

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

APACHE PRODUCTS COMPANY,

Chapter 11 Case
Case No. 02-20896-8P1

Debtor. _____/

APACHE PRODUCTS COMPANY,

Plaintiff,

vs.

Adv. Proc. No. 03-462

MR. WINTER, INC.,

Defendant. _____/

**FINDINGS OF FACTS, CONCLUSIONS
OF LAW AND MEMORANDUM OPINION**

In the above-captioned adversary proceeding, Apache Products Company (Debtor) filed a two-count Complaint to Require Turnover of Property (Complaint) as against Mr. Winter, Inc. (Mr. Winter). In the Complaint, the Debtor alleges that it supplied commercial materials to Mr. Winter from November 4, 2004 through March 21, 2003 and issued invoices for the materials sold. The Debtor further alleges that Mr. Winter failed to pay for the materials and owes the Debtor \$142,595.80 plus interest and late fees. Count I is for turnover of property pursuant to 11 U.S.C. § 542(a) and Count II is for the alternative relief pursuant to 11 U.S.C. § 542(b).

In due course, Mr. Winter filed its Answer and Affirmative Defenses admitting and denying the allegations pled in the Complaint and asserting five affirmative defenses. The affirmative defenses are summarized as follows: (1) the claims are barred in whole or in part by payment over the long term relationship of the parties; (2) Mr. Winter is entitled to a setoff due to the damages sustained by the defective materials supplied by the Debtor; (3) there is an accord and satisfaction which Mr. Winter is fully and faithfully performing; (4) the Debtor failed to mitigate; and (5) the Debtor has unclean hands.

The matter was set for final evidentiary hearing, upon which this Court heard testimony of witnesses, received documents entered into evidence and now finds and concludes as follows.

The Debtor was previously in the business of manufacturing and/or distributing certain types of foam insulation, in the form of EPS and ISO-25. Mr. Winter is in the business of constructing walk-in coolers and freezers and uses the foam insulation with its business.

It is without dispute that the Debtor and Mr. Winter have had a long-standing relationship, dating back to 1975. Moreover, it is without dispute that for almost that entire time, the Debtor was Mr. Winter's sole supplier of foam insulation. Finally, it is without dispute that Mr. Winter paid the Debtor on a regular basis but that its balances exceeded 30 days net, and it was not

uncommon for there to be balances owed to the Debtor in excess of \$20,000 and for more than 90-days net.

It is without dispute that as of the filing of the Debtor's Chapter 11 case, which was on October 22, 2002, Mr. Winter had a past-due balance with the Debtor. Following the Debtor's filing for Chapter 11 relief, the relationship between the Debtor and Mr. Winter became strained. On February 10, 2003, Greg Thompson, the Chief Financial Officer of the Debtor corresponded with Manny Mijares, the president of Mr. Winter stating that all deliveries going forward would be on a COD plus, 25% of the current invoice terms until the account of Mr. Winter was current. (Db. Ex. 5). As of the date of that letter, the Debtor indicated that Mr. Winter owed \$116,816.05 but in another part of the letter indicated that the amount owed was \$161,826.31.

Following this letter, there was an exchange of correspondence between the parties regarding whether or not there was a minimum weekly amount that had to be purchased by Mr. Winter. It appears that there was never an agreement about this minimum purchase, as Mr. Thompson did not execute the letter from Mr. Layne, the attorney for Mr. Winter. (Db. Exs. 6 & 7).

Regardless, it is without dispute that Mr. Winter did continue to purchase product from the Debtor and did make some payments according to the terms of the "COD + 25% of current invoice terms." And, equally, it is without dispute

that the Debtor accepted these payments and applied them against the outstanding balance due from Mr. Winter. However, the record is clear that Mr. Winter did not pay off the balance in full, and as of the filing of the Complaint, Mr. Winter owed the Debtor the sum of \$136,538.41. (Db. Ex. 1).

This Court is satisfied that the evidence demonstrates that Mr. Winter owes the Debtor the sum of \$136,538.41. There was no evidence that rebuts the Debtor's contention that Mr. Winter does not owe that amount. This leaves for consideration Mr. Winter's affirmative defenses. At the trial, this Court indicated that failure to mitigate damages and equitable defenses are not valid affirmative defense under Federal law. This leaves for consideration the three defenses of setoff, that the debt has been paid, and accord and satisfaction.

Setoff is a defense asserted to diminish or extinguish a plaintiff's claim. In this case, at the trial, Mr. Winter presented both testimony and documentary evidence asserting that Mr. Winter has sustained damages in the amount of \$38,507 for defective materials supplied by the Debtor. (Def. Ex. 5). This Court is satisfied that Mr. Winter is entitled to a setoff.

With respect to the affirmative defenses of accord and satisfaction and that the debt has been paid, this Court is satisfied that Mr. Winter failed to prove with competent evidence these affirmative defenses.

Based upon the foregoing, this Court is satisfied that as to Count I, there is no *res* within which turnover is appropriate pursuant to 11 U.S.C. § 542(a) and therefore, this Count shall be dismissed with prejudice. However, with respect to Count II, this Court is satisfied that the Debtor has proven by the preponderance of the evidence that Mr. Winter owes the Debtor the sum of \$136,538.41 less the setoff in the amount of \$38,507 for a total amount owed to the Debtor of \$98,031.41, and is entitled to a judgment in its favor and against Mr. Winter pursuant to 11 U.S.C. § 542(b).

A separate Final Judgment shall be entered in accordance to the foregoing.

DATED at Tampa, Florida, on Oct. 4, 2004.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
U.S. Bankruptcy Judge