UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

Apyron Technologies, Inc.,

Debtor.

CASE NO. 02-74350

CHAPTER 11

JUDGE MASSEY

Dr. Sherman M. Ponder,

Plaintiff,

v.

Apyron Technologies, Inc.,

Defendant.

ADVERSARY NO. 04-6443

ORDER GRANTING BALANCE OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

In this adversary proceeding, Dr. Sherman M. Ponder, the Plaintiff, sought a judgment declaring that he and not his former employer, Apyron Technologies Inc., owned certain intellectual property (the "Ice Wand") that Dr. Ponder helped to develop. Defendant Apyron moved for summary judgment on this and other issues discussed below. This Court determined that resolution of the ownership issue was not a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(1) and, accordingly, transmitted to the United States District Court for the Northern District of Georgia proposed findings of fact and conclusions of law and a recommendation that the District Court determine that only Defendant owns the Ice Wand technology. In an order entered on August 2, 2005, in case no. 1:05-cv-00766-CC, the District

Court adopted the findings of fact and conclusions of law recommended by this Court and ruled that Defendant is the owner of the Ice Wand technology. The District Court's order is now final and not subject to appeal.

Defendant responded to the complaint by filing several counterclaims, most of which were held in abeyance pending the entry of a final order on the issue of ownership of the Ice Wand technology. It is now appropriate for this Court to address the balance of Defendant's motion for summary judgment on the following relief demanded in the counterclaims: (1) disallowance of Plaintiff's claim number 55 except in the amount of $6,023.08 as a general unsecured claim, (2) subordination of Plaintiff's claim number 55, (3) entry of a permanent injunction restraining Plaintiff from asserting or claiming any interest in the Ice Wand and (4) an award of all costs incurred by Debtor in defending against Plaintiff's complaint. The District Court having ruled that Defendant owns the Ice Wand technology, all of these remaining matters constitute core proceedings. *See Cont'l Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1348-49 (11th Cir. 1999). The proof of claim issues are matters "arising in" a proceeding under title 11 of the U.S. Code. The request for a preliminary injunction is likewise a core matter because it concerns interference by the Plaintiff with a reorganization under Title 11.

Pursuant to Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056, a party moving for summary judgment is entitled to prevail if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party carries the initial burden of proof and must establish that no genuine factual issue exists. *Celotex*, 477 U.S. at 323;

Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). The moving party must point to the pleadings, discovery responses or supporting affidavits which tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court will construe the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987).

Debtor submitted a Statement of Undisputed Facts and three affidavits with numerous exhibits in support of its factual contentions. Debtor submitted an affidavit from Dr. Leslie J. Story, Debtor's President and CEO during all times relevant to this adversary proceeding. Debtor submitted an affidavit from Mr. Brian E. Kepner, Debtor's former Chief Technical Officer, who worked on the Ice Wand project and who is listed as an inventor on the Ice Wand's patent application. Debtor also submitted an affidavit from Mr. John A. Reade, who served as Vice President of Finance and Human Resources during all times relevant to this adversary proceeding. Plaintiff did not respond to the motion for summary judgment.

The uncontradicted evidence submitted by Defendant supports the following facts, which the Court finds.

Debtor hired Plaintiff on April 30, 2001. There was not a written employment contract. Plaintiff worked for Debtor until he resigned on May 23, 2002. His job included working with others to develop the Ice Wand.

Plaintiff's proof of claim, claim number 55, asserts a general unsecured claim for $41,496.50, consisting of alleged unpaid salary, vacation pay, a performance bonus, severance pay and interest. In particular Plaintiff contends that he is owed salary for seven weeks in the

amount of 7,974.97, vacation pay of $1,282.69, a performance bonus of $25,000, severance pay of $2,568.38, and interest on the total unpaid compensation in the amount of $4,670.46.

In his affidavit, Mr. Reade states Debtor owes Plaintiff salary for five weeks and two days at his base pay rate, for a total debt of $6,023.08. The affidavit states that Plaintiff had taken all his accrued vacation time prior to resigning and is not entitled to any severance pay. In his affidavit, Dr. Story attached a copy of the letter agreement with Dr. Ponder that promised him a bonus based on the "successful introduction of a commercially ready Apyron 'ice stick' anti-microbial device at the National Restaurant Show in the spring of 2002." Dr. Story further stated that the device was taken to the National Restaurant Show, appeared to be "a big success" but that Apyron was unable thereafter to manufacture the device to required specifications, leading to the recall of the few such devices that were sold. He further stated that the problems with the device were not solved until several months after Dr. Ponder left the company's employ. The Court concludes from these facts that the Ice Wand was not commercially ready by the time it was shown in the spring of 2002.

As reflected in the affidavit of Dr. Storey, during the pendency of Debtor's bankruptcy case, Ponder sent letters to a potential purchaser of the company's assets and to a secured lender, among others, in which he claimed to be the sole and rightful owner of the Ice Wand technology and stating that he would object to the sale of the technology. He also solicited money to fund his own version of the device. NanoGlobal, Inc., which had signed a letter of intent to purchase the Debtor's property, including its technology, for $6,000,000 in cash and stock in a newly formed public company, terminated its letter of intent and broke off all negotiations with Debtor and gave as its reason "information that indicates a potential claim against Apyron's technology." Dr.

Storey further averred that "[t]he withdrawal of NanoGlobal's offer and the Ponder letters have caused a steep drop in the offering price of subsequent potential purchasers." The Court finds these facts to be well supported and unopposed. The Court further notes that Ponder continued to assert his unfounded claims to ownership in this adversary proceeding. Although the evidence presented by Defendant as to the dollar amount of injury it and its other creditors have suffered is not explicitly set forth, the Court infers that it is greater than the amount of Plaintiff's claim in this case.

The Court now turns to the various counterclaims on which Defendant seeks a judgment, beginning with its objection to Plaintiff's proof of claim.

> Fed. R. Bankr.P. Rule 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." The objecting party has the burden of going forward and introducing sufficient evidence to rebut the presumption of validity created pursuant to Rule 3001(f). "Such evidence must be sufficient to evidence a true dispute and must have probative force *916 equal to the contents of the claim. Upon introduction of sufficient evidence by the objecting party, the burden of proof must then be met by the claimant by a preponderance of the evidence." 8 Collier on Bankruptcy, ¶ 3001.05 (15th ed.1995). "The burden of proof is on the objecting party to produce evidence 'equivalent in probative value to that of the creditor to rebut the prima facie effect of the proof of claim··· The burden of ultimate persuasion rests with the claimant.' " *In re Homelands of DeLeon Springs, Inc.,* 190 B.R. 666, 668 (Bankr.M.D.Fla.1995) *citing In re VTN, Inc.*, 69 B.R. 1005 (Bankr.S.D.Fla.1987).

In re Gurley, 311 B.R. 910, 915-916 (Bankr. M.D.Fla. 2001). Defendant met its burden of introducing sufficient evidence to rebut the presumption of validity of the claim. Plaintiff failed to respond to the objection. Consequently, the Court must disallow the claim except to the extent as to the $6,023.08 that Defendant concedes an amount.

In its counterclaim, Defendant requested this Court subordinate Plaintiff's proof of claim (number 55) to the allowed claims of Debtor's other unsecured creditors. 11 U.S.C. § 510(c).

Debtor contends Plaintiff's proof of claim deserves to be equitably subordinated because Plaintiff's claims of ownership in the Ice Wand were made in bad faith and damaged Debtor's reorganization.

Section 510(c) of the Bankruptcy Code provides in relevant part:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may–
>
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest[.]

11 U.S.C.A. § 510. The Eleventh Circuit has established a three-prong test for deciding whether a claim may be equitably subordinated under section 510(c).

> Proper exercise of the equitable subordination power can take place only where three elements are established:
>
> (1) The claimant must have engaged in some type of inequitable conduct,
> (2) The misconduct must have resulted in injury to the creditors or conferred an unfair advantage on the claimant,
> (3) Subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.
>
> *In re Mobile Steel*, 563 F.2d 692, 700 (5th Cir.1977) (citations omitted); *accord N & D Properties*, 799 F.2d at 731; *In re Multiponics*, 622 F.2d 709, 713 (5th Cir.1980). The inequitable conduct need not be related to the acquisition or assertion of the claim. *Mobile Steel*, 563 F.2d at 700. The claim can be subordinated only to the extent necessary to offset the harm suffered by the bankrupt and its creditors on account of that conduct. *Id.* at 701.

Matter of Lemco Gypsum, Inc., 911 F.2d 1553, 1556 (11th Cir. 1990).

Plaintiff's communication of unsupported and meritless claim that he was the sole owner of the Ice Wand technology, which he communicated to third parties during the pendency of this Chapter 11 case, constituted inequitable conduct obviously calculated to harm Defendant and

therefore its other creditors, since Defendant is insolvent, as reflected in its Schedules of assets and liabilities filed with the Court. His conduct did injure Defendant and by extension its other creditors in that a potential purchaser withdrew its letter of intent to purchase the Ice Wand technology, Defendant was unable to interest other potential purchasers, and Defendant incurred costs in defending against Dr. Ponder's claim in this adversary proceeding. The amount of the injury exceeds the allowed amount of Dr. Ponder's claim. Subordination of Plaintiff's claim is appropriate under these circumstances and is not inconsistent in any way with the Bankruptcy Code.

Defendant also seeks a permanent injunction prohibiting Plaintiff from "making any assertions or claims, either verbally or in writing, as to his alleged ownership rights in the Ice Wand and its related technology and from taking any action to establish or enforce any such purported property rights, including, without limitation, making any patent applications or filing any infringement actions relating thereto." Such injunctive relief, in view of Plaintiff's conduct, is appropriate and necessary to avoid further efforts by Plaintiff to sabotage Defendant's business.

Finally Defendant seeks an award of costs, which consist of the filing fee to initiate this adversary proceeding. It is entitled to this relief.

Accordingly, it is

ORDERED that the balance of Defendant's motion for summary judgment is GRANTED. The Court will enter a separate judgment.

Dated: September 12, 2005.

James E. Massey

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE