

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re

KMART CORPORATION,

Debtor.

Chapter 11

Case No. 02 B 02474

Hon. Susan Pierson Sonderby

RESPONSE OF KMART CORPORATION TO MOTION TO REOPEN CASE

Kmart Corporation (“Kmart”) files this response to the motion of Mary Eason Curtis (“Curtis”) to reopen case.

1. Kmart’s chapter 11 bankruptcy case was closed upon the entry of a Final Decree on March 6, 2010.

2. Prior to Kmart’s bankruptcy filing on January 22, 2002, Curtis filed a lawsuit against Kmart in the Guilford County Superior Court, North Carolina (the “North Carolina Court”) for an alleged personal injury that occurred in 1997. In 2002, Curtis filed a timely proof of claim (the “Curtis Claim”) in this bankruptcy case for the same pre-petition personal injury. The proof of claim was assigned no. 12769. A copy of the Curtis Claim is Exhibit A hereto.

3. Kmart objected to the Curtis Claim in Kmart’s 21st Omnibus Objection to Claims filed on February 2, 2004. A copy of the objection was served on Curtis on:

Irvey, McClellan, Gatton & Talcott
Curtis, Mary
Edwin R. Gatton
121 South Elm Street
Greensboro, NC 27401

the same address as appearing on the Curtis Claim. A copy of the relevant pages of the Certificate of Service of the 21st Omnibus Objection to Claims is attached hereto as Exhibit B.

4. Curtis did not respond to the objection, and consequently the claim was disallowed by an Order entered on April 1, 2004. A copy of the relevant pages of the Order is attached hereto as Exhibit C.

5. In 2005, Kmart moved in the North Carolina Court for summary judgment in the lawsuit filed by Curtis. Rather than respond to the summary judgment motion, on August 24, 2005 Curtis, with Kmart's consent, filed in the North Carolina Court a Notice of Dismissal Without Prejudice (see Exhibit D hereto). The Notice of Dismissal was signed by the same counsel for Curtis (Edward Gatton) as on whom Kmart served the 21st Omnibus Objection to Claims.

6. As stated on its face, the Notice of Dismissal was filed under Rule 41(a) of the North Carolina Rules of Civil Procedures. Rule 41(a) provides:

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof. –

(1) By Plaintiff; by Stipulation. – Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

7. Under Rule 41(a)(1), Curtis had one year from the without prejudice dismissal of her case to file a new action. Curtis filed no new action by August 24, 2006, and accordingly the dismissal of the prior action is now effectively with prejudice.

8. Curtis has filed the present motion, without a notice of hearing, more than six years after this Court's disallowance of her claim and more than five years after she voluntarily dismissed her claim in the North Carolina Court. Curtis's claim has been disposed of not once but twice, and there is no basis to reopen this bankruptcy case for a claim disallowed so long ago.

9. Moreover, because the Curtis Claim is for an alleged personal injury, there is limited relief this Court could provide.

For reasons set forth above, Kmart requests that the motion to reopen case be denied.

Dated: October 14, 2010

Respectfully submitted,

KMART CORPORATION

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CERTIFICATE OF SERVICE

I, William J. Barrett, an attorney, hereby certify that **Response of Kmart Corporation to Motion to Reopen Case**, was served on October 14, 2010 (i) via first class, United States Postal Service Mail, postage prepaid, to the party listed below; and (ii) via notification of the e-filing to all parties on the attached CM/ECF Electronic Mail Notice List for this case.

Mary E. Curtis
211 Burton Avenue
Dunn, NC 28334

Dated: October 14, 2010
Chicago, Illinois.

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Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive e-mail notices for this case.

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