UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
OCEAN POWER CORPORATION,	)	Case No. 02-15989 (REG)
Debtor.	)	

DECISION ON MOTION FOR SUMMARY JUDGMENT LIQUIDATING ADMINISTRATIVE EXPENSE CLAIM OF ALGONQUIN CAPITAL MANAGEMENT

APPEARANCES:

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BEFORE: ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

In this contested matter in a case under chapter 11 of the Bankruptcy Code, Algonquin Capital Management, LLC ("Algonquin"), and Michael D. Lockwood, as managing member of Algonquin and individually ("Lockwood," together with Algonquin, the "Movants"), move for summary judgment liquidating an administrative expense claim for the repayment of debtor-in-possession ("DIP") financing that Algonquin provided. The Movants assert that they are entitled to the immediate payment

of the approximately $323,242 due on the DIP loan, contending that under the DIP financing documents and order, their claim was fully secured and accorded superpriority status.

The Official Committee of Unsecured Creditors (the "Committee") objects to the motion on several grounds. First, the Committee argues that Algonquin breached DIP financing documents because it failed to fund the carve-out--a sum reserved for the payment to the professionals of the Debtor as required by those same DIP financing documents. Second, the Committee argues that Algonquin's loan is unsecured, because assets that were used as collateral to secure the DIP loan were sold to Algonquin, and subsequently to other purchasers, free and clear of all liens. Third, the Committee argues that Algonquin intended to, and did, waive its right to payment under the DIP financing documents as part of the consideration for the sale of all of the Debtor's assets to Algonquin and another purchaser.

The Court grants the Movants' summary judgment motion, and orders that the Debtor repay the DIP loan and that Algonquin fund the carve-out or, if economically equivalent, that the Debtor repay the DIP loan net of any applicable carve-outs. The following are the Court's findings of fact and conclusions of law in connection with its determination.

Facts

Ocean Power Corporation (the "Debtor") is the successor to a development stage company formed in 1992 to develop and manufacture modular seawater desalination and power plants. The Debtor has never earned a profit and the Debtor's operations have

been financed primarily by raising capital through private placements of its stock and loans from third parties.

Pre-Petition Debt

In 2001 and early 2002, prior to the Petition Date, the Movants advanced in excess of $3 million to the Debtor in exchange for a combination of promissory notes, warrants to purchase the Debtor's common stock, and other consideration. On May 30, 2002, the holders of that debt obtained a security interest in all of the Debtor's assets to secure any outstanding debt and any future advances to the Debtor. Prior to the petition Date, the Movants collectively beneficially owned nearly 14% of the Debtor's outstanding common stock.

On December 1, 2002, (the "Petition Date"), the Debtor filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code. The Debtor continues as a debtor-in-possession.

The DIP Order and the DIP Loan Agreement (the "DIP Loan Agreement")

On December 1, 2002, a Credit Agreement was executed between the Debtor, as the borrower, and Algonquin, as the lender, under which Algonquin would lend the Debtor up to $216,819 in post-petition financing. On December 20, 2002, this Court entered an order (the "DIP Order") authorizing Debtor's post-petition financing pursuant to the DIP Loan Agreement. The DIP Order further provided that the financing under the DIP Loan Agreement would be fully secured by a lien on all of the Debtor's assets, and, in addition, would be accorded superpriority claim status, in each case subject only to a carve-out to pay the fees of Debtor's professionals.

The Asset Purchase Agreement

On December 1, 2002, the day the petition was filed, an Asset Purchase Agreement was executed between the Debtor, as the seller, and Algonquin and a third party named Hibernia, as the purchasers of substantially all assets of the Debtor. As part of the purchase price, Algonquin agreed to waive all its rights under a portion of its pre-petition loans to the Debtors. On the next day, the Debtor filed a motion (the "Sale Motion") to sell its assets pursuant to the Asset Purchase Agreement.

The Objections of the Committee

The Committee was appointed after the DIP Order was executed. After its appointment, the Committee filed a motion to vacate the DIP Order. The Committee also undertook investigation as to the liens and claims on the Debtor's assets. Following its investigation, the Committee objected to the Sale Motion, and filed a complaint against the Movants seeking damages for allegedly improper actions by the Movants under the Asset Purchase Agreement, and for the avoidance of the Movants' secured claims. The Committee also sought permission to locate an alternative purchaser for Debtor's assets.

The Sale Order and the Settlement Agreement

On February 6, 2003, after negotiations among the Debtor, the Committee and the Movants, this Court entered an order (the "Sale Order") approving the Asset Purchase Agreement, as modified by a Creditor Settlement Agreement (the "Settlement Agreement"), and authorizing sale to the Movants of substantially all of the Debtor's assets free and clear of liens, claims, interests, and encumbrances. Pursuant to the Settlement Agreement, as part of the purchase price for the Debtor's assets, after all of the Debtor's the assets were transferred to Algonquin and Hibernia, the estate received a

60% equity interest in a portion of the Debtor's transferred assets (the "Oases Assets"). The Settlement Agreement also required that Algonquin fund all remaining obligations under the DIP Order, including the carve-out for counsel to the Committee and the Debtor. The Oases Assets were subsequently sold to a third party for cash. The cash generated from the sale of the Oases Assets is the only remaining asset of the estate.

As part of the Settlement Agreement, the Committee waived its claims against the Movants, including its objection to the asset sale, and agreed to withdraw its complaint against the Movants and its pending motion to vacate the DIP Order. To date, the Debtor has not repaid its DIP loan and Algonquin has not funded the carve-out. The Movants now move for summary judgment and an order authorizing repayment of the DIP loan and any other remedies under the DIP Order and the DIP Loan Agreement.

Discussion

I.

Summary Judgment Standards

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."[1] The moving party bears the initial burden of showing that the undisputed facts entitle it to judgment as a matter of law.[2] Then, if the movant carries this initial burden, the non-moving party must set forth specific facts to show that there

[1] Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056.

[2] *See Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995); *Ferrostaal, Inc. v. Union Pacific R. Co.*, 109 F. Supp. 2d 146, 148 (S.D.N.Y. 2000) (Schwartz, J.) ("The initial burden rests on the moving party to demonstrate the absence of a genuine issue of material fact…")

are triable issues of fact, and cannot rely on pleadings containing mere allegations or denials.[3]

In determining a summary judgment motion, it is well settled that the court should not weigh the evidence or determine the truth of any matter, and must resolve all ambiguities and draw all reasonable inferences against the moving party.[4] A fact is material if it "might affect the outcome of the suit under the governing law."[5] An issue of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[6]

II.

Entitlement to Payment

A. Contract Law

The Movants assert that they are entitled to judgment because the Debtor, in breach of its obligations under the DIP Order, has failed to repay any principal or interest on the DIP loan. The Committee opposes the entry of an order directing the Debtor to pay, asserting that Algonquin breached the DIP Order and the Sale Order because it failed to fund the carve-out for the payment to the professionals of the Debtor and the

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[3] Fed. R. Civ. P. 56(e); s*ee also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Kittay v. Peter D. Leibowits Co., Inc. (In re Duke & Benedict, Inc.)*, 265 B.R. 524, 529 (Bankr. S.D.N.Y. 2001) (Hardin, J.) ("[T]he nonmoving party must set forth specific facts that show triable issues, and cannot rely on pleadings containing mere allegations or denials.")

[4] *See Matsushita*, 475 U.S. at 587 (holding that summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party"); *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 262 (2d Cir. 2001); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001) ("We…constru[e] the evidence in the light most favorable to the non-moving party.")

[5] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[6] *Id.*

Committee called for by the DIP Order and the Sale Order. The Committee further argues that because Algonquin itself failed to abide by the DIP Order and the Sale Order, it is not entitled to repayment of its DIP loan.

The elements of a claim for a breach of contract under New York law[7] are: "(1) the existence of a contract; (2) due performance of the contract by the plaintiff; (3) breach of contract by the defendant; and, (4) damages resulting from the breach."[8]

The Court finds that the Movants have established the existence of all four elements of their claim for breach of contract. The DIP Order and the DIP Loan Agreement are valid and binding,[9] as is undisputed by the Committee after its withdrawal of its motion to vacate the DIP Order. Algonquin advanced the Debtors $216,819 as contemplated by the DIP Loan Agreement. But the Debtor failed to repay the borrowed funds on the maturity date or thereafter. The Debtor's failure to repay the DIP Loan triggered an event of default under the DIP Loan Agreement,[10] entitling Algonquin to the payment of the principal and accrued interest.[11]

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[7] The DIP Loan Agreement (*see* §8.3) is governed by the laws of the state of New York.

[8] *Marks v. New York Univ.*, 61 F. Supp. 2d 81, 88 (S.D.N.Y. 1999) (Patterson, J.) (citations omitted); see also *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998).

[9] Pursuant to the DIP Order at ¶ 22 "[t]he DIP Loan Documents…shall constitute legal, valid and binding obligations of the Debtor, enforceable in accordance with their terms."

[10] DIP Loan Agreement at §7.1 states:

> Events of Default. An Event of Default shall mean the occurrence or existence of one or more of the following events or conditions…(d) The Borrower (i) shall fail to make any payment of principal of, or interest on, the Loan when due and payable…

[11] DIP Loan Agreement at §7.2 states:

> Certain Rights and Remedies. If any event of Default shall have occurred and be continuing, then the Lender may, upon 3 business days written notice to the Borrower: (ii) declare all or any portion of the Obligations hereunder, to be forthwith due and payable…

While the Committee does not dispute that Algonquin fully funded its DIP loan obligations under the DIP Order, it argues that Algonquin violated the DIP Order and the Sale Order because it did not also fund the carve-out as required under the Settlement Agreement. The Committee asserts that this failure to fund the carve-out for nearly four years constitutes a breach of the Sale Order and DIP Order, and that the Movants, who now "come before the Court with unclean hands"[12] are not entitled to relief from this Court. However, the funding of the carve-out, while contemplated under the Settlement Agreement, was not made a condition to the duty to repay the DIP Loan under the DIP Order or the DIP Loan Agreement. While superpriority claims and priority on post-petition liens granted to the DIP lender were subordinated to the carve-out pursuant to the DIP Order,[13] the DIP Order did not absolve the Debtor of its duty to pay back its DIP loan as a consequence of DIP lender's failure to first fund the carve-out.

The Committee also argues that to the extent Algonquin and/or Lockwood had any rights under the DIP financing documents, they are now barred from asserting those rights, because they did not demand the repayment of the loan for three years and thus "have slept on their rights."[14] However, under the DIP Loan Agreement, delay in prosecuting claims for repayment of debt may not operate as a waiver of the Movants' rights under the loan agreement.[15] The Debtors are contractually bound to repay their debt to the Movants.

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[12] Committee's Response to Summary Judgment Motion at ¶ 53.

[13] DIP Order at ¶ 13.

[14] Committee's Response to Summary Judgment Motion at ¶ 54.

[15] DIP Loan Agreement at §8.2 provides:

B. Superpriority Claim

The Committee devotes the bulk of its argument to contending that, because the Oases Assets were transferred to the Movants, and subsequently to the Debtor, free and clear of liens, the Movants no longer have a lien on the assets of the estate, and are therefore not entitled to repayment of their loan.[16] However, the DIP loan was not only secured by all of the Debtor's collateral; it was also awarded superpriority status under the DIP Order. Thus, the DIP Order, pursuant to section 364(c)(1) of the Code, granted the Movants "an allowed superpriority administrative expense claim…having priority over any and all administrative expenses...subject and subordinate in priority of payment only to the Carve-Out."[17]

This grant of superpriority was distinct from, and in addition to, the grant of a security interest in the Debtor's collateral. Section 364(c)(1) of the Code does not contemplate that a superpriority claim be secured by a lien on property of the estate or by any other collateral.[18] The Committee did not satisfactorily address the effect of the DIP Order's grant of superpriority status to Algonquin's loan.

> No failure or delay on the part of the Lender to exercise any right, power or privilege under this Agreement and no course of dealing between the Borrower and the Lender shall impair such right, power or privilege or operate as a waiver of any default or an acquiescence therein, nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

[16] Committee's Response to Summary Judgment Motion at ¶ 33.

[17] DIP Order at ¶ 9. The DIP Loan Agreement at § 3.1 similarly provides that the Debtor's obligations under the loan agreement

> shall at all times constitute allowed superpriority administrative claims against the Borrower…having priority over any and all administrative expenses…and shall at all times be senior to the rights of the Borrower, the Borrower's estate…

[18] Section 364(c)(1) of the Bankruptcy Code states in relevant part:

The Court has found that the DIP Loan must be repaid, and has further found that the repayment obligation has superpriority status under the DIP Order. Thus, the Court, does not need to decide, and does not decide, whether the DIP loan remained secured by a lien on the property of the estate after the sale of the Oases Assets.

III.

Intent of the Parties

The Committee further argues that summary judgment should be denied because a material issue of fact exists with respect to the intent of the parties during the negotiations of the Settlement Agreement and the execution of the Sale Order. Specifically, the Committee asserts that the parties to the Settlement Agreement intended that the Debtor's assets be sold to Algonquin and Hibernia free and clear of all claims and interests, including the Debtor's obligations under the DIP financing documents, and that discovery is needed to gather evidence of this intent to the extent it is not clear from the documents.

The Court cannot agree. Under basic principles of contract law, the objective intent of the parties controls interpretation of a contract.[19] And it is well settled that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face."[20] Whether a contract is ambiguous is a question of law, to be resolved by the court.[21]

> If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court…may authorize the obtaining of credit or the incurring of debt … (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title.

[19] *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997) (citations omitted).

[20] *W.W.W. Associates v. Giancontieri*, 77 N.Y.2d 157, 163 (1990) (citations omitted). Thus, the Court also must deny the Committee's post-argument request to supplement the record, to adduce evidence of oral understandings contradicting the documents.

The Committee argues that Algonquin intended to waive its rights to repayment of the DIP loan when it and Hibernia agreed to purchase the Debtor's assets free and clear of all claims and interests. The Committee further asserts that this waiver of Algonquin's rights under the DIP loan constituted part of consideration for the purchase price of the Debtor's assets. And the Committee further asserts that as a result of transfer of the Debtor's assets "free and clear of all Claims and Interests of any kind or nature whatsoever," any party is now barred by the Sale Order from asserting any claims--including a demand to repay the DIP Loan--against the Debtor that could have been asserted against the Debtors prior to the sale.[22] The Committee claims that because the Sale Order and Settlement Agreement are subsequent in time to the DIP Order (and because the Settlement Agreement is neither subordinated nor made subject to the DIP Order) the provisions of the Sale Order were intended to supersede the provisions of the prior DIP Order. The Committee further contends that if this intent is not clear from the language of the Sale Order and the Settlement Agreement, then the intent of the parties at the time of negotiation must be ascertained.

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[21] *Id.* at 162.

[22] The Sale Order states in ¶¶ 6 and 7:

> Pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Acquired Assets shall be transferred to the Purchaser…free and clear of all Claims and Interests of any kind or nature whatsoever.
>
> Except as expressly permitted or otherwise specifically provided by the Sale Agreement or this Sale Order, all persons and entities…holding Claims and Interests against or in the Seller or the Acquired Assets…arising under or out of, in connection with, or in any way relating to, the Seller, the Acquired Assets, the operation of the Business prior to the Closing Date, or the transfer of the Acquired Assets to the Purchaser, hereby are forever barred, estopped, and permanently enjoined from asserting against the Purchaser, its successors or assigns, its property, or the Acquired Assets, such persons' or entities' Claims and Interests.

The Court cannot agree with the Committee's interpretation of the effect of the Sale Order. The DIP Order unambiguously provides that the rights of the lender under the DIP Order shall not be modified by any subsequent order unless and until the obligations under the DIP Order have been satisfied in full.[23] The DIP Order further provides that in case of conflict among the terms of the DIP Order and any other order of this Court, the terms and provisions of the DIP Order shall govern.[24] And the DIP Loan Agreement requires a writing to modify it,[25] which necessarily implies that the writing state the modification with enough specificity so the nature of the modification can be ascertained.

The language of the DIP Order and the DIP Loan Agreement is unambiguous. It contemplates that Algonquin has an indefeasible right to repayment of its loan absent its express consent to waive that right. The Settlement Agreement does not amount to the waiver of Algonquin's rights under the DIP Loan Agreement and the DIP Order because

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[23] The DIP Order provides at ¶ 22:

> Binding Nature of Agreement. …The rights, remedies, powers, privileges, liens and priorities of the Lender provided for in this Final Order and in any other DIP Loan Document shall not be modified, altered or impaired in any manner by any subsequent order (including a confirmation order) or by any plan of reorganization or liquidation in this case or in any subsequent case under the Code unless and until the Post-Petition Obligations have first been paid in full in cash and completely satisfied.

[24] The DIP Order provides at ¶ 26:

> Priority of Terms. To the extent of any conflict between or among the express terms or provisions of any of the DIP Loan Documents, the Motion, any other order of this Court, or any other agreements and the express written terms and provisions of this Final Order…the terms and provisions of this Final Order shall govern.

[25] The DIP Loan Agreement provides in §8.5:

> No provision of this Agreement may be amended or waived unless such amendment or waiver is in writing and is signed by the Borrower and the Lender.

nowhere in the Settlement Agreement or the Sale Order did Algonquin waive its rights under the DIP Order.[26]

The terms of both the DIP Order and the Sale Order are plain and unambiguous, and thus no genuine issues of material fact exist.[27] If the parties intended the Sale Order to supersede the terms of the meticulously drafted DIP Order and to waive their duties to pay the DIP loan, they would have included appropriate language to do so.[28]

Conclusion

For the foregoing reasons, the Movants' motion for summary judgment is granted. Algonquin and the Debtor must both comply with their respective obligations; Algonquin must fund the carve-out, and the Debtor must repay the DIP loan. The Movants are to settle an order and judgment in accordance with this decision.

Dated: New York, New York
March 26, 2007

s/Robert E. Gerber
United States Bankruptcy Judge

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[26] In addition to its contractually preserved right that waiver be expressly manifested, under New York law the intent to waive an existing right must be unmistakably manifested, and is not to be inferred nor lightly presumed. *See Navillus Tile, Inc. v. Turner Constr. Co.*, 2 A.D.3d 209, 211 (N.Y. App. Div. 1 Dep't 2003) (citations omitted).

[27] Because the Court finds that the Sale Order and the DIP Order were unambiguous, the Committee's reliance on *In re Thomson McKinnon Secur. Inc.*, 132 B.R. 9,13 (Bankr. S.D.N.Y. 1991) (Schwartzberg, J.), which involved a release determined by that court to be ambiguous, is inapposite.

[28] When the instrument is between sophisticated, counseled business persons, the presumption that an executed written contract manifests the true intention of the parties applies with even greater force. *See Quantum Chem. Corp. v. Reliance Group, Inc.*, 180 A.D.2d 548, 549 (1st Dep't 1992), app. den. 79 N.Y.2d 760 (N.Y. 1992).