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UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re BAPTIST FOUNDATION OF ARIZONA, INC., an Arizona nonprofit 501(c)(3) corporation, et al., Debtors.	Chapter 11 Case Nos. B-99-13275-ECF-GBN through B-99-13364-ECF-GBN All Cases Jointly Administered Under Case No. B-99-13275-ECF-GBN FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The contested matter involving enforcement of a settlement agreement of October 2, 2000, between the Baptist Foundation of America, Inc. and Del Webb Communities, Inc. and Del Webb Corporation (collectively "Del Webb") was tried to the court as a bench trial on May 14-15, June 4, and July 10, 2001. Posttrial briefing occurred. Closing argument was presented on September 10, 2001. An interim order was entered on October 31, 2001, announcing the court's decision.

The court has considered the stipulated joint pretrial order of May 14, 2001, posthearing briefs, the declarations and testimony of witnesses, designations, admitted exhibits, and the facts and circumstances of this matter. The following findings and conclusions are entered:

FINDINGS OF FACT

1. In June of 1999, an affiliate of the Baptist Foundation of Arizona, Inc. ("BFA"), known as Pleasant Point, L.L.C. ("PP-LLC") acquired an option to purchase a land parcel known as Lakeland Village in Maricopa County, Arizona. The option terms are stated in the Wirth Option agreement. Ex. 51. Joint Pretrial Order ("JPO") p. 2, ¶ III.A.1.

2. In February 2000, Del Webb purchased the Lakeland Village property that was subject to the Wirth Option. JPO at III.A.2.

3. A realty assemblage of approximately 7,100 acres of land in Maricopa County, Arizona, known as the Pleasant Point property, is composed of two primary parcels: Lakeland Village (approximately 3,100 acres) and White Peak Ranch (approximately 4,000 acres). PP-LLC acquired the Pleasant Point property by acquisition of the White Peak Ranch parcel, a small portion of the Lakeland Village parcel and the Wirth Option, which covered the remainder of the Lakeland Village parcel. Del Webb's acquisition of the Lakeland Village portion subject to the Wirth Option and optionor's interest in the option occurred shortly thereafter. Test. of Melissa Cooper-Thompson ("Thompson") of May 14, 2001.

4. BFA, its subsidiaries and affiliates filed a series of jointly administered chapter 11 bankruptcy reoganization cases on November 9, 1999. A joint liquidating plan of reorganization was confirmed on December 22, 2000 for the jointly administered cases, which created a reorganized entity

known as BFA Liquidation Trust as the agent to manage and liquidate bankruptcy estate assets for the benefit of creditors. Administrative docket no. ("dk") 1170.

5. On September 14, 2000, BFA filed a motion to approve procedures for an auction sale of the Pleasant Point property to the highest bidder. Ex. 47. Del Webb objected. Exs. 5, 32. On September 21, 2000, this court held a hearing on the auction motion and objections filed by Del Webb and others. A continued hearing was set for October 3, 2000 on the Del Webb objection, as well as a schedule for further briefing. Mins. of Sept. 21, 2000, dk 848.

6. On October 2, 2000, representatives of Del Webb and BFA met in a private settlement conference to attempt to resolve Del Webb's pending auction objections. JPO at III.C. p. 7. BFA had two meeting objectives: (1) to encourage Del Webb's participation as an active bidder for the property at the auction sale, and (2) quantify the deferred compensation to be paid Del Webb upon exercise of the option. Thompson direct test.; direct test. of Mary J. Alexander.

7. Shea Homes, Inc. ("Shea") offered to purchase the Pleasant Point property, along with a multi-million dollar net operating loss ("NOL") held by BFA entity Foundation Administrative Services, Inc. ("FAS"). PP-LLC controlled the property through fee ownership of approximately 4,800 acres and holding the exclusive right to acquire approximately 2,200 additional acres under the Wirth Option. The proposed Shea acquisition would occur, assuming Shea was the successful bidder,

by a structured transaction in which PP-LLC would exercise the option and acquire the Wirth Option land. Thereafter, the Pleasant Point property, consisting of the 4,800 acres of fee land and the Wirth Option land, would be transferred by PP-LLC to FAS in a private sale for $56,500,000. Shea would then acquire FAS and its assets, including Pleasant Point and the NOL in a stock transaction for $85,000,001. Ex. 47, pp. 5-16. Shea's offer would serve as the opening bid or "stalking horse" for the auction. Id. p. 16. BFA's auction motion proposed procedures for the conduct of the auction. Id. pp. 16-21.

8. The Wirth Option dated December 8, 1995, as amended, provided the optionee with the exclusive right to purchase all or a portion of the option land by payment of the base purchase price of $10,000 per acre. In addition, under certain circumstances, the optionee would pay additional, deferred compensation to the optionor, such as when the optionee sells to another party land obtained by exercise of the option. Specifically, when PP-LLC acquired option land and sold it to affiliate FAS prior to December 31, 2000, PP-LLC was required to pay optionor Del Webb deferred compensation of 8% of the net price, but not less than $800 per acre. Ex. 51, art. II, ¶ 2.01(a), pp. 6-7.

9. The option agreement also required payments of $200,000 per year to keep the option effective. One hundred thousand dollars of each annual payment could be used as a credit toward the base purchase price if the option was exercised. Ex. 51, art. I, ¶ 1.04, pp. 2-3. At the time Del Webb acquired the

optionor's interest, it was established in an optionee estoppel certificate of February 2000, provided to Del Webb by PP-LLC, that $2 million in credit against future amounts owed by optionee had been created through prior payments. Ex. 4, at ¶ 5, pp. 1-2.

10. This $2 million credit entitlement would be a material element in a global agreement to establish the deferred compensation payable to Del Webb and to settle Webb's objections to the auction procedures motion.

11. Each party's representatives left the meeting on October 2, believing they had reached an agreement to establish the deferred compensation amount at $3.1 million. The next day, counsel announced the resolution to the court at a hearing. Ex. 55, pp. 2-6. The parties advised a stipulated order would be generated and reviewed by the two official creditors' committees. Id. p. 7.

12. No witness who participated in the October settlement meeting was able to testify that the $2 million BFA credit was raised, considered or discussed in either the joint settlement meeting or the private caucus each side conducted to discuss the negotiated settlement. See, e.g., Thompson direct test. ("no discussion of credits"), cross-exam. ("credits never mentioned at all") and questions by court ("meeting discussion and focus was over deferred compensation, not on credits or the purchase price"); McDonough direct test. ("no discussion of credits"), cross-exam. ("no recollection of the word 'credits' being used by any party"); Gleason cross-exam. ("during our internal caucus there was no discussion of the credits");

Alexander direct test. ("BFA credits weren't mentioned discreetly, we were focused on future value and our legitimate objections on future value and our legitimate objections - No participant used the word 'credits', wished someone did"), cross-exam. ("I didn't think about the credits, just thought about the money"); Dawson cross-exam. ("Don't recall that we discussed credits in either our caucus or with BFA"); Hansen direct test. ("no waiver of credits was discussed or agreed upon").

13. The BFA witnesses credibly testified they did not understand the $3.1 million figure to be a final cash figure, not subject to credits or reductions or that BFA was waiving the $2 million credit. Test. of Thompson; test. of Edward M. McDonough, Ex. 39 (Oct. 4, 2000 McDonough memo which fails to reflect any discussion of $2 million credits or Del Webb statement of a total cash payment at meeting); test. of Craig Hansen.

14. The Del Webb witnesses credibly testified that they did not understand the $3.1 million settlement figure to be subject to any credits or reductions. It was internally important to the company (but not communicated to BFA) to have a specific loss limit established. Test. of John H. Gleason; test. of Alexander; test. of John J. Dawson; test. of Diane M. Haller; Ex. 36 (draft of Del Webb auction bid reflecting that the full amount of the $3.1 million deferred compensation settlement will be used as a credit bid by Webb), Ex. 10 (actual bid with same provision).

15. The fact of the credits' existence was clearly in the _institutional_ memories of the parties. First, each party was

on notice of the credit provision of paragraph 1.04(b) when it chose to acquire its interests in the Wirth Option from its respective predecessor. Ex. 51. Indeed, at Del Webb's request, PP-LLC prepared an optionee estoppel certificate in February 2000, which clearly identified the credit and its amount. Ex. 4, ¶ 5, pp. 1-2. Finally, BFA's auction motion of September 14, 2000, announced its intention to apply the credit: "The companies currently possess a $1.9 million credit that will offset the amount required to exercise the Wirth Option." Ex. 47, ¶ 15, p. 6.

16. Thereafter, no reference to the credits appears in any dealings between these parties. Del Webb's extensive objections to debtors' auction motion made no objection to or mention of the credits. See Ex. 5 (31 pgs.and attachments), Ex. 32 (8 pgs.). The memorandum of September 27, 2000 by debtors' counsel to Del Webb's counsel suggested a meeting to resolve the dispute which BFA viewed as a dispute "by as much as $1,000,000" over the calculation of deferred compensation owed to Del Webb.[1] Ex. 18, p, 1. No mention was made of BFA credits. No one with Del Webb objected to the memorandum's statement that the range of the dispute was "as much as $1,000,000." Cross-exam. of Dawson.

1BFA based this $1,000,000 dispute valuation on statements in Del Webb's objection of September 19, 2000. Ex. 18, p. 1. See Ex. 5, p. 23. The committee's financial advisor was also under the impression that Del Webb believed deferred compensation was understated "by as much as $1 million." PricewaterhouseCoopers memo of Oct. 4, 2000. Ex. 39.

17. After advising the court that a settlement had been reached, the parties began work on a stipulated order. No attempt was made at the October 3 hearing to present an oral stipulation for court approval. Ex. 55. Del Webb's counsel prepared the first draft, which made no mention of credits, since counsel had no understanding credits would be applied to reduce the amount paid to Del Webb. Dawson direct test. Ex. 41 (e-mail to BFA and committee counsel of Oct. 4, 2000, enclosing draft settlement order). Counsel for the unsecured creditors' committee added specific language to the order to ensure BFA received credit for all annual option payments and prorations. Direct test. of Cathy L. Reece of May 15, 2001; Ex. 41, at draft order, ¶ B, p. 6. On October 5, the committee's counsel asked BFA's counsel to make her suggested changes, including the "credit" language. BFA did not oppose this. Committee's counsel had no concern her changes would not be incorporated, although she intended to monitor the drafts to ensure it occurred. Reece test. However, the committee's suggested credit language was not incorporated in subsequent drafts circulated between the parties on October 5 and 12. Exs. 42, 44.

BFA's attorney acknowledged to committee counsel on October 13 the draft would state credits would be determined in accordance with the option. Ex. 45. The draft of October 13 did include the requested language expressly preserving debtors' credits under the option. Ex. 9.

The committee's counsel did not attend the settlement conference of October 2 and has no idea what was subjectively in

the minds of the Del Webb negotiators. However, she understood the conference was to resolve the dispute over paragraph 2.01(a) of the option[2] and establish an agreed figure for deferred compensation, not to discuss credits BFA possessed for the purchase price. The committee would not have agreed to waive $2 million in credits. Counsel understood the range of the deferred compensation dispute to be $1 million. Reece cross-exam. and redirect.

18. On October 13, BFA counsel circulated a draft which expressly reflected entitlement to a credit on the base purchase price of the property as established in the option. Ex. 9, at draft, p. 4, ¶ B(i). On October 17, Del Webb refused to sign the order, solely because of the credit language. Ex. 12. The parties could not resolve the dispute.

19. On October 30, the court conducted an auction sale of the property. The successful bid was submitted by Shea. Tr. p. 63, Ex. 56. Del Webb and BFA preserved the dispute by agreeing to the amount due to Del Webb in a stipulated order, which sequestered the $2 million disputed amount pending further proceedings. Stipulated Order of Oct. 30, 2000, p. 5, para. C(iii), Ex. 11.

2Essentially, the parties were disputing whether the private sale of the realty between BFA affiliates PP-LLC and FAS for $56,500,000 was the appropriate bench mark sale to use to compute Del Webb's deferred consideration or if the public auction sale figure should be used. As noted, supra Shea's stalking horse auction bid was $85,000,001. See Ex. 51, at ¶ 2.01(a), pp. 6-7.

20. The court finds there was no meeting of the minds and consent to all material terms. The $2 million credit is clearly a material item. Del Webb had an internal need to assure its board in February 2000 that there would be a maximum $2.5 million loss resulting from the land transaction. Ex. 2, at 00006; Gleason direct test. and cross-exam; Alexander direct test. and cross-exam. Yet, there is no indication Del Webb considered the $2 million impact of the credits when it formulated its oral settlement offer to BFA on October 2, 2000.

The impact on BFA is just as material. The company operating under the close scrutiny of two official creditors' committees, has confirmed a plan which will not pay all of its creditors in full. Relinquishing a $2 million asset in these circumstances, without any consideration or discussion with creditors, would be an unreasonable abdication of debtors' fiduciary responsibility.

21. The court finds that the settling parties failed to focus on the material issue of BFA's $2 million purchase price credits. Accordingly, they failed to mutually consent to all material terms. A distinct intent common to both parties did not exist as to the credits.[3]

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[3] It is not the court's function or responsibility to speculate on how a group of experienced professionals could overlook a $2 million credit item. However, the fact finder can easily appreciate how such an incident could occur. These jointly administered cases of operating entities, tinged with possible fraud, have presented a confused and complex environment for both the debtors and creditors' professionals. Operating on a short time frame, the negotiators were focused on future values (continued...)

22. 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. These conclusions of law are reviewed de novo. Factual findings are reviewed for clear error. American Law Center PC v. Stanley (In re Jastrem), 253 F.3d 438, 441 (9th Cir. 2001).

4. Under Arizona law, the validity and enforceability of stipulations and settlement agreements are resolved under

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3(...continued)
and Del Webb's objections, not the discrete issue of credits. Alexander direct test.

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 (Ariz. App. 1983).

5. 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 BFA and Del Webb have each failed to establish, by a preponderance of the evidence, the existence of the particular oral contract each was advocating.

6. Before a binding contract is formed, the parties must mutually consent to all material terms. A distinct intent common to both parties must exist. Until all understand alike, there can be no assent. Where parties misunderstand each other, there is no contract. Hill-Shafer Partnership v. Chilson Family Trust, 165 Ariz. 469, 799 P.2d 810, 814 (en banc. 1990). As long as the misunderstandings of the parties are reasonable under the specific circumstances, a court may properly find a lack of mutual assent. 799 P.2d at 816.

7. The court concludes the parties failed to consider, understand alike and mutually consent to the material term of whether of the BFA credits to the land purchase price under the option had been waived by their settlement.

ORDER

The parties will appear for a 15 minute status hearing on the 10th day of December, 2001, at 9:00 a.m., in Courtroom No. 4, 10th Floor, Phoenix Plaza, 2929 N. Central, Phoenix, Arizona, prepared to discuss a litigation management plan regarding the pending BFA motion to resolve the amount payable to Del Webb Communities, Inc. under paragraph 2.01(a) of the Wirth Option.

DATED this 8th day of November, 2001.

George B. Nielsen, Jr.
United States Bankruptcy Judge

Copy mailed the 9th day
of November, 2001, to:

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