

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
PIRNIE BROS. INVESTMENTS,) CASE NO. BK92-82225
)
DEBTOR) CH. 11

MEMORANDUM

Hearing was held on December 3, 1993, on the Objection to Claim of Estate of James D. Pirnie. Appearing on behalf of Debtor was Wayne Griffin of North Platte, Nebraska. Appearing on behalf of the "Pirnie Heirs" was Robert Ginn of Brashear & Ginn, Omaha, Nebraska. 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)(B).

This matter comes before the Court on an objection by the Debtor to the claim of the estate of James D. Pirnie et al. The claimants are referred to as the "Pirnie Heirs."

Background

In 1984, Pirnie Brothers Investment Company (the Debtor) entered into a Stock Sale Agreement with Mitchell L. Pirnie, Co-Personal Representative of the Estate of James D. Pirnie; Clifford L. Pirnie, Personal Representative of the Estate of Frank A. Pirnie; and Roy Pirnie (the Pirnie Heirs). The Agreement provided that the Debtor would purchase the stock of the Pirnie Heirs for \$680,000.00. The dispute before the Court concerns an interpretation of the Stock Sale Agreement and related documents regarding how the Pirnie Heirs were to be paid the \$680,000.00. The Stock Sale Agreement provided that the Debtor would, in consideration for the conveyance of the shares of stock, assign to the Pirnie Heirs certain rights of the Debtor in a real estate installment contract with Highway 20 Terminal, Inc. (Highway 20)

After the Debtor filed bankruptcy in 1992, the Pirnie Heirs filed a proof of claim alleging that the Debtor still owed the Pirnie Heirs \$680,000.00. The Pirnie Heirs believe that the Stock Sale Agreement should be interpreted to mean that the assignment of the Highway 20 payment was to secure repayment of

the full \$680,000.00 debt rather than being the actual and only method of paying the \$680,000.00. The Debtor takes the position that the Assignment was in satisfaction of the \$680,000.00, and that the Debtor after executing and delivering the Assignment and related Deed of Trust was released from further liability on the debt. The agreement between the parties consists of three documents: the Stock Sale Agreement, the Assignment of Contract, the Deed of Trust.

Discussion of the Stock Sale Agreement

The Stock Sale Agreement established the terms by which the Pirnie Heirs, who are the "Sellers" in the contract, sold their stock to the Debtor, who was the "Buyer" in the contract. Paragraph 2 of the Stock Sale Agreement provides that the purchase price for the stock was \$680,000.00 and was "full consideration." The paragraph specified that no interest was to be added. Paragraph 3 entitled Payment of Purchase Price states, in relevant part:

As payment of the purchase price. . .Buyer assigns and sets over to Sellers. . .the sum of \$680,000 and \$0.00 in interest which sum is a portion of the amount to become due to Buyer under a Contract for Sale of Real Estate, hereinafter "Contract". . . . This Assignment is made free and clear of any liens, claims, advances, assignments or encumbrances of any kind, as to Buyer's rights and interests in the Contract.

As security for the Debtor's obligations under the agreement, the Debtor agreed to execute a Deed of Trust in favor of the Pirnie Heirs. The purpose of the Deed of Trust was "to secure the payment of the principal sum of Six Hundred Eighty Thousand Dollars (\$680,000.00)." (Paragraph 4)

Discussion of the Assignment of Contract

The assignment of the real estate contract states, in the second paragraph on the first page:

This Assignment is made free and clear of any liens, claims, advances, assignments or encumbrances of any kind, as to PBI's rights and interests in the Contract. This Assignment is not made as collateral security for a loan in any amount but is an outright sale and assignment and is not subject to redemption or rescission.

The Assignment specifically refers to the amount of \$680,000.00 and interest of \$0.00, and grants to the representative of the Pirnie Heirs full power and authority to collect the sum of \$680,000.00 and interest of \$0.00 and to discharge the obligation of Highway 20 to the Debtor.

Discussion of the Deed of Trust

By the Deed of Trust, the Debtor conveyed, as security, the real estate which was the subject of the Contract for sale of real estate between the Debtor and Highway 20. The Deed of Trust refers to the Stock Sale Agreement and Assignment of Contract, and specifies that it is given as security for the payment of \$680,000.00 and interest of \$0.00. Although some of the paragraphs in the Deed of Trust specifically relate to the stock sale transaction and Assignment of Contract, most of the paragraphs appear to be standard "boilerplate" language generally present in deeds of trust. For example, Paragraph 5 and Paragraph 6 of the Deed of Trust deal with circumstances under which "all the sums secured by this Deed of Trust can be accelerated."

General Discussion

The Debtor suggests that the agreement between the Debtor and the Pirnie Heirs, which includes three separately identified documents; the Stock Sale Agreement, the Assignment of Contract and the Deed of Trust, is ambiguous. Although it states a definite amount of payment and appears to state a definite manner by which payment shall be made, it also contains language which could be construed to mean that if the Pirnie Heirs did not receive \$680,000.00 from the proceeds of the Assignment of Contract, some amount would still be due from the Debtor to the Pirnie Heirs. The Debtor refers specifically to language in Paragraph 3.1 and Paragraph 3.2 of the Stock Sale Agreement to support its argument that the language is inconsistent and, therefore, ambiguous.

Because the Debtor believes the language is ambiguous, the Debtor proposes to supplement the contractual language with other evidence, including earlier drafts of the Stock Sale Agreement, affidavits of principals of the Debtor, and a deposition of the representative of the Pirnie Heirs. The purpose for submitting this evidence is to show the intent of the parties at the time the Stock Sale Agreement was entered into.

The Pirnie Heirs object to the admission of any evidence beyond the three documents that make up the contract between the parties. It is the position of the Pirnie Heirs that the

documents are clear and unambiguous and that parol evidence is not admissible to explain either the documents or the intent of the parties.

Under Nebraska law, the intentions of parties to unambiguous contracts are determined by examining the contract itself and are not subject to interpretation or construction. Properties Inv. Group of Mid-America v. Applied Communications, Inc., 242 Neb. 464, 495 N.W.2d 483 (1993). Ambiguity arises only after rules of interpretation are applied and only if it is clear that the contract could be logically construed to have more than one meaning. Luschen Bldg. Ass'n v. Fleming Companies., Inc., 226 Neb. 840, 415 N.W.2d 453 (1987). To determine whether there is ambiguity, the contract is reviewed objectively, and the subjective contentions of the parties are disregarded because the existence of opposing subjective viewpoints on interpretation does not indicate ambiguity per se. Id.

In addition, a court must view the contract as a whole, Omaha Paper Stock Co. v. Harbor Ins. Co., 596 F.2d 283 (8th Cir. 1979), and not interpret the contract so as to render meaningless parts of the contract. Beister v. John Hancock Mut. Life Ins. Co., 356 F.2d 634 (8th Cir. 1966). If the contract is capable of more than one interpretation after considering all pertinent provisions, the contract is ambiguous. Id.

Once a contract is found to be ambiguous, the contract is explained through the use of parol evidence. Olds v. Jamison, 195 Neb. 388, 238 N.W.2d 459 (1976). A court may consider all facts and circumstances leading up to the contract's execution, nature and situation of subject matter, and apparent purpose of contract. Lone Oak Farm Corp. v. Riverside Fertilizer Co., 229 Neb. 548, 428 N.W.2d 175 (1988). The conduct of the parties in performing the contract to ascertain the parties' intentions may also be considered once it is necessary for the court to construe the contract. Professional Serv. Indus., Inc. v. J.P. Const., Inc., 241 Neb. 862, 491 N.W.2d 351 (1992). Additional documents that were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are legally one instrument and will be construed as one document with the contract in question, and parol evidence is admissible to show the true intent of the parties to the transaction. Peterson v. Hynes, 220 Neb. 573, 371 N.W.2d 664 (1985). When considering parol evidence, the Nebraska Supreme Court states that the course of performance of the parties before the controversy arose is one of the best indicators of intent, and the acts of the parties should be given great if not controlling influence. Nowak v. Burke Energy Corp., 227 Neb. 463, 418 N.W.2d 236 (1988).

The contractual arrangements between the parties in this case are not ambiguous. The Stock Sale Agreement provides that the Pirnie Heirs will sell their stock in the Debtor to the Debtor for \$680,000.00. The payment for the purchase price is the absolute assignment of \$680,000.00 of the proceeds of the real estate contract between the Debtor and Highway 20. Both the Stock Sale Agreement and the Assignment recite that the amount due from Highway 20 was not immediately payable, but was to come due at a date in the future. Notwithstanding the fact that the Highway 20 payment was not immediately payable, the parties specifically provided that the Pirnie Heirs would receive no interest on the \$680,000.00.

The parties agreed in the language of the Stock Sale Agreement that the Pirnie Heirs would have the right to renegotiate the Highway 20 contract in any respect. The Assignment of Contract specifically states that it is not an assignment for security but is an outright sale.

The Deed of Trust secures the right of the Pirnie Heirs to collect the \$680,000.00 amount from Highway 20 or to foreclose upon the real estate which is the subject of the contract between the Debtor and Highway 20 and thereby be paid from the proceeds of the sale of such real estate.

By virtue of the Assignment of Contract and the Deed of Trust, the Pirnie Heirs had all rights with regard to the contract between the Debtor and Highway 20, at least to the extent of \$680,000.00, which was due from Highway 20 to the Debtor.

There is no underlying promissory note between the Debtor and the Pirnie Heirs. There is no due date for payment of the \$680,000.00 separate from the obligation of Highway 20 to make payments under the real estate contract. There is no interest to be paid even if Highway 20 defaults. There is no language in any of the three documents from which it could be inferred that the Pirnie Heirs could look for payment of the \$680,000.00 purchase price from any source other than the proceeds of the real estate contract or the proceeds of the sale of the real estate pursuant to a foreclosure of the Deed of Trust.

The language in Paragraph 3.2 of the Stock Sale Agreement which the Debtor believes is ambiguous is language which permits the Pirnie Heirs to renegotiate any terms of the contract with Highway 20 but which provides that if there is any renegotiation where the Pirnie Heirs agree to take less than \$680,000.00 from Highway 20, such agreement will not enure to the detriment of the Debtor. In other words, the Pirnie Heirs can do what they like

with the real estate contract, but the Debtor is not responsible for paying the difference between the renegotiated price and \$680,000.00. That language is not ambiguous.

Based upon a reading of each and every paragraph of the three documents which encompass the contractual arrangements between the Debtor and the Pirnie Heirs, the Court concludes that the contract is not ambiguous and that the Pirnie Heirs have no claim against the Debtor for payment of the \$680,000.00 other than any claim the Pirnie Heirs may have which is derived from the Assignment of Contract and Deed of Trust.

Therefore, the objection to the claim of \$680,000.00 filed by the Pirnie Heirs is sustained to the extent the claim asserts personal liability on behalf of the Debtor. The objection is overruled to the extent that the Pirnie Heirs can satisfy such claim only by looking to their rights in the Assignment of Contract and in the real estate, with no recourse for any deficiency as against the Debtor or other property of the Debtor.

Separate journal entry to be entered.

DATED: February 8, 1994.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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PIRNIE BROS. INVESTMENTS,)	CASE NO. BK92-82225
)	A
<u>DEBTOR(S)</u>)	
)	CH. 11
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: February 8, 1994
<u>Defendant(s)</u>)	HEARING DATE: December
)	3, 1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Objection to Claim of Estate of James D. Pirnie.

APPEARANCES

Wayne Griffin, Attorney for debtor
Robert Ginn, Attorney for Pirnie Heirs

IT IS ORDERED:

The objection to the claim of \$680,000.00 filed by the Pirnie Heirs is sustained to the extent the claim asserts personal liability on behalf of the Debtor. The objection is overruled to the extent that the Pirnie Heirs can satisfy such claim only by looking to their rights in the Assignment of Contract and in the real estate, with no recourse for any deficiency as against the Debtor or other property of the Debtor. See memorandum entered this date.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.