

**UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY**

IN RE:)	
)	
THERMOVIEV INDUSTRIES, INC.)	
)	
Debtor(s))	Case No. 05-37123(1)(7)
)	
THOMAS W. FRENTZ)	
)	
Plaintiff(s))	AP No. 07-3015
)	
vs.)	
)	
PROLUX, INC.)	
)	
_____)	
Defendant(s))	

MEMORANDUM-OPINION

This matter is before the Court on the Motion for Summary Judgment of Defendant Prolux, Inc. (“Defendant”) and the Motion to Withdraw and Amend Admissions of the Plaintiff Thomas W. Frenz, Trustee for Thermoviev Industries, Inc. (“Trustee”). The Court considered the responses to each motion, the reply of Defendant to the Trustee’s response on the summary judgment motion and the comments of counsel at the hearing held on the matters. For the following reasons, the Court **DENIES** the Motion for Summary Judgment and **GRANTS** the Motion to Withdraw and Amend Admissions.

PROCEDURAL BACKGROUND

On January 5, 2007, Trustee initiated this adversary proceeding against Defendant by filing a Complaint to Avoid Transfers Pursuant to 11 U.S.C. §547 and to Recover Property Transferred Pursuant to 11 U.S.C. §550. Defendant filed its Answer to the Complaint on February 7, 2007.

On May 29, 2007, the Court entered an Agreed Order extending the deadline within which the Trustee had to respond to Defendant's First Set of Interrogatories, Request for Production of Documents to July 1, 2007. Defendant's deadline to complete discovery was extended to August 1, 2007. The Trustee did not respond to Defendant's Request for Admissions.

On July 10, 2007, Defendant filed its Motion for Summary Judgment. In that Motion, Defendant relied on the Trustee's failure to respond to the Request for Admissions as constituting admissions of critical facts negating the Trustee's claims.

On July 23, 2007, the Trustee filed his Response to Defendant's Motion for Summary Judgment and a Motion to Withdraw and Amend Admissions. Defendant filed its Objection to the Trustee's Motion to Withdraw and Amend Admissions on August 2, 2007. Defendant also filed a Reply Memorandum in Support of its Motion for Summary Judgment on August 8, 2007.

LEGAL ANALYSIS

In ruling on a Motion to Withdraw Admissions, it is clear that the Court has "considerable discretion." Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 154 (6th Cir. 1997). This discretion must be exercised in light of Rule 36(b) which allows withdrawal (1) "when the presentation of the merits of the action will be subserved thereby," and (2) "when the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Id., quoting Fed. R. Bankr. P. 7036(b).

Based on these guidelines, the Court will grant the Trustee's motion and allow the deemed admissions to be withdrawn.

The record before the Court does not support Defendant's entitlement to summary judgment absent the admissions. Although Defendant contends in its reply brief that it has additional defenses to the Trustee's claims, they were not supported by admissible evidence, nor were they the basis of the summary judgment motion. Federal policy favors deciding issues based upon the actual merits of the case and not on the basis of procedural niceties. In re Ottawa River Steel, 324 B.R. 636, 638 (N.D. Ohio 2005). Thus, the first part of the two part test is met when upholding the admissions would practically eliminate any presentation of the merits of the case. Id., citing Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995). Here, every essential element of the Trustee's case is negated by the deemed admissions. No admissible evidence was presented by the Defendant in support of the summary judgment motion, other than the admissions. The issues in this case should be decided on the merits.

The second part of the test in determining whether it is appropriate to withdraw admissions is whether the party who obtained the admissions will be prejudiced by the withdrawal. The Sixth Circuit described this requirement as follows:

In regard to prejudice, '[t]he prejudice contemplated by [Rule 36(b)] is not simply that the party who initially obtained the admission will not have to convince the fact finder of its truth.' Brook Village North Assoc. v. General Electric Co., 686 F.2d 66, 70 (1st Cir. 1982). Prejudice under Rule 36(b), rather, 'relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission.' American Auto, 930 F.2d at 1120.

Kerry, 106 F.3d at 154. Further, the party who obtained the admission has the burden of proving prejudice. Id.

In this case, Defendant failed to prove that it will be prejudiced by withdrawal of the admissions. Defendant's contention that it has been prejudiced because it has incurred extra time and expense in filing the Motion for Summary Judgment is not sufficient to establish prejudice. See, Ottawa River Steel, 324 B.R. at 640, citing Federal Deposit Ins. Corp. v. Pressure, 18 F.2d 637, 640 (8th Cir. 1994).

Additionally, as the Trustee stated at the hearing on this matter, it is the Trustee who is prejudiced in this case by any delay. The Trustee does not have easy access to the Debtor's records making it much more difficult for him to prove his case. Conversely, Defendant has access to its own records necessary to prove its defenses. Defendant will suffer no prejudice by defending this case on the merits. Accordingly, the Trustee's Motion to Withdraw and Amend Admission will be granted.

Finally, with the withdrawal of the admissions, it is clear that Defendant is not entitled to judgment as a matter of law pursuant to Fed. R. Bankr. P. 56. Thus, the Motion for Summary Judgment is denied.

CONCLUSION

For all of the above reasons, the Motion for Summary Judgment of Defendant Prolux, Inc. is **DENIED** and the Motion to Withdraw and Amend Admissions of Plaintiff Trustee Thomas W. Frentz is **GRANTED**.

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ORDER

This matter having come before the Court on the Motion for Summary Judgment of Defendant Prolux, Inc. and the Motion to Withdraw and Amend Admissions of Plaintiff Thomas W. Frenz, Trustee for Thermoviev Industries, and the Court being duly advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of Defendant Prolux, Inc., be and hereby is, **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Withdraw and Amend Admissions of Plaintiff Thomas W. Frenz, Trustee for Thermoviev Industries, Inc., be and hereby is, **GRANTED**.