UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

WINTZ COMPANIES,
d/b/a Milbank Freightways,

Debtor.

* *

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

CHARLES W. RIES, Trustee for
Wintz Companies, d/b/a Milbank
Freightways

Plaintiff,

v.

BKY 97-35514
ADV 98-3232

GEORGE L. WINTZ, individually;
LEO WOLK & ASSOCIATES, a Minnesota
partnership; KAGIN & ASSOCIATES, a
Minnesota partnership; LEO WOLK, individually;
and STANLEY KAGIN, individually,

Defendants.

* *

At St. Paul, Minnesota, this 22d day of May, 2000.

This adversary proceeding came on before the Court on the Plaintiff's complaint for leave to amend his complaint. The Plaintiff appeared by his attorney, Gary W. Koch. Defendant George L. Wintz appeared by his attorney, Ralph V. Mitchell. The remaining defendants ("the Wolk/Kagin defendants") appeared by their attorney, Michael L. Meyer. Upon the moving and responsive documents

and the arguments of counsel, the Court makes the following order.

The Plaintiff is the trustee in bankruptcy for Debtor Wintz Companies. Defendant George L. Wintz is the president and sole shareholder of the Debtor. In his complaint, the Plaintiff alleges that Defendant Wintz caused the Debtor to grant the Wolk/Kagin defendants mortgages and liens against the Debtor's real and personal property, to secure debt that ran from Defendant Wintz individually to them. As his central request for relief, the Plaintiff seeks a judgment avoiding those liens as fraudulent transfers within the meaning of MINN. STAT. §§513.44(a)(1)-513.44(a)(2), and giving him appropriate relief pursuant to 11 U.S.C. §550.[1]

The Plaintiff now moves for leave to amend his complaint, to add a claim for contribution against Defendant Wintz. The underlying theory is that the bankruptcy estate is entitled to contribution from Defendant Wintz if it is required to make any payment on account of Defendant Wintz's personal obligations to the Wolk/Kagin defendants.[2]

Defendant Wintz opposes the motion. Arguing that any claim against him for contribution is not ripe, he maintains that the amendment would be futile and should not be allowed. In support, he insists that Minnesota law prohibits a co-obligor from suing out a contribution claim until it has actually paid out more than its fair share of a joint obligation--something that the Plaintiff can not and will not do until the

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[1]During his administration of the estate, the Plaintiff sold the assets that had been subject to the Wolk/Kagin defendants' liens. Pending the outcome of this adversary proceeding, he is holding the proceeds, impressed with a replacement lien.

[2]At this stage of the litigation, it appears that the bankruptcy estate would have to pay the Wolk/Kagin defendants only if it lost its avoidance action against them. The contribution claim appears to be a hedge against such a loss--an alternate attempt to recover the value that the Plaintiff says the Debtor gave up when it pledged its assets for a debt not its own.

right to the proceeds is adjudicated.

Under the traditional formulation in Minnesota law, one who seeks the remedy of contribution must show that two parties have a common liability or burden to a third party, and one of them has paid more than its fair share of that liability. *Canosia Twp. v. Grand Lake Twp.*, 83 N.W. 346, 347 (Minn. 1900). Pronouncements in some of the decisions suggest that actual payment determines the ripeness of a claim for contribution. *Id.* ("There must be a payment, or such assumption of the demand as imposes on the claimant more than his share, and a corresponding release against those from whom he claims..."); *Coble v. Lacey,* 101 N.W.2d 594, 597 (Minn. 1960) ("The right of contribution arises upon payment by one of the joint obligors of more than his share of the obligation...").

However, the Minnesota Supreme Court has also drawn a distinction between the right to *seek* contribution and the right to *recover* contribution. *Milbank Mut. Ins. Co. v. Village of Rose Creek,* 225 N.W. 2d 6, 9 (Minn. 1974). Under modern rules of pleading, "it is no longer necessary to wait until liability has been fixed to bring a separate action, since the issue of contribution can now be litigated by cross-claims or third-party proceedings between persons who are not, but may ultimately be, jointly liable." *Radmacher v. Cardinal,* 117 N.W.2d 738, 740 (Minn. 1962). "Payment by [a joint obligor] is not a prerequisite to his action for contribution. A defendant may implead for contribution if it appears he will be obliged to pay." *Koenigs v. Travis,* 75 N.W.2d 478, 481 (Minn. 1956). *See also In re Westerhoff,* 688 F.2d 62, 63-64 (8th Cir. 1983) (applying Minnesota law).

At this point, Defendant Wintz does not make an issue of whether the Plaintiff can can

legally support his claim that a joint liability exists.[3] Contrary to what he argues, however, the Plaintiff need not wait until the bankruptcy estate has actually paid more than its "fair share" of any joint liability to the Wolk/Kagin defendants before it can sue out its claim for contribution against him. It is clear that the claim that would be added by the amendment is not frivolous, or utterly lacking in merit. *Cf. Weimer v. Amen,* 870 F.2d 1400, 1407 (8th Cir. 1989); *Holloway v. Dobbs,* 715 F.2d 390, 392-393 (8th Cir. 1983); *Ulrich v. City of Crosby,* 848 F. Supp. 861, 877 (D. Minn. 1994); *Occhino v. Lannon,* 150 F.R.D. 613, 621-622 n. 8 (D. Minn. 1993), *aff'd,* 19 F.3d 23 (8th Cir. 1994), *cert. den.*, 513 U.S. 940 (1995); *In re Quality Pontiac Buick GMC Truck, Inc.*,222 B.R. 865, 870 (Bankr. D. Minn. 1998). In the absence of that showing, the general dictate of Rule 15(a) should govern: leave to amend "shall be freely given when justice so requires". *Becker v. Univ. of Nebraska,* 191 F.3d 904, 907-908 (8th Cir. 1999). Accordingly,

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[3]Apparently, the Plaintiff proposes to establish his part of the joint liability element through the fact that assets of the bankruptcy estate would be used to satisfy Defendant Wintz's personal liability to the Wolk/Kagin defendants, if the Plaintiff fails in his bid to avoid the liens. This is not without support in bankruptcy theory. A liability that is solely *in rem*, impressed by lien against assets that are subject to the bankruptcy court's jurisdiction, is a claim cognizable and treatable in a bankruptcy case even if the debtor has no *in personam* liability. *Johnson v. Home State Bank,* 501 U.S. 78, 84, 111 S.Ct. 2150, 2155 (1991). Though an application of the doctrine of contribution like this would be a bit novel in the bankruptcy context, it is not utterly without corollary in Minnesota caselaw. *See In re Estate of Sjerven,*170 N.W.2d 66 (Minn. App. 1985) (wife's pledge of her separate assets for premarital debt owing solely by husband, and husband's payment of debt from proceeds of those assets after her death, could support claim of contribution against husband's probate estate by wife's separate probate estate).

IT IS HEREBY ORDERED:

1. The Plaintiff's motion for leave to amend his complaint is granted.

2. If the Plaintiff has not served Defendant Wintz's counsel with a copy of his second amended complaint, he shall do so forthwith. No later than ten days after service of the second amended complaint, or within ten days of the date of this order if it has been served, Defendant Wintz shall serve and file an answer to the second amended complaint.

BY THE COURT:

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GREGORY F. KISHEL
UNITED STATES BANKRUPTCY JUDGE