

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re	:	Case No. 02-59858
Fixzit National Install Services, Inc.,	:	Chapter 11
Debtor.	:	(Judge Caldwell)

**ORDER DENYING DEBTOR'S MOTION TO ENFORCE INJUNCTION
AND DISCHARGE PROVISIONS OF CONFIRMED CHAPTER 11 PLAN (NO. 160)
AND DIRECTING CLOSING OF CASE**

This Order addresses the Motion to Enforce Injunction and Discharge Provisions of Confirmed Chapter 11 Plan filed on behalf of Fixzit National Install Services, Inc. ("Debtor"). In this Motion the Debtor seeks a determination that the claims of Scott Gurvey and Amy R. Gurvey ("Creditors") are subject to the discharge and injunctive provisions of its confirmed plan. The Creditors oppose this relief, and seek sanctions, legal fees and costs. The dispute emanates from a contract for the installation of an HVAC system in the Creditors' home.

Based upon testimony, documents received into evidence, pleadings filed in this case, and statements of the parties, the Court has determined that the Debtor has not established entitlement to the requested relief. Also, it has been concluded that the Creditors have not established any basis for the imposition of sanctions and the awarding of legal fees and expenses. As the essential facts are not in dispute, only those most relevant will be discussed.

The Debtor was engaged in the business of installing HVAC systems in four states, Ohio, Florida, New Jersey and Pennsylvania. On May 15, 2002, the Debtor and the Creditors entered into a contract for the installation of HVAC equipment in the home of the Creditors located in Upper Montclair, New Jersey, for the sum of \$13,995.00. The contract included a 5 year warranty on equipment, and a 1 year warranty for labor.

On or about July 14, 2002, the installation of the system was completed. Six days later, on July 20, 2002, the Creditors requested service under the warranty. Even though the Debtor responded with repairs, the Creditors asserted that the temperature remained uncomfortably high. Approximately one month after the installation, this chapter 11 proceeding was filed on behalf of the Debtor on August 1, 2002. The Creditors were not included in the schedules, and they were not given formal notice of the proof of claim bar date (December 4, 2002). The record indicates that 76 claims were filed in this case that totaled \$ 1,002,404.89. According to the Debtor, after the bankruptcy filing it continued to provide service to the Creditors in order to maintain good will with one of their relatives that had business connections with the Debtor.

On August 4, 2003, the Debtor's plan was confirmed. It included the following relevant terms: a. Under Article IV, Sec. 4, the Debtor only assumed specific executory contracts for vehicles; b. Under Article VIII, the Debtor stated that confirmation would serve as a discharge of all pre petition debt, including damages related to the rejection of executory contracts; and c. The plan provided that this Court would retain jurisdiction to address disputes over its terms (Article IX I).

On September 30, 2004, the Debtor filed its Motion for Final Decree and Final Report and detailed that \$ 346,323.00 was distributed to unsecured creditors, and on December 22, 2004, a Final Decree Closing Case was entered. There is no dispute, however, that the Creditors were not given actual notice of the bankruptcy filing until a June 24, 2005, letter from the Debtor addressed to Mr. Scott Gurvey that stated in relevant part as follows:

(I)n August of 2002 this company (Fixzit), because of various circumstances, including your brother-in-law's company not paying us \$66,000.00 for inspected and approved work, etc., we were forced to file bankruptcy ... Because your claim is prior to the filing of our bankruptcy, should you decide to seek litigation, I (Fixzit) would have no choice but to include you in this bankruptcy.

Approximately 16 months after this case was closed, the Creditors filed a breach of contract action on April 17, 2006, in the United States District Court for the Northern District of New Jersey (Case No. 06-CV-1779 (DRD)). As a result, on the motion of the Debtors this case was reopened on October 20, 2006, to determine whether the warranty claim of the Creditors was discharged and subject to the confirmation injunction.

Turning to the applicable statutory provisions, section 1141(a) of the United States Bankruptcy Code ("Code") provides that, "...a confirmed plan (binds) the debtor ... and any creditor ... whether or not the claim or interest of such creditor ... is impaired under the plan and whether or not such creditor ... has accepted the plan." Section 1141(d)(1)(A), that addresses the scope of a chapter 11 discharge states, "... the confirmation of a plan- ... discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g) (executory contract rejection damages under Code section 365) ..." A discharge serves as an injunction of further collection efforts. 11 U.S.C. Sec. 524(a)(2). In sum, rejected executory contract damages are treated as general unsecured claims for purposes of distribution, and are discharged and subject to injunctive relief.

Considering the facts in this case, as of the date of the bankruptcy filing, the warranty was in existence. Repair obligations remained to be performed by the Debtor, and meeting such obligations would impact the Debtor's ability to consummate its plan. For bankruptcy purposes the warranty constituted an executory contract subject to rejection under section 365 of the Code and as provided in the Debtor's confirmed plan. See *The Huntington National Bank Co. V. Alix, et al. (In re Cardinal Industries, Inc.)*, 146 B.R. 720, 725-731 (Bankr. S.D. Oh. 1992).

Based upon the statutory provisions and plan terms detailed above such a warranty obligation would ordinarily be discharged and subject to injunctive relief by virtue of plan confirmation. The difficulty in this case, however, is the lack of formal or actual notice to the Creditors of the bankruptcy

filing and most importantly the proof of claim bar date. Timely notice would have allowed the parties to resolve their dispute in post confirmation claims litigation, and the Creditors may have been able to sustain their entitlement to a pro rata distribution of the funds paid to unsecured creditors.

Where formal and/or actual notice has not been given, courts have held that due process mandates the parties should not be bound by the discharge and injunctive provisions of confirmed plans. *Geno Enterprises, Inc. V. Newstar Energy U.S. A., Inc. (In re Newstar Energy of Texas, LLC)*, 280 B.R. 623, 626-627 (Bankr. W.D. MI. 2002); *Reliable Electric Co., Inc. v. Olson Construction Company (In re Reliable Electric Co., Inc.)*, 726 F.2d 620, 623 (10th Cir. 1984); *Sequa Corporation, et al. v. Christopher (In re Christopher)*, 28 F.3d 512, 516-519 (5th Cir. 1994); *Depippo v. Kmart Corporation*, 335 B.R. 290, 295-296 (D. S.D. NY. 2005); *CareMatrix Corporation, et al. v. Czehowski (In re Carematrix Corporation, et al.)*, 306 B.R. 478, 486-487 (Bankr. D. DEL. 2004). It is undisputed that in this case there was no actual or formal notice, and on this basis the Creditors can not be bound by the discharge and injunctive terms of the confirmed plan.

Addressing the Creditors' request for sanctions and legal fees, given the terms of the plan, the Court finds that the Debtor acted responsibly to preserve its interests, by seeking clarification from this Court. Indeed, the confirmed plan contemplated post confirmation jurisdiction to interpret its terms. The Debtor simply responded to the litigation by having this case reopened and requesting a determination whether the Creditors' lawsuit was barred under the Code and the confirmed plan. There is no basis to conclude that the Debtor and its Counsel acted without ample justification, as mandated by Rule 9011(b) of the Federal Rules of Bankruptcy Procedure. Finally, the Creditors have not cited any statute that supports the award of legal fees and expenses in this instance.

Accordingly, the Debtor's Motion to Enforce Injunction and Discharge Provisions of Confirmed Chapter 11 Plan is **DENIED**.

It is further ordered that in due course the Clerk shall **CLOSE** this case.

IT IS SO ORDERED.

Date: March 20, 2008



Charles M. Caldwell
United States Bankruptcy Judge

Copies to:

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