

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Outboard Marine Corporation

Bankruptcy No. 00 B 37405

Adversary Caption: Alex D. Moglia, Chapter 7 Trustee v. Johnson Outdoors, Inc.
d/b/a Johnson Worldwide Associates

Adversary No. 02 A 00750

Date of Issuance: April 24, 2003

Judge: John H. Squires

Appearance of Counsel:

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

| | | |
|--|---|---------------------------|
| IN RE: |) | |
| OUTBOARD MARINE CORPORATION, |) | |
| |) | Chapter 7 |
| Debtor. |) | Bankruptcy No. 00 B 37405 |
| _____ |) | Judge John H. Squires |
| |) | |
| ALEX D. MOGLIA, not personally but as |) | |
| Chapter 7 Trustee for Outboard Marine |) | |
| Corporation and its related debtor entities, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Adversary No. 02 A 00750 |
| |) | |
| JOHNSON OUTDOORS, INC. d/b/a |) | |
| JOHNSON WORLDWIDE ASSOCIATES, |) | |
| |) | |
| Defendant. |) | |

MEMORANDUM OPINION

This matter comes before the Court on the motion of Alex D. Moglia, Chapter 7 case trustee (the “Trustee”) for the debtor, Outboard Marine Corporation and its related entities (the “Debtor”) to dismiss the counterclaim filed by the defendant, Johnson Outdoors, Inc. d/b/a Johnson Worldwide Associates (“Johnson”) pursuant to Federal Rule of Civil Procedure 12(b)(6), incorporated by reference in Federal Rule of Bankruptcy Procedure

7012.¹ For the reasons set forth herein, the Court grants the Trustee's motion to dismiss Johnson's counterclaim.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F) and (O).

II. APPLICABLE STANDARDS

In order for the Trustee to prevail on his motion to dismiss Johnson's counterclaim under Federal Rule of Civil Procedure 12(b)(6) and its bankruptcy analogue Federal Rule of Bankruptcy Procedure 7012, it must clearly appear from the pleadings that Johnson can prove no set of facts in support of its claim which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Veazey v. Communications & Cable of Chicago, Inc., 194 F.3d 850, 854 (7th Cir. 1999). The Seventh Circuit has emphasized that "[d]espite their liberality on pleading matters . . . the federal rules still require that a [counterclaim] allege

¹ The Trustee styled the motion as a motion to strike. A motion to strike, however, is properly made under Federal Rule of Civil Procedure 12(f) wherein the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). In spite of styling the motion as a motion to strike, the Trustee has invoked Federal Rule of Civil Procedure 12(b)(6) as the basis for the motion. The standards under Rules 12(b)(6) and 12(f) are different. The Court will treat and refer to the Trustee's motion as a motion to dismiss pursuant to Rule 12(b)(6) because this is the basis for the Trustee's motion.

facts that, if proven, would provide an adequate basis for each claim." Gray v. Dane County, 854 F.2d 179, 182 (7th Cir. 1988) (citations omitted).

Moreover, the Court must take as true all well pleaded material facts in the counterclaim, and must view these facts and all reasonable inferences which may be drawn from them in a light most favorable to Johnson. See Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323, 326 (7th Cir. 2000). The issue is not whether Johnson will ultimately prevail, but whether it has pleaded a cause of action sufficient to entitle it to offer evidence in support of its claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the counterclaim, not to decide the merits of the case. Demitropoulos v. Bank One Milwaukee, N.A., 915 F. Supp. 1399, 1406 (N.D. Ill. 1996) (citing Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)).

Generally, federal notice pleading standards require only that the counter-plaintiff give the counter-defendant fair notice of the claims and the grounds for those claims. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993), Conley, 355 U.S. at 47. Rule 8(a) of the Federal Rules of Civil Procedure requires only that a counterclaim identify the basis for jurisdiction and contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). A counterclaim must, however, allege facts sufficiently setting forth the essential elements of the cause of action. Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir.), cert. denied, 506 U.S. 893 (1992). Mere conclusory allegations unsupported by factual assertions

will not withstand a motion to dismiss. Reed v. City of Chicago, 77 F.3d 1049, 1051 (7th Cir. 1996).

III. FACTS AND BACKGROUND

On May 23, 2002, the Trustee filed the instant adversary proceeding against Johnson. The multi-count complaint sought to avoid and recover certain alleged preferential transfers against Johnson pursuant to 11 U.S.C. § 547(b) and § 550(a). On November 25, 2002, the Trustee filed a motion for leave to amend the complaint to increase the amount of the Trustee's claim against Johnson and to amend Johnson's name. On December 10, 2002, the Court entered an agreed order granting the Trustee's motion to amend his complaint. On December 20, 2002, Johnson filed its answer, affirmative defenses and counterclaim. Therein, Johnson asserts in its counterclaim that it has a fixed, non-contingent claim against the Debtor in the sum of \$429,465.89 arising from goods with a value of \$229,465.89, which were sold and delivered by Johnson to the Debtor prior to the commencement of the bankruptcy case, and an additional estimated \$200,000.00 of incidental damages incurred when the Debtor breached the supplies contract that the parties had entered into.

On February 26, 2003, the Trustee filed the instant motion to dismiss Johnson's counterclaim. The Court set a briefing schedule on the motion and then took the matter under advisement.

IV. DISCUSSION

In his motion to dismiss Johnson's counterclaim, the Trustee contends that the counterclaim asserts an improper setoff claim. Specifically, the Trustee maintains that the debt underlying Johnson's setoff claim does not possess the same characteristic of mutuality with that of the Trustee's preference cause of action. See In re NTG Indus., Inc., 103 B.R. 195, 197 (Bankr. N.D. Ill. 1989). Further, the Trustee argues that Johnson's request for incidental damages in the approximate amount of \$200,000.00 when the Debtor breached the supplies contract raises a post-petition, pre-conversion administrative expense claim, which must be denied as untimely because the bar date for filing administrative claims in the bankruptcy case was November 15, 2002.

Johnson contends that when the bankruptcy case was commenced, it had unsecured claims against the Debtor for goods delivered and goods made specifically for the Debtor. In its answer to the amended complaint, Johnson asserts "payment in the ordinary course" and "new value" as affirmative defenses pursuant to 11 U.S.C. § 547(c)(2) and (c)(4) against the Trustee for the value of the goods manufactured and/or delivered to the Debtor. Johnson maintains that its counterclaim against the Trustee asserts a claim against the Debtor's estate for the value of those damages. Additionally, Johnson argues that the counterclaim does not refer to 11 U.S.C. § 503 or utilized language that would indicate that it was in fact seeking an administrative or priority claim. Further, Johnson acknowledges that while the counterclaim makes reference to "offset," the counterclaim is not an attempt to assert a setoff under 11 U.S.C. § 553 against the Trustee's preference allegations. Finally, Johnson argues that it

asserted its counterclaim because the facts concerning its unsecured claim against the Debtor arose from the same transactions and occurrences which were pleaded in the Trustee's amended complaint and because its unsecured claim relates to the preference allegations asserted by the Trustee.

The Trustee replies to Johnson's arguments that the counterclaim is an inappropriate method for amending and adjudicating its pre-petition unsecured claim against the Debtor's estate. The Trustee argues that Johnson is improperly attempting to amend its proof of claim (Claim No. 3126, which was timely filed in the bankruptcy case) in this adversary proceeding to assert additional "incidental damages" estimated to be \$200,000.00.

The Court hereby grants the Trustee's motion to dismiss Johnson's counterclaim. The Court wholly agrees with the Trustee's position that Johnson's counterclaim is an attempt to amend its timely filed proof of claim to assert additional incidental damages in the approximate sum of \$200,000.00. While the Court understands that Johnson's claim for "incidental damages" may have arisen from the same transactions or occurrences as the preference allegations, a counterclaim in this adversary proceeding is not the proper method to assert those damages. Johnson cannot compel the adjudication of its pre-petition claim against the Debtor's estate simply because the Trustee has commenced an adversary proceeding under § 547(b) and § 550(a).

If Johnson seeks to amend its timely filed proof of claim, it may do so to include the alleged \$200,000.00 incidental damages. Indeed, under the claims process, Johnson's timely filed proof of claim is deemed allowed unless and until any objection thereto is filed. Pursuant

to Federal Rule of Bankruptcy Procedure 3001(f), “[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” Fed. R. Bankr. P. 3001(f); see also 11 U.S.C. §§ 501 and 502(a). If the Trustee prevails in his preference avoidance action, Johnson’s claim would be disallowed under the mandate of § 502(d) unless it has paid the amount or turned over the property avoided under § 547(b) and recovered under § 550(a). If Johnson chooses to file an amendment to its proof of claim, that amendment will be subject to the claims process under the Bankruptcy Code. Unfortunately, Johnson’s assertion of approximately \$200,000.00 in “incidental damages” as a counterclaim to the Trustee’s preference complaint is improper and the counterclaim must be dismissed.

V. CONCLUSION

For the foregoing reasons, the Court grants the Trustee’s motion to dismiss Johnson’s counterclaim.

This Opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

