

Agreement to Purchase
Specific Performance
Effect of Court Order Approving Sale

US Forest Industries v. Jernigan, Adversary No. 01-6255-fra
US Forest Industries, Inc., Case No. 600-67584-fra11

2/07/2002 FRA

Unpublished

Defendant signed a Letter of Intent, as representative for an entity yet to be formed, to purchase a lumber mill located in Alabama belonging to the Debtor. Debtor filed a motion for an order approving the sale with the court; the motion was thereafter approved and the Debtor was authorized to proceed with the sale. Unable to secure funding for post-acquisition capital improvements, Defendant chose not to execute the Asset Purchase Agreement and declined to purchase the property, forfeiting a \$35,000 deposit made to the Debtor. Debtor filed this adversary proceeding seeking a judgment of specific performance and Defendant responded by filing a motion to dismiss under FRCP 12(b)(6).

Debtor argued that the court's order approving the sale bound the parties to proceed with the sale. The court held, however, that the order was merely judicial permission to enter into a contract. The Letter of Intent specifically stated that the sale was not binding on either party until an Asset Purchase Agreement was executed. Moreover, there were material terms of the sale missing from the Letter of Intent which could not be supplied by the court. Because execution of an Asset Purchase Agreement was a condition subsequent to a binding contract of sale that had not been performed and because key elements of the sale were missing, the court held that a judgment of specific performance would not lie. Defendant's motion to dismiss was granted.

E02-1(10)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE)
)
U.S. FOREST INDUSTRIES, INC.,) Case No. 600-67584-fra11
)
Debtor.)
)
U.S. FOREST INDUSTRIES, INC.,) Adv. Proc. No. 01-6255-fra
)
Plaintiff,)
v.)
)
JOSEPH H. JERNIGAN,)
) MEMORANDUM OPINION
Defendant.)

Plaintiff seeks a Judgment finding that an agreement between Plaintiff and Defendant in which Defendant was to purchase a saw mill in southern Alabama is binding and enforceable, and ordering that the Defendant perform according to the terms of the agreement.

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Defendant has filed a motion to dismiss the Complaint, arguing that it fails to state grounds for relief. I find that the Defendant's motion is well taken, and that the Complaint should be dismissed, with prejudice.

Legal Standard

Defendant moves under FRCP 12(b)(6) for dismissal based on failure to state a claim upon which relief may be had.¹

Review of a complaint under FRCP 12(b)(6) is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the plaintiff. North Slope Borough v. Rogstad (*In Re Rogstad*), 126 F.3d 1224, 1228 (9th Cir. 1997) (citations omitted). Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Id. However, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. Naert v. Daff, (*In Re Washington Trust Deed Service Corp.*), 224 B.R. 109, 112 (BAP 9th Cir. 1998).

In considering the motion, the court may not consider any material "beyond the pleadings." Hal Roach Studios, Inc. v. Richard Feiner and Co. Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, material which is properly submitted as part of

¹FRCP 12(b)(6) is made applicable to this proceeding by FRBP 7012(b).

the complaint may be considered. Id. Exhibits submitted with the complaint may also be considered. Durning v. The First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Further, a document whose contents are alleged in the complaint, or which is crucial to the complaint, and whose authenticity no party questions, but which is not physically attached to the pleading, may be considered. Branch v. Tunnell, 14 F.3d 449, 453-454 (9th Cir. 1994), cert. den. 119 S. Ct. 510 (1998) (contents alleged in, but not attached to, complaint); Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th Cir. 1998) (not specifically alleged and unattached, but integral to plaintiffs claims). Finally, matters that may be judicially noticed may be considered, Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds, Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991), including court records in related or underlying cases. In re American Continental Corp./ Lincoln Sav. & Loan Securities Litigation, 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom., Lexecon Inc. v. Milberg Weiss Bershad Hynes and Lerach, 523 U.S. 26 (1998).

In this case, the Complaint provides a complete record for the purpose of analyzing Defendant's motion, including as exhibits all of the underlying documents supporting Plaintiff's claim.

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Facts

The Plaintiff, at the times in question, was the Debtor-In-Possession in the above captioned Chapter 11 case.² Among Plaintiff's assets is a saw mill in Abbeville, Alabama. Plaintiff undertook to sell the mill pursuant to 11 U.S.C. § 363. An auction was conducted on July 13, 2001, in which Defendant Jernigan placed a bid of \$1,800,000.00. The oral bid was supplemented by a letter faxed to the Plaintiff's attorney by the Defendant's attorney, which purported to submit a written bid on Mr. Jernigan's behalf.

The bid itself is in the form of a Letter of Intent dated July 13, 2001. The letter is on the letterhead of Arnold Lumber Company, of Bonifay, Florida, and is signed by "Joseph H. Jernigan on behalf of the limited liability company as the Buyer to be formed." Pertinent provisions of the Letter of Intent are as follows:

1. **Purchase of Assets**. Subject to the terms and conditions of a definitive asset purchase agreement (the "Asset Purchase Agreement") *to be negotiated* between the Buyer and the Seller and further subject to the approval of the United States federal bankruptcy court by court order of the transaction contemplated by this letter of intent and by the Asset Purchase Agreement for which any appeal time shall have expired without appeal by any party or creditor, Buyer will

²After the Complaint was filed a Plan of Reorganization was confirmed, and the Plaintiff now operates as a reorganized Debtor.

purchase the sawmill plant, related equipment and other tangible and intangible assets of the Abbeville, Alabama sawmill (the "Abbeville Mill") (sometimes all of the assets of the Abbeville Mill being hereinafter referred to collectively as the "Assets"). [Emphasis added]

2. **Asset Purchase Price.** On the Closing Date (as hereinafter defined), the Buyer will pay the cash sum of One Million Eight Hundred Thousand and No/100 Dollars (\$1,800,000) to the Seller for the purchase of the Assets consisting of the Abbeville Mill. The Buyer shall deposit the cash sum of Thirty-Five Thousand Dollars (\$35,000) (the "Buyer Deposit") with the United States federal bankruptcy court as a good faith deposit to be applied against the purchase price on the Closing Date.³ Should all of the conditions precedent set forth in this letter of intent and the Asset Purchase Agreement fail to be satisfied to the reasonable satisfaction of the Buyer, the Buyer shall be refunded the Buyer Deposit by the court and Buyer shall have no further obligation to pursue the purchase of the Abbeville Mill. No liabilities of the Seller will be assumed by the Buyer. [Emphasis in original]

9. **Non-binding Effect.** This Letter of Intent is a statement of present intention on the part of both the Buyer and the Seller and is not intended to create a legal and binding obligation to purchase or sell the Assets of the Seller, nor shall it be interpreted as an agreement or used as the basis of asserting an enforceable contract. It is understood that no person will be obligated to perform any of the undertakings contemplated by this Letter of Intent until the Asset Purchase Agreement, setting forth in detail all of the provisions normally contained in such an agreement, is signed by each of the Buyer and the Seller and until

³There is no record of the funds being deposited with the Court. It is the Court's understanding that the funds are being held by the Debtor-In-Possession.

As the term is generally understood in real estate transactions, earnest money is forfeited to the Seller as liquidated damages in the event that the Buyer is able to perform but declines to do so. In this case, the Defendant makes no claim to the funds, implicitly acknowledging that the earnest money is payable to the Plaintiff as damages.

all of the conditions precedent set forth in the Asset Purchase Agreement and in this letter of intent are satisfied to the reasonable satisfaction of the Buyer.
. . . .

The Letter of Intent is executed by Joseph Jernigan "on behalf of the limited liability company as the Buyer to be formed."

By order filed July 24, 2001, the Court found that no party in interest had raised an objection to the proposed sale other than GMAC Commercial Credit LLC ("GMACCC"). In response to the objection, GMACCC had been given additional time to make an upset bid, but had declined to do so. Accordingly, the Court ordered that the motion to approve the sale "is granted to the extent that it applies to the proposed sale on specified terms of the Debtor's Abbeville, Alabama property to Jernigan in the amount of \$1.8 million. The Debtor is authorized to proceed with the proposed sale. . . ."

An Asset Purchase Agreement was drafted, but never signed. After failing to obtain suitable financing (that is, suitable to Mr. Jernigan⁴), Mr. Jernigan withdrew from the sale. This action followed.

⁴The complaint alleges "On information and belief, Defendant refuses to proceed with the Abbeville property transaction because he has not secured funding for post-acquisition capital improvements." I see nothing in the Letter of Intent which prohibits Defendant from withdrawing under those circumstances. The complaint does not allege that he was able to get such funding, but declined to do so.

Discussion

According to the Letter of Intent, the Buyer's duty to purchase the mill would become binding only upon execution of a definitive Asset Purchase Agreement. This contingency did not occur. Specific performance does not lie where a condition subsequent has not been satisfied. See Miller v. Gassner, 632 P.2d 1318, 53 Or. App. 647 (1981). Specific performance of a contract to purchase land will not be specifically enforced under Oregon law if it is incomplete or uncertain in any material aspects, or if important features have been left to be determined by future negotiations. Philips v. Johnson, 266 Or. 544, 514 P.2d 1337 (1973); Smith v. Vehrs, 194 Or. 492, 500, 242 P.2d 586, 589 (1952). ("It is a well-established rule of law in this state that equity will not decree specific performance unless the contract is definite, certain and complete. The court cannot make a contract for the parties, nor can it make clear that which is left in doubt and uncertainty.")

The parties' agreement is not subject to specific performance under Alabama law. Alabama Code §8-1-41(6) prohibits specific enforcement of "[a]n agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." Under this rule, specific enforcement of an agreement to sell land will lie only when all the terms of the agreement have been agreed on, leaving nothing

for negotiation. Trotter v. Allen, 285 Ala. 521, 234 So.2d 287 (Ala.1970). The sale of a large asset such as a lumber mill includes more than payment of a sum of money and tendering a deed. The Court cannot supply any of the missing terms. It follows that the agreement between the parties in this case is not subject to specific performance under state law.

Plaintiff relies principally on the fact that the Court entered an order authorizing the sale. Plaintiff argues that the order effectively binds the parties to proceed to perform the contract, relying on Oyster Bay Cove, Ltd., 161 B.R. 338, 342 (Bankr. E.D.N.Y. 1993), In re Rosecrest Enterprises, 80 B.R. 354 (Bankr. W.D. Pa. 1987) and In re Winston Inn and Restaurant Corp., 120 B.R. 631 (Bankr. E.D.N.Y. 1990). These cases, involving competitive bidding for estate assets, hold that once the court has approved a sale on specific conditions, the successful bidder is bound by the terms of the sale set out in the order. It follows that the buyer cannot escape his duties under the approved agreement by attacking the order. Oyster Bay Cove, Ltd., *supra* at 342.

Another view of the effect of an order authorizing sale is set out in North Port Associates, Inc., 182 B.R. 810, 813 (Bankr. E.D. Mo. 1995). The Court in North Port observes that

The language in § 363, as well as its function in the reorganization process, speaks to the *circumstances* under which a debtor or trustee may sell property and the type of notice and hearing which must be provided.

Section 363 does not make the Court the vender, but rather governs the circumstances in which a Court may authorize a sale.

In other words, the order under § 363 authorizing the Debtor-In-Possession to proceeds was just that: Judicial permission to enter into a contract. It does not provide the material elements of the contract itslef, and does not, absent specific language to that effect, compel either party to perform.

Whatever the abstract merits of these lines of cases, North Port more closely describes the nature and effect of the order in this case. The element common to the cases relied on by plaintiff which is missing here is an agreement susceptible to enforcement. The order in this case simply authorized the parties to proceed along the lines set out in the Letter of Intent. It did not supply the additional terms to be worked out, establish the nature of the sale's financing, or identify the ultimate purchaser. While the parties may have prepared an explicit and complete contract of sale, it was never approved, much less mandated, by the Court.

Conclusion

The parties never arrived at a contract susceptible to specific performance. The Court's order does not require performance of the Defendant, nor create in the Plaintiff a cause of action. For that reason, the Court finds that the Complaint does not state a cause of action and that it should be dismissed.

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This memorandum opinion constitutes the Court's findings of fact and conclusions of law. An Order consistent with the foregoing will be entered.

FRANK R. ALLEY, III
Bankruptcy Judge