IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-31754

LOGIXX AUTOMATION, INC.

Debtor

LOGIXX AUTOMATION, INC.

Plaintiff

v. Adv. Proc. No. 00-3053

COMMUNITY REUSE ORGANIZATION OF EAST TENNESSEE, d/b/a CROET

Defendant

MEMORANDUM ON MOTION TO AMEND FINDINGS OF FACT AND JUDGMENT

APPEARANCES: JENKINS & JENKINS ATTYS., PLLC
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The court has before it the Plaintiff's Motion to Amend Findings of Fact and Judgment (Motion) filed August 7, 2000. In support of its Motion, the Plaintiff submits an excerpt of the transcript of the proceedings before the court from the trial on July 18, 2000, which consists of the testimony of Susan A. Patterson, a witness for the Defendant. The Plaintiff asks the court to amend its findings of fact set forth in the Memorandum Opinion dictated from the bench on July 28, 2000, which was transcribed and filed on August 2, 2000, and to amend its Judgment entered July 28, 2000.[1] On August 17, 2000, the Defendant filed its Response to Motion to Amend Findings of Fact and Judgment.

I

This action involved the determination of the amount of deposit required of the Debtor pursuant to 11 U.S.C. § 366(b), the amount of the monthly payment owed by the Debtor to the Defendant for postpetition utility services, and the extent to which the Defendant should be enjoined from terminating the Debtor's utility service in the event of a default.

[1] The Plaintiff grounds its Motion on Rule 59 of the Federal Rules of Civil Procedure, incorporated into this adversary proceeding by Rule 9023 of the Federal Rules of Bankruptcy Procedure, which provides in material part at subsection (e) that "[a]ny motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment." The court also deems the Motion filed pursuant to Rule 52 of the Federal Rules of Civil Procedure, incorporated into this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, which provides in material part at subsection (b) that "[o]n a party's motion filed not later than 10 days after entry of judgment, the court may amend its findings - or make additional findings - and may amend the judgment accordingly."

One issue in this action was whether and in what amount the Debtor was contractually obligated to pay to the Defendant a component of electricity service charges referred to within the industry as a demand charge. The court determined that the Debtor was obligated to pay a demand charge to the Defendant. Although the portion of the contract providing for the payment of electricity set a rate of $67.50 per megawatt hour, the court found that the contract rate of $67.50 was to be applied only to megawatts of actual consumption and that it therefore did not include a demand charge component. Thus, the court looked for evidence to establish the actual amount of the monthly demand charges. It found that the Debtor did not present evidence as to the appropriate amount for the demand charge. Consequently, it accepted the demand charge which was calculated by Eugene T. Christensen, Jr., and presented to the court by him through deposition testimony. Mr. Christensen testified that he is employed as a project accountant by Operations Management International (OMI) and that OMI manages the Debtor's utility service, among other things, under an agreement with the Defendant. He calculated that the Debtor owed $1,326.00 each month for demand charges.

By its present Motion, the Plaintiff directs the court's attention to the testimony of Susan A. Patterson, a witness for the Defendant. Ms. Patterson testified that she is also employed by OMI as a project accountant and that she was the party responsible for computing the $67.50 contract rate in 1998 for the Debtor's electric services. Ms. Patterson testified that the $67.50 rate that she computed included a demand charge. Specifically, when asked on direct examination by Mr. Morgan, CROET's counsel, what factors were included in the rate, she testified that "[t]he

[$67.50] cost per megawatt hour includes the commodity, demand, use tax, and the operations and maintenance of the power systems." Exc. of Tr. of July 18, 2000 trial, test. of Susan Patterson at 8. Later in her direct examination, she again testified regarding the components of the $67.50 cost per megawatt hour. The following exchange took place between CROET's counsel and Ms. Patterson:

> Q. Okay. How was this sixty-seven dollar and fifty cent rate selected, if you know?
>
> A. It's a calculation that I did back in 1998 when I was the finance officer for power operations. And at that point in time it covered the commodity, the demand, the use tax, and the operation. So it was the actual cost in 1998 to the site.

Id. at 23.

On cross-examination, Ms. Patterson, in response to questions propounded by the Plaintiff's attorney, Mr. Fitzpatrick, gave the following testimony:

> Q. . . . But you do know from the time that you calculated the sixty-seven dollar and fifty cent figure that at that point in time that number times the megawatts covered the entire expense of DOE for electricity for that facility?
>
> A. At the time I calculated it back in '98?
>
> Q. Yes Ma'am.
>
> A. Yes.

Id. at 26-27.

Thus, CROET, through its proof-in-chief, conclusively established that the $67.50 rate includes a factor for the demand charge.

II

Motions to alter or amend a judgment are considered if filed within ten days after entry of the judgment pursuant to FED. R. CIV. P. 59(e), made applicable to cases in bankruptcy by FED. R. BANKR. P. 9023. Rule 59(e) lists no specific grounds for granting a motion to amend or alter a judgment, and courts have broad discretion in ruling on such motions. *See Global Network Techs., Inc. v. Regional Airport Auth.*, 122 F.3d 661, 665 (8th Cir. 1997); *McClendon v. B & H Freight Servs., Inc.*, 910 F. Supp. 364, 365 (E.D. Tenn. 1995). Motions under Rule 59(e) should be granted sparingly and are typically denied. *See McClendon*, 910 F. Supp. at 365 (citations omitted).

Motions to amend or alter a judgment are granted in four situations: (1) to correct clear errors of law; (2) to evaluate newly discovered evidence; (3) to prevent manifest injustice; or (4) to consider an intervening change in the controlling law. *See GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted). Such motions are properly granted where a court "failed to give relief on a claim on which it has found that the party is entitled to relief." *Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 (7th Cir. 1985); *In re Barker-Fowler Elec. Co.*, 141 B.R. 929, 934 (Bankr. W.D. Mich. 1992).

Denial of a motion under Rule 59(e) is appropriate if used by a party to raise arguments or issues that could have been raised before the judgment. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *McClendon*, 910 F. Supp. at 365. Similarly, additional evidence cannot be presented with a motion to amend or alter a judgment if the evidence was available to the party before the judgment. *See GenCorp*, 178 F.3d at 275; *Global Network Techs.*, 122 F.3d at 665-66; *McClendon*, 910 F. Supp. at 365.

III

The court erred in not recognizing and relying upon Ms. Patterson's testimony in determining the amount owing for the demand charge. She is the individual who computed the $67.50 rate and her testimony that the rate included a demand charge is unequivocal. Furthermore, she was a witness for the Defendant. Accordingly, the court will amend its Judgment to reflect that fact.

The monthly amount owing for postpetition electricity charges, as determined by the court from Mr. Schwab's testimony, is $1,393.43. This represents the $67.50 per megawatt hour rate multiplied by the amount of megawatts which the court found to be the amount that the Debtor had used during the postpetition months from the filing of the petition on April 28, 2000.[2]

[2] In its discussion of Mr. Schwab's testimony at page 13 of the court's July 28, 2000 Memorandum Opinion, which was transcribed and filed on August 2, 2000, the court referred to the $1,393.43 monthly electricity charges calculated by Mr. Schwab as "actual consumption charges" and "actual electrical consumption charges." Mr. Schwab also testified that his calculations did not include a demand charge. The demand rate is, however, as Ms. Patterson explained, factored into the $67.50 rate referred to in Exhibit C to the Lease which was used by Mr. Schwab in his computation of the monthly electricity charges.

The total monthly charge owing postpetition from April 28, 2000, the date the Debtor commenced its Chapter 11 case, is $2,224.20, which represents $1,393.43 for electricity, $127.30 for water and sewer, and $703.47 for steam. The prorated amount owing for the two postpetition days in April 2000 is $148.28. Thus, the Debtor owes a total of $2,372.48 for its utilities from the date of its petition through May 31, 2000. The Debtor has paid $4,500.00 to the Defendant for payment of its June and July utilities, for a total of $9,000.00. Therefore, the Debtor has overpaid the Defendant $4,551.60 for its utilities during these two months.

The court also determined that the Debtor, pursuant to 11 U.S.C. § 366(b), must make a deposit in order to provide "adequate assurance of payment" to the Defendant for future utility services in an amount equal to one and one-half months of service. The amount of the required deposit must be amended therefore to the amount of $3,336.30. As the Debtor tendered the sum of $3,000.00 for this purpose prior to trial, it must now tender the balance of $336.30.

In summary, the Debtor owes the Defendant $2,372.48 for utilities from April 29 through May 31, 2000, but has overpaid June and July utilities by $4,551.60. Applying the overpayment to the amount due, the Debtor is still entitled to a credit of $2,179.12 which is to be applied against its obligation for utilities accruing after July 31, 2000. Additionally, the Debtor will be required to remit to CROET the $336.30 balance of its deposit within five days provided, however, that to the extent the Debtor has paid the balance of the deposit in the amount directed by the court in its July 28, 2000 Judgment, it will be entitled to apply any portion of this payment in excess of $336.30 toward its future monthly utility charges.

The Plaintiff's Motion will be granted and an amended judgment superseding the Judgment previously entered on July 28, 2000, will be entered. This Memorandum constitutes an amendment to the court's findings as set forth in the July 28, 2000 Memorandum Opinion filed August 2, 2000.

FILED: August 29, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-31754

LOGIXX AUTOMATION, INC.

Debtor

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v. Adv. Proc. No. 00-3053

COMMUNITY REUSE ORGANIZATION OF EAST TENNESSEE, d/b/a CROET

Defendant

O R D E R

For the reasons set forth in the Memorandum on Motion to Amend Findings of Fact and Judgment filed this date, the court directs that the Motion to Amend Findings of Fact and Judgment filed by the Plaintiff on August 7, 2000, is GRANTED. An amended judgment superseding the Judgment previously entered on July 28, 2000, will be entered.

SO ORDERED.

ENTER: August 29, 2000

BY THE COURT

/s/ Richard Stair, Jr.
RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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COMMUNITY REUSE ORGANIZATION OF EAST TENNESSEE, d/b/a CROET

Defendant

AMENDED JUDGMENT

For the reasons set forth in the court's Memorandum Opinion dated July 28, 2000, which was transcribed and filed on August 2, 2000, and in the Memorandum on Motion to Amend Findings of Fact and Judgment filed this date, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Plaintiff, within five (5) days, shall remit to the Defendant the sum of $336.30 which, together with the $3,000.00 already paid, shall provide the Defendant with "adequate assurance of payment" for postpetition utility service provided by the Defendant as required by 11 U.S.C. § 366(b).

2. The Plaintiff, within five (5) days, shall remit to the Defendant the sum of $2,372.48 representing the balance owing the Defendant for postpetition utility service provided from April 29 through May 31, 2000.

3. The Plaintiff, by August 5, 2000, and by the 5th day of each month thereafter, shall remit to the Defendant the sum of $2,224.20 representing the monthly charge for utility service.

4. To the extent the Plaintiff, in reliance on the court's July 28, 2000 Judgment, has already paid all or a portion of the obligations imposed upon it by paragraphs one, two, and three of this Amended Judgment, it is entitled to an appropriate credit by the Defendant with such credit to be applied towards its future monthly charges for utility service.

5. The Defendant is enjoined from terminating the utility service it furnishes to the Plaintiff provided, however, that the Defendant may terminate such service without further notice or hearing if the Plaintiff fails to timely make the payments required under paragraphs one and two of this Amended Judgment, or fails to cure any default in the monthly payments required under paragraph three of this Amended Judgment within ten (10) days of the due date, i.e., by the 15th day of each month.

ENTER: August 29, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE