

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
CRAIG INDUSTRIES, INC.,) CASE NO. BK98-81268
)
DEBTOR.) A98-8052
_____)
CRAIG INDUSTRIES, INC.,)
) CH. 11
Plaintiff,)
vs.)
) Fil. No. 2,5; 7,11
DOUGLAS COUNTY BANK & TRUST)
COMPANY, A Nebraska Corporation,)
)
Defendant.)

MEMORANDUM

Hearing was held on October 5, 1998, on motions for summary judgment. Appearances: Mark Williams and Sandra Maass for plaintiff and William Dittrick and John Jay Jolley, Jr., for defendant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(E).

Both the plaintiff and the defendant have filed motions for summary judgment. The motion for summary judgment filed by the defendant is granted. The motion for summary judgment filed by the plaintiff is denied.

The plaintiff is a construction company and the defendant is a bank. In the spring of 1997, the plaintiff, through its chief financial officer, negotiated a loan commitment with the Bank. This commitment was reduced to writing in the form of a letter dated May 2, 1997, from Scott E. Hill, a commercial loan officer of the defendant, to Mr. David Craig, president of the plaintiff. The terms and conditions contained in the letter of May 2, 1997, were accepted by the debtor, as guarantor, and other parties. The letter agreement is in evidence at Exhibit 5.

One of the terms and conditions of the Bank's obligation to loan money to the plaintiff was a requirement, at paragraph 10 on page 2 of the letter, that the plaintiff would be

responsible for paying all of the setup costs, including title insurance, appraisal, surveying and recording fees, and, as a further condition, "[A] non refundable origination fee of \$6,750.00 will be paid by Borrower to Bank upon acceptance of this commitment."

In the paragraph following all the numbered terms and conditions, the Bank included the following language:

This commitment is void unless signed and accepted on or before May 5, 1997, with the loan closing by May 31, 1997. The bank will agree to proceed with the closing; however, no advances will be made until receipt of all requirements are received as described herein above.

Two paragraphs later, the letter states:

If these terms and conditions are acceptable, please indicate by signing this letter and returning it to me, along with a check in the amount of \$6,750.00 for the commitment/
origination fee which is non-refundable.

The plaintiff, and others, did sign and accept the terms and conditions contained in the letter on May 5, 1997, and did send the Bank \$6,750.00. However, the loan did not close by May 31, 1997. In July of 1997, after further negotiations and discussions, and after the Bank received certain additional information from the plaintiff, the Bank declined to fund the loan.

Some time thereafter, this Chapter 11 case was filed and the current adversary proceeding was filed by the plaintiff. The complaint in this adversary proceeding asserts that the letter agreement, Exhibit 5, became void when the loan did not close by May 31, 1997, and, because of the voidance of the agreement, the Bank is obligated to return the \$6,750.00 fee. In addition, the plaintiff claims that the Bank has converted property of the plaintiff, that is, the amount of \$6,750.00, by refusing to return it.

Rule 56 of the Federal Rules of Civil Procedure is incorporated in Fed. R. Bankr. P. 7056. A summary judgment is appropriate if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

In this case, there is no dispute concerning any material facts. The parties entered into a written contract, the meaning of which is in dispute. That dispute has been brought to the attention of the court and both parties have requested the court to interpret the contract.

The proper construction of a written contract and an examination of a contract for ambiguity are questions of law. Spittler v. Nicola, 239 Neb. 972, 479 N.W.2d 803 (1992); Luschen Bldg. Ass'n. v. Fleming Cos., 226 Neb. 840, 415 N.W.2d 257 (1987); Mecham v. Colby, 156 Neb. 386, 56 N.W.2d 299(1953); Meyers v. Frohm Holdings, Inc., 211 Neb. 329, 318 N.W.2d 716 (1982).

In interpreting a contract under Nebraska law, the court as a matter of law must first determine whether the contract is ambiguous. Crowley v. McCoy, 234 Neb. 88, 449 N.W.2d 221 (1989).

The general rules concerning ambiguity are:

a) An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

b) The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.

c) If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract. Id.

The court is required to construe a contract as a whole, and, if possible, give effect to every part of the contract. Johnson Lakes Dev. v. Central Neb. Pub. Power, 254 Neb. 418, 576 N.W.2d 806 (1998).

The letter agreement contained a commitment to loan money under certain terms and conditions. The specific commitment language is as follows:

Please consider this letter as a commitment from Douglas County Bank and Trust Co. (Bank) to provide Craig R.E. Partnership (Borrower) with a loan for six hundred seventy-five thousand and no one hundreds (\$675,000.00) dollars. The consummation of this transaction is subject to the following terms and conditions of this commitment:

Thereafter, the letter contains sixteen numbered paragraphs of terms and conditions, including the requirement of payment of a non-refundable origination fee upon acceptance of the commitment.

Following the sixteen paragraphs of terms and conditions is the paragraph referred to above which states that the commitment is void unless signed and accepted on or before May 5, 1997, with the loan closing by May 31, 1997.

Finally, the letter invites the recipient to, if the terms and conditions are acceptable, sign the letter and return it to the Bank, along with the \$6,750.00 check for the commitment/origination fee which is non-refundable.

The "commitment" referred to in the letter, in the introductory paragraph, in the "void" paragraph, and in the final paragraph inviting the signature, the return of the letter, and the check, is to loan \$675,000.00 to the borrower. That commitment to loan \$675,000.00 to the borrower would become void if the letter was not signed and accepted on or before May 5, 1997, or if the loan was not closed by May 31, 1997. However, the "voidance" of the obligation of the Bank to loan money is separate and independent from the obligation of the borrower to pay the "non-refundable origination fee of \$6,750.00." The two provisions are not subject to conflicting interpretations or meanings. They are independent of one another and deal with separate, but related, issues.

The Bank had no obligation to go forward with the preparation for or the closing of a loan unless it first received the non-refundable fee. Additionally, the Bank was not required to go forward with preparation for disbursement

of loan proceeds unless the Bank received the letter signed by the borrower and others agreeing to the terms and conditions of the loan. Finally, the Bank was not required to go forward with the loan, and its obligations to the borrower became void, if the loan was not closed by May 31, 1997.

There is nothing in the letter from which one could conclude that the "non-refundable" fee was refundable if the loan did not close. Although there may be an underlying legal obligation by the borrower to move forward in good faith in an attempt to meet the terms and conditions, and there may be a legal obligation on the part of the Bank to act in good faith when attempting to determine whether the borrower had substantially complied with the terms and conditions, the issue of good faith on the part of either party and the issue of whether or not the Bank somehow breached its "commitment" are not before this court. The only question before this court is whether the "non-refundable" fee became refundable because the commitment to loan funds became void after May 31, 1997. As discussed above, such "non-refundable" fee is separate and distinct from and does not become "refundable" simply because of the voidance of the commitment by the passage of time.

Judgment shall be entered in favor of the defendant and against the plaintiff. The amount of \$6,750.00 was property of the Bank on the petition date and is not property of the estate.

DATED: December 10, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

29 DITTRICK, WILLIAM
29 JOLLEY, JOHN JAY
59 MAASS, SANDRA

Copies mailed by the Court to:

Mark Williams, Attorney
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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JUDGMENT

The motion for summary judgment filed by the Defendant Bank is granted and judgment is entered in favor of the Bank and against the Plaintiff. The motion for summary judgment filed by the Plaintiff is overruled. See Memorandum entered this date.

DATED: December 10, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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