

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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March 7, 2005

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Subject: *In re The Credit Store, Inc.*,
Chapter 7, Bankr. No. 02-40922

Dear Counsel:

The matter before the Court is the Motion to Alter or Amend Order Dismissing Debtor's Motion to Reject an Executory Contract Pursuant to 11 U.S.C. § 365(a) filed by Thornton Capital Advisors, Inc., and Recovery Partners, II, and the objection thereto filed by Trustee John S. Lovald. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As discussed below, the Motion will be denied.

Summary. In late 2002, while the case was under Chapter 11, Debtor filed a Motion (and later an amended motion) for an Order Authorizing Rejection of Executory Contract Pursuant to 11 U.S.C. § 365(a) ("Motion to Reject"). An objection (and later an amended objection) was filed by Thornton Capital Advisors, Inc., and Recovery Partners, II ("Thornton Capital"), and a reply to the amended objection was filed by Coast Business Credit ("Coast"). Following an evidentiary hearing on December 11, 2002, Debtor's Motion to Reject was denied because the Bankruptcy Court concluded that the subject agreement was not executory.

Coast appealed the Bankruptcy Court's order. On September 16, 2003, the United States District Court for the District of South Dakota concluded that the subject agreement was indeed executory and reversed. Thornton Capital's appeal to the United States Court

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of Appeals for the Eighth Circuit was dismissed on December 9, 2004, on the grounds that the District Court's order was not final for purposes of 28 U.S.C. § 158(d). The District Court remanded the matter to the Bankruptcy Court on January 13, 2005.

Following the remand, the Bankruptcy Court held a status conference on February 8, 2005, with counsel for parties in interest. As discussed at the hearing, the Court dismissed Debtor's Motion to Reject as moot because the case had been converted from Chapter 11 to Chapter 7 while the appeals were pending, and Debtor was no longer the appropriate party to advance the relief sought in the Motion to Reject. An order was entered February 9, 2005.

On February 17, 2005, Thornton Capital filed a Motion to Alter or Amend Order Dismissing Debtor's Motion to Reject an Executory Contract Pursuant to 11 U.S.C. § 365(a) ("Motion to Amend") under Fed.R.Bankr.P. 9023 and Fed.R.Civ.P. 59(e) asking the Court to amend its February 9, 2005, Order. It wanted the amended order to acknowledge that the District Court's ruling and the intervening conversion to Chapter 7 had resulted in the subject agreement being automatically rejected under 11 U.S.C. § 365(d)(1). Thornton Capital requested the amended order so it could then advance another appeal to the Court of Appeals.

Trustee John S. Lovald objected to Thornton Capital's Motion to Amend on March 4, 2005. He said Thornton Capital had fully supported the Bankruptcy Court's decision at the February 8, 2005, hearing and could not now be heard under Rule 59(e) to request a modification of the February 9, 2005, Order.

Discussion. Trustee Lovald is correct that Thornton Capital's Motion to Amend is not properly granted under Rule 59(e).

Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment. [*Norman v. Arkansas Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir.1996)] (citing *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982)). Rule 59(e) motions serve a limited function of correcting "manifest errors of law or fact or to present newly discovered evidence."

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[*Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir.)](quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), as amended, 835 F.2d 710 (7th Cir.1987)). Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. *Id.*

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998). Thornton Capital has not advanced any error of law or fact that the Bankruptcy Court made at the February 8, 2005, hearing. To the contrary, as also noted by Trustee Lovald, Thornton Capital was fully supportive of the Court's decision to dismiss as moot Debtor's Motion to Reject.

It indeed may be true that by operation of law, following the conversion of the case to Chapter 7, the agreement that was the subject of Debtor's Motion to Reject is now deemed rejected. Debtor's stale Motion to Reject, however, is not the appropriate vehicle under which that declaration -- yay or nay -- should be made. Debtor's Motion to Reject was appropriately dismissed as moot due to the conversion. A definitive ruling on the effect the conversion to Chapter 7 had on the subject agreement, however, will have to await the filing of an appropriate pleading by either Thornton Capital or Trustee Lovald

An order denying Thornton Capital's Motion to Amend will be entered.

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

MAR 07 2005

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By dm

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

INH:sh

CC: case file (docket original; serve parties in interest) MAR 07 2005

Charles L. Nail, Jr., Clerk
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District of South Dakota

Label Matrix for USBC
South Dakota
Case 02-40922
Tue Mar 1 08:11:06 CST 2005

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