UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. Case No. 92-50206
	)	
BRUNO, INC.,	)	Chapter 11
d/b/a Molly B's Truck Stop,	)	
Restaurant & Motel, a South	)	
Dakota Corporation,	)	MEMORANDUM OF DECISION RE:
	)	OBJECTION TO CLAIM OF
Employer's Tax ID No.46-0412862	)	JEFFREY C. LUCAS
	)	
Debtor.	)	

The matter before the Court is Debtor's Objection to Proof of Claim Filed by Jeffrey C. Lucas. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute findings and conclusions as required by F.R.Bankr.P. 7052.

I.

Debtor Bruno, Inc., filed a Chapter 11 petition on August 3, 1992. Debtor's Schedule G acknowledges Debtor is currently leasing a restaurant to Lucas Management Systems. Lucas Management Systems was not scheduled as a creditor.

On March 29, 1993 Jeffrey C. Lucas filed proof of an unsecured, non priority claim for $31,781.00 based on a restaurant lease deposit of $4,000.00; an inventory buy back provision in the lease for $10,000.00; $2,475.00[1] for replacinq a water heater; and damages of $15,306.00 for Debtor's pre-petition breach of the restaurant lease arising from the interruption of business due to a leaking roof and the repair of the roof from March through July

[1] Mr. Lucas initially sought reimbursement of $2,465.00 for his placement of the water heater but amended that figure to $2.175.00 by his exhibit filed July 19, 1993.

of 1992 and Debtor's failure to replace a roof sign for the restaurant.

On March 30, 1993, Debtor filed an objection to Mr. Lucas' proof of claim. Debtor stated repair or replacement of the water heater was Mr. Lucas' responsibility under the lease, that all roof repairs were done with as little disruption to the restaurant's business as possible, that Mr. Lucas had not previously notified Debtor of any damages arising from the roof leaks or repairs, and that any damages would be speculative.

Upon consent of the interested parties, a hearing on shortened notice was held April 5, 1993. Appearances included Haven L. Stuck for Debtor and Lester Nies for Jeffrey C. Lucas. Exhibits received include a roof repair proposal by Eagle Roofing Company that Debtor received; the restaurant's monthly gross revenue figures for 1990 prepared by Dan W. Corey of the C.P.A. firm of Ketel1 Thorstenson & Co.; some gross sale comparisons, gross sale projections, and summary of damages prepared by Mr. Lucas; some official weather summaries obtained by Mr. Lucas; the restaurant's 1992 sales tax return worksheets; a 1991 profit statement prepared by Mr. Lucas; some daily business journal entries made by Mr. Lucas and Diane McClintock; a letter from Lucas Management Systems to Debtor dated March 10, 1992; and photographs taken by Ms. McClintock showing problems and interior damage in the restaurant caused by the leaks.

The restaurant lease between Debtor and Mr. Lucas was entered

into on June 11, 1991. It provides that Mr. Lucas will lease the

> business premises, all restaurant equipment, furniture, fixtures and signs as presently located on the restaurant premises, and as more particularly described in the Attached Exhibit A, including the business name "Molly B's Restaurant," specifically excluding, however, the beer and wine license and sales thereof, and video lottery machines and video lottery license.

[Emphasis in original.] The lease term is five years with an option to renew for one additional five year term. Mr. Lucas must pay a monthly rent of ten percent of gross receipts or $4,000.00, whichever is greater, plus a portion of the real estate taxes. The lease includes a maintenance provision. It states, in pertinent part:

> Lucas shall be responsible for maintaining and caring for all of the machinery and equipment, which is set forth in Exhibit A attached hereto, and shall keep the same in a good state of repair, reasonable wear and tear excepted. Should any equipment become unrepairable during the term of this lease, Lucas shall have the responsibility to replace the same with like equipment and, upon the termination of this lease, the ownership of said equipment shall belong to Bruno. . . .
>
> Bruno shall be responsible to maintain the roof, glass and exterior of the building, parking lot areas, and shall be responsible for the replacement of any air conditioning and heating units and any extraordinary repair upon the same.
>
> Lucas shall be responsible for ordinary maintenance of the heating and air conditioning systems, to provide all interior maintenance, including entrance doors, bathrooms, carpet, equipment, maintenance, and replacement of any said equipment as previously set forth herein, and shall further be responsible for the outside sign maintenance and bulb replacement. Bulb replacement on the building shall be limited to the area which is designated as the restaurant area and the common entrance area to said restaurant.
>
> An exhibit: entitled "Restaurant & Equipment Inventory List"

is attached to the lease. Included on this list are "2 HOT WATER HEATERS: 1 ELEC., 1 GAS." The exhibit is referred to three times in the lease when equipment and machinery or fixtures are mentioned. The first reference describes what Mr. Lucas is leasing: "all restaurant equipment, furniture, fixtures and signs as presently located on the restaurant premises, and as more particularly described in the attached Exhibit A [.]" The second reference is: "This lease shall include all of the equipment presently located in said restaurant premises and which equipment is set forth in Exhibit A attached hereto and by specific reference made a part hereof as though set forth fully herein." The third reference is: "Lucas shall be responsible for maintaining and caring for all of the machinery and equipment, which is set forth in Exhibit A attached hereto, and shall keep the same in a good state of repair, reasonable wear and tear excepted."

At the hearing Mr. Lucas testified that Ms. Brunson had refused to repair or replace the broken water heater and so he was forced to pay for the new unit himself. He said the water heater was Debtor's responsibility under the lease, not his.

Mr. Lucas stated his claim for damages was based on projected sales for March through July 1992 as if the leaks and roof repairs had not hindered business. He calculated his damages of $10,621.00 for March, April, and May 1992 based on projected "net lost sales" at the restaurant. He calculated his damages of $2,090.00 for June and July 1992 based on lost revenues per chair. To these damages

he added clean up labor totaling $995.00 and rent abatement of $1,600.00.[2]

Ms. McClintock, an employee of Mr. Lucas' and a manager at the restaurant, described the damages and repairs related to the leaking roof, her staff's efforts to deal with the mess, the inconvenience caused by the leaks and repairs, and her customers' reactions to the leaks and repairs.

Marlys Brunson, one of Debtor's managers and shareholders, testified about the continuing problems with the roof, the necessity of repeated repairs, and her decision to install a new roofing system.

The matter was taken under advisement on May 4, 1993 after the Court received briefs and reply briefs from Debtor and Mr. Lucas on two issues: Whether the claim of Mr. Lucas' that will arise when the restaurant lease is terminated must be estimated by the Court in this proceeding and whether the replacement of the water heater was the responsibility of Debtor or Mr. Lucas under the terms of the lease.

Subsequently, the Court directed Mr. Lucas to file an exhibit detailing the restaurant's net income from the inception of the lease through July 1992. This exhibit was filed July 19, 1993. Debtor filed its response to the exhibit on August 4, 1993 Mr. Lucas filed another response on August 12, 1993 and Debtor's final response was filed on August 16, 1993. The matter was again taken

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[2] Mr. Lucas' Exhibit B summarizes these calculations.

under advisement.

Mr. Lucas' latest exhibit indicates that from the inception of the lease through July 1992 the restaurant had an average net income of $371.21 with significant fluctuations between months, especially prior to and during the restaurant's busy month of August when a large, week-long motorcycle rally convenes in Sturgis, South Dakota, where the restaurant is located.

II.

General Provisions Governing Claims. In bankruptcy a claim is a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]

11 U.S.C. § 101(5). A creditor is an "entity that has a claim against the debtor **that arose at the time of or before the order for relief** . . . " 11 U.S.C. § 101(10) [emphasis added]

When a creditor timely files proof of his claim, the claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection to a claim is made, the Court determines the amount of such claim on the date of the petition. 11 U.S.C. § 502 (b). A contingent or unliquidated claim may be estimated if necessary to avoid undue delay in the administration of the case. 11 U.S.C. § 502(c) (1). A right to payment arising from a right

to an equitable remedy for breach of performance may also be estimated. 11 U.S.C. § 502(c) (2).

A debt is "liability on a claim." 11 U.S.C. § 101(12). When a Chapter 11 plan is confirmed, the debtor's debts[3] are discharged if they arose before the confirmation, whether or not a proof of claim was filed, the claim was allowed under § 502, or the creditor holding the claim accepted the plan. 11 U.S.C. § 1141(d) (1)

Determining Damages Arising From the Breach of a Lease. State law provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately cause thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

S.D.C.L. § 21-2-1. Damages must be reasonable. S.D.C.L. § 21-1-3; see ***Atyeo v. Paulsen***, 319 N.W.2d 164, 166 (S.D. 1982). Further, damages may not provide a greater recovery than the plaintiff would have obtained by full performance of the obligation by both sides. S.D.C.L. § 21-1-5; ***see Regan v. Moyle Petroleum Co.***, 344 N.W.2d 695, 697 (S.D. 1984).

When applying these statutes, "[u]nder any damage model, 'there need only be a reasonable basis for measuring the loss and

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[3] "Debts" are discharged, not claims. 11 U.S.C. § 1141(d) (1).

it is only necessary that damages can be measured with reasonable certainty.'" ***Tri-State Refining and Investment Co. v. Apaloosa Co.***, 452 N.W..2d 104, 110 (S.D. 1990) (quoting ***Schmidt v. Wildcat Cave, Inc.***, 261 N.W.2d 114, 118 (S.D. 1977)). Strict mathematical proof is not required. ***Atyeo,*** 319 N.W.2d at 166 (citing ***Nebraska & D. Land & Live-Stock Co. v. Burns***, 73 N.W. 919, 920-21 (S.D.1898)). "Where doubt exists as to certainty of damages, those doubts should be resolved against the wrongdoer." ***Tri-State Refining and Investment Co.***, 452 N.W.2d at 110 (quoting ***Lorenz Supply Co. v. American Standard, Inc.***, *300 N.W.2d 335 (Mich. App. 1981),* aff'd. 358 N.W.2d 845 (Mich. 1984)). The evidence is sufficient if the financial information in the record permits a just or reasonable estimate to be drawn. ***Horizons, Inc. v. Avco Corp.***, 714 F.2d 862, 866 (8th Cir. 1983).

When lost profits are sought as damages, the South Dakota Supreme Court has stated,

> Although sometimes difficult to prove, the generally accepted rule is that, where it is shown that a loss of profits is the natural and probable consequence of the act or omission complained of, and their amount is shown with reasonable or sufficient certainty, there may be a recovery therefore. [citation omitted] However, such damages must not be speculative, contingent, or uncertain and there must be reasonable proof of the amount thereof. Any reasonable method of estimating a prospective profit is acceptable. [citation omitted] Absolute certainty is not required.

Glanzer v. St. Joseph Indian School, 438 N.W.2d 204, 213 (S.D. 1989) (***quoting Olson v. Aldren***, 170 N.W.2d 891, 895 (S.D. 1969) [brackets in citing source] ; see also ***Mash v. Cutler***, 488

N.W.2d 642, 646 (S.D. 1992).

III.

A. *Determination of Mr. Lucas' claim that will arise when lease is terminated.* Upon consideration of the 11 U.S.C. §§ 101(5) and 101(10), this Court concludes that a determination of Mr. Lucas' claim against Debtor when the restaurant lease is terminated does not need to be made at this time. The claim did not arise pre-petition and will not be paid under the plan. Further, it is not likely that the feasibility of the plan will be affected by the payment of these sums at some future point.

B. *Obligation to replace water heater.* References to the Exhibit A in the restaurant lease describe the items on the list as machinery, equipment1 furniture, fixtures, or signs. The exhibit is entitled, "Restaurant & Equipment Inventory List." The lease states Mr. Lucas is responsible for "maintaining and caring for all of the machinery and equipment, which is set forth in Exhibit A attached hereto[.]" In contrast, the items for which Debtor is responsible for maintaining and providing extraordinary repair are concisely stated in the lease: the roof, glass and exterior of the building, parking lot, and the heating and air conditioning systems. With one possible exception, none of these items are on the lease's Exhibit A. Consequently, the Court concludes that the water heater replaced by Mr. Lucas was his

responsibility since it was included on Exhibit A. Had it been the parties' intent that Debtor be responsible for it, the water heater would have been included within the lease term which specifically stated the property for which Debtor is responsible. Further, no evidence was presented that the parties had interpreted otherwise the somewhat ambiguous provision of lease regarding Mr. Lucas' responsibilities or that maintenance of water heaters is generally within the purview of a commercial lessor of a restaurant facility.

The one possible item on Exhibit A that was Debtor's responsibility to maintain is the "1 Kold Wave Air Conditioner." Mr. Lucas did not present evidence that this was part of the building's heating and cooling system; it may be a window or portable unit which the parties considered as equipment. The inclusion of that item on Exhibit A is insufficient evidence on which to conclude that the replaced water heater was also a part of the building's heating and cooling system for which Debtor was responsible.

C. *Damages arising from the roof leaks and repair of the lease*. As noted in the previously cited case law, Mr. Lucas faced a difficult task in proving the damages he incurred from the roof leaks and the repair of the roof. His attempt to show lost projected profits based on the restaurant's failure to meet expected increases in sales or on lost per chair revenues was a reasonable place to start but is insufficient without additional evidence. Too many other factors affecting net income were not

addressed.

Evidence that the Court needed but did not receive from Mr. Lucas included, for example, the restaurant's revenue per chair for
months prior to March 1992. Factors that could affect net income that were not adequately addressed include what the restaurant's expenses were for each month and how and why these expenses varied.
Were labor costs steady, including payments to Mr. Lucas? Did food prices increase? What discretionary expenses existed, such as advertising? Without consideration of variables such as these, a computation of damages arising from the restaurant's failure to
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meet projected increases in net income is too speculative and the Court is unable to establish a damage award with reasonable certainty.

Similarly, Mr. Lucas' request for a rent abatement of $1,600.00 will not be allowed. There is insufficient evidence on which to establish that award with reasonable certainty.

Debtor did not dispute the labor costs Mr. Lucas incurred in cleaning the restaurant when leaks occurred and while repairs were being made. Those damages totaling $995.00 will be allowed.

An appropriate order will be entered allowing Mr. Lucas' claim for $995.00.

So ordered this 18th day of October, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

Deputy

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. Case No. 92-50206
BRUNO, INC.,	)	
d/b/a Molly B's Truck Stop,	)	
Restaurant & Motel, a South	)	Chapter 11
Dakota Corporation,	)	
	)	ORDER DETERMINING CLAIM
Employer's Tax ID No.46-0412862	)	OF JEFFREY C. LUCAS
	)	
Debtor.	)	

In compliance with and recognition of the Memorandum of Decision Re: Objection to Claim of Jeffrey C. Lucas,

IT IS HEREBY ORDERED that Jeffrey C. Lucas, d/b/a as Lucas Management Systems, is allowed a claim of $995.00.

So ordered this 18th day of October, 1993.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

_____
Deputy

(SEAL)