United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re F.F. Mengel Company, Debtor
Bankruptcy Case No. 93-52312-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

September 23, 1994

Jerry W. Slater, Kelly, Weber, Pietz & Slater, S.C., for Bank One Milwaukee, N.A.
James M. Klein, Glinski, Haferman, Ilten & Klein, S.C., for the trustee.
Eric W. Forsberg, Greene & Forsberg, P.A., for Cobb-Streker-Dunphy & Zimmermann, Inc.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter comes before the Court on the Objection to the Claim of Bank One Milwaukee, N.A. (the "Bank"), as Assignee of Banc One Leasing Corp. (the "Lessor"). An Objection to said claim was filed by Cobb-Streker-Dunphy & Zimmermann, Inc. ("Cobb"), an unsecured creditor in this case, for a determination of the validity of certain sums included in the Bank's claim. The Trustee has joined in this Objection as well.

The Bank is represented by Jerry W. Slater of Kelly, Weber, Pietz & Slater, S.C.; the Trustee is represented by James M. Klein of Glinski, Haferman, Ilten & Klein, S.C.; and Cobb is represented by Eric W. Forsberg of Greene & Forsberg, P.A. The facts having been stipulated, and the parties having fully briefed the issues before the Court, this matter is now ripe for determination.

The only issue before the Court in this matter is whether the Bank is entitled to include in its claim the sum of $187,722.20, constituting a "residual" the Bank believes is a proper component of its claim.

11 U.S.C. § 502(a) provides that a claim will be deemed allowed unless it is objected to by a party in interest. Once an objection has been made, under § 502(b) a claim will still be allowed except to the extent that:

> . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured. 11 U.S.C. § 502(b)(1).

Thus, the question in this matter is whether, under the agreements between the parties or other applicable law, the Bank is entitled to claim the "residual" amount set forth in its amended proof of claim. The validity of the Bank's claim is to be determined by applicable non-bankruptcy state and federal law. Grogan v. Garner,

498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). As the Bank's claim is essentially a claim for breach of contract, determining this issue necessitates a review of both the agreements between the Debtor and the Lessor and applicable Wisconsin law.

All parties agree that the Debtor and the Lessor (the Bank's predecessor in interest) entered into a Master Lease Agreement in December of 1989 which covered certain items of heavy machinery. The Master Lease contained two subparts, designated as schedules, which covered different equipment. The terms of these schedules each ran for sixty (60) months, and the Debtor was required to make certain periodic rental payments thereunder.

Attached to the Master Lease and the schedules was an "addendum" labeled a Terminal Rental Adjustment Clause Addendum (the "TRAC"). The TRAC contained various clauses relating to monetary adjustments between the parties at the expiration of the lease term based upon the difference between the actual and estimated residual value of the equipment at the end of the Lease. The parties agree that the Debtor did not comply with the terms of the Lease, as the Debtor defaulted by failing to make the required rental payments. After the Debtor's default, the equipment was sold by agreement at a private sale in August of 1991. The proceeds of the sale were applied to the amounts due under the Lease.

The Debtor filed this bankruptcy case on August 17, 1993. In January of 1994, the Bank filed an amended proof of claim in the amount (exclusive of interest) of $278,187.51. This amount includes the sum of $90,465.31 for the future rents "lost" by the Bank as a result of the Debtor's default, and also includes the sum of $187,722.20, which the Bank claims is the "residual value" of the equipment which it expected to receive at the end of the lease term. It is undisputed that this residual value is calculated using the "estimated value" of the equipment contained in the TRAC. As the parties have agreed that the future rents are allowable, the only remaining issue is the allowance of a claim for the residual value.

To support their objections to the Bank's claim, the Trustee and Cobb direct the Court's attention to paragraph 19 of the Master Lease, which contains a laundry list of remedies available upon the lessee's default. In particular, paragraph 19(d) provides that the lessor may:

> . . . sell or lease any or all items of Equipment at public or private sale, or lease, for cash or credit, to such persons and upon such terms as Lessor shall elect, free and clear of any rights of Lessee, and recover from Lessee all costs of taking possession, storing, repairing, and selling or leasing Equipment, including reasonable attorney's fees, as well as the unpaid balance of the total rent for the rental term of this lease attributable to the items of Equipment sold or leased less the net proceeds of such sale, if sold, or, if leased, the rent under such lease attributable to the period remaining under this Lease.

Cobb and the Trustee argue that, as the Bank selected the remedy found in paragraph 19(d) of the Lease, the Bank is precluded from now claiming a right to be compensated for the "residual value" of the equipment which the Bank decided to liquidate. In response, the Bank argues that paragraph 19(f) permits it to receive this compensation, as this subparagraph reserves to the lessor "any other remedy at law or in equity." The Lease also provides that the remedies found in paragraph 19 are cumulative, not exclusive.

The Bank's essential argument is that its claim for the residual value of the equipment reflects economic reality and the economic loss suffered by the Bank. The Bank argues that if the Debtor had performed as agreed the Bank would have received not only the total lease payments but also the equipment at the end of the lease. The actual value of the equipment would have caused certain adjustments pursuant to the TRAC, in that either the Bank or the Debtor would have paid the other the difference between the actual value and the estimated value found in the TRAC. Nonetheless, the Bank would have likely received the estimated value set forth in the TRAC. Accordingly, argues the Bank, its claim for the residual value merely grants it the "benefit of its bargain."

The Bank has cited numerous sections of Article 11 of Wisconsin's Uniform Commercial Code, which pertains to personal property leases, to support its "benefit of the bargain" theory. In particular, the Bank cites Wis. Stat. § 411.532, which provides that a lessor may recover an amount sufficient to compensate for any "loss of or damage to" the lessor's residual interest in the property. However, as noted by the Trustee and Cobb, these sections are inapplicable because Article 11 only affects leases entered into after July 1, 1992, unless otherwise agreed by the parties. Indeed, even the Bank admits this fact, although it argues that the quoted sections may be used for "guidance."

In its briefs, the Bank repeatedly stresses that both common law and Article 11 permit it to receive the benefit of its bargain. It also cites the case of In the Matter of Smith Management, Inc., 8 B.R. 346 (Bankr. W.D. Wis. 1980) for support. In Smith, the court examined a lease and determined that it was in fact a disguised sales transaction. In determining the amount of damages to be awarded the seller, the court found that the buyer was required to put the seller in the same position it would have been in if the contract had been fully performed. Id. at 350.

Smith, however, is not applicable to this case. It merely restates basic common law concepts regarding damages and remedies. The question in the present case is not whether a lessor could legitimately claim damages resulting from the "loss" of its residual interest in the leased property, but whether the Bank is in fact entitled to such an award under the terms of the parties' agreement. The case of In re Kavoosi, 55 B.R. 120 (Bankr. S.D. Fla. 1985), also cited by the Bank, is inapplicable for similar reasons.

Wisconsin law, with the exception of Wis. Stat. § 411.532, is silent on the issue of residual value as an element of damages. However, this Court has located cases in other jurisdictions which would appear to justify such an award under certain circumstances. See, e.g., DSCO, Inc. v. Warren, 829 P.2d 438 (Colo. App. 1991); Transpacific Leasing, Inc. v. Klineline Sand & Gravel Co., 535 P.2d 1360 (Ore. 1975); Clay-Dutton, Inc. v. Plantation Nursing Home, 239 So.2d 442 (La. App. 1970). In these cases, however, the courts were construing and enforcing contractual provisions which permitted the awards sought.

In the present case, the Master Lease contains very detailed provisions regarding the lessor's remedies upon default. However, there is absolutely no statement that the Lessor is entitled to the "residual value" of the equipment upon default in addition to the future rents. The TRAC by its own terms is inapplicable, as it is effective only if the lessee has fully complied with the terms of the lease. Paragraph 19(d) expressly provides that the sales proceeds will be applied to the costs of sale and future rents, nothing more. The only language which the Bank can truly cite to support its claim is paragraph 19(f) of the Lease, which permits the lessor to pursue any other remedy "at law or equity." Regardless of the purported economic realities of the situation, it

seems highly unjustified to permit the drafter of a document to receive huge sums of money through the use of such boilerplate language.

If there is an ambiguity in a contract, the court must construe the document against its drafter. Noack v. John Deere Co., 44 B.R. 172, 176 (E.D. Wis. 1894); Batavian Nat. Bank of La Crosse v. S. & H. Inc., 3 Wis.2d 565, 89 N.W.2d 309 (1958). Under Wisconsin law, the rights and liabilities of the parties to a lease must be determined from the express provisions contained therein, and a court will not create terms or conditions "contravening the solemn agreement of the parties." Metropolitan Inv. Co. v. City of Milwaukee, 182 Wis. 539, 196 N.W. 240 (1923). Thus, the parties can vary their rights and remedies by agreement, and the agreement will usually control.

In the present case, the lease is in fact ambiguous as to the remedy sought by the Bank. There is no provision for the allocation of the residual value of the equipment upon default. The Lease must be construed against the drafter, as otherwise the debtor, or the estate, is penalized while the Bank receives a windfall. The Bank or its predecessor could have expressly provided for the damages now sought, but did not. Thus, this Court makes no statement as to whether a provision awarding the "residual value" of leased equipment to the lessor would be enforceable. Under the agreement of the parties in this matter, no such award was contracted for; accordingly, no such award may be made.

Therefore, the Objections of Cobb and the Trustee to the claim of the Bank are granted, and the Bank's claim shall be allowed in the amount of $90,465.31.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.