

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

Lenny Perry's Produce, Inc.

Case No. 09-10297 K

Debtor

John B. Ordille, Inc.
Jackson's Farming Company
Wings Landing Farms
Pismo-Oceano Vegetable Exchange
Wendell Roberson Farms, Inc.
Brooks Tropicals, LLC
Kenneth Alexander Produce Sales LLC

NOT FOR PUBLICATION

Plaintiffs

-vs-

AP No. 09-01015 K

Lenny Perry's Produce, Inc.
Harold P. Bulan

Defendants

The PACA Trust Creditors of Lenny Perry's
Produce, Inc.

Plaintiff

-vs-

AP No. 09-1269 K

Genecco Produce, Inc., David Genecco

Defendants

David Genecco, Genecco Produce, Inc.

Counter-Claimants

-vs-

The PACA Trust Creditors of Lenny Perry's
Produce, Inc.

Counter-Defendant

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INTERIM DECISION

PACA is, of course, the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499a-499t (2007 & Supp. 2009) (the “PACA”).

This is a PACA proceeding, sent to the Court from the U.S. District Court because of its relationship to the Chapter 7 bankruptcy case of a corporate produce dealer and that corporation’s principal. The

principal is very active here because his nondischargeable personal liability to PACA trust beneficiaries is reduced to the extent that those beneficiaries are paid in full from PACA trust assets or from § 541 property of the bankruptcy estate.

It is important to note that this is not a District Court Civil Action. Rather, at the direction of the District Court, it is an original Adversary Proceeding that in all respects parallels what would be a civil action in the District Court. Hence, this is not a 28 U.S.C. § 157 Special Reference; it is neither a District Court case, nor is it a bankruptcy proceeding in which the general reference was withdrawn, and then the matter re-referred with special orders.

Nonetheless, in order to allay any jurisdictional concerns, this Court is hearing all matters that have substantive effect (rather than mere procedural effect), on a Report and Recommendation basis, much as a Magistrate Judge would hear and a matter under 28 U.S.C. § 636(b)(1)(B), for Decision by the District Court.

The issue of the day is a series of objections to PACA claims asserted by suppliers of perishable agricultural commodities to the Debtor corporation. With certain exceptions, the major points of dispute would not exist were it not for the fact that certain of the claims to which objections have been filed were originally asserted in plenary PACA proceedings in the District Court, rather than in these proceedings in the Bankruptcy Court. These objections will be addressed first. Then this Court will address objections stemming from the fact that the nature of bankruptcy proceedings is such that there is always a “main” bankruptcy case filed before Adversary Proceedings are filed within that “main” case. Lastly, this Court will address objections that are matters of substantive PACA law - - specifically, provisions of PACA under which a trust claim might be waived or lost by changing the usual payment terms between the supplier and the PACA debtor, and provisions of PACA that address offsets or the elements of damages that do or do not enjoy trust protections.

First we address the objections stemming from the existence of PACA proceedings in the District Court as well as in this Court. The disputes here arise out of the fact that a PACA claims Procedure Order was entered by this Court on July 14, 2009 and approved by the District Court on September 16, 2009.

That Order failed to explicitly recognize the proceedings that had occurred or were occurring in

the District Court, and consequently purported to initiate a new and exclusive process for asserting a PACA claim against the trust assets now being accumulated and administered under this Court's authority (totally separate and apart from 11 U.S.C. § 541 assets of the estate, and with careful accounting intended to make sure that trust assets are not used for non-trust purposes.)¹

The claims and objections falling in this category are: Claim No. 66 of Weis-Buy Farms, Inc. and Claim No. 67 of Kenneth Alexander Produce Sales, LLC.

This Court finds that because it is a "unit" of the District Court (28 U.S.C. § 151) what has occurred in any part of the U.S. District Court for the Western District of New York, occurred in every "unit" thereof. By analogy (again), Rule 5005 allows the Court to remedy a misfiling with a trustee, for example, by deeming the document to have been filed with the clerk of the Court. That being the case, it is not possible to conclude that what has occurred in the District Court for the Western District of New York, and is part of the record of that Court, is not binding in this "unit" of the District Court of the Western District of New York. Consequently, this Court will recommend to the District Court that an Order be entered deeming all papers filed in the District Court PACA case also to be filed in the suitable bankruptcy proceedings *ab initio*. "Submission to the jurisdiction of the Court" that was accomplished in the District Court was also achieved in this Court.

This also resolves the second group of objections - - those addressed to the fact that suitable documents were filed in substance, though possibly not in proper form, in the "main" bankruptcy case. At argument, it was proffered that this Court's staff refused to file a "Proof of Claim" in this Adversary Proceeding, insisting that it could be filed only in the "main" case. (Those objections also were raised as to the above Claims 66 and 67 of Weis-Buy Farms and Kenneth Alexander Produce Sales.)

Having once served as Clerk of this Court (as well as having once served as Clerk of the District

¹For purposes of analogy only, one might consider how a secured creditor's collateral cannot be surcharged under 11 U.S.C. § 506(c) for purposes other than the preservation, protection, and administration of assets other than that creditor's collateral, without that creditor's consent. (Consent frequently is given when, for example, there is synergistic value to administering encumbered and unencumbered property together with expenses to be allocated according to some agreed formula. Consider, for example, a going-concern sale of a manufacturing plant as to which personalty is liened and real estate is not, or vice versa.)

Court), I find that the failure of the Procedure Order to direct the Clerk otherwise is this writer's own failure,² and that, as a consequence, claims filed in the main case are to be deemed filed simultaneously in the Adversary Proceeding.

The claims objections arising from substantive PACA law fall into several subcategories. Claim No. 87 of J & J Produce, Inc. and Claim No. 92 of Wendell Roberson Farms, Inc. are objected to on the grounds that the claimants changed payment terms, and or permitted payment periods of more than 30 days. The Debtor maintains that such terms invalidate the claimant's PACA trust claims.

Another subcategory of objections relates to inclusion of attorneys fees and/or interest in the filed claims. The Debtor maintains that such claims may only attain PACA trust claims status if they constituted valid contractual obligations. The following claims are subject to those objections:

Claim Number 87, of J & J Produce, Inc.,
Claim Number 88, of Burch Equipment LLC.,
Claim Number 89, of Jackson's Farming Company,
Claim Number 90, of Pismo-Oceano Vegetable Exchange,
Claim Number 91, of Wings Landing Farms,
Claim Number 92, of Wendell Roberson Farms, Inc.,
Claim Number 93, of Brooks Tropicals, LLC.,
Claim Number 94, of John B. Ordille, Inc.,
Claim Number 67, of Weis-Buy Farms, Inc.,
Claim Number 66, of Kenneth Alexander Produce Sales, LLC.

Lastly, the dispute in AP No. 09-1269K; the PACA Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce turns on another matter of substantive PACA law. In that adversary proceeding the Defendant

²This is not to say that parties in interest may never rely on erroneous orders entered by the Court. They may if prejudice results. (See Kayak Manufacturing Corp., Bk No. 90-12981K, Trustee v. Majestic Pools, AP No. 92-1102 K). But the fact that court error may result in more people sharing in a fixed pie is not prejudice - - it is mere disappointment. See Cardon Realty, 172 B.R. 182 (Bankr. W.D.N.Y. 1994).

(Genecco) claims that it owes nothing to the Debtor because of the course of business between the two entities. Plaintiff PACA Trust Creditors assert that, under applicable PACA law, Genecco is prohibited from setting off amounts owed by the Debtor against amounts owed to the Debtor by Genecco.

First, the “change in terms” issue. PACA itself states that if the PACA Trust benefits are to be retained by the seller despite extended payment terms, the terms must be agreed-upon in writing “before entering into the transaction.” 7 U.S.C. § 499e (c)(3)(ii) and *American Banana*, 362 F.3d 33 (2d Cir. 2004). The parties here disagree as to which claimants properly protected themselves and which claimants did not.

Next, the matter of attorneys fees or interest. Binding case law establishes that where attorneys’ fees and costs and interest are part of the contract, they are also part of the trust claim, and that invoices may create an enforceable contract. *Coosemans Specialties*, 485 F.3d 701 (2d Cir. 2007). Again, the parties here disagree as to which claimants properly protected themselves in this regard, and which claimants did not.

Now that the Court has ruled on the procedural issues, it would benefit from argument that focuses on specific facts as to the aforementioned disagreements.

Lastly, the matter of “setoffs.” The Court would also benefit from further argument on this issue, finding no clear authority in the statute or the cases.

CONCLUSION

These matters are restored to the calendar for further argument (1) as to any remaining disagreements regarding claims involving extended payment terms, and claims including attorneys fees, costs and interest, to the extent that the parties are otherwise unavailable to agree or settle such claims, and (2) as to the issue of setoffs.

These matters will be heard on **July 6, 2010, at 10:00 a.m.** Where only the matter of setoff is to be argued, telephonic argument will be permitted by prior arrangement with Chambers. As to extended payment terms and attorneys’ fees, costs and interest, however, the marking of exhibits may be necessary, and cannot be done

by telephone unless the pertinent exhibits can be stipulated into evidence.

All of the above rulings and all rulings that the Court reaches after hearing on **July 6, 2010**, will be incorporated into a Report and Recommendation to the District Court. Consequently, nothing in this Interim Decision constitutes an order that is appealable, or that is subject to a Motion for Leave to Appeal an Interlocutory Order.

SO ORDERED.

Dated: Buffalo, New York
June 16, 2010

/s/ Michael J. Kaplan

U.S.B.J.