

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa.

In the Matter of

HAWKEYE CHEMICAL CO.,
An Iowa Corporation,

Debtor.

Case No. 86-3231-D

Chapter 11

ORDER ON OBJECTION TO CLAIM

on January 7, 1988 an objection to claim came on for hearing in Des Moines, Iowa. Among those present at the hearing were Kathleen T. Tobin appearing on behalf of Hawkeye Chemical Company (Hawkeye) and Morris E. Sweat (Sweat) appearing pro se. The present dispute arises from Hawkeye's termination of Sweat's employment and his claim for \$42,137.00 which he alleges is owed him under a "Continuation Agreement". Upon conclusion of the evidentiary hearing, the court took the matter under advisement.

FACTUAL BACKGROUND

Sweat served in a managerial capacity during his tenure at Hawkeye. To induce Sweat to continue his employment with Hawkeye during 1984 when the sale of Hawkeye was being contemplated, Hawkeye and Sweat executed a "Continuation Agreement" on August 27, 1984. The agreement in essence provided that Sweat would receive enhanced severance pay for one year and certain benefits upon employment termination

that resulted from any of the following:

- 1) The adoption of a plan of liquidation or dissolution of Hawkeye;
- 2) The sale of all or substantially all of the assets of Hawkeye;
- 3) The merger, consolidation or reorganization to which Hawkeye was not the surviving entity;
- 4) The sale by Getty Oil Company of all or substantially all of the stock of Hawkeye; and
- 5) The failure of Hawkeye's successor at any time within two years from the date of such succession to provide continued employment to Mr. Sweat on terms equal to or greater than the terms and conditions with respect to his salary, position and the benefits as in effect prior to the succession.

The agreement by its terms did not apply to a termination for cause. "Cause" was defined in the agreement as:

- 1) any material act of dishonesty;
- 2) disclosure of confidential information;
- 3) gross carelessness or misconduct;
- 4) intentional or continual neglect of duties under the agreement;
- 5) intentional or continual acts contrary to the proper and reasonable instructions of Hawkeye and its delegates;
- 6) willful or egregious action which would constitute an act of moral turpitude in the community where Mr. Sweat resides or which would otherwise have an adverse effect on Hawkeye's reputation; or
- 7) other material breaches of the agreement.

Hawkeye filed a petition for relief under Chapter 11 on December 8, 1986. On or about February 20, 1987 Hawkeye terminated Sweat's employment. On April 2, 1987 it moved to

reject the executory contract which concerned the "Continuation Agreement" with Sweat.¹

Jerry Higdon, president of Hawkeye, testified that the reason for severing Sweat's employment was that his position

¹ The court notes from a review of the voluminous files in this case that Hawkeye's motion does not appear to have been served upon Mr. Sweat. Likewise, there is no indication that Hawkeye caused its motion to reject to be noticed for hearing as was one in the numerous other matters in this case. Hence, no order was entered. However, on September 29, 1987 this court confirmed Hawkeye's plan. Paragraph 6.1 of the plan provides:

"Executory Contracts". Any contract or lease which is executory, in whole or in part and to which the Debtor is a party and which has not been assumed, assigned, or terminated during the pendency of the Chapter 11 case by the Debtor or pursuant to the provisions of this plan contemporaneously with the Confirmation of this Plan for which application has not been filed prior to Confirmation, or is not assumed or assigned by authorization of Court pursuant to a modification of said Plan is deemed rejected as of the Confirmation Date of this Plan. Claims arising out of the rejection of executory contracts by virtue of this provision of this Plan must be filed with the Bankruptcy Court on or before the thirtieth (30th) day after the Confirmation Date of this Plan in order to participate in any distribution under this Plan. Any such claim not timely filed shall be and is barred from any distribution under and is fully discharged pursuant to the provisions of this plan. (Emphasis added.)

Although the language of Paragraph 6.1 indicates that it does not reach executory contracts that were the subject matter of an application prior to confirmation, the court views the April 2, 1987 motion as a nullity because it was not properly served and never came on for hearing. Hence, the continuation agreement was rejected upon confirmation of the plan.

was eliminated as a result of a change in management structure. Hawkeye adduced no evidence showing that Sweat was terminated for cause as defined in the agreement. After the termination, Hawkeye paid Sweat severance pay for 13 weeks.

In his proof of claim filed September 23, 1987, Sweat claims that Hawkeye owes him \$42,137.00 under the "Continuation Agreement." He calculates his claim by subtracting the amount Hawkeye has paid him over the thirteen week period from the amount he expected to receive for one year as called for by the agreement.

DISCUSSION

Section 502 of the Bankruptcy Code governs the determination and allowance of claims or interests. Section 502(a) provides that a proof of claim is deemed allowed unless a party in interest objects. If an objection to claim is made, the court must determine the amount of claim as of the date the petition was filed and must disallow any portion of the claim that falls within the eight paragraphs of section 502(b). Hawkeye objects to Sweat's claim on the ground the "Continuation Agreement" did not apply to his termination. The court assumes Hawkeye objects under section 502(b)(1) which disallows a claim if:

- (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

Thus, to the extent that applicable law, including state

law, would afford the debtor a defense to a claim of a creditor absent bankruptcy, such defense is available to the trustee (or debtor in possession) in objecting to the claim. 3 Collier on Bankruptcy § 502.02 at 502-25 (15th ed. 1986).

Pursuant to section 502(a) and Bankruptcy Rule 3001(f), the filing of a claim itself constitutes prima facie evidence of the validity and amount of the claim. The party objecting to a proof of claim carries the burden of going forward with evidence tending to defeat the claim. Such evidence must be of a probative force equal to that of the allegations of the creditor's proof of claim. 3 Colliers on Bankruptcy § 502.01 at 502-17 (15th ed. 1986). Once evidence as to the invalidity of the claim, the excessiveness of its amount or any affirmative defense going to the allowability of the claim has been presented, the burden rests upon the claimant to introduce evidence in rebuttal--it is the claimant's burden of ultimate persuasion. Id. at p. 502-18.

Resolution of this case involves construing the "Continuation Agreement." In doing so, the court is guided by certain maxims of contract interpretation. First, courts will not resort to rules of construction where the intent of the parties is expressed in clear and unambiguous language. Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (Iowa 1976). Ambiguity appears when the language of a contract is susceptible to more than one meaning. Gendler Stone Products v. Laub, 179 N.W. 628, 631 (Iowa 1970). With respect to the

use of extrinsic evidence in interpreting contracts, the Iowa Supreme Court has stated:

Contract interpretation involves ascertaining the meaning of contractual words, and extrinsic evidence is admissible as an aid to interpretation when it sheds light on the situation of the parties, antecedent negotiations, the attendant circumstances, and objects they were striving to attain.

Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 433 (Iowa 1984).

Here the "Continuation Agreement" does not address the circumstances under which Hawkeye terminated Sweat. An ambiguity arises in that none of the specified events which would have entitled Sweat to severance pay and benefits occurred; yet, Hawkeye produced no evidence that it terminated Sweat "for cause" as defined in the agreement and that Sweat was thereby ineligible for severance pay and benefits. In short, whether the parties intended that severance pay and benefits be paid upon termination resulting from elimination of Sweat's position is not clear. Therefore the court must look to extrinsic evidence to determine the parties' intent.

One undisputed fact leads the court to conclude that the parties indeed intended that Sweat's termination would be covered by the "Continuation Agreement". Once Hawkeye terminated Sweat it paid him severance pay for thirteen weeks. Surely, if Hawkeye did not consider itself bound by the agreement, it would not have made the severance payments.

The court's conclusion is supported by the preclusive effect Hawkeye's motion to reject may have on Hawkeye's objection to Sweat's claim. Under 11 U.S.C. section 365(g) rejection of an executory contract constitutes a breach. The court questions whether Hawkeye now may take a position that the agreement is not applicable to Sweat's termination--a position inconsistent with the operation of section 365(g). See In re White Motor Corp., 44 B.R. 563 (N.D. Ohio 1984) (rejection of executory contract precludes a party from raising defenses inconsistent with a prior finding of breach under section 365(g)).

Hawkeye introduced no evidence challenging Sweat's calculation of his claim. Hence, the court finds Hawkeye liable to Sweat in the amount of \$42,137.00.

CONCLUSION AND ORDER

WHEREFORE, for the reasons discussed above, the court finds that the "Continuation Agreement" is enforceable against Hawkeye and property of Hawkeye and that Hawkeye is liable to Morris E. Sweat in the amount of \$42,137.00.

THEREFORE, Hawkeye's objection to Sweat's claim is overruled.

Signed and dated this 18th day of April, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE