2003 BNH 016 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-13453-JMD
Chapter 11

Spike Broadband Systems, Inc.,
Debtor

John M. Sullivan, Esquire
Daniel P. Luker, Esquire
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Concord, New Hampshire
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Douglas Greenwood
Creditor
Pro Se

MEMORANDUM OPINION

I. INTRODUCTION

Douglas Greenwood (the "Creditor") timely filed Proof of Claim No. 218 ("POC 218") in this proceeding claiming an unsecured claim against the Debtor in the amount of $929,333.33 for damages arising out of the Debtor's prepetition breach of an employment agreement. The Debtor filed an objection to POC 218 (Doc. No. 242) (the "Objection"). In the Objection the Debtor contends that the Creditor's claim is barred by *res judicata* due to a prepetition judgment in a suit by the Creditor against the Debtor over a breach of his employment agreement. The prepetition suit resulted in a judgment in the amount of $61,400.00 in favor of the Creditor, which judgment was paid by the Debtor.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

After a hearing on April 15, 2003 the Court entered an Order (Doc. No. 262) (the "Procedural Order") directing the parties to confer and determine which documents filed in the two prepetition Virginia state court proceedings were necessary to resolve the Debtor's *res judicata* objection. The Debtor was directed to file such documents as well as any legal arguments on or before April 25, 2003. The Creditor was given until May 9, 2003 to file any response to such documents, as well as any additional documents, and/or any legal argument. The Procedural Order stated that after the receipt of further pleadings and documents from the parties, it would rule on the Debtor's *res judicata* objection. If the POC 218 was not barred in its entirety by *res judicata*, the Court would then schedule further evidentiary hearings.

The Debtor submitted its memorandum of law together with Exhibits A through K (the "Debtor's Memorandum") (Doc. No. 266). The Debtor's response indicated that Exhibits D through I were prepetition state court pleadings agreed upon by the parties. The Creditor submitted his memorandum of law together with Exhibits A through R (the "Creditor's Memorandum") (Doc. No. 274). Some of the Creditor's exhibits are duplicates of those submitted by the Debtor, some are not. In accordance with the Procedural Order, the Court shall consider Exhibits D through I to the Debtor's Memorandum as a stipulated record of the prepetition proceedings in the Virginia state courts.

The Creditor computes his proof of claim under his employment agreement dated September 15, 1999 (the "Employment Agreement") with the Debtor's predecessor as follows:

Base Salary prior to 12/23/00	$120,000.00
Annual Bonus	$ 50,000.00
Total	$170,000.00
Multiplier per §7(d)(i)(2) of Employment Agreement	x 3
	$510,000.00
Interest from 12/23/00 to 2/22/02 (14 mos at 8.0%)	$ 47,600.00
Total	$557,600.00
Gross-Up Payment on account of taxes under §8 of the Employment Agreement assuming at 40% tax rate	÷ 0.60
Total Claim	$929,333.33

Based upon the stipulated record and the arguments of the parties there does not appear to be any material factual dispute regarding the history of the contractual or the litigation relations between the Creditor and the Debtor. On September 15, 1999, the Creditor and Integrity Communications, Inc., the Debtor's predecessor, entered into the Employment Agreement. During August of 2000, the Debtor acquired Integrity Communications, Inc. by merger. Subsequent to the merger, the Creditor claimed to be owed the sum of $61,400.00 under the terms of the Employment Agreement due to the "change of control" provisions in that agreement. On November 27, 2000 the Creditor's legal counsel made a final written demand on Spike for payment. See Creditor's Memorandum, Exhibit H. A check dated December 4, 2000 in the amount of $61,400.00 was issued by the Debtor and delivered to the Creditor. Id. On December 7, 2000 the Creditor delivered a letter to the Debtor terminating his employment under the terms of the Employment Agreement. See Creditor's Memorandum, Exhibit I. The Creditor stated that he was terminating his employment for "good reason," as defined in the Employment Agreement, due to (1) substantial changes in the authority and responsibility of his position, (2) the Debtor's breach of the

Employment Agreement due to its failure to pay monies due on August 3, 2000 upon the change of control, (3) the Debtor's failure to provide him with certain term life insurance coverage required upon a change of control, and (4) the Debtor's failure to review his job performance in over a year (the "Notice of Termination"). Id. The Debtor immediately stopped payment on the $61,400.00 check issued on December 4, 2000. See Creditor's Memorandum, Exhibit J. On December 8, 2000 the Debtor's General Counsel responded to the Creditor's resignation of December 7, 2000. The Debtor indicated that it did not accept the Creditor's resignation for "good reason," but that it had accepted his resignation "without good reason" and had announced the resignation to its other employees via e-mail (the "Acceptance of Resignation"). See Creditor's Memorandum, Exhibit K.

On or about December 20, 2000, the Creditor filed suit in the Circuit Court of the City of Richmond alleging a breach of the Employment Agreement by the Debtor for failure to pay $50,000.00 due upon a change of control and $11,400.00 in accrued, but unpaid, salary (the "First Lawsuit"). See Debtor's Memorandum, Exhibit D. On January 18, 2001 the state court entered a final judgment for $61,400.00 in favor of the Creditor. Debtor's Memorandum, Exhibit E. On April 3, 2001 the Creditor commenced another action against the Debtor in state court (the "Second Lawsuit"). Debtor's Memorandum, Exhibit F. The allegations in the Second Lawsuit alleged the same breach of contract issues raised in the Creditor's Notice of Termination plus an additional breach because of the Debtor's failure to cure the "good cause" for termination within the period specified in the Notice of Termination and the Employment Agreement. Id.

On May 7, 2001 the debtor filed an answer and counterclaims against the Creditor. Debtor's Memorandum, Exhibit G. On May 7, 2001, the Debtor also filed a special plea claiming that the Creditor is barred from bringing the Second Lawsuit by virtue of the final judgement in the

First Lawsuit and principles of *res judicata*. Debtor's Memorandum, Exhibit H. On June 1, 2001 the state court entered at the request of the parties a non-suit order as to all claims and counterclaims in the Second Lawsuit. Debtor's Memorandum, Exhibit I. That order provided:

> CAME the parties, by their respective counsel, pursuant to § 8.01-380 of the Code of Virginia, and requested a non-suit of their claims set forth in the Motion for Judgement and Counterclaim filed in this action. And it appearing proper to do so, the Court hereby
>
> ORDERS that this case be and hereby is non-suited ~~without prejudice~~ to the claims asserted by the parties.

Id. (strikeout in the original). The state court judge struck the words "without prejudice" from the form of non-suit order jointly submitted by counsel for the Debtor and Creditor.

The Creditor submitted with the Creditor's Memorandum copies of two letters from his counsel regarding certain conversations with the state court judge's law clerk following the entry of the non-suit order with the strikeout. See Creditor's Memorandum, Exhibit Q. The Debtor Filed a Motion to Strike (Doc. No. 275) the Exhibit containing the letters on the basis that it is hearsay. The Creditor responded to the Motion to Strike (Doc. No. 306) by submitting a copy of a letter to him dated May 30, 2003 form the state court judge explaining the rationale for his ruling in 2001.

III. DISCUSSION

The *res judicata* effect of the state court order non-suiting the Second Lawsuit is determined under the law of Virginia. See 11 U.S.C. § 502(b)(1); In re Edward G. Leroux, Jr., 216 B.R. 459, 467 (Bankr. D. Mass. 1997). Under Virginia law the doctrine of *res judicata* prevents "relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies." Bill Greever Corp. v. Tazewell Nat'l Bank,

504 S.E.2d 854, 856 (Va. 1998) (citing Bates v. Devers, 202 S.E.2d 917, 920 (Va. 1974)). A claim which "could have been litigated" is one which if tried separately would be subject to the prohibition against claim-splitting. Id. "Claim-Splitting" is brining successive suits on the same cause of action where each suit addresses only a part of the claim. Jones v. Morris Plan Bank of Portsmouth, 191 S.E. 608, 610 (Va. 1937). In order to bar the Creditor's claim in POC 218 based upon a defense of *res judicata*, the Debtor must establish four elements: (1) identity of the remedy sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made. Davis v. Marshall Homes, Inc., 576 S.E.2d 504, 506 (Va. 2003).

In this case the parties do not dispute that the Second Lawsuit involved the same parties, a request for money damages and allegations of one or more breaches of the same contract as the First Lawsuit. Accordingly, all of the elements of a *res judicata* defense are established with the exception of identity of the cause of action. The breach of contract alleged in the Second Lawsuit are not the same as the First Lawsuit. Therefore, the sole issue for this Court is whether the claims in the Second Lawsuit "could have been litigated" in the First Lawsuit. If the answer to this question is in the affirmative, then POC 218 would be barred because under Virginia law the Second Lawsuit would be prohibited. The Creditor contends that the claims in the Second Lawsuit involve claims arising from his termination of employment for good cause and, therefore, the claims did not accrue until after he filed the First Lawsuit because the cure period required under the Employment Agreement had not expired when the First Lawsuit was filed.

Although the Creditor provided the Debtor on December 7, 2000 with notice of his termination of employment with good cause under the terms of the Employment Agreement, the Debtor rejected that notice the following day taking the position that the Creditor had terminated

his employment without good cause. The Debtor not only advised the Debtor of its position, it also announced the Creditor's resignation to the other employees of the Debtor. Therefore, the Debtor knew as of December 8, 2000 that the Debtor had rejected his notice of termination for good cause. The Debtor's actions at best amounted to a rejection of any time to cure and were at least a rejection of any claim by the Creditor for damages arising from a termination by the Creditor for good cause.

Twelve days after the debtor's action, the Creditor filed the First Lawsuit against the Debtor for breach of the Employment Agreement and claimed money damages. The claims in the First Lawsuit arose because the Debtor stopped payment on a settlement check which had been delivered before the Creditor's notice of termination for good cause, but before the check cleared the Debtor's bank account. Therefore, at the time the First Lawsuit was filed the Creditor was aware of his dispute with the Debtor over the monies due him under his Employment Agreement as a result of his termination. In fact, but for his notice of termination on December 7, 2000, the claims raised in the First Lawsuit would appear to have been settled. Under the facts of this case, the Court finds that the Creditor's claims for damages for the Debtor's alleged multiple breaches of the Employment Agreement are not divisible and, under Virginia law, could not have been proceeded upon separately. Jones, 191 S.E. at 609.

IV. CONCLUSION

Accordingly, the Court finds that the Creditor's claims in POC 218 are barred by the doctrine of *res judicata* under Virginia law. Because POC 218 is barred by *res judicata*, the Court need not consider the impact of Exhibit Q to the Creditor's Memorandum, the Debtor's

Motion to Strike that exhibit or the Creditor's response. The Motion to Strike shall be denied as moot.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue separate orders consistent with this opinion.

DATED this 19th day of June, 2003, at Manchester, New Hampshire.

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge