

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:	.	
JWP, INC.	.	Case No. 93-46404-rdd
Debtor.	.	
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.....	.	
R. KEITH MILLIGAN, et al.,	.	
Plaintiffs,	.	
vs.	.	
	.	
HETRA COMPUTER & COMMUNICATION INDUSTRIES, INC., et al.,	.	Adversary Proceeding Case No. 94-08469-rdd
	.	
Defendants.	.	
.....	.	

MODIFIED AND CORRECTED BENCH RULING ON EMCORE GROUP, INC.'S
MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiff: (Via Telephone)	R. KEITH MILLIGAN (Pro Se)
For EMCORE GROUP, INC.: (f/k/a JWP, Inc.)	DAVID A. SIFRE, ESQUIRE Stroock & Stroock & Lavan, LLP 180 Maiden Lane New York, New York 10038 (212) 806-5400

1 THE COURT: I have before me a motion by Emcore
2 Group, Inc., formerly known as JWP, Inc., a Defendant in this
3 adversary proceeding, for summary judgment pursuant to
4 section -- I'm sorry, pursuant to Bankruptcy Rule 7056, which
5 incorporates Fed.R.Civ.P. 56. That Rule provides that the
6 Court shall grant summary judgment if the movant shows that
7 there is no genuine dispute as to any material fact and the
8 movant is entitled to judgment as a matter of law.

9 Subject to Fed.R.Civ.P. 56(C)(2) through (4) and
10 56(D) through (E), which are inapplicable here, a party
11 asserting that a fact cannot be or is genuinely disputed must
12 support the assertion by, a) citing to particular facts or
13 parts of materials in the record including depositions,
14 documents, electronically stored information, affidavits, or
15 declarations, stipulations, admissions, interrogatory
16 answers, or other materials; or b) by showing that the
17 materials cited do not establish the absence or presence of a
18 genuine dispute or that an adverse party cannot produce
19 admissible evidence to support the fact. Fed.R.Civ.P.
20 56(C)(1).

21 The movant bears the initial burden to come
22 forward with evidence that satisfies each material element of
23 its claim or defense. *Vermont Teddy Bear Company v. 1-880-*
24 *BEARGRAM Company*, 373 F. 3d 241, 244 (2nd Cir. 2004); *Isaac*
25 *v. City of New York*, 701 F.Supp. 2d 477, 485 (SDNY 2010),

1 affirmed 271 F.App. 60 (2nd Cir. 2008).

2 Upon such a showing the non-moving party must
3 provide evidence of a genuine issue of material fact in order
4 to successfully oppose the motion. *Matsushita Electric*
5 *Industries Company v. Zenith Radio Corporation*, 475 U.S. 574,
6 586 (1986). Facts are material if they "might affect the
7 outcome of the suit under the governing law." *Anderson v.*
8 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1996).

9 The Court "is not to weigh the evidence, but is
10 instead required to view the evidence in the light most
11 favorable to the party opposing summary judgment, to draw all
12 reasonable inferences in favor of that party, and to eschew
13 credibility assessments." *Amnesty America v. Town of West*
14 *Hartford*, 361 F. 3d 113, 122 (2nd Cir. 2004).

15 The non-moving party may not defeat a summary
16 judgment motion by identifying a disputed fact that is not
17 material or relying on conclusory or self-serving statements
18 or metaphysical doubts about a material fact. *Liberty Lobby*,
19 477 U.S. at 247 through 248; *Matsushita Electric*, 475 U.S. at
20 586.

21 Where opposition of the motion is based upon an
22 asserted dispute of material factual issue, there must be
23 evidence on which the trier of fact could reasonably find for
24 the non-moving party. *Id* at 248.

25 "Although if there is any evidence in the record

1 from any source from which a reasonable inference in the non-
2 moving party's favor may be drawn, the moving party simply
3 could not obtain a summary judgment." *Binder & Binder, PC v.*
4 *Barnhart*, 481 F. 3d 141, 148 (2nd Cir. 2007). *See generally,*
5 *Matsushita v. Zenith Radio Corp.*, 475 U.S. at 586.

6 In addition, Local Bankruptcy Rule 7056-1 is
7 applicable here. Subsection (d) of that rule provides, "Each
8 numbered paragraph in the statement of material facts
9 required to be served by the moving party shall be deemed
10 admitted for purposes of the motion unless specifically
11 controverted by a correspondingly numbered paragraph in the
12 statement required to be served by the opposing party."

13 It has repeatedly been held that the opposing
14 party's failure to controvert any of the facts asserted in a
15 Rule 7056 statement or otherwise in the Motion for Summary
16 Judgment, the statement of facts is deemed admitted -- I'm
17 sorry, that the -- let me say that again.

18 It has repeatedly been held that the failure to
19 controvert any of the facts set forth in the movant's Rule
20 7056 statement of facts results in the deemed admission of
21 that statement. *See, In re: Interbank Funding Corp.*, 310
22 B.R. 238, 254, and the cases cited therein (Bankr. SDNY
23 2004).

24 Before turning to the motion and the facts set
25 forth therein which, are therefore deemed admitted given that

1 there has been no response to the motion, let alone a Rule
2 7056-1 statement filed by Mr. Milligan specifically
3 controverting the facts set forth in Emcore's Rule 7056-1
4 statement, I should note that the Plaintiff in this case, Mr.
5 Milligan, contends that he did not receive a copy of Emcore's
6 Motion for Summary Judgment, although he acknowledges, as is
7 clear from the record, that he was aware of the motion as
8 well as today's hearing on the motion, since, at his request,
9 the motion was adjourned, or the hearing on the motion was
10 adjourned, from April 26th to today's date. (See Docket
11 Entry 288.)

12 It is presumed, given the certificate of service
13 that was filed listing Mr. Milligan's correct address, that
14 he received service of the motion. See -- and I will fill in
15 the cite for this when I review the transcript -- *In re: R.H.*
16 *Macy Company*, 161 B.R. 355, 359 (Bankr. S.D.N.Y. 1993)(*citing*
17 *Hagner v. United States*, 285 U.S. 427, 430, 52 S. Ct. 417, 76
18 L. Ed. 861 (1932)), *In re: Dana Corporation*, 2007 Bankr.
19 LEXIS 1934, at *13-15 (Bankr. S.D.N.Y. May 30, 2007), and *In*
20 *re: Delphi Corporation*, 2009 Bankr. LEXIS 571, *4-5 (Bankr.
21 S.D.N.Y. January 20, 2009).

22 As set forth in those rulings, all from this
23 District, the foregoing presumption is not rebutted simply by
24 statements that the document was not received contrary to a
25 certificate of service.

1 Such statements are all that I have before me and,
2 in light of that and the foregoing case law, as well as the
3 fact that Mr. Milligan clearly had knowledge that there was a
4 pending motion for summary judgment at least from April 25,
5 2011, I find and conclude that he did, in fact, have the
6 motion and that it was served on him properly.

7 I know also that Mr. Milligan contends that he was
8 unable to respond to the motion because of his illness. I
9 accept his representations to the Court that, in fact, he has
10 been severely ill for some time. I will note, however, that
11 this matter also has been pending for a long time. The
12 hearing during which I ruled that this matter would be dealt
13 with on the evidence with regard to the issue of damages and
14 whether Emcore and JWP acted not in good faith in missing the
15 three year deadline agreed to by the parties in their
16 settlement agreement, that hearing occurred --

17 MR. MILLIGAN: Only by 20 years.

18 THE COURT: -- that hearing occurred on December
19 13, 2005. The record of discovery in this case is set forth
20 in the motion, including the Plaintiff, Mr. Milligan's,
21 response to Emcore's interrogatories, which response is
22 undated, although the interrogatories were dated August 20,
23 2010. It states that Mr. Milligan, other than relying on
24 common sense and Florida case law, is unable to state what
25 specifically JWP should have done to have completed the

1 remediation within three years of the February 22, 1995 Order
2 approving the settlement between the parties, and implicitly
3 states that he's not aware of whether any specific facts
4 could be shown to establish that JWP did not act in good
5 faith in doing so.

6 In addition, those interrogatory answers merely
7 respond as "irrelevant" to Emcore's interrogatories 2 through
8 10, going to the elements of potential damages caused by the
9 failure to complete the remediation within that three year
10 period.

11 Thus, while I'm obviously sympathetic to Mr.
12 Milligan's health conditions, I do not believe that there's a
13 basis here to delay the determination of this motion in an
14 adversary proceeding that has been live and ready to be dealt
15 with through the discovery process, and then either summary
16 judgment or a trial, since at least February 2, 2006 when I
17 entered the Order memorializing my December 13, 2005 bench
18 ruling.

19 Then, turning to the merits of the motion itself,
20 the issues in this adversary proceeding are properly stated
21 by Emcore, repeating the next-to-last decretal paragraph of
22 my February 2, 2006 Order; that is, Plaintiff shall be
23 required to prove that (a) JWP's failure to clean up the
24 property by the deadline provided in the February 22, 1998
25 Order caused damages to the Plaintiffs, and (b) that the

1 failure was caused by JWP's lack of good faith to clean up by
2 such deadline.

3 As was made clear at the December 13, 2005
4 hearing, at page 42 of the transcript, and by the disjunctive
5 nature of the issue that I've just read, the failure to
6 establish either point (a) or point (b) would result in a
7 judgment in favor of Emcore.

8 The notice of motion contains, as is required by
9 Local Bankruptcy Rule 7056-1, a statement of uncontroverted
10 facts, which are supported by the affidavits of Messrs. Long
11 and Barq, which I have also reviewed. Those three documents,
12 that is: the Rule 7056-1 statement, the Long declaration, and
13 the Barq declaration or affidavit, establish that JWP/Emcore
14 acted in good faith in pursuing the clean up or remediation
15 of the property at issue, the Philips Street property.

16 In particular, the 7056-1 statement states, at
17 paragraph 11: "There is no evidence that the Philips Street
18 property could have been cleaned up by February 1997, much
19 less the failure to clean the property by that date, was due
20 to JWP's lack of good faith effort to clean the property."
21 The Barq affidavit - although, given the fact that Mr.
22 Milligan did not file a controverting Rule 7056-1 statement
23 it is not necessary for him to rely on the Barq affidavit --
24 the Barq affidavit confirms the foregoing uncontroverted
25 assertion, not in a conclusory way, but, rather, by detailing

1 the history of the clean-up through the date of the three-
2 year anniversary of Judge Gallet's 1995 Order.

3 In addition, the Plaintiffs have not stated the
4 amount of any damages they claim to have suffered as a result
5 of the failure to clean up the property by that three-year
6 anniversary, and, in fact, in their interrogatory answers
7 have stated that the issue of damages and their calculation
8 is irrelevant.

9 Given all of that, I find and conclude that Emcore
10 has carried its burden on its Motion for Summary Judgment and
11 that that motion should be granted.

12 So, counsel for Emcore should submit an order
13 consistent with my ruling at the chambers address. It
14 doesn't need to settle that order with Mr. Milligan, but it
15 should email him a copy of it as well as mail it to the
16 address on the certificate of service for the Summary
17 Judgment Motion.

18 As I said, I will add to the transcript the cites
19 to the *Macy*, *Dana*, and *Delphi* cases, since I did not know
20 that Mr. Milligan was going to contend that he didn't receive
21 the documents.

22 MR. MILLIGAN: I did not understand what you said.

23 THE COURT: I'm going to add those cites to the
24 transcript, since I did not have them with me here, not
25 knowing that Mr. Milligan was going to assert that he did not

