

SIGNED.

Dated: September 29, 2011



James M. Marlar

James M. Marlar, Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)	Chapter 11
)	
BASHAS' INC.)	No. 2:09-BK-16050-JMM
BASHAS' LEASECO INC.)	No. 2:09-bk-16051-JMM
SPORTSMAN'S, LLC)	No. 2:09-bk-16052-JMM
<u>Debtor.</u>)	
This Filing Applies to:)	MEMORANDUM DECISION
<u>X</u> All Debtors)	(Re: Claim No. 1284)

Before the court is the Debtors' objection (ECF No. 2726) and legal memorandum in support of objection (ECF No 3117) to a claim (Epiq Claim No. 1284) filed by St. Joseph's Foundation and Barrow Neurological Foundation ("St. Joseph's") in the amount of \$145,000.¹ St. Joseph's filed a response in opposition (ECF No. 2826).

A hearing was held on the matter at which Debtors were represented by Michael McGrath, Esq., and St. Joseph's was represented by Gregory Gnepper, Esq. Having considered the pleadings, argument, relevant record and the law, the court now rules.

The issues are whether, under Arizona law, Debtors' charitable pledge was a binding contract, and if there is no legally enforceable contract, whether the promise should still be enforced under the doctrine of promissory estoppel.

The basis of St. Joseph's claim was a February 28, 2005 letter from Eddie Basha in which Debtors pledged \$250,000 to be made in ten annual \$25,000 payments, beginning in 2006,

¹ At the September 22, 2011 hearing, counsel for St. Joseph's informed the court that the correct amount of the claim was \$145,000, rather than \$155,000 as filed.

1 to the "Barrow's Capital Campaign Fund Drive."² Exh. A to Debtors' Brief (ECF No. 3117).
2 According to St. Joseph's, this was a fund raiser to support the expansion and renovation of the St.
3 Joseph's medical campus, and specifically the construction of a new neuroscience institute known
4 as the "Barrow Tower." Response at 2 (ECF No. 2826). However, the letter did not state a specific
5 use for the funds. Pursuant to the letter, Debtors donated \$40,000 prior to filing for bankruptcy on
6 July 12, 2009. The Barrow Tower at issue was completed in 2006.³

7 Debtors contend that the charitable pledge was not a binding contract. The letter did
8 not mention any consideration to be given by St. Joseph's to Debtors, any benefit to Debtors, nor
9 any detriment to St. Joseph's, in exchange for the pledge. Nor, they maintain, should Debtors be
10 estopped from objecting to the claim because St. Joseph's did not rely on the pledge to construct the
11 Barrow Tower, which has already been built and has not gone into default.

12 St. Joseph's counters that it gave consideration for the pledge because it "promised
13 to devote these funds to further its [campaign] objectives." Response at 7 (ECF No. 2826). In
14 addition, St. Joseph's asserts that by making the charitable pledge, Debtors received goodwill and
15 positive exposure in the community. Alternatively, St. Joseph's maintains that Debtors' promise
16 induced reasonable reliance by St. Joseph's to proceed with construction of the Barrow Tower.

17 In Arizona, "an enforceable contract requires an offer, acceptance, and consideration,
18 along with terms specific enough to enable the parties to determine their obligations." Paczosa v.
19 Cartwright Elementary School Dist. No. 83, 222 Ariz. 73, 78, 213 P.3d 222, 227 (Ct. App. 2009).
20 Consideration is generally defined as "[s]omething of value (such as a act, a forbearance, or a return
21 promise) received by a promisor from a promisee." BLACK'S LAW DICTIONARY (7th ed.1999).

22 It is clear there was no specific consideration given by St. Joseph's as part of the
23 charitable donation represented in the 2005 letter. See Leikvold v. Valley View Community Hosp.,
24 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984) (where terms of agreement are clear and
25 unambiguous, construction of contract is question of law). A condition or requisite benefit to be

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27 ² St. Joseph's alleges the fundraiser was actually called the "Pushing Boundaries Capital
28 Campaign." Response at 2 (ECF No. 2826).

³ The court takes judicial notice of the BARROW MAGAZINE, Vol. 18, Issue 2 (2006).

1 received by Debtors in the way of goodwill or community exposure was not contemplated within
2 the four corners of the letter. See Hoffman Co. v. Meisner, 17 Ariz. App. 263, 265, 497 P.2d 83,
3 85 (Ct. App. 1972) (court must determine the parties' intent from the four corners of the instrument).

4 The court holds that St. Joseph's gave no consideration for Debtors' promise to
5 contribute to the campaign. Therefore, the commitment letter was not a binding contract.

6 St. Joseph's alternatively argues that the facts and law would support its claim based
7 on promissory estoppel. The doctrine of promissory estoppel affords relief to parties if justice
8 requires it and the requirements for promissory estoppel are met, even when some element
9 necessary to the creation of an enforceable contract, such as consideration, is not present. Kersten
10 v. Continental Bank, 129 Ariz. 44, 47, 628 P.2d 592, 595 (Ct. App. 1981). Arizona follows the
11 RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981), see Johnson Intern. Inc. v. City of
12 Phoenix, 192 Ariz. 466, 474, 967 P.2d 607, 615 (Ct. App. 1998), which section provides:

13 A promise which the promisor should reasonably expect to induce action or
14 forbearance on the part of the promisee or a third person and which does
15 induce such action or forbearance is binding if injustice can be avoided only
16 by enforcement of the promise.

17 Although St. Joseph's argues that it relied on Debtors' pledge to construct the
18 Barrow Tower, this argument is not credible. The Barrow Tower has already been built, whereas
19 Debtors have only contributed a fraction of their pledged amount.

20 Even if there were no reliance, St. Joseph's further urges the court to adopt § 90(2)
21 of the Restatement, which specifically deals with charitable subscriptions, and states:

22 (2) A charitable subscription or a marriage settlement is binding under
23 Subsection (1) without proof that the promise induced action or
24 forbearance.

25 RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981).

26 Comment f indicates that this section applies where there is a "probability of
27 reliance," because "American courts have traditionally favored charitable subscriptions," and gives
28 the following illustration:

1 A orally promises to pay B, a university, \$100,000 in five annual installments
2 for the purposes of its fund-raising campaign then in progress. The promise is
3 confirmed in writing by A's agent, and two annual installments are paid before
A dies. The continuance of the fund-raising campaign by B is sufficient
reliance to make the promise binding on A and his estate.

4 St. Joseph's additionally supports its argument with case law from other circuits where
5 courts enforced a charitable subscription mainly as a matter of public policy. One law review article
6 explained:

7 In a typical charitable pledge, conventional consideration is absent
8 because the charity suffers no detriment and the promisor seeks no benefit.
Nevertheless, courts have strained to find basis to enforce the pledge.

9 Under the doctrine of consideration, gratuitous promises are not enforced.

10 Strict application of this general rule results in hardships. Thus, the rule
11 has necessary exceptions. For example, when reliance on a gratuitous promise
12 results in detriment to the promisee, or when a public charity's very existence
is threatened because a pledge is not paid, courts attempt to mitigate the
hardship by enforcing the pledge.

13 Pledges to Nonprofit Organizations: Are they Enforceable and Must they be Enforced?, 27 USFLR
14 47 (Fall, 1992), pp. 51-52.

15 In the early 1990's the authors of this article perceived a trend toward enforceability
16 without consideration or reliance, as reflected in the "modern approach" of Section 90(2). Id. at
17 55. However, there is no Arizona case or Ninth Circuit Court of Appeals opinion on point. Without
18 more guidance from the Arizona courts, this court prefers to tread the more conventional path.

19 Furthermore, St. Joseph's has not shown that, ultimately, the facts, law or even public
20 policy are in its favor where neither its campaign nor its existence has been threatened because the
21 pledge was not fully paid. See In re Holm, 931 F.2d 620, 623 (9th Cir. 1991) (ultimate burden of
22 persuasion remains at all times upon the claimant). In view of the Bashas' bankruptcy, the federal
23 policy of payment to true trade vendors and conventional creditor/debtor adjustment trumps a
24 charitable pledge. The court holds such pledge unenforceable in the bankruptcy court.
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1 Accordingly, a separate order will be entered sustaining Debtors' objection to the
2 claim. Any aggrieved party has 14 days from entry to appeal Fed. R. Bankr. P. 8002.

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4 DATED AND SIGNED ABOVE.

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6 To be NOTICED by the BNC ("Bankruptcy Noticing Center") to:

7 Attorney for Reorganized Debtors
8 Attorney for St. Joseph's
9 Office of the U.S. Trustee

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