

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:) Case No. 02-B02474
)
KMART CORPORATION,) Chapter 11
) Hon. Susan Pierson Sonderby
Debtor.) Hearing Date: August 5, 2009
) Hearing Time: 11:00 a.m. (CDT)

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Wednesday, August 5, 2009, at the hour of 11:00 a.m. (CDT)**, we shall appear before Judge Susan Pierson Sonderby, Courtroom 642, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, or before any other judge who may be sitting in her place and stead, and shall present **Kmart's Motion for Order Disallowing Claim of Anibal Ortiz dba A.I.R. Enterprises**, a copy of which is attached hereto and herewith served upon you at which time and place you may appear if you so see fit.

PLEASE TAKE FURTHER NOTICE that if you desire to appear telephonically at this hearing, please contact Mark Mackowiak of the law firm below at 312-629-5187.

Dated: July 10, 2009

Respectfully submitted,

/s/ William J. Barrett

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CERTIFICATE OF SERVICE

I, William J. Barrett, an attorney, hereby certify that a true and correct copy of **Kmart's Motion for Order Disallowing Claim of Anibal Ortiz dba A.I.R. Enterprises** was served via U.S. Mail delivery, postage prepaid, to the parties listed below, on the 10th day of July, 2009.

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Mailing Information for Case 02-02474

Electronic Mail Notice List

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:

KMART CORPORATION,

Debtor.

Case No. 02 B 02474

Honorable Susan Pierson Sonderby

Hearing Date: August 5, 2009

Hearing Time: 11:00 a.m.

**KMART'S MOTION FOR ORDER DISALLOWING CLAIM
OF ANIBAL ORTIZ dba A.I.R. ENTERPRISES**

Kmart Corporation ("Kmart"), for its Motion for Order Disallowing Claim of Anibal Ortiz dba A.I.R. Enterprises, states as follows:

1. Anibal Ortiz dba A.I.R. Enterprises ("Claimant") filed a proof of claim for \$4,903,000. The claim incorporates a "Demanda" – a Spanish language complaint filed in the Superior Court in San Juan, Puerto Rico. Attached as Exhibit A is the original Demanda and as Exhibit B is Kmart's English language translation of the Demanda. In the Demanda, the Claimant makes two claims: a claim of \$167,706 for amounts owed for work performed at several Kmart stores, and a claim of tortious interference with contract of \$4,900,000, including \$1,000,000 for mental anguish.

2. Kmart objected to the claim in its 19th Omnibus Objection, asserting that the claim should be allowed for \$0. Although the Claimant did not file a response to the Objection, Kmart continued the Objection, and so no order has been entered on the claim.

3. Kmart bases its objection to the claim of the Claimant on the following:

- (i) the claim was filed late;
- (ii) the claim is duplicative of amounts claimed by Elite Security Systems (“Elite”);
- (iii) Kmart had no privity of contract with the Claimant; and
- (iv) the tort claim is unsupported and without legal basis.

Background

3. The claim arises out of work allegedly performed by Elite for the installation of doors at several Kmart stores. Whatever relationship existed between Kmart and Elite, however, clearly ended when, on July 16, 2001, Kmart advised Elite that:

The following letter is to confirm our telephone conversation today in reference to various store locations that are to be stopped immediately from your services of door repairs and/or replacement. As discussed per my conversation you were not authorized by a formal contract to execute such work and was directed by Kmart representatives that the work was not to be performed by your company. Even with such cancellation notice being given you have chosen to ignore this and proceed with service which will be at your own expense and considered a gift to Kmart.

See Exhibit C hereto.

4. Elite nonetheless filed a timely claim in this bankruptcy case for \$167,706 allegedly owed to it for work performed prior to its termination. A copy of Elite’s claim is attached hereto as Exhibit D.

5. From the documents attached to Elite’s proof of claim, it appears that Elite subcontracted to the Claimant some of the work Elite was to perform for Kmart. Specifically, the Elite claim includes several “Contractor’s Sworn Statements” that show “Anibal Ortiz (A.I.R. Enterprises)” as a subcontractor for Elite on the Kmart projects. No document attached to either the Claimant’s Proof of Claim or the Elite Proof of Claim shows any direct contractual relationship between Kmart and the Claimant.

6. In its Proof of Claim, the Claimant includes eight open invoices totaling \$167,706, the precise amount claimed by Elite in its Proof of Claim. In fact, the \$167,706 claimed by the Claimant (see Paragraph 11 of the Demanda) relates to the same charges as claimed by Elite. Although the Elite Proof of Claim does not include a single list of the underlying charges that comprise the claim, from the documents attached to the Elite claim it is clear that:

(i) Elite claimed \$13,867 for work on Kmart store 7768, for which the Claimant also makes a claim (see no. 4 on Paragraph 11 of Demanda);

(ii) Elite claimed \$63,459 for work on Kmart store 7665, for which the Claimant also makes a claim (see no. 2 on Paragraph 11 of Demanda);

(iii) Elite claimed \$9,800 for work on Kmart store 7446, for which the Claimant also makes a claim (see no. 6 on Paragraph 11 of Demanda);

(iv) Elite claimed \$22,308.40 for work on Kmart store 4494, for which the Claimant also makes a claim (see no. 5 on Paragraph 11 of Demanda) (the Demanda shows the amount as \$22,308.40); and

(v) Elite claimed \$5,200 for work on Kmart store 4490, for which the Claimant also makes a claim (see no. 3 on Paragraph 11 of Demanda).

7. Elite and Claimant were co-plaintiffs in the lawsuit against Kmart initiated by the filing of the Demanda in the Puerto Rico courts on February 13, 2002. In that case, Elite and Claimant were both represented by Nicolas Noguerras, who also prepared and filed the Proof of Claim for the Claimant and was designated as authorized attorney in the Proof of Claim filed by Elite. In the Demanda, the Claimant does not allege that it had a contract with Kmart – only Elite makes such an allegation. In fact, the Complaint does not explain how the Claimant had any relationship with Kmart other than that Elite hired the Claimant to serve as a subcontractor under a contract Elite had with Kmart.

Basis For Objection.

I. The Claim Was Filed Late.

8. The Claimant filed its claim on January 7, 2003, after the July 31, 2002 deadline for filing claims.

9. Because Kmart had no contract with the Claimant, Kmart did not send notice of the claim filing deadline to the Claimant. Notice was sent to Elite, the party with whom Kmart had a contract. Elite filed a timely claim on the form that Trumbull (the claims agent) had sent to it along with a notice of the bar date.

10. In its Proof of Claim, Elite designated attorney Nicolas Nogueras as its attorney in fact. Mr. Nogueras was the attorney who represented both Elite and the Claimant in the action instituted in February 2002 by the filing of the Demanda. Mr. Nogueras was clearly counsel for the Claimant at the time the bar date notice was sent, and remained counsel at least through January 2003, when Mr. Nogueras signed and filed a Proof of Claim for the Claimant.

11. Claimant's counsel, Mr. Nogueras, had actual knowledge of the bar date by which claims must be filed in this case, as evidenced by the fact that he filed a timely claim for Elite on the form that accompanied the claim bar date notice. The Proof of Claim filed by the Claimant offers no explanation as to why it was filed late, and no separate leave to file a late claim has been sought. Claimant's Proof of Claim was late and should be disallowed.

II. Claimant's Claim Duplicates the Claim filed by Elite.

12. As detailed above, the Demanda, which is attached to the Claimant's Proof of Claim, lists eight invoices totaling \$167,706. Elite's Proof of Claim was for the exact same amount, and the documents attached to its proof of claim match, by amount, and the Kmart store number at which the work was performed, and match the work descriptions on the Demanda.

III. Claimant Did Not Have Privity with Kmart.

13. Nowhere in the Demanda, and nowhere in any document attached to Elite's Proof of Claim, is it stated or does it appear that the Claimant had any contract with Kmart. The Claimant's contract was with Elite.

IV. Claimant Has Not Stated a Claim for Tortious Interference.

14. The Demanda says that Kmart terminated the agreement it had with Elite and awarded the work to Metro Rolling Doors. Without any further allegations of where, what, when, and how, the Demanda says that "these unlawful acts by [Kmart] have caused severe economic damages to [Elite and Claimant]." At best, Elite has stated in the Demanda a claim for breach of contract; a breach of contract claim cannot also give rise to a tortious interference with contract claim. See *Restatement of the Law, Torts 2d*, §766A (tortious interference requires action by a third party, not action by one of the parties to the contract). As for the Claimant, it has not stated any claim – its contract was with Elite, and there is no allegation that Kmart did anything that would have prevented Elite from performing whatever contractual duties it owed to the Claimant.

For the reasons set forth herein, Kmart moves that the claim of the Claimant be allowed at \$0.

Dated: July 10, 2009

Respectfully submitted,

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