**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

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|---|---|---|
| In re: | ) | Chapter 7 |
| | ) | |
| AMERICAN REMANUFACTURERS, INC., et al., | ) | Case No. 05-20022(PJW) |
| | ) | |
| | ) | Converted from Chapter 11 |
| | ) | Jointly Administered |
| Debtors. | ) | |
| _____ | ) | |
| | ) | |
| MONTAGUE S. CLAYBROOK, as Chapter 7 Trustee of The Estates of AMERICAN REMANUFACTURERS, INC., et al., | ) | |
| | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Adv. Proc. No. 07-51750 (PJW) |
| | ) | |
| METRO AUTO XPRESS, LLC, trading as TRI-CITY AUTOMOTIVE WAREHOUSE, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION**


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Dated: March 19, 2010

**WALSH, J.**

This opinion is with respect to the motion ("Motion") of Defendant Metro Auto Xpress, LLC, trading as Tri-City Automotive Warehouse ("Metro Auto" or "Tri-City") for summary judgment with respect to Complaint of Plaintiff Montague S. Claybrook, Chapter 7 Trustee ("Trustee") for the estates of American Remanufacturers, Inc., et al., (collectively, the "Debtors"), for breach of contract, unjust enrichment, and quantum meruit, or, in the alternative, to recover transfers pursuant to 11 U.S.C. §§ 547, 548, 549 and 550. (Adv. Doc. # 68.) I will deny the Motion because I am unable to conclude that Metro Auto met its burden of showing that there are no issues of material fact. Among other things, the inconsistencies between the Motion papers and Metro Auto's Answer show why it has not met its burden for summary judgment.

**BACKGROUND**

American Remanufacturers, Inc. ("ARI") was a North American remanufacturer of automotive under body components. The company purchased broken and used parts ("Cores") from customers and remanufactured them into their original equipment tolerances for resale and reuse. Automotive Caliper Exchange, Inc. ("ACE") was one of the affiliated companies owned by ARI and included in the bankruptcy filings. Prior to filing its bankruptcy petition, ACE sold remanufactured automotive parts to its customers in the United States. (Adv. Doc. #1.)

On November 5, 2007, the Trustee filed a Complaint on behalf of the Debtors, alleging that Defendant Metro Auto purchased automotive parts from ACE on account and sold Cores back to ACE for credit. (Adv. Doc. #1.) The Trustee further alleged that as of January 12, 2006, Metro Auto had an outstanding balance of $218,328.96 on account with ACE. The Trustee's Complaint charged Metro Auto with eight counts. (Adv. Doc. #1.) In response, Metro Auto filed a motion to dismiss certain counts. On July 25, 2008, this Court granted the motion to dismiss, allowing only counts for breach of contract, unjust enrichment, quantum meruit, and turnover of estate property. (Adv. Doc. # 27.)

By its Motion, Metro Auto asserts that it has a valid recoupment or, in the alternative, setoff defense against the Trustee's claim, due to its alleged credits of $215,385.11. Metro Auto further asserts that due to its setoff defense, it owes ARI no more than $2,943.85. To support its Motion, Metro Auto attached declarations by one of its current employees and two of ARI's former employees.

**DISCUSSION**

**Standard for Summary Judgment**

Under Bankruptcy Rule 7056, which adopts Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment may be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine

issue as to any material fact . . . .” Fed. Rules Bankr. Proc. Rule 7056. In other words, “summary judgment may be granted for the movant only when the movant carries forward his burden of clearly showing that there are no genuine issues of material fact and that a formal trial would be needless.” In re Georgia Jewelers, Inc., 219 F.Supp.386, 390 (D.C.Ga. 1962).

**Metro Auto’s Answer Does Not Specify Which Agreements Are Relevant To Its Motion**

Metro Auto makes the following statement in its Answer:

> Metro Auto admits that it entered into a Vendor Agreement with ARI dated October 17, 2000 and that a copy of the Vendor Agreement is attached to the Complaint as Exhibit “A,” however, it appears to be incomplete. A complete copy of the ARI Agreement is attached hereto as **Exhibit 1.**

(Adv. Doc. # 67, ¶ 23.)

Contrary to this statement, the record shows that the “Vendor Agreement” is not attached to the Complaint as Exhibit A. Furthermore, a copy of the “ARI Agreement” is not attached to the Answer as Exhibit 1. Additionally, the Answer does not clarify whether the “ARI Agreement” is the “Vendor Agreement,” but assuming that it is, Metro Auto is inconsistent about the number of agreements involved. On page 12 of its Answer, Metro Auto alleges:

> Metro Auto avers that any transactions by and between Metro Auto and ARI are governed by the Vendor Agreements executed by Metro Auto and the respective Debtors (the ‘Vendor Agreements’). . . .

(Adv. Doc. #67, p. 12.)

Note that Metro Auto is now referencing "Vendor Agreements". This inconsistency occurs in various other parts of the Answer.

On page 14 of the Answer, in its twelfth affirmative defense, Metro Auto asserts:

> Metro Auto reserves all rights and claims pursuant to Bankruptcy Rule 7013 including, but not limited to, Metro Auto's rights to enforce the Addendum to Vendor Agreement; the right to enforce the Vendor Agreements with ARI with regard to payment of freight charges, applicable credits, return of goods . . . .

(Adv. Doc. # 67, pp. 14-15) (emphasis added).

Metro Auto confuses the facts within the scope of this single defense. I presume that Metro Auto would want to reserve its rights to enforce the Addendum to the Vendor Agreement, and the right to enforce the Vendor Agreement. However, the language it uses implies that either additional agreements are involved in which Metro Auto is not reserving rights, or that the two mentioned agreements are not the same.

On page 16 of the Answer, Metro Auto asserts:

> ARI wrongfully refused to accept the return of goods and the shipment of cores from Metro Auto as required by the Vendor Agreements, and have failed to provide appropriate credits and allowances to Metro Auto pursuant to said Vendor Agreements and are therefore in breach of said Vendor Agreements.

(Doc. #67, p. 16)(emphasis added).

I note that Metro Auto again continues to reference "Vendor Agreements", furthering the confusion.

Notwithstanding Metro Auto's focus on Vendor Agreements as being determinative on the issues raised by the Complaint and the Answer, it is striking that there is no reference in the Motion papers to a Vendor Agreement. Whether mistakenly or purposely omitted, the reference is necessary to understand the basis for Metro Auto's motion for summary judgment. The absence of such reference makes it difficult, if not impossible, to understand and to rule on Metro Auto's Motion.

**Metro Auto's Motion Is Unclear and In Conflict With Metro Auto's Answer**

Metro Auto's Motion contains a number of inconsistent comments and allegations which are difficult to decipher and which do not reconcile with its Answer. One example is the following statement in the Motion:

> In response, Metro Auto asserts that as of the petition date, it had claims against ARI in the amount of $215,385.00 based on the same contract that purportedly gave rise to the alleged outstanding accounts receivable.

(Adv. Doc. #69, p. 1.)

It is unclear what "contract" Metro Auto is referencing. It could either be the Vendor Agreement (or Agreements), of which we have insufficient knowledge, or the "Statement of Sales Policy" which is

attached as Exhibit A to the Declaration of Wayne Schaack in support of the Motion ("Schaack Declaration").

In another part of the Motion, Metro Auto states:

> As of the petition date and pursuant to the Statement of Sales Policy, Metro Auto was entitled to: 1) a Core Credit (based on prepaid core value) and defective returns in the total amount of $180,935.34, 2) a 2005 Volume Rebates in the amount of $23,487.07 and 3) a 2005 Marketing Allowance in the amount of $2,531.70 . . . .
>
> All of these claims are based on the Statement of Sales Policy and existed as of the petition date. The entire series of invoiced transactions are governed by the single, uniform Statement of Sales Policy. Accounting for these recoupment and/or setoff claims, the amount actually owed to ARI is approximately $2,943.79.

(Doc. #69, pp. 6-7.)

The first obvious discrepancy is in the document that governs the dispute in this case. As quoted above, Metro Auto's allegation that "[t]he entire series of invoiced transactions are governed by the single, uniform Statement of Sales Policy" is in direct conflict with Metro Auto's allegations in the Answer that the transactions are governed by the Vendor Agreements. The second discrepancy is in the figures listed. According to the Motion, "Metro Auto asserts that as of the petition date, it had claims against ARI in the amount of $215,385.00." (Adv. Doc. #69, p. 1.) However, the three figures included in the first paragraph of the above-quoted statement add up to $206,954.11. With uncertainty as

to the material facts in this case-the governing document or documents in the dispute and the sum of funds involved–it is virtually impossible to rule on a motion for summary judgment, which requires no genuine issue as to any material fact.

**The Declarations Attached to Metro Auto's Motion are not in compliance with the Federal Rules of Evidence**

To give more substance to its factually incoherent Motion, Metro Auto offers declarations by three individuals, who are purportedly in the position to testify on the transactions between Metro Auto and ARI. The offered declarations, however, do not satisfy the Federal Rules of Evidence.

The Declaration of Wayne Schaack states:

> The exhibits, orders, letters, and contracts I attach are all records I am the custodian of for Metro Auto Xpress, LLC, trading as Tri-City Automotive Warehouse ("Metro Auto") that were produced in the ordinary course of business . . . .

(Doc. # 69, Declaration of Wayne Schaack, ¶ 1.)

According to Federal Rule of Evidence 803(6), the Court can accept exhibits, such as memoranda, reports, records, or data compilations if they are "kept in the course of a regularly conducted business activity . . . as shown by the testimony of the custodian . . . ." Fed. R. Evid. 803(6). As discussed in further detail below, my review of Exhibits "D" and "E" to the Schaack Declaration leads me to conclude that those documents were not prepared in the ordinary course of business.

In paragraph 17 of his Declaration, Mr. Schaack states:

> In connection with my responsibilities for Metro Auto I have completed an accounting of the respective obligation between the parties. . . . Attached hereto as **Exhibit "D"** is a true and correct copy of an accounting summary of the respective obligations owed by ARI to Metro Auto; see also **Exhibit "E"** is a summary of the outstanding credits owed by ARI to Metro Auto . . . .

(Doc. # 69, Declaration of Wayne Schaack, ¶ 17.)

It should be noted that Exhibit "D" is identified as an "accounting summary" of obligations that ARI purportedly owes Metro Auto. I seriously doubt that a summary document, such as the one presented, was prepared in the ordinary course of Metro Auto's business. Similarly, the Declaration identifies Exhibit "E" as "a summary of the outstanding credits owed by ARI to Metro Auto." Any lay person could tell from looking at Exhibit "E" that it is a summary, the underlying information for which was taken from other sources, as evidenced by several references to "see letter". Exhibit "E" is therefore unlikely to have been made in the ordinary course of business. Lastly, both exhibits are presented into evidence by Mr. Schaack, whose Declaration I do not consider to be testimony under oath and subject to cross-examination. For the stated reasons, I will not accept Exhibits "D" and "E" as ordinary course documents.

Under the Federal Rule of Evidence 802, hearsay is not admissible unless it falls into one of the enumerated exceptions.

Paragraph 18 of the Schaack Declaration contains an obvious hearsay statement:

> I am informed that Metro Auto has complied with all its obligations under the Statement of Sales Policy. I am further informed that once ARI filed for bankruptcy it refused to accept any of the cores which were and, have been, ready for return to ARI in accordance with the terms of the Statement of Sales Policy.

(Adv. Doc. # 69, Declaration of Wayne Schaack, ¶ 18.)

This statement does not fall into any of the enumerated exceptions, and therefore I will not accept it into evidence.[1]

To add to the string of non compliance with the Federal Rules of Evidence, Metro Auto did not properly establish the qualifications of its witnesses. Metro Auto presented the witnesses as either current or previous employees of either itself or the Debtors. Paragraph 20 of the Schaack Declaration states:

> Based on my experience in the industry and knowledge of the facts in this situation, it is my opinion that the Metro Auto should be credited for outstanding cores

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[1] The Declaration of Mark Sromalla (Adv. Doc. #69) contains similar statements of hearsay:

"I am informed that the Statement of Sales Policy contains provisions for Core Return Policy and Defective Return." Id. at ¶ 7.

"I am informed that the above practice was a well settled practice governed by the Statement of Sales Policy . . . ." Id. at ¶ 13.

> and defective products. This is consistent with the prior business practice of the Debtor. This is also consistent with the industry standard for the auto after market.

(Adv. Doc. # 69, Declaration of Wayne Schaack, ¶ 20.)

Mr. Schaack's conclusion that the practice in question is consistent with the industry standard for the auto after market is more than a mere statement by a person with first hand knowledge of the transactions between the parties. Mr. Schaack's conclusion sounds as an opinion of an expert in the field. Unless Mr. Schaack becomes a disinterested expert witness on this subject, I give no weight to his opinion.[2] The Schaack Declaration cannot be accepted as a showing "that there is no genuine issue as to any material fact" as required by Bankruptcy Rule 7056.

**Metro Auto's Motion Fails To Prove Its Mitigation of Damages for ARI's Alleged Breach of Contract**

Metro Auto's counterclaims include a count asserted as ARI's alleged breach of contract. If the recoupment/setoff is deemed to be based upon a breach of contract, then Metro Auto has the burden of proving mitigation of damages. The Motion does not address this issue.

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[2] Paragraph 15 of Mark Sromalla's Declaration and paragraph 17 of the Warren Tardie Declaration, contain statements identical to paragraph 20 of the Schaack Declaration. (Adv. Doc. # 69.) Neither Mr. Sromalla nor Mr. Tardie was identified as a disinterested expert witness, and I therefore decline to give weight to their opinions as well.

**CONCLUSION**

For the reasons stated above, Metro Auto's motion for summary judgment is denied.

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**DISTRICT OF DELAWARE**

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| Defendant. | ) | |

**ORDER**

For the reasons set forth in the Court's memorandum opinion of this date, the Defendant's motion for summary judgment (Doc. # 68) is **denied.**

PETER J. WALSH
United States Bankruptcy Judge

Dated: March 19, 2010