

DOCKET NUMBER: 94-12435

ADV. NUMBER:

JUDGE: M. A. Mahoney

PARTIES: RAB Industries, Inc., GIS-Handels AG

CHAPTER: 11

ATTORNEYS:

DATE: 7/28/95

KEY WORDS:

PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

RAB INDUSTRIES, INC.

Case No. 94-12435-MAM-11

Debtor.

ORDER DETERMINING STATUS OF
GIS-HANDELS AG CLAIM

Debtor filed a Motion to Determine Administrative Claim of GIS-Handels AG (“GIS”) after the Court ruled that no monies could be paid to GIS until the status of its claim was considered. Based upon the evidence presented, the Court finds that the claim of GIS is a prepetition debt in full or prepetition debt in part and postpetition debt in part.

The Court has jurisdiction to hear the matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O).

RAB Industries, Inc. (“RAB” or the “Debtor”) manufactures and wholesales a variety of infant products. GIS is a Swiss supplier/ manufacturer of stuffed animals. Prior to October 1994, RAB entered into a verbal contract with GIS to sell GIS merchandise in the United States. The president of RAB testified that a contract was made between GIS and RAB although he was not aware of the exact terms of it when made because he was not employed as CEO until after the contract was agreed upon. RAB had never distributed juvenile toy products before.

On November 14, 1994, GIS informed RAB that 2 containers of stuffed animals were to be shipped to RAB shortly. RAB did not act to stop the shipment. In fact, fax memoranda

indicate that both RAB and GIS acknowledged the existence of the contract on November 17, 1994.

The shipping documents reflect the following:

SHIPMENT # 1

GIS-Handels Invoice Date: November 9, 1994
Invoice Terms: FOB Port Europe
Total Invoice Amount: \$49,657
Bill of Lading Date: November 17, 1994 (Antwerp)
U.S. Entry Date: December 15, 1994

SHIPMENT # 2

GIS-Handels Invoice Date: November 21, 1994
Invoice Terms: FOB: (unclear)
Total Invoice Amount: \$40,464.20
Bill of Lading Date: November 28, 1994 (Zurich)
U.S. Entry Date: unknown

RAB received both shipments after the filing of its Chapter 11 case on November 21, 1994.

To date, RAB has not paid GIS on either invoice. Neither RAB nor GIS has made any motion relating to assumption or rejection of the agreement. The CEO of RAB testified that generally RAB was not committed to pay for goods until the date a Bill of Lading was issued.

The Court must determine whether the claim of GIS is a prepetition claim under the definition of “claim” in Section 101(5) in the Bankruptcy Code which must be treated under Sections 501 and 502, or is a postpetition administrative expense under Section 503. A “claim” is a “right to payment . . . or . . . right to an equitable remedy for breach of performance.”

11 U.S.C. § 101(5).

Whether or not a right to payment or a right to an equitable remedy existed for GIS at the filing of RAB’s case on November 21, 1994 is governed by state law. *Chiasson v. J. Louis Matherne and Assoc. (In re Oxford Management, Inc.)*, 4 F.3d 1329 (5th Cir. 1993). Under Alabama law, the intent of the parties and their understanding of an agreement governs. *Mayo v.*

Andress, 373 So. 2d 620 (Ala. 1979). RAB admitted GIS and RAB had a contract. RAB also admitted that generally it was liable for payment once a Bill of Lading was issued for product it agreed to buy. Based on these admissions alone, RAB was clearly liable prepetition to GIS for Shipment #1. The Alabama version of the Uniform Commercial Code also dictates this conclusion. Section 7-2-401(2)(a) states that “If the contract . . . authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment . . .” In this case, there is no evidence of the exact terms of when payment is due or when title passes in the verbal contract itself. The Bill of Lading stated “FOB Port Europe.” This means delivery was complete per the Bill of Lading when the shipper received the merchandise. The date the shipper received the goods was November 17, 1994. These terms are consistent with RAB’s normal course of business. Therefore, the right to payment arose when title passed on November 17, 1994 and the claim is a prepetition one as to Shipment #1.

Shipment #2 was contracted for prepetition and the Bill of Lading was issued postpetition and, thus, title to the goods would pass postpetition if RAB accepted the goods. In order to accept the goods, RAB would need to assume the contract with GIS as required by 11 U.S.C. § 365. The contract was executory as that term is used in Section 365 because both sides had significant actions remaining to be performed under the contract. RAB had yet to accept the goods and pay for them at filing of its case; GIS had to deliver the goods to the shipper (or to RAB). *Collingwood Grain, Inc. v. Coast Trading Company, Inc. (In re Coast Trading Company, Inc.)*, 744 F.2d 686 (9th Cir. 1984); *In re Nevins Ammunition, Inc.*, 79 B.R. 11 (Bankr. D. Idaho 1987). The contract, as to Shipment #2, has never been assumed or rejected since the RAB Chapter 11 was filed. If assumed, RAB may keep the merchandise and pay the invoice as a

postpetition administrative expense. If rejected, RAB may return the goods and GIS will have a prepetition claim for any damages suffered. ALA. CODE § 7-2-602; 11 U.S.C. § 502(g).¹

Therefore, it is ORDERED that:

1. The claim of GIS-Handels AG for \$49,657 for Shipment #1 is a prepetition claim and Debtor's motion to so treat it is GRANTED.

2. The claim of GIS-Handels AG for \$40,464.20 for Shipment #2:

a) is a prepetition claim if an order rejecting the executory contract with GIS-Handels AG is entered or if a deemed rejection occurs pursuant to 11 U.S.C.

§ 365(d)(1) or

b) is an administrative expense claim under 11 U.S.C. § 503 if the executory contract is assumed. Debtor's motion to treat the debt for Shipment #2 as an administrative expense claim is DENIED unless an assumption of the executory contract occurs.

Dated: July 28, 1995

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE

¹On July 26, 1995, RAB voluntarily converted its case to a liquidation under Chapter 7. A trustee will now determine whether to assume or reject the contract.