

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	CASE NO. BK04-83727
)	
GEORGE FOREMAN FOODS, INC.,)	CH. 11
)	
Debtor.)	Filing No. 9, 83

MEMORANDUM

Trial was held in Omaha, Nebraska, on December 10 and 14, 2004, on the motion for relief from stay filed by George Foreman (Fil. #9) and the debtor's resistance (Fil. #83). James S. Mitchell and Clifford Lee appeared for the debtor, and Bruce White and Frank Merideth, Jr., appeared for George Foreman. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

BACKGROUND

George Foreman Foods, Inc., a Delaware corporation which asserts that its offices and assets are in the State of Nebraska, entered into a License Agreement ("Agreement") effective as of December 3, 2002, with an individual, George Foreman. That Agreement has been offered into evidence as Filing No. 35. The Agreement contains thirty-three numbered paragraphs with numerous subsections in various paragraphs. It controls the relationship between the parties.

Mr. Foreman is a former world heavyweight boxing champion and is currently a businessman who licenses his name, image and marketing abilities to a number of different companies which promote a variety of products. Included among the products is the "Lean Mean Fat-Reducing Grilling Machine," distributed by a company named Salton/Maxim Housewares, Inc. ("Salton"), as well as products distributed by Meineke Discount Muffler Shops, Inc., and others.

The apparent purpose of the Agreement between the debtor and Mr. Foreman was to allow the debtor to use Mr. Foreman's name, image and marketing prowess to sell numerous food and other products and services. The license appears to include meat and protein products; all products and services sold via the website as defined in the Agreement; and all additional products and services added to the Agreement. The only exclusion from the definition of products covered by the Agreement concerns those products marketed by Salton or Meineke or other specific companies with whom Mr. Foreman had contractual relations at the time the Agreement was executed.

Within the first few months after the execution of the contract, there arose one or more disputes between the debtor and Mr. Foreman with regard to the interpretation of the contract. Eventually, counsel for Mr. Foreman, pursuant to the terms of the Agreement, notified the debtor in writing that the debtor was in material breach of the Agreement. When the time for curing such material breach had expired, counsel for Mr. Foreman notified the debtor in writing that Mr. Foreman was exercising his option to terminate the Agreement. When representatives of the debtor informed counsel for Mr. Foreman that the debtor did not agree that the Agreement had been properly terminated and that the debtor would not discontinue its operations under the Agreement, counsel for Mr. Foreman initiated an arbitration proceeding. That proceeding was authorized, and arguably required, by paragraph 31 of the Agreement. Paragraph 31 states:

Arbitration. Any dispute, controversy or claim arising out of or relating to this Agreement shall be resolved by binding arbitration before a retired judge at JAMS in Santa Monica, California. The arbitration shall be administered by JAMS pursuant to its standard Arbitration Rules and Procedures. Judgment on the award may be entered in any court having jurisdiction.

The debtor acquiesced in the arbitration proceeding and participated in it. The judge presiding over the arbitration proceeding held three days of hearings in July 2004. He scheduled additional hearings for late October 2004.

Just prior to the scheduled October hearings, a creditor in Arizona filed an involuntary bankruptcy petition against the debtor in the District of Arizona. Although it was quickly dismissed, the same creditor filed a second involuntary petition against the debtor in the District of Arizona prior to the arbitration hearings being rescheduled. It appears that that petition was then dismissed and the debtor filed this Chapter 11 case in the District of Nebraska.

As a result of the various bankruptcy filings, the arbitration proceedings have been stayed.

Mr. Foreman has filed this motion for relief from the automatic stay requesting that the stay be lifted to permit the completion of the arbitration. The debtor has resisted continuing with arbitration. The debtor suggests that the Agreement is an executory contract which was not properly terminated prior to the bankruptcy filing and which may be assumed within the bankruptcy context after curing whatever defaults may have existed prior to this petition being filed.

This motion for relief was tried for two days in December 2004. Mr. Foreman presented evidence in an attempt to show that at the time his counsel delivered written notice of default and termination to the debtor, the debtor actually was in material breach of the Agreement and therefore there was a legitimate basis for the

termination of the Agreement. On the other hand, the debtor attempted to present evidence that Mr. Foreman and his counsel simply do not understand the terms of the Agreement, and that during the arbitration proceeding, Mr. Foreman's counsel continually filed motions and pleadings on an expedited basis and received orders from the judge supervising the arbitration scheduling hearings on an expedited basis. From the debtor's point of view, Mr. Foreman's financial resources and having the benefit of counsel near the arbitration site put the debtor at a significant disadvantage in attempting to present its case to the arbitrator and obtain a fair hearing. The debtor therefore requests the court to ignore the arbitration clause of the Agreement and set the matter of the legitimacy of the termination of the Agreement for trial in the bankruptcy court.

ISSUES RELATED TO THE RIGHT TO TERMINATE

There appear to be numerous issues with regard to the interpretation of the contract and the actions of the parties which will need to be considered by the trier of fact, be it the California arbitrator or this court, in order to determine whether the debtor or Mr. Foreman was in breach of the Agreement. In addition, once the trier of fact determines which, if either, party was in material breach, the remedy for such breach will need to be determined.

By way of illustration, several disputes will be discussed. First, in paragraph 2b of the Agreement, entitled "Grant of License," the paragraph provides in part:

. . . Licensee agrees that Licensee shall not distribute, directly or indirectly, on its own or through its affiliates, any of the Licensed Products other than pursuant to this License Agreement. However, in no way shall this derogate against or restrict Licensee's right to distribute the Licensed Products through customary channels including, but not limited to, outside sales persons, representatives and the like.

Mr. Foreman testified at the hearing on the motion for relief from stay that he did not approve of the use of certain companies that the debtor apparently was using to develop and distribute the product. Whether the use of such outside companies is consistent with the terms of paragraph 2b is a question for the trier of fact.

Mr. Foreman claims that the debtor breached the Agreement by failing to pay all of his out-of-pocket expenses for a promotional appearance on the QVC television channel. At paragraph 5i of the Agreement, it appears that the language is very specific with regard to the transportation expense that must be reimbursed. That section, entitled "Travel and Accommodations," provides in relevant part:

Licensee will provide Licensor with two first-class transportations (by air, if appropriate), limousine transportation and driver for Licensor's personal use at all times, first-class hotel accommodations, and non-accountable

living expenses as are customary for a person of Licensor's renown, when Licensor is required to render services hereunder outside the Houston, Texas area.

Mr. Foreman did not use first-class air accommodations to travel from Houston to the location of the taping of the television program. Instead, he flew either on his own private jet or on a chartered jet and requested reimbursement for the cost. The debtor, consistent with the terms of paragraph 5i of the Agreement, reimbursed him only for two first-class airline tickets.

Mr. Foreman insists that he has a right to full reimbursement of his travel expenses, notwithstanding the language of paragraph 5i. Because the debtor did not cover all of his expenses, he feels that the debtor was in material breach. This is a matter for the trier of fact.

The Agreement, at paragraph 6b, requires the debtor to indemnify and hold harmless Mr. Foreman by obtaining "a combined single-limit insurance policy in an amount not less than Ten Million Dollars (\$10,000,000.00) which shall include errors and omissions, celebrity endorsement, general liability and tail insurance." The debtor claims that it obtained the appropriate insurance and Mr. Foreman claims that it did not. Mr. Foreman presented expert testimony to the arbitrator and to this court with regard to the deficiencies in the insurance policy obtained by the debtor. In the arbitration proceeding, the debtor has not yet had its opportunity to present its evidence concerning the validity of the insurance policy in conjunction with the terms of the Agreement. This is a question of fact to be determined.

Section 7 of the Agreement provides for a procedure with regard to obtaining approval from Mr. Foreman of the manner in which the product will be displayed, the type of photography and artistic renderings that the debtor may use with regard to Mr. Foreman's image, and the approval of various products which the debtor desires to distribute. That section contains subsections a through i. At paragraph g, entitled "Products," the language is as follows:

g. Products. Licensor shall have the right to approve, in Licensor's sole discretion, each of the Licensed Products. Once Licensor has so approved, the quality of the approved products shall be maintained, and Licensor shall be entitled to reasonable inspection rights to ensure quality compliance, upon reasonable notice, during regular business hours. Licensor shall also have the right to approve suppliers located outside the United States and Canada, and suppliers of food products not supplied by ConAgra, which approvals shall not be unreasonably withheld.

Subsection h then provides: "Should Licensor fail to disapprove in writing within ten (10) days of submission any item for which Licensor has approval rights pursuant to this Section 7, such item shall be deemed approved."

Mr. Foreman asserted in the notice of default and in the arbitration proceeding, and in the hearing before this court, that the debtor was allowed to use only food products supplied by ConAgra, and that no product, food or otherwise, was authorized unless Mr. Foreman approved the product in writing. At the hearing he was asked to review and consider the language in Section 7g and h which appears to be contrary to his understanding of the agreement. He did review the language, but insisted it was taken out of context and that a review of the complete Agreement would show that he was right.

This dispute is a question of fact and/or law with regard to the specific approval requirements in the language of the Agreement.

Section 10 of the Agreement provides for the procedure for termination and the basis upon which termination may occur. Mr. Foreman has invoked the termination procedures based upon his understanding that there has been one or more material breaches of the Agreement. Whether the alleged material breaches are sufficient for the termination procedures to be invoked is a question for the trier of fact.

Sections 12 and 13 of the Agreement concern monthly statements and accountings and books and records. Mr. Foreman, pursuant to the terms of Sections 12 and 13, sent a certified public accountant to audit the books and records of the debtor. The certified public accountant testified at the arbitration hearing and at the hearing on the motion for relief from the automatic stay. It is his opinion that the debtor did not maintain adequate books and records to comply with the terms of the Agreement. Therefore, Mr. Foreman argues that the debtor is additionally in material breach of the Agreement. The question of what books and records were necessary to be kept at the time the CPA initiated the audit is one of interpretation of the contractual language. In addition, whether the failure to keep all of the records that the CPA felt were important is actually a material breach is a question for the trier of fact.

Section 16 concerns non-competition. The debtor claims that Mr. Foreman was in material breach of the non-compete agreement early on. Mr. Foreman denies that he has promoted meat products in violation of the terms of the Agreement. Whether or not Mr. Foreman is in breach of the non-competition provision of the Agreement is a factual question to be determined.

Section 24, entitled "Results of Services of Licensor," provides in part:

Notwithstanding anything to the contrary, it is understood that Licensee shall not have the right to trademark Licensor's name except in conjunction with the Licensed Products; however, Licensee shall have the right to protect by trademark or copyright the names, packaging, artwork and advertising for the Website and Licensed Products which bear Licensor's name and/or likeness.

Mr. Foreman complains that the debtor has breached the Agreement by attempting to trademark his name with regard to the products subject to the Agreement. This dispute over the language of paragraph 24 will need to be decided by the trier of fact.

Section 25, entitled "Governing Law," provides that the parties agree to the exclusive jurisdiction of the federal and state courts in Los Angeles, California, in matters relating to the Agreement. Section 31, entitled "Arbitration," as mentioned above provides:

Any dispute, controversy or claim arising out of or relating to this Agreement shall be resolved by binding arbitration before a retired judge at JAMS in Santa Monica, California. The arbitration shall be administered by JAMS pursuant to its standard Arbitration Rules and Procedures. Judgment on the award may be entered in any court having jurisdiction.

Mr. Foreman asserts that the language of that section requires all of the disputes listed above, plus any additional disputes that were listed in the notice of default, to be referred to the arbitrator in California. The debtor suggests that a bankruptcy filing in Nebraska trumps the terms of Section 25 and Section 31.

ARBITRATION CLAUSES & BANKRUPTCY

"Generally, a court has little reason to ignore non-executory contractual arbitration clauses, and a court should give effect to a contractual arbitration term in the same manner as the court gives effect to any other non-executory contract in bankruptcy, especially considering the strong federal policy favoring arbitration." In re Farmland Indus., Inc., 309 B.R. 14, 18 (Bankr. W.D. Mo. 2004) (citing Shearson/Amer. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) for the proposition that the Arbitration Act establishes a federal policy favoring arbitration¹ and Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) for the proposition that the Arbitration Act was designed to put arbitration agreements on the same footing as other contracts).

The Farmland court also observed that "enforcement of an arbitration clause arising out of litigation involving solely pre-petition contracts that are only core

¹As explained by the United States Supreme Court in McMahon:

The Arbitration Act . . . [provides] that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act also provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement, § 3[.]

482 U.S. at 226.

inasmuch as they involve seeking relief from the automatic stay to proceed to arbitration and determining the allowed amount of a proof of claim under applicable state law have been found not to conflict with the underlying provisions of the Bankruptcy Code." 309 B.R. at 19 (citing In re Statewide Realty Co., 159 B.R. 719, 722, 724 (Bankr. D.N.J. 1993) and United States Lines, Inc. v. American Steamship Owners Mutual Protection & Indemnity Ass'n, Inc. (In re United States Lines, Inc.), 197 F.3d 631, 640 (2nd Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000)).

"[A]ny conflict between the Bankruptcy Code, which favors centralization of disputes concerning a debtor's estate, and the Arbitration Act, which advocates a decentralized approach to dispute resolution, 'is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration.'" Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160, 165-66 (2d Cir. 2000) (quoting United States Lines, 197 F.3d at 640).

DECISION

The motion for relief from automatic stay is granted. The parties are allowed to proceed with completion of the arbitration proceeding in California. The arbitrator is permitted to exercise all of the powers granted to an arbitrator under the federal and state statutes and the JAMS standard Arbitration Rules and Procedures. However, if the arbitrator rules in favor of Mr. Foreman and if a monetary award for damages or attorney fees and costs is rendered, Mr. Foreman may not proceed to obtain a judgment on the arbitration award without further order of this court. On the other hand, if the arbitrator rules in favor of Mr. Foreman with regard to the issue of the effectiveness of the termination notice, Mr. Foreman may proceed to obtain judgment in the appropriate California court without further order of this court.

Relief is granted because factually and legally the matter is more appropriately presented to the arbitrator. As described above, federal law encourages federal courts to acknowledge the legitimacy of arbitration clauses in contracts, and bankruptcy courts traditionally, with some exceptions, respect arbitration clauses. In this case, the arbitration clause was negotiated at arms' length. The arbitration proceeding was begun by Mr. Foreman and acquiesced in and participated in by the debtor. The main officer of the debtor testified that he saw nothing wrong with the arbitration proceeding in California and that he had no complaints about the fairness of the judge involved in the arbitration. The arbitration proceeding has moved forward with three days of "trial" and this court has had the opportunity to note that more than five hundred exhibits have been provided to the arbitrator. If the arbitrator determines that the Agreement has not been properly terminated by the notices provided by counsel for Mr. Foreman, the debtor will be permitted to proceed under the Bankruptcy Code with regard to cure of any alleged breaches and assumption of the Agreement. If, however, the arbitrator rules in favor of Mr. Foreman, it will be clear that the contract was properly terminated and the debtor will be proceeding with limited remedies within

the bankruptcy court.

Separate order will be filed.

DATED: January 12, 2005.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the court to:

James S. Mitchell & Clifford Lee

*Bruce White & Frank Merideth, Jr.

United States Trustee

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

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ORDER

Trial was held in Omaha, Nebraska, on December 10 and 14, 2004, on the motion for relief from stay filed by George Foreman (Fil. #9) and the debtor's resistance (Fil. #83). James S. Mitchell and Clifford Lee appeared for the debtor, and Bruce White and Frank Merideth, Jr., appeared for George Foreman.

IT IS ORDERED: Relief from the automatic stay is granted to proceed with arbitration in the State of California pursuant to the terms of the contract. If a monetary arbitration award is entered in favor of Mr. Foreman, it may not be reduced to judgment without further order of this court. If, however, an arbitration award in favor of Mr. Foreman simply determines that the Agreement has been properly terminated, that determination may be reduced to judgment in the California courts.

DATED: January 12, 2005.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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