NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	CHAPTER 11
1945 Route 23 Associates, Debtor.	CASE NO.: 06-17474 (NLW)
Plaza 23 Associates, Plaintiff(s),	Adv.: 07-1207
v.	**OPINION**
R&S Liquidating Company, Inc., et al Defendant(s).	

Before: HON. NOVALYN L. WINFIELD

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The above-captioned adversary proceeding was removed to the bankruptcy court from the Superior Court of the State of New Jersey, Law Division, Morris County. At the time of removal, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment was pending. It is these motions that are decided as set forth below.

JURISDICTION

Pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984, the court has jurisdiction to hear these motions. However, virtually all of the counts in the complaint are non-core matters. As authorized by 28 U.S.C. § 157(b)(3) the court has reviewed the counts of the amended complaint and has determined that the First through Fifth Counts and Twelfth through Sixteenth Counts are plainly non-core. They all address pre-petition conduct and rest solely upon New Jersey statutes or common law. Similarly, the Sixth, Seventh, Eighth and Tenth Counts all involve pre-petition conduct and concern claims that appear to be grounded in state law. Thus, none of these counts arise

under title 11 or arise in the instant Chapter 11 case as required for core jurisdiction. *Ii U.S.C. §1334(b).* The Ninth and Eleventh Counts appear to concern core matters under 11 U.S.C. § 157(b)(2)(N) and (O)[1]. Because the instant litigation was removed to this court by the mutual agreement of the plaintiff and the defendants, the court infers that with regard to the non-core matters, all parties consent to the entry of final orders by the court. The following constitutes the court's findings of fact and conclusions of law as required by Federal R. of Bankr. P. 7052.

STATEMENT OF FACTS

A. Procedural History

On August 10, 2006, R&S Parts and Service, Inc. ("Parts & Service") and 1945 Route 23 Associates, Inc. filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Thereafter, a joint plan of reorganization was confirmed by order dated April 27, 2007. The litigation presently before the court is but one of the several, as yet, unresolved claims against the estate.

It appears that Plaza 23 first commenced suit in 1996 in the Superior Court of the State of New Jersey, Law Division, Morris County ("State Court Action"). Since that date, resolution of this litigation has been delayed for various reasons, including two Chapter 11 cases. During the instant litigation the parties agreed among themselves to remove the State Court Action to this court. Accordingly, a Notice of Removal was filed on February 6, 2007.

[1]However, these matters are not core proceedings in the present case. As discussed below, this court does not believe that it can decide the summary judgment motion as to those counts.

B. The Property

Plaza 23 is the owner of real property located at 500 State Highway 23, Pompton Plains, New Jersey (the "Property"). Plaza 23's acquisition of the Property occurred in two stages. Initially, on October 31, 1983, it acquired the building and other improvements on the Property and took an assignment of the ground lease ("Ground Lease") of the Property from defendant Plains Plaza. In 1987, Plaza 23 purchased the fee simple interest in the Property from Louis and Lillian A. Epstein.

The Ground Lease was subject to a sublease dated September 12, 1967 ("1967 Sublease"). In or about 1979, defendant Donald Schlenger received an assignment of the 1967 Sublease from defendant Roth-Schlenger, Inc. Thereafter, in or about 1982, Roth-Schlenger, Inc. entered into a general partnership with defendant Schottenstein Stores Corp. ("SSC") to form defendant R&S/Strauss Associates, which subleased the Property and operated a parts and service store. On June 9, 1998, R&S/Strauss, Inc. and certain related entities filed Chapter 11 petitions in the Bankruptcy Court in the District of Delaware.[2] During the case, Parts & Service entered into an Asset Purchase Agreement with Strauss. The Asset Purchase Agreement was approved in an order dated March 1, 2000. Following the sale, Strauss became known as R&S Liquidating Co., Inc. At the time the Chapter 11 petition was filed, Strauss was a month-to-month tenant at the Property, in that the lease had expired on December 31, 1997. Strauss paid $15,000 per month for rent. After the closing on the Asset Purchase Agreement, Parts & Service became a month-to-month tenant, also at $15,000 per month. On March 29, 2001, Plaza increased the monthly rent to $35,000. Parts & Service paid the increased rent through June 30, 2002.

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[2]The papers filed by the parties do not reveal when R&S/Strauss Associates became R&S/Strauss, Inc. However, because plaintiff and defendant seem to treat the entities as essentially the same, the court will do likewise. Hereafter, either entity will be referred to as Strauss.

C. The Environmental Contamination

A 550 gallon underground storage tank (the "UST") was located on the Property which Strauss and its predecessors used to store waste oil, hydraulic fluids and other waste products related to the operation of the auto parts and service business. In Spring 1990, Strauss contracted with Insurance Restoration Specialists, Inc. ("IRS") to remove the UST. After IRS removed the UST, IRS observed petroleum products in the soil of the UST excavation. The New Jersey Department of Environmental Protection ("NJDEP") was notified and a spill case number was assigned to the Property.

After conducting further investigation of the Property, IRS also discovered petroleum products in the basin of the in-ground hydraulic lift located inside the maintenance and repair facility. This section of the maintenance and repair facility was the part of the building closest to the UST. IRS cleaned the lift basin and removed the petroleum products. However, even after these steps were taken, IRS observed petroleum products seeping back into the lift basin from cracks in the concrete block wall that lined the basin. IRS investigated the area further and concluded that the soil beneath the maintenance repair facility, particularly in the area of the UST and the in-ground hydraulic lift, was heavily contaminated with petroleum products. IRS obtained a contractor to remove the hydraulic lift and the basin. Following removal, IRS again discovered that significant contamination existed in the soil surrounding the lift basin, and that petroleum products had accumulated in the concrete block walls surrounding the lift basin. To remove the contaminated soil surrounding the lift basin, IRS excavated an area seventeen feet long by seventeen feet wide by thirteen feet deep. It found the sidewalls of the excavation area to be contaminated. To address the condition, IRS lined the excavation area with plastic, installed a six inch PVC pipe in the base of

the excavation area to serve as a sump to remove ground water and contaminants, and then backfilled the excavation area with peastone.

IRS also concluded that further environmental investigation was required and in March 1991 it prepared and submitted a status report to the NJDEP. IRS did not subsequently conduct any further investigation or submit any other materials to the NJDEP.

In 1995, Plaza 23 retained EcolSciences to investigate the contamination. EcolSciences conducted soil sampling and discovered petroleum concentrations in excess of NJDEP criteria. EcolSciences concluded that the petroleum waste contamination was spreading from the UST location and that the spread coincided with the flow of ground water. A major soil excavation was begun in August 2003, which resulted in the transportation of 1,064.82 tons of contaminated soil to a recycling facility in early September 2003. Because the property was excavated to the depth of the water table, water filled the excavation area and the petroleum products that accumulated on the water surface were pumped into a tank for offsite disposal. After the excavation process was completed, the ground water continued to be monitored. The monitoring indicated that the source of the contamination had been removed.

According to King Moy ("Moy"), a Senior Vice-President of EcolSciences, NJDEP regulations do not require NJDEP to pre-approve a soil remediation workplan, and it is typical for soil remediation to be performed with a report thereafter presented to NJDEP in order to obtain a No Further Action Letter ("NFA"). On August 12, 2004, EcolSciences submitted the Remedial Investigation and Remedial Action Reports to the NJDEP. Plaza 23 is still awaiting a decision from the NJDEP on its application for a NFA.

Several years earlier, in April 1998, EcolSciences also prepared a summary expert report on liability for the environmental damage to the Property. In the report, EcolSciences determined that

the contamination had the characteristics of motor oil, that the UST likely suffered a breach in the tank wall or a breach in the piping system, and that neither injury would be self-repairing. The EcolSciences report stated that it found no record of any repairs to the UST system and that its review of the NJDEP file revealed a letter from Strauss' attorney indicating that the UST had failed a tightness test. Based on the information available and its observations, EcolSciences concluded that the UST was leaking until its removal in 1990.

D. The Delaware Chapter 11 Case

Strauss filed for Chapter 11 relief on June 9, 1998 in the United States Bankruptcy Court for the District of Delaware. During the case, November 30, 1998 was set as the deadline for prepetition creditors to file proofs of claims. Plaza 23 did not file its proof of claim for clean-up costs in the amount of $242,000 ("Plaza 23 Claim") until December 18, 1998. However, on June 7, 1999 the court signed a consent order agreed to by counsel for Strauss, the Unsecured Creditors' Committee and Plaza 23, which deemed the Plaza 23 proof of claim to be a timely filed general unsecured claim in the amount of $150,000. Notwithstanding this consent order, the Plaza 23 claim was listed as a late filed claim in the Debtors' First Omnibus Objection to Claims, and was expunged by order dated August 30, 2000.

Also during the Strauss Chapter 11, the debtors entered into an Asset Purchase Agreement with Parts & Service. The sale of substantially all of debtors' assets to Parts & Service was approved by order dated March 1, 2000. Parts & Service points out that the Asset Purchase Agreement explicitly stated that none of its provisions were to be construed to confer benefits or rights on a third party. The Asset Purchase Agreement, did however, contain a list of liabilities which Parts & Services assumed, including "Environmental Claims or Liabilities with Respect to

Environmental Conditions or Environmental Laws not to Exceed $1,000,000."[3] The March 1, 2000 order similarly relieved Parts and Services from any successor liability after the closing, except as provided in the Asset Purchase Agreement. The closing on the Asset Purchase Agreement took place on April 26, 2000, and on that date Parts & Service became the tenant at the Property.

Also during the Strauss bankruptcy, Parts & Service entered into an Environmental Settlement Agreement with Strauss, Roth-Schlenger, Inc., Schottenstein Stores Corporation, Donald Schlenger and R&S Strauss Associates to settle potential claims among the parties. This agreement also contained language limiting its terms to solely benefit the parties to the agreement and explicitly stated that "Nothing in this Agreement, express or implied, is intended to or shall confer upon any person other than the parties, and their respective heirs, legal representatives, successors and permitted assigns, any rights, remedies, obligations or liabilities." This agreement, with certain amendments, was approved by order dated December 15, 2000. In the Environmental Settlement Agreement, Parts & Service agreed to undertake, inter alia, the required remedial action at the Property.

In May, 2002, Parts & Service allegedly advised Plaza 23 that it would remediate the contamination at the Property, but instead on June 3, 2008 gave notice that it was terminating its tenancy at the Property.

On November 23, 2004, Plaintiff filed an amended sixteen (16) count complaint in the Law Division of the Superior Court of New Jersey. Parts & Service moved for summary judgment in March 2005. Apparently, a decision was never entered on the motion before Parts & Service filed

[3]Another provision of the Asset Purchase Agreement provides that the Bankruptcy Court for the District of Delaware retains exclusive jurisdiction to resolve any controversy or claim arising out of or relating to the agreement. This provision is also reflected in the March 1, 2000 order that approved the agreement and granted other relief.

its own bankruptcy petition in this court on August 10, 2006. As noted earlier, Plaza 23 removed the State Court Action in February 2007 and the summary judgment motion is now before this court.

Parts & Service's summary judgment motion can be broken down as follows: 1) the claims based on environmental damage should be dismissed because they were expunged in the Strauss bankruptcy, proceeding and therefore are no longer viable; 2) Parts & Service has no liability under the New Jersey Spill Compensation and Control Act ("Spill Act") claims because Plaza 23 cannot establish that it is entitled to recover "cleanup and removal costs"; 3) Parts & Service has no liability for the environmental damage because Plaza 23 cannot point to any proof that Parts & Service caused the damage; 4) Parts & Service is not liable for the environmental damage under the theory of successor liability; 5) Plaza 23 is not an intended third party beneficiary under either the APA or ESA and 6) Parts & Service provided Plaza 23 with sufficient notice to quit the premises.

Plaza 23 opposes the summary judgment motion and cross-moves for summary judgment on the issue of whether Parts & Service gave enough notice before it quit the Property.

CONCLUSIONS OF LAW

Standard for Summary Judgment

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See In re Bressman,* 327 F.3d 229, 237-38 (3d Cir. 2003); *Anchorage Assocs. v. V.I. Bd. of Tax Review,* 922 F.2d 168, 175-76 (3d Cir. 1990). Once a moving party with the burden of proof makes such an affirmative showing, it is entitled to summary judgment unless the non-moving party comes forward with probative evidence that would demonstrate the existence of a triable issue of fact. *Fed. R. Civ.*

P. 56(e). Under a summary judgment motion, the facts should be viewed in the light most favorable to the non-movant. *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587 (1986).

Expungement of Plaza 23 Claim in Previous Bankruptcy

Parts & Service argues that summary judgment must be granted in its favor on the First through Twelfth Counts of the amended complaint because the very same claims made in this adversary proceeding were encompassed by Plaza 23's proof of claim which was disallowed and expunged in the Strauss bankruptcy by order dated August 30, 2000. Additionally, it argues that confirmation of the Strauss bankruptcy discharged all of Strauss' pre-petition debts and Plaza 23 cannot now seek payment from Parts & Service. From the Court's reading of the amended complaint, it appears that the Fourteenth through Sixteenth Counts (waste, treble damages from waste and nuisance) also arise from the environmental contamination of the Property allegedly caused by Strauss and its predecessors, and similarly should be considered as part of the request for summary judgment.

Plaza 23 counters that expungement of its claim against Strauss does not affect its ability to pursue payment from Parts & Service. It relies on the fact that under the Asset Purchase Agreement Parts & Service assumed liability for environmental claims. To support its position, Plaza 23 relies on case authority that recognizes a creditor's right to proceed against non-debtor third parties. *See, In re Coho* Resources, *Inc.,* 345 F.3d 338, 343 (5th Cir. 2003)(failure to file a proof of claim bars prosecution of claim against debtor, but does not affect claims against non-debtors, such as general liability insurers); *Matter of Fernstrom Storage and Van Co.,* 938 F.2d 731, 733-34 (7th Cir. 1991)(failure to file a claim should not bar recovery against debtor's insurers because it would not

interfere with administration of the bankruptcy case or deplete debtor's assets); *In re Jet Florida Systems, Inc.*, 883 F.2d 970, 973 (11th Cir. 1989)(the §524(a) injunction protects the debtor and bankruptcy estate and does not enjoin a creditor from taking action against another).

These cases do, in fact, have considerable significance to the matter at hand because they recognize that the discharge afforded a debtor doesn't extinguish debts, but rather relieves a debtor of personal liability. In fact, Bankruptcy Code § 524(e) provides that with the exception of certain community property claims identified in § 524(a)(3), "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

However, the cases cited by Plaza 23 are not entirely apposite because they involve cases in which creditors had not filed proofs of claim. In the matter at hand, a proof of claim was filed, but was subsequently disallowed and expunged. Disallowance of a claim on its merits is understood as a determination that the debtor has no liability for the obligation. If expungement of its claim may be considered as a determination that Strauss had no liability, this may be problematic for Plaza 23 because it has been held that where the debtor is not principally liable, the third party cannot be held derivatively liable. *See, Bursch v. Beardsley & Piper,* 971 F.2d 108 (8th Cir. 1992).

Because this court did not preside over the Strauss bankruptcy and did not enter the order disallowing the claim, it is not able to consider a motion to modify or vacate that order. For similar reasons, the court does not believe it can consider whether expungement of the Plaza 23 claim as a late-filed claim is a determination on the merits regarding Strauss' liability. Rather, the parties must return to the court that presided over the Strauss case for disposition of these matters.

The Court further finds that it should not address the question of whether its assumption of liability for environmental claims under the Asset Purchase Agreement renders Parts & Service liable to Plaza 23. The Asset Purchase Agreement explicitly provides that the Delaware bankruptcy

court retains exclusive jurisdiction to resolve any controversy or claim in connection with that agreement. Further the court order dated March 1, 2000, inter alia, approved the Asset Purchase Agreement and also stated that the Delaware bankruptcy court retains jurisdiction to "implement and enforce the terms and provisions of this Order and the Agreement, including any disputes relating thereto...". In light of this reservation of jurisdiction, this court finds that it would be improper for it to opine on the effect of the provision in the Asset Purchase Agreement under which Parts & Service assumed certain environmental liabilities.

Further, until the aforementioned issues are adjudicated, it is premature for this court to decide the remainder of Parts & Service's summary judgment motion. The remaining issues involve, inter alia, application of the Spill Act successor liability, negligence and waste. In some degree, they all depend either on the status of Plaza 23's claim or the interpretation and application of the Asset Purchase Agreement. Only after the Delaware bankruptcy court rules, will this court know what claims are before it. Simply put, the remaining issues are not yet ripe for determination. *See*, *Ricketts v. Lightcap,* 567 F.2d 1226, 1232 (3d Cir. 1977)("Ripeness concerns whether the legal issues at the time presented in a court is sufficiently concrete for decision.") Article III, section 2 of the United States Constitution limits federal jurisdiction to actual "cases" and "controversies." The case or controversy requirement is a direct prohibition on federal courts issuing advisory opinions. *See, Armstrong World Industries v. Adams,* 961 F.2d 405, 410 (3rd Cir. 1992). Among the requirements needed to establish a case or controversy is the presentation of "a legal controversy that is real and not hypothetical." *Id.* Given the matters that remain to be decided in another court, this court can only speculate as to the claims of Plaza 23 and thus cannot adjudicate the matters before it.

CONCLUSION

Only the bankruptcy court that presided over the Strauss Chapter 11 case may adjudicate the status of Plaza 23's claim in the Strauss bankruptcy. Likewise, resolution of claims under the Asset Purchase Agreement are matters reserved for the Delaware bankruptcy court to determine. This court will defer consideration of the remainder of the summary judgment motion until the Delaware bankruptcy court has decided the issues raised by the expungement of the Plaza 23 claim and the claims arising under the Asset Purchase Agreement.

Dated:

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NOVALYN L. WINFIELD
United States Bankruptcy Judge