UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re	)	Chapter 11
	)	
WILLIAM S. DAVIS and LINDA L. DAVIS,	)	No. 00-250-ECF-CGC
	)	
Debtors.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The motion of William S. Davis and Linda L. Davis ("debtors") to enforce the terms of a settlement agreement was heard as a bench trial before this court[1] on June 29 and September 4, 2001. Closing argument was received on September 4, 2001, and post-trial briefing was waived.

The court has considered the declarations and testimony of witnesses, admitted exhibits and the facts and circumstances of this case. The following findings and conclusions are entered:

FINDINGS OF FACT

1. Bill J. Davis ("Bill J." or "creditor") is the father of William S. Davis ("William S."), one of the debtors in

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1The United States Bankruptcy Judge assigned to this Chapter 11 case sua sponte recused himself from hearing this particular matter by order dated May 7, 2001. The matter was assigned to the undersigned by random draw of the clerk on the same date.

this bankruptcy proceeding. The father and debtors engaged in business together. Eventually, disputes led to litigation between the family members and others.

2. Litigation included a January 4, 2000 judgment in the approximate amount of $1.4 million entered against debtors and in favor of Bill J., following a jury trial in Orange County, California Superior Court. Ex. M. The jury found fraud and asserted punitive damages of $600,000 against debtors. This judgment is currently on appeal before the Orange County Court of Appeals.

3. Pending in the Arizona Bankruptcy Court is adversary proceeding no. 00-245-CGC, brought by debtor William S. against his father and his father's attorney. Also pending in Arizona Bankruptcy Court is adversary proceeding no. 00-251-CGC, in which Bill J. seeks a determination that his California Superior Court judgment is nondischargeable in bankruptcy.

4. Pending in Orange County Superior Court since January 8, 2001, is another suit by Bill J. against debtors and others. Ex. N. The father's filing of this action post-petition generated litigation by debtors in the Arizona Bankruptcy Court, alleging Bill J. violated the automatic stay of 11 U.S.C. § 362(a).

5. Pending in the United States District Court for the District of Arizona as case CIV-00-707-PHX-RCB is litigation brought by debtors against Bill J. individually and as trustee of various family trusts, seeking an accounting and removal of the trustee and alleging violations of fiduciary duties. Exs. Q, R.

6. Finally, pending in debtors' Chapter 11 bankruptcy filing of January 10, 2000, are various motions and objections involving these family members. See generally docket for case 00-250-ECF-CGC.

7. During a March 1, 2001 California deposition, Bill J. and William S. were left alone and began a dialogue. They instructed their attorneys to continue the deposition and attempt a settlement. Direct test. of William S., June 29, 2001; direct test. of Bill J., June 29, 2001. The parties negotiated on March 2, after cancelling the deposition. June 29, 2001 direct test. of Brian Sirower. Creditor Bill J. left with debtors' oral settlement proposal. There were subsequent discussions between counsel. In a letter dated March 7, 2001, Bill S. made a settlement offer to debtors. Id. ex. 2.

8. This written communication clearly identified the five specific elements of the offer and expressly cautioned debtors that the pending litigative matters would proceed "unless and until we have achieved a settlement." Ex. 2, at 1 and 2. The document does not require debtors' acceptance to be in writing. Id.; Bill S. test., supra.

9. At a bankruptcy court settlement conference on March 21, 2001, the bankruptcy judge requested clarification of plaintiff's March 7 offer. Creditor improved his offer by $150,000 and indicated he sought debtors' acceptance that day. Debtors did not accept that day, but made a counter offer by

letter of April 6, 2001.[2] William S. test., supra; Ex. C. The counter offer recapped the pending settlement offer of Bill S. into six elements. Ex. C at 1-2. One stated element was that while debtors would be dismissed from the January 8, 2001 Orange County litigation, the nondebtor defendants would not be dismissed. Id. at 2.

10. Bill S. rejected debtors' counter offer on April 9, 2001 and expressly required debtors to accept or reject his pending offer within 24 hours, or else he would continue litigation in district and bankruptcy court:

> He requests that Billy and Linda either accept or reject such offer no later than 1:00 p.m. tomorrow, Tuesday, April 10. After such time, he will be forced to focus his attentions on the defense of the District Court action and the finalization of a Plan to submit in Billy and Linda's bankruptcy proceeding.

Ex. D (emphasis in original).

Again, no written acceptance was required by this demand. Id. This document did not change any terms of the father's pending offer. Test., Bill J., supra.

11. Debtor William S. testified credibly before this fact finder that he authorized his attorney to accept his father's offer, which he did not understand required a writing. In reliance on his acceptance, debtor advised his children, his children's teachers and neighbors that this difficult matter was resolved. William S. test., supra.

2An earlier counter offer was made by debtors on March 20, 2001, just prior to the settlement conference. Ex. B.

12. Acting on this authorization, at approximately 12:35 p.m. on April 10, 2001, debtors' counsel attempted to reach creditor's counsel by telephone to accept the offer. Failing to reach creditor's California attorney, debtors' counsel left the following voice message:

> Hey Robby, this is Brian Sirower. I'm also here with Scott Goldberg and Joe Hamilton, and calling you on the Davis matter.
>
> I wanted to respond by your deadline and hence the call, it's about 12:35 now.
>
> I needed to confirm a couple of points that we talked about yesterday, and if we can confirm those I think we can have a definitive acceptance of your proposal or ultimatum, however you want to characterize it and this thing can come to an end. So call me as soon as possible at 602 229 5416.
>
> I think it's appropriate to treat this message as a response and acceptance of your proposal, but again I just want to clarify what we talked on the phone yesterday; after we talk, I will get a formal letter to you, again just confirming this so we have a record and we can talk about how we may want to get this on the record before either Magistrate Sitver tomorrow, or ask for a special emergency hearing in front of Judge Case.
>
> Thanks. Again I'm at 602 229 5416. Bye.

Exhibit 5.

13. The testimony of debtor William S. and debtors' bankruptcy counsel that debtors' intent was to accept Bill J.'s offer on April 10, is credible to this fact finder. William S. test., supra, June 29, 2001; direct test. of Brian Sirower. To document the oral acceptance on April 10, debtors' counsel had two of his associates listen in on the conversation. Ex. 5, at

¶ 1, Decl. of Joseph Hamilton at ¶¶ 4-6, at 2, ex. J; Decl. of Scott Golberg at ¶¶ 4-6, at 2, ex. K.

14. The "clarifications" referenced in the voice mail had been discussed between counsel on April 9, 2001. These items concerned (1) whether Bill J. would agree to dismissal of all defendants in the 2001 Orange County suit (to ensure debtors would not be brought back into the litigation by the remaining defendants following debtors' dismissal), and (2) whether Bill J. would allow the fraud findings in the January 4, 2000 judgment to be vacated. By seeking these clarifications, debtors did not intend to make their acceptance conditional. William S. and Sirower test., supra. The father's attorney returned the call and advised Bill J. was ill and could not be reached to provide the clarifications. During an April 11 conversation, counsel agreed that since Bill J. still could not be contacted, the settlement terms would include dismissal of only debtors from the 2001 litigation and no alteration of the January 4, 2000 fraud judgment. The father's attorney did not contend that the debtors had not timely accepted, nor did he claim, at that time, that the acceptance was conditional. Sirower test., id. The court finds this testimony credible.

15. On April 11, both counsel agreed to place a joint call to the Phoenix chambers of a United States Magistrate Judge to vacate a settlement conference scheduled for 1:30 p.m. that day. The conversation with the attorneys left the magistrate judge's judicial assistant with the belief that the matter had settled, not that there were ongoing settlement negotiations.

The judicial assistant's civil minutes of April 11, 2001 state: "The parties having telephonically notified the Court that this matter has settled and they will be filing the appropriate documents reflecting their agreement, the settlement conference set before U.S. Magistrate Judge Morton Sitver has been vacated." Ex. Q. That same date, the judicial assistant advised the chambers of a senior district judge[3] that "a settlement has been reached." District court minute order of April 11, 2001, ex. R. Accordingly, that court vacated oral argument set for April 30 and a status hearing set for June 25, based on the fact "that a settlement had been reached." Id.

16. The father's counsel verified he was on the telephone line when debtors' counsel spoke to the magistrate judge's assistant. He concedes debtors' counsel "might" have used the words "we have a settlement." He received a copy of the magistrate judge's minutes stating "this matter has settled." Ex. Q. He took no action to correct the flat statement in both court records, copies of which he received, believing it was not his role to correct court personnel. Direct and cross-exam. test. of Robert L. Conn. This fact finder does not find such an excuse plausible.

17. Both counsel then attempted to contact the bankruptcy judge to advise him of their discussions. When that

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[3]The assistant had advised both attorneys she would be contacting the district court to vacate its hearings. Sirower direct test. of June 29. No objections were raised by creditor's counsel.

judge was unavailable, the parties agreed creditor's counsel would draft papers to suspend litigation in the bankruptcy court. See exs. 6 and 7. The stipulation simply states it is the parties' desire "to prepare and submit to the above-entitled Court a written settlement agreement resolving all pending issues between these parties." Ex. 6, at 2. The document is ambiguous. It can be read to state the parties had settled and merely had to reduce their verbal agreement to a writing, an interpretation favoring debtors. It could be read to imply the parties intended to subsequently reach an agreement in writing, the position advanced by creditor Bill J. Such interpretation, however, violates creditor's flat ultimatum of 48 hours earlier that district and bankruptcy litigation would proceed if debtors did not accept creditor's settlement offer. See letter of April 9, 2001, at 4-5; ex. D. On balance, the bankruptcy suspension stipulation, drafted by creditor's counsel, favors debtors' theory of a verbal settlement, reached 24 hours earlier.

18. Also on April 11, 2001, in a massive exercise of poor judgment on the part of debtors and their attorney, a letter was written to creditor's counsel.[4] Ex. E. The intent was to address certain "non-settlement factors" and also continue to track the precise settlement terms. Sirower direct, supra. In the communication, debtors refused entirely to take any responsibility for the debilitating family dispute. Ex. E at 1.

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[4]In the April 10 voice mail, debtors' counsel stated he would "get a formal letter to you, again just confirming this so we have a record." Ex. 5.

Bill J., a 75 year old gentleman, was accused of not having worked a day in his life and lacking any intent to restore family relations. Id. at 3 and 4.[5] Nonetheless, this disrespectful letter clearly states:

> With this in mind, and to serve the best interests for themselves and their children, my clients will accept your offer as you clarified on the phone today. Again, please be advised that your offer is not generous and is accepted reluctantly and only with a long term view of the Debtors and their children in mind. Accordingly, your offer which is hereby accepted, is as follows:

Id. at 4.

19. Immediately following were eight agreement terms: six economic (1-6) and two relating to pending litigation (7-8). Id. at 4-5. The foregoing agreement was to be reduced to writing and approved by the bankruptcy court. Id. at 5. The "clarification issues", raised in counsel for debtors' voice mail acceptance of April 10 were addressed. First, the letter acknowledged that only debtors would be dismissed from the "2001 complaint", although debtors' counsel again argued the logic of a complete dismissal:

> The 2001 Complaint will be dismissed against the Debtors with prejudice. As we discussed over the phone, the action probably should be dismissed in its entirety in light of the risk of third party claims against the

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5Creditor's initial offer, relayed in the letter of March 7, 2001, clearly conveyed that the father was looking for respect from his son and desired to "make things right" in the family relationship. Ex. A at 2. What debtors were attempting to accomplish through the personal attacks in their April 11 letter is unclear.

> Debtors and the conspiracy nature of the claims raised in that Complaint (which will be deemed released, as a matter of law, upon the dismissal of the Debtors).

Id. at 4 (emphasis added).

Second, debtors acknowledged that if Bill J. refused to allow the California judgment to be vacated or amended, this would not affect their acceptance:

> We want to specifically leave open the possibility of having the California Judgment vacated or amended in light of the settlement. If your client continues to want to be punitive with respect to the judgment and potentially interfere with his son's livelihood, then he may elect not to agree to vacate or amend the judgment. The fact that your client may elect to be punitive and not want to vacate the judgment will in no way affect the absolute and binding acceptance of your offer.

Id. at 4 n.3.

20. This letter is an additional indication debtors accepted the settlement order. This finding is further supported by creditor's reaction. Debtors were not immediately told their acceptance had been rejected. Instead, in a letter written nine days later, creditor's counsel advised debtors' April 11 letter had been forwarded to Bill J. for his review. Ex. 9. Counsel referred to the dealings as a "tentative" settlement and that the parties were "trying to achieve a full settlement of the pending issues." Id. Creditor's counsel stated he was looking forward to receiving a proposed settlement agreement, which debtors' counsel was drafting. Id. Counsel had spoken after receipt of debtors' April 11 letter and agreed that debtors' counsel would be responsible for drafting the bankruptcy settlement papers.

Sirower direct exam., supra. Compromises and settlements in bankruptcy must be approved by a judge on a motion, following notice to all creditors and the U.S. trustee. Fed. Bankr. R. 9019(a). Given that both a motion and notice are required, all bankruptcy settlements require one or more writings. Consequently, the fact that debtors' counsel was drafting formal settlement papers is not evidence the parties had agreed that no oral settlement would be binding.[6] The fact that formal drafting was ongoing infers that the parties had reached a meeting of the minds and it was now time to document the matter. Accordingly, these elements favor debtors' theory of a binding oral agreement.

21. Debtors' unfortunate letter of April 11 had a result which should have been expected. By letter of April 27, 2001, creditor's counsel reported: "Mr. Davis was stunned by the viciousness of Billy and Linda's temperament as expressed in the fax dated April 11." Ex. G at 1. The letter concluded that the climate and distrust are to a point where Bill J. cannot believe the settlement would give him peace. Id. Accordingly, the letter indicated counsel had been instructed to renew the litigation. Id. at 2.

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[6]Creditor's letter of April 20 speaks of the parties' "attempt to complete the tentative settlement" by debtors' counsel "preparing a proposed settlement agreement for consideration by my client." Ex. 9. Debtors' counsel credibly testified he interpreted this to refer to the legal fact that no settlement is final in bankruptcy until approved by a court following notice and an opportunity to object. Sirower cross-exam. of June 29, 2001. Accordingly, Sirower continued working on the settlement papers, exhibit F2, transmitting them to creditor's counsel on April 23, 2001. Ex. F1.

22. Bill J. testified his withdrawal of his settlement offer on April 27, 2001 occurred because debtors' letter of April 11 hurt him emotionally and took away all benefits of settling. Direct test. of Bill J. Davis of June 29, 2001. He felt he could withdraw his offer because a writing signed by both parties was required to settle, although no such requirement is imposed in his April 9 offer. Bill J. knew when he made the original offer that it would impose a financial burden. The most important reason he withdrew his offer was that the response expressed no appreciation for what he was trying to do for the family. Direct test. of Sept. 4, 2001.

23. Bill J. and his counsel testified they believed the parties never reached a binding settlement agreement. Creditor's counsel supports this belief by three arguments: (1) A written and signed settlement agreement was a precondition for acceptance, (2) Debtors continued to negotiate after their April 10 acceptance, and (3) in a two-person telephone conversation, debtors' counsel asserted debtors were not bound by the settlement. Direct test. of Robert L. Conn.

(A) None of the written settlement offers made by creditor contain a requirement that an acceptance must be in writing, or that the parties would not be bound until a signed agreement was obtained. See creditor's letters of March 7 and April 9, 2001, exs. A and D. Creditor did not allege the precondition of a signed writing until counsel's letter of April 30, 2001. Ex. I at 1-2. This letter was responding to debtors' assertions of an existing, binding settlement made in their

letter of April 27. Ex. H. Nor does debtors' correspondence indicate the existence of such a precondition to enforceability of the settlement. See exs. B, C (which repeats the elements of the offer received from creditor at pp. 1-2); E (again repeats elements of creditor's offer at 4-5), and H.

Finally, creditor was ready to enter into a binding settlement agreement during a bankruptcy court settlement conference held on March 21, 2001. Direct test. of Bill J. of June 29, 2001; Sirower direct test. of June 29 and redirect of Sept. 4, 2001; Conn cross-exam. This willingness to act that day also negates the allegation of a writing as a precondition.

The court does not find creditor's testimony of a writing as a precondition to a binding settlement to be credible.

(B) Following debtors' verbal acceptance of creditor's offer on April 10, debtors continued to urge creditor to grant the additional concessions of amending the California judgment and dismissing all defendants in the "2001" California litigation.[7] Creditor argues this establishes the lack of a mutual agreement to settle.

Debtor and his counsel have credibly testified that such requested "clarifications" would be welcome, but did not affect debtors' absolute acceptance of the settlement offer. See

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7It appears debtors attempted to induce creditor's agreement to dismiss all defendants by "reminding" creditor's counsel he was personally named in a stay violation complaint, which debtors had not agreed to dismiss as to third parties. Letter of Apr. 23, 2001, ex. F1.

findings of fact 11-14. See also Sirower recross test. of Sept. 4, 2001.

Debtors' letter of April 11 makes the same point: Debtors accepted dismissal of only themselves from the 2001 litigation (although they recommended a broader dismissal) and made an "absolute and binding acceptance" even if creditor elected not to amend the judgment. Ex. E at 4 and n.3. See also findings of fact 18-20. Finally, the draft agreement prepared by debtors' counsel to document the oral agreement, clearly indicates only debtors would be dismissed from the 2001 action. Ex. F2, at 10, ¶ 2.3(e)(v). There is no provision in the draft for amendment of the California judgment. Id. The draft was sent to the creditor on April 23, 2001, exhibit F1, prior to creditor's repudiation of the offer on April 27. Ex. G.[8]

The court does not find credible the creditor's belief that the parties continued to negotiate and failed to reach a mutual agreement to settle.

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[8]The draft contains execution and security provisions that both parties agreed were never negotiated beforehand. Debtors' counsel credibly testified that the various provisions were "boilerplate" contract language dealing with contingencies such as avoiding probate if the 75 year old creditor expired before making all required payments. The witness also credibly testified that none of these provisions were conditional to debtors' acceptance. Sirower direct and cross-exam. of June 29, 2001. The court finds these suggested provisions common in documentation of achieved settlements. It does not find them credible evidence that no binding agreement had been reached. To be sure, such unnegotiated provisions are not part of the parties' oral agreement. They are not enforceable against the creditor.

(C) Finally, creditor's counsel testified that at some juncture in the discussions, debtors' counsel indicated debtors had the right to argue against the bankruptcy court approving the settlement. Conn direct test. This circumstance was not raised in counsel's letter of April 30, 2001, arguing why there was no enforceable settlement. Ex. I. Debtors' counsel testified that if the parties allowed the California appeal to go forward and debtors prevailed, this changed circumstance might compel debtors ethically to argue before the bankruptcy court that the settlement was no longer as beneficial to the estate. Sirower cross-exam. of June 29, 2001. Counsel also pointed out that if the bankruptcy court first approved the settlement, debtors' appeal would be dismissed as part of the negotiated settlement terms. Sirower recross of Sept. 4, 2001. This discussion occurred because debtors wanted the creditor to stipulate to continue the oral argument on the appeal set for June. Conn direct test. Creditor refused since (1) he had requested and received priority on the appellate docket, and (2) a continuance could result in a three-year delay of the appeal. Id.

Debtors' counsel was correct on the legal principle: If the appeal went forward and debtors were successful, this changed circumstance could require them to advise the court the settlement was no longer as beneficial to the estate. More to the point, the discussion, this court finds, was postured in an attempt to gain a stipulation to continue the appellate argument. Debtors' testimony and exhibits have convinced this court they intended to bind themselves by accepting creditor's offer.

24. As early as March 7 and as late as April 9, creditor emphasized that litigation in the various forums would continue "unless and until we have achieved a settlement." Ex. A at 2, at last ¶; ex. D at 4-5. However inartful debtors' voice mail acceptance was phrased on April 10, the surrounding circumstances convince this fact finder debtors accepted the offer. The next day the parties were arranging continuances of litigation in joint phone calls, which creditor had vowed would occur only if the parties "have achieved a settlement (ex. A at 2) or debtors "accept. . .such offer no later than 1:00 p.m. . .Tuesday, April 10." Ex. D at 4-5. The attorneys' joint telephone discussion with district court staff convinced the staff that a settlement had been reached. Exs. Q, R. When copies of the magistrate and district minute orders were sent to creditor's counsel, indicating a settlement had been reached, counsel made no effort to correct these official court records. Debtors' letter of April 11 clearly reflected that creditors' offer "is hereby accepted" and creditor's election regarding the existing judgment "will in no way affect the absolute and binding acceptance of your offer." Ex. E at n3. Creditor failed to object that no binding settlement was reached.

Creditor's words in subsequent writings of a "tentative settlement" (letter of April 20, 2001, exhibit 9; fee objection of April 24, exhibit 12) are fully consistent with the legal requirement that no bankruptcy settlement is final until court approved. This fact finder is not convinced that an oral agreement was not reached.

25. A valid acceptance of creditor's offer having occurred, creditor's April 27 repudiation of his settlement offer was ineffective. Ex. G.

26. To the extent any of the following conclusions of law should be considered findings of fact, they are hereby incorporated by reference.

CONCLUSIONS OF LAW

1. To the extent any of the above findings of fact should be considered conclusions of law, they are hereby incorporated by reference.

2. Pursuant to 28 U.S.C. § 1334(a), jurisdiction of this bankruptcy case is vested in the United States District Court for the District of Arizona. That court has referred, under 28 U.S.C. § 157(a), all cases under Title 11 and all adversary proceedings arising under Title 11 or related to a bankruptcy case to this court. (Amended General Order, May 20, 1985). This case having been appropriately referred, this court has jurisdiction to enter a final order determining whether the parties have settled certain causes of action held by debtors and certain claims pending against debtors and the estate. 28 U.S.C. § 157(b)(2)(B) and (C).

3. In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal choice of law rules. In re Lindsay, 59 F.3d 942, 948 (9th Cir. 1995). Federal common law choice of law rules follow the Restatement (Second) of Conflicts of Laws. In re Gibson, 234 B.R. 776, 779 (Bankr. N.D. Cal. 1999((citing cases).

4. This matter is a dispute over whether the parties formed a valid settlement contract. Section 188 of the Restatement provides that the parties' rights and duties in contract are determined by the law of the state that has the most significant relationship to the transaction and parties. In the absence of an effective choice of law by the parties, the state contacts to be considered include the place of contracting and negotiation, the place of performance, the location of the subject matter and the domicile and the residence of the parties. Restatement (Second) of Conflicts of Laws § 188 (1969).

5. While the respondent creditor and the attorney who negotiated for him reside in California, movants are Arizona residents who filed a bankruptcy case in the District of Arizona through their Arizona attorney. Any compromise or settlement reached by the parties must be approved by the Arizona bankruptcy court. The settlement involved Arizona real property. The court will apply Arizona law to this dispute.

6. Under Arizona law, the validity and enforceability of stipulations and settlement agreements are resolved under contract principles. Hartford v. Industrial Comm'n of Ariz., 178 Ariz. 106, 870 P.2d 1202, 1205 (Ariz. App. 1994). For an enforceable contract to exist, there must be an offer, an acceptance, consideration and sufficient specification of terms, so that obligations can be ascertained. K-Line Builders, Inc. v. First Federal Savings & Loan Ass'n, 139 Ariz. 209, 677 P.2d 1317, 1320 (Arizona App. 1983).

7. The party asserting the existence of an oral contract must prove this contract by a preponderance of the evidence. This is the burden of persuading the trier of fact that the terms of the oral contract were mutually understood and agreed to by evidence which is more probable to the existence of such contract terms than to the nonexistence of such terms. Goldbaum v. Bloomfield Building Industries, Inc., 10 Ariz. App. 453, 459 P.2d 732, 736 (Ariz. App. 1969).

The court concludes that debtors have established, by a preponderance of the evidence, that an enforceable contract existed through execution of an offer and acceptance, consideration (consisting of the promise to settle, expedited acceptance and agreement to suspend litigation) and sufficient specification of terms that obligations can be ascertained.

8. An offer is a manifestation of willingness to enter into a bargain, made to justify another in understanding his assent to that bargain is invited and will conclude it. K-Line Builders, Inc., 677 P.2d at 1320. Creditor made an offer in the March 7, 2001 letter from creditor's counsel to debtors' counsel. Ex. A.

9. An acceptance is a manifestation of assent to the terms made by the offeree in a manner invited or required by the offer. Id. Mutual assent is based on objective evidence, not on the hidden intent of the parties. What is operative is the objective manifestation of assent by the parties. Hill-Shafer Partnership v. Chilson Family Trust, 165 Ariz. 469, 799 P.2d 810, 815 (Ariz. 1990 (en banc).

The court concludes that the voice mail message of April 10, 2001, at 12:35 p.m., constituted an acceptance of the offer by debtors. This conclusion is buttressed by the subsequent objective manifestations of both parties. See findings of fact 11-20, 24.

10. The settlement terms did require a transfer of real property. Exs. 2, 4, at 2, 8, at 4. Creditor argues the oral settlement agreement would therefore be in violation of the statute of frauds. If part of an inseparable oral contract runs afoul of the statute of frauds, the entire contract is unenforceable. Lininger v. Sonenblick, 23 Ariz. App. 266, 532 P.2d 538, 540 (Ariz. App. 1975). However, in Lininger, the court found "a clear intent on the part of Mr. Sonenblick that the agreement be placed in writing, that it be approved by an attorney for appellants Lininger and Myrland and that he and the other parties sign the agreement." Id.

By contrast, in an action seeking enforcement of an oral settlement, one party, as here, argued the agreement was not binding because it had not been reduced to writing. Fotinos v. Baker, 164 Ariz. 447, 793 P.2d 1114, 1115 (Ariz. App. 1990). There, as here, the fact finder decided the parties intended to be bound by the oral agreement of their counsel. Id. The court found a sufficient writing to comply with the statute of frauds through Fotinos' signing of a verified complaint and an attorney's preparing settlement papers. 793 P.2d at 1116.

In the present case, there also are sufficient writings to meet the statute of frauds. Counsel for creditor's

letters of March 7 and April 9 discuss transfer of the executive plaza property to debtors and transfer of the 26th Street property to the father. Ex. 2, at 1; ex. 4, at 2-3. The letters of counsel for the debtors also outlined the transactions. Ex. 3, at 1; ex. 8, at 4.

11. The court concludes that the parties intended to be bound by the agreement of their counsel. The fact that it was later to be reduced to a writing does not affect the enforceability of the oral contract. Fotinas, supra at 1115. See also In re Frye, 216 B.R. 166, 172 (Bankr. E.D. Va. 1997) (under Virginia law, the mere fact that a later formal writing is contemplated, will not vitiate an oral agreement).

ORDER

Debtors will promptly serve and file a proposed final order regarding this contested matter. Creditor will have five days from service to object to the form of the order.

DATED this 30th day of October, 2001.

George B. Nielsen, Jr.
United States Bankruptcy Judge

Copy mailed the 30th day of October, 2001, to:

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