UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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January 10, 2001

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Re: Omega Papier Wernshausen GmbH vs. Harnischfeger Industries, Inc., Beloit Corporation, Mark E. Readinger, Ross J. Altman, and Scott Baker
Adv. Proc. No. A-00-399

Dear Counsel:

This is my ruling with respect to the Unsecured Creditors' Committee's Motion for Judgment on the Pleadings (Doc.

36).[1] For the reasons briefly described below, I will deny the motion.

FACTS

The relevant facts are essentially as follows.

On February 12, 1999 Omega Papier Wernshausen GmbH ("Omega") entered into a contract with Beloit Austria GmbH ("Beloit Austria") for the construction of tissue paper making equipment to be installed in Omega's facilities in Germany. On February 18, 1999 Beloit Corporation ("Beloit USA"), the indirect parent of Beloit Austria, executed a letter in which it guaranteed Beloit Austria's performance of the contract. On March 8, 1999 Beloit USA delivered a letter to Omega with respect to the contract in which it stated that Harnischfeger Industries, Inc. ("HII"), the owner of 80% of the common stock of Beloit USA, "stands behind Beloit" in the performance of the contract. Thereafter Omega made a payment of DM 9,100,000 to Beloit Austria and commenced monthly payments of DM 1,820,000.

On June 7, 1999 HII and Beloit filed Chapter 11 petitions in this Court. On July 12, 1999 Beloit USA executed a letter guarantee in favor of Omega with respect to the contract, which letter contained the same guarantee wording as the February 18, 1999 letter. On August 11, 1999 Beloit USA and HII signed a

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[1] By a May 30, 2000 order the Committee was granted leave to intervene in this adversary proceeding.

further letter commitment in which Beloit USA reaffirmed its guarantee and HII represented that it joined in the Beloit letter and agreed to "use commercially reasonable efforts to cause Beloit to perform its obligations under this letter." According to Omega, on the basis of these commitments it resumed the monthly payments of DM 1,820,000 and Beloit Austria began work on the equipment. According to Omega, on November 19, 1999 it was notified by Beloit Austria that Beloit Austria was ceasing work on the project and Beloit Austria was not receiving any further support from Beloit USA. Work on the project ceased.

Omega refers to these prepetition and postpetition letters as "guarantees." The Committee disputes this characterization as to some of the letters. For convenience of reference I will simply refer to them as "commitments" with no intended ruling at this time as to their efficacy.

In its complaint Omega asserts nine separate causes of action. The subject motion is with respect to just two of those, namely: (1) the first claim, which asserts breach of the postpetition commitments and (2) the third claim, which alleges breach of implied covenant of good faith in connection with the postpetition commitments.

The Committee seeks judgment for the defendants on these two claims based on three theories:

(1) The Debtors' postpetition letters, if effective in the manner Omega alleges, would constitute a settlement of Omega's prepetition claims and since the settlement was not effected pursuant to the requirements of § 363 (b)[2] and Rule 9019, they are invalid and unauthorized undertakings under bankruptcy law.

(2) The prepetition letters constitute executory contracts and the effect of the postpetition letters results in a constructive assumption of the prepetition executory contracts, which assumption was not approved by the Court pursuant to § 365 and therefore is invalid and unauthorized under bankruptcy law.

(3) HII's postpetition letter to use "commercially reasonable efforts" to cause Beloit USA to perform is not a guarantee.

DISCUSSION

In its review of a motion to dismiss under Rule 12(c) the Court applies the same standard applied to a motion to dismiss under Rule 12(b)(6). The Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff." Southmark Prime Plus, L.P. v. Falzone, 776 F. Supp. 888, 891 (D. Del. 1991). Moreover, the Court must construe the complaint and all documents attached to the complaint in favor of the plaintiff. See LDA Acquisition, LLC v. Flag Wharf,

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[2] All references herein to "§ ____" refer to sections of the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

Inc. (In re Competrol Acquisition Partnership, L.P.), 203 B.R. 914, 916 (Bankr. D. Del. 1996).

I will address the Committee's third argument first. The parties appear to agree that the contract and the letters are governed by German law.[3] The Committee submitted an affidavit of a German lawyer to the effect that under German law the "commercially reasonable efforts" commitment does not constitute a guarantee. Omega has submitted an affidavit by a German lawyer which argues that under German law the HII postpetition commitment

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[3] I would not foreclose the possibility that some of the commitments may not be governed by German law. The February 18, 1999 letter from Beloit USA recites the commitment to Omega and then states that "[t]his declaration is governed by the laws of Germany." However, the March 8, 1999 commitment to stand behind Beloit USA makes no such reference to German law. Beloit USA's July 12, 1999 letter reads verbatim on the February 18, 1999 letter, including the commitment statement followed by the statement that "[t]his declaration is governed by the laws of Germany." The August 11, 1999 letter from Beloit USA follows the pattern of the February 18, 1999 letter and the July 12, 1999 letter by declaring Beloit USA's commitment to Omega and then reciting that "[t]his declaration is governed by the laws of Germany." However, the commitment by HII is appended to the bottom of the August 11, 1999 letter and it is not at all clear that the "this declaration" statement covers the HII commitment to Beloit USA. If the HII commitment is not governed by German law, but by the law of some other jurisdiction, based on the limited facts before me, whether the HII commitment should be construed as a guarantee is problematic. It is certainly clear that the HII commitment is not a conventional guarantee under American jurisprudence.

constitutes a "hard declaration of support" which is tantamount to a guarantee.[4]

The Committee and Omega obviously view the Committee's third argument as invoking the interpretation of German law. In deciding such an issue this Court typically makes a finding based upon testimony by qualified experts on the foreign law subject matter. Given the conflicting views expressed in the two affidavits, this Court cannot make a factual determination based upon the affidavits and cannot grant a Rule 12(c) motion based on conflicting material facts.

As its first theory, the Committee argues that the execution of the postpetition commitments effectively overrides fundamental bankruptcy law as embodied in § 362(a). In refusing to make further monthly payments until it obtained the postpetition letters, the Committee argues that Omega effectively converted its general unsecured prepetition claim into an administrative priority claim to the detriment of other unsecured creditors. The Committee views Omega's conduct in extracting these postpetition letters as effecting a settlement of their prepetition unsecured claim. According to the Committee that settlement was not a transaction in the ordinary course of business and § 363(b) requires notice and a

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[4] While Omega argues that the HII postpetition commitment is tantamount to a guarantee, its recitation of German law applied to the facts as Omega views them does not in my view "virtually support Summary Judgment in [Omega's] favor on this issue." (Doc. # 40 p. 31).

hearing pursuant to the procedures set forth in Rule 9019. Thus, the Committee concludes that since no such court approval was obtained, or even sought, the postpetition letters constitute a settlement which is unenforceable as a matter of bankruptcy law.

In response, Omega argues that the postpetition commitments are postpetition transactions entered into in the ordinary course of the Debtors' businesses and are therefore not subject to § 363(b) or Rule 9019. Omega denies that there was a "dispute" which the postpetition letters were designed to settle. The Committee argues that the fact that Omega refused to make any further monthly payments until it received the commitments is plain evidence of a dispute. However, there is nothing in the record to suggest that the Debtors viewed Omega as being in breach of the contract in not making the monthly payment. Thus, there is insufficient evidence at this stage of the case to conclude that bona fide disputes existed regarding contract performance and that the postpetition commitments were intended to settle those disputes.

According to Omega, the Committee's position is a superficial attempt to simply label the postpetition commitments as "compromise and settlement" documents. Omega points out that § 363(c)(1) allows a debtor to enter into transactions without notice or court approval if they are within a debtor's "ordinary course of business." Omega then goes on to discuss in detail the

horizontal test and the vertical test applied by the courts for determining whether a transaction is in the ordinary course of business. Omega concludes by arguing that whether these postpetition letters were transactions in the ordinary course of business is a question of fact which cannot be decided in a Rule 12(c) motion. I agree. To decide this issue one must examine the facts and circumstances regarding (1) the Debtors' prepetition policies and practices, (2) the Debtors' postpetition policies and practices and (3) the particulars surrounding the issuance of the commitments.

The Committee's second argument is that the prepetition letters should be viewed as executory contracts and the execution of the postpetition letters constitutes an assumption of those contracts. According to the Committee, the prepetition letters address continuing performance obligations on both sides of a contract and within one month of the filing of the petition, Omega demanded that the Debtors reaffirm their prepetition letters regarding performance of the prepetition contract. However, assumption of a prepetition contract can only be effected pursuant to a notice and a hearing and an order by the court pursuant to § 365. Thus, the Committee argues that since no such court approval was sought by the Debtors, the postpetition letters should be deemed an attempt to assume such contracts without court approval thereby rendering them unenforceable.

In response, Omega argues that even if the prepetition commitments are executory contracts, it is irrelevant to whether the postpetition commitments are valid postpetition contracts entered into the ordinary course of business because § 365 does not apply to postpetition contracts. According to Omega, the postpetition commitments are independent postpetition agreements entered into by the Debtors in the ordinary course of their businesses. Of course, as noted above, whether the postpetition commitments were entered into in the ordinary course of the Debtors' business is a fact question which cannot be disposed of by the subject motion. Whether the postpetition commitments are inextricably linked to the prepetition commitments to result in the type of assumption that the Committee argues is a fact issue which cannot be resolved by this motion. In this regard I note that at several points in its argument the Committee premises its position on "the extent the Court views all or part of the Pre-Petition Letters as executory contracts susceptible to assumption." (Doc. # 37 pp. 12 and 15). Is the Committee arguing that the prepetition letters are to be viewed as executory contracts separate and apart from the underlying construction contract? If so, I do not believe the Committee has given a sufficient basis for drawing that conclusion from the pleadings to date.

In its § 365 argument the Committee argues that "Omega's request that the Debtor's confirm the Pre-Petition Letters resulted

in Debtors providing the Post-Petition Letters with virtually identical language." (Doc. #37 p.15). This is not a correct statement. While it is true that Beloit USA's August 11, 1999 letter contains the exact same commitment language as its February 18, 1999 letter, HII's commitment of August 11, 1999 does not contain the same language as the commitment letter of March 8, 1999. Specifically, the August 11, 1999 letter states: "Harnischfeger Industries, Inc. ("HII") joins in this letter for the purpose of ensuring that HII will use commercially reasonable efforts to cause Beloit [USA] to perform its obligations under this letter." Whereas, the March 8, 1999 letter states: "I am writing to assure you that Harnischfeger Industries, Inc., a worldwide leader in the mining equipment business for both underground and surface mines and the principal shareholder of BELOIT Corporation, stands behind BELOIT both financially and otherwise." These are obviously different commitments. Equally important is the fact that it is not at all clear that the March 8, 1999 letter represents a commitment by HII. It is not a letter from HII. The letter is from Beloit USA and it is signed by Mark E. Readinger as President and COO. However, the August 11, 1999 letter is from Beloit USA and signed by Mr. Readinger as President and COO of Beloit USA but, in addition, with respect to the HII commitment in that letter it is signed by Mr. Readinger as Senior VP of HII. Whatever commitment Omega obtained from HII in the August 11, 1999

letter, it seems to me there is a serious question as to whether, as it alleges, it obtained "a guarantee from Harnischfeger" in the March 8, 1999 letter. (Doc. # 40 p. 5). In this regard I note that the record before me suggests that HII and Beloit USA operated as separate and distinct entities with corporate headquarters at different locations.

For the reasons set forth above, the Unsecured Creditors' Committee's Motion for Judgment on the Pleadings (Doc. # 36) is denied.

So Ordered.

Very truly yours,

Peter J. Walsh

PJW:ipm