UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

PESTER REFINING COMPANY, a Kansas corporation,

Debtor.

Case No. 85-340-C

Chapter 11

PESTER REFINING COMPANY,

Plaintiff,

and

THE CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO; FIRST INTERSTATE BANK OF DENVER, N.A.; and BANKERS TRUST COMPANY;

Plaintiffs-Intervenors,

v.

MAPCO GAS PRODUCTS, INC. and MID-AMERICA PIPELINE COMPANY,

Defendants.

Adversary No. 85-0203

BURKE ENERGY CORPORATION,

Plaintiff,

v.

PESTER REFINING COMPANY,

Defendant.

PESTER REFINING COMPANY,
Counterclaimant and
Third Party Plaintiff,

v.

BURKE ENERGY CORPORATION,
Counterdefendant,
and
MID-AMERICA PIPELINE COMPANY,:
Third Party Defendant.

Defendant.

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED that Mid-America Pipeline Company's application for setoff is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that MidAmerica Pipeline Company have judgment against Pester Refining Company for net costs in the amount of $765.00.

Dated this 16th day of February, 1989.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court

BY:_____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated: 2-16-89

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Counterdefendant,

and

MID-AMERICA PIPELINE COMPANY,
Third Party Defendant.
Defendant.

ORDER--APPLICATION FOR SETOFF AND BILL OF COSTS

On September 2, 1988, a hearing was held on Defendant Mid-America Pipeline Company's application for setoff and bill of costs. The following attorneys appeared on behalf of their respective clients: John G. Fletcher for Debtor Pester Refining Company (hereinafter "Pester"); and W. Michael Shinkle for Defendant Mid-America Pipeline Company (hereinafter "Mid-America"). At the conclusion of said hearing, the Court took the matter under advisement and now considers it fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. On February 25, 1985, Pester filed a Chapter 11 petition.

2. Following Mid—America's alleged acts of conversion on March 1, 1985, Pester filed an adversary complaint against Mid—America requesting, among other things, turnover of property and damages for tortious conversion.

3. Although it claimed a right to set off unpaid transportation charges, Mid—America based its whole defense on a carrier's lien it allegedly held against the product.

4. This Court, in Matter of Pester Refining, 66 B.R. 801 (Bankr. S.D. Iowa 1986), held Mid-America was not entitled to a carrier's lien and granted Pester damages in the amount of $72,909.00 against Mid-America for conversion and $36,500.00 in punitive damages.

5. The District Court affirmed but on further appeal, the Eighth Circuit affirmed the conversion damages but reversed the punitive damages in Matter of Pester Refining, 845 F.2d 1476 (8th Cir. 1988).

DISCUSSION

Three issues are presented in this case. The first issue is whether Mid-America's application for setoff is barred by the doctrine of res judicata. The second issue is whether Mid-America is entitled to setoff on the merits under 11 U.S.C. §553. The final issue is whether Mid-America is entitled to have the Court tax its bill of costs against Pester. The Court will address each issue individually.

A. Res Judicata

The doctrine of res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." Allen V. McCurry, 449 U.S. 90, 94 101 S.Ct. 411, 415, 66 L.Ed. 2d 308 (1980). Res judicata precludes relitigation of claims already determined by a valid and final judgment on the merits

between the same parties. In re Abco Metal Corp., 36 B.R. 344, 347—48 (Bankr. N.D. Ill. 1984). The doctrine bars not only matters that were actually determined in a prior suit but all matters that could have been raised in the prior suit. Id.; In re Westside Utilities, Inc., 53 B.R. 254, 257 (Bankr. N.D. Miss. 1985) (citations omitted). Res judicata applies in a bankruptcy context. Westside Utilities, 53 B.R. at 257.

Res judicata bars an action if four requirements are met: 1) the parties must be identical in both suits; 2) the prior judgment must have been rendered by a court of competent jurisdiction; 3) there must have been a final judgment on the merits; and 4) the same causes of action must be involved in both cases. Id. Concerning whether the same causes of action are involved in both cases, the test is whether both suits arise out of the same basic factual situation. Abco Metal, 36 B.R. at 348 (citations omitted).

In the case at bar, Pester filed an adversary complaint against Mid—America requesting, among other things, turnover of property and damages for tortious conversion. Mid— America defended by alleging it had a carrier's lien against the product. This Court, in Matter of Pester Refining, 66 B.R. 801 (Bankr. S.D. Iowa 1986), held Mid-America was not entitled to a carrier's lien and granted Pester damages in the amount of $72,909.00 against Mid—America for conversion and $36,500.00 in punitive damages. On appeal, the Eighth

Circuit affirmed the conversion damages but reversed the punitive damages. Matter of Pester Refining, 845 F.2d 1476, 1488 (8th Cir. 1988). As a result, the Court concludes the first three requirements of res judicata are met because the parties are identical and there was a final judgment on the merits rendered by a court of competent jurisdiction.

The final requirement to consider is whether the same cause of action is involved in both cases. As noted earlier, the test is whether both suits arise out of the same basic factual situation. In its application for setoff, Mid-America argues both this Court and the Eighth Circuit failed to address its alleged undisputed and uncontested fundamental claim for unpaid transportation charges. In response, Pester argues the validity of MidAmerica's alleged claim for unpaid transportation charges was never properly presented by Mid—America in the conversion litigation; rather, Mid—America's only argument was that it had a valid carrier's lien under the Uniform Commercial Code for unpaid transportation charges.

Upon review, the Court agrees with Pester. As stated by the Eighth Circuit:

> Mid—America also argues that it was not required to turn over the normal butane in question because it had the right to set off the normal butane against Pester's unpaid transportation charges. A creditor may refuse to turn over property if the creditor possesses a valid right of setoff under 11 U.S.C. §553. 11 U.S.C. §542(b) (1982). In order to defeat a debtor's cause of action for turnover, however, the burden is on the

> creditor to establish a valid right of setoff under section 553. [citation omitted] Our review of the record reveals that Mid—America did not raise this issue during the bankruptcy court proceedings. Because it was not properly raised and litigated in the bankruptcy court and was not addressed by that court, we will not address the merits of Mid-America's setoff claim. [citation omitted].

Pester Refining, 845 F.2d at 1486. In the case at bar, the Court finds Mid-America's setoff claim did arise out of the same basic factual situation as did Pester's turnover and conversion litigation. Mid—America could have argued its setoff claim as a defense to Pester's request for conversion damages. Instead, it chose to rely on a carrier's lien defense which proved to be unsuccessful. Therefore, the Court concludes the fourth and final requirement under res judicata is met, thus precluding Mid—America under res judicata from asserting a right to setoff.

B. Setoff

Assuming arguendo Mid—America is not barred from asserting its alleged right to setoff by the doctrine of res judicata, the next issue is whether Mid-America is entitled to set off unpaid transportation charges against the conversion damages it owes Pester. Bankruptcy Code §553 provides, in relevant part:

> Except as otherwise provided.., this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that

> arose before the commencement of the case....

11 U.S.C. §553(a) (emphasis added). The decision to allow or disallow a setoff rests within the bankruptcy court's sound discretion. In re Bacigalupi. Inc., 60 B.R. 442, 445 (9th Cir. B.A.P. 1986). The burden of proof under §553 rests with the creditor urging the offset. In re Wilson, 29 B.R. 54, 56 (Bankr. W.D. Ark. 1982).

The key inquiry in determining whether setoff is warranted is whether the debts are mutual. Matter of Springfield Casket Co., Inc., 21 B.R. 223, 228 (Bankr. S.D. Ohio 1982); In re Virginia Block Co., 16 B.R. 771, 774 (Bankr. W.D. Va. 1982). To be mutual, the debts must be in the same right and between the same parties, standing in the same capacity. Matter of Fasano/Harriss Pie Co., 43 B.R. 864, 870 (Bankr. W.D. Mich. 1984). The court must strictly construe the mutuality requirement. Id.

Mutual debts must be owing when the debtor's bankruptcy petition is filed. Wilson, 29 B.R. at 56; Virginia Block, 16 B.R. at 774. As a result, it is well established that a creditor may not set off its pre-petition claims against a debt to the debtor which came into existence after the filing of the bankruptcy petition. Cooper-Jarrett. Inc. v. Central Transport, Inc., 726 F.2d 93, 96 (3rd Cir. 1984) (citations omitted); Virginia Block, 16 B.R. at 774—75. The Springfield Casket court reached the same result:

> [P]ost-petition debts may not provide the basis for setoff because mutuality ceases upon the filing of the bankruptcy estate, i.e., a claim owing to a creditor by a debtor may not be offset by a post-petition debt owing by the creditor to that debtor's estate since the parties are not identical and mutuality has ceased.

21 B.R. at 228 (emphasis added).

In the case at bar, Mid—America's alleged claim for unpaid transportation costs arose pre—petition. The conversion judgment arose out of Mid-America's post—petition conversion acts when it refused to turn over to Pester the product in its possession. See Pester Refining, 66 B.R. at 819 (Mid-America committed the tort of conversion on March i, 1985——Pester filed its Chapter 11 petition on February 25, 1985). As a result, the Court finds the debts are not mutual. Therefore, the Court concludes Mid—America is not entitled to setoff under §553 because it cannot meet its burden of proof.

C. Bill of Costs

Rule 39 of the Federal Rules of Appellate Procedure sets out the guidelines for costs and provides in relevant part:

> (a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or

> is vacated, costs shall be allowed only as ordered by the court.
>
> (e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for costs of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Fed.R.App.P. 39 (emphasis added). Fees for copies of papers necessarily obtained for use in the case may also be taxed as costs. 28 U.S.C. §1920(4).

In the case at bar, Mid–America requests the Court to tax the following costs against Pester: 1) $105.00 fee for filing Notice of Appeal to the Eighth Circuit; 2) $5.00 fee for filing Notice of Appeal to the District Court; and 3) $3,832.00 fee for supersedeas bonds, for a total of $3,942.00. Pester objected in part on the ground MidAmerica failed to identify which part of the costs related to the Eighth Circuit's reversal and which related to the affirmance. Pester also filed a conditional bill of costs and requested that should the Court allow partial recovery of costs to Mid–America based on the partial reversal, Pester also wanted costs for the partial affirmance including: 1) $402.60 in fees for court reporter's work on the transcript; 2) $286.40 in fees for transcripts of

depositions offered into evidence; and 3) $139.05 of copy fees, for a total of $828.05.

Mid-America was partially successful in its appeal in that the judgment for punitive damages was reversed. The award for punitive damages constituted one-third of the total judgment. Mid-America's cost should be allowed in the amount of $1,317.00 which is approximately one-third of its total cost.

Pester was successful on appeal to the extent the judgment for actual or compensatory damages was affirmed which constituted two-thirds of the total judgment. Pester's costs should be allowed in the amount of $551.00 which is approximately two-thirds of its total bill of costs.

The Court concludes the allowed portion of Mid-America's bill of costs should be set off by the allowed amount of Pester's bill of costs for a net allowed bill of costs in the amount of $765.00.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes:

1) Mid-America's application for setoff is barred by the doctrine of res judicata;

2) Under 11 U.S.C. §553, Mid-America is not entitled to set off unpaid transportation charges against the judgment for conversion damages; and

3) Net costs should be taxed against Pester in the amount of $765.00.

IT IS ACCORDINGLY ORDERED that Mid-America Pipeline Company's application for setoff is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that MidAmerica Pipeline Company have judgment against Pester Refining Company for net costs in the amount of $765.00.

Dated this 16th day of February, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE