15</sup> Plaintiff's attempt to litigate the issues now is foreclosed by res judicata. See, e.g., Eubanks v. F.D.I.C., 970 F.2d at 1394-97.

See Order entered this date.

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/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: November 16, 1992

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<sup>15</sup>Counterclaims by the estate against persons filing claims against the estate are core proceedings. 28 U.S.C. §157(b)(2)(C). See also Barnett v. Stern, 909 F.2d 973, 979 (7th Cir. 1990) (holding that previously unasserted claims for relief are barred by res judicata only if they would have been core proceedings in the bankruptcy case).