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HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-07-1255-MkMoPa
JOSEPH SPERA; ELIZABETH SPERA,	Bk. No. 02-21071
Debtors.	Adv. No. 05-02128
PHILIP BALL; MIRNA BALL,	
Appellants,	
v.	**MEMORANDUM**[1]
MICHAEL BURKART, Trustee,	
Appellee.	

Argued and Submitted on February 22, 2008
at Sacramento, California

Filed - March 14, 2008

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable David E. Russell, Bankruptcy Judge, Presiding

Before: MARKELL, MONTALI and PAPPAS, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

This is an appeal, after trial, of a judgment in favor of a trustee in a breach of contract action. The plaintiff, Michael Burkart, chapter 7[2] trustee, received a judgment in the amount of $131,152.60 for unpaid installments, interest, and late charges due on a contract for the sale of a business. We AFFIRM the bankruptcy court's judgment.

I. FACTS

On August 4, 1999, seller, Joseph Spera ("Spera"), and buyer, Philip Ball ("Ball"), entered a written "Purchase Agreement" for the sale of the assets of a business known as S&T Towing for $390,000. As consideration for the transfer of certain assets, the Purchase Agreement required Ball to make a down payment of $100,000, monthly installment payments totaling $190,000, and assume credit lines/leases in the amount of $100,000.

Ball made the initial down payment and Spera delivered all business assets covered by the Purchase Agreement, including the business' premises, tow trucks, and shop equipment. Ball assumed all credit lines/leases, and made the monthly installment payments from September 1999 through April 2000.

At the time of the sale, the majority of the business' revenues came from a contract ("AAA Contract") with the California State Automobile Association ("AAA"). The Purchase

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[2]Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005), and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

Agreement does not expressly and specifically assign the AAA Contract to Ball; instead, it contains a recital which required Spera to perform consulting services consisting of attending AAA meetings when necessary for the 32 months following the signing of the Purchase Agreement.

Spera told Ball that the AAA Contract was not a salable item. According to Ball's testimony, when he signed the Purchase Agreement, he intended that the AAA Contract would be transferred at some time in the future. The transfer of the AAA Contract was not an express condition of the sale. Accordingly, the signed Purchase Agreement made no mention of the transfer of the AAA Contract.

In the spring of 2000, Ball and Spera met with representatives of AAA and were told that AAA was terminating S&T Towing's contract. At that time, Spera first learned that the AAA application form had been submitted to Ball months before, but that Ball had not returned it to AAA. After the meeting, Ball told Spera that he had not filled out the AAA application form. Ball did not at any time apply for a AAA contract under his own name.

Spera and his wife filed for chapter 7 relief in January 2002, and Michael F. Burkart was appointed as trustee. In that capacity Burkart sued Ball to collect the balance owed on the Purchase Agreement. Following trial, the bankruptcy court ruled for Burkart, entering judgment in the trustee's favor for $131,152.60. Ball appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O). We have jurisdiction pursuant to 28 U.S.C. §§ 158(a)(1) and (c)(1).

III. ISSUES

Whether the bankruptcy court erred in determining that the Purchase Agreement was a valid contract, and that Ball was not excused from performance of completing payment of the agreed-upon price for the business.

IV. STANDARDS OF REVIEW

Findings of fact are reviewed under a "clearly erroneous" standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co. 333 U.S. 364, 395(1948). "If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 573-575(1985); Hansen v. Moore, (In re Hansen), 368 B.R. 868, 874-875 (9th Cir. BAP 2007).

V. DISCUSSION

This appeal raises two basic issues: was there a valid contract between the parties as evidenced by the Purchase Agreement, and if so, was Ball's performance excused?

1. The Purchase Agreement is a valid, enforceable contract.

Under California law, "[i]t is essential to the existence of a contract that there should be: 1) Parties capable of contracting, 2) Their consent, 3) A lawful object; and 4) A

sufficient cause or consideration." CAL. CIV. CODE § 1550. See also United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 462 (9th Cir. 1999), cert. denied, 530 U.S. 1228 (2000); Ramsey v. Vista Mort. Corp. (In re Ramsey), 176 B.R. 183, 187 (9th Cir. BAP 1994).

The bankruptcy court held:

> "But I have decide [sic] this particular case on the basis, I guess, of the evidence before me and the California law. And first of all, I find that there was a contract. I mean, I don't think there's any way of saying there was no contract. There was a written document. It was signed, both of the parties acted upon it, money was paid, assets were transferred."

Hr'g Tr. May 11, 2007, p. 160:15-22.

The elements of a contract as defined by the California Civil Code are met here. Ball and Spera, parties capable of contracting, signed the Purchase Agreement, demonstrating their consent, for the purchase of a towing business, a lawful object, in consideration of exchange of assets for $390,000. The bankruptcy court's holding that there was a valid contract is supported by the evidence at trial. Therefore the court's holding is not clearly erroneous.

2. There are no excuses for Ball's failure to perform.

Ball put forth four arguments as to why he should be excused from his failure to perform (i.e., pay the balance of the purchase price) under the terms of the Purchase Agreement:

1) A material asset was bargained for in a purchase contract and was not delivered;

2) A significant asset of the business was not transferred, making the Purchase Agreement an executory contract;

3) There was commercial frustration as to the agreement of the parties; and

4) There was a material failure of consideration as to the agreement of the parties.

Items 1), 2), and 4) are simply different variations of the same point: Ball believes that the Purchase Agreement required the assignment of the AAA Contract.[3] Since that contract was not only not assigned, but terminated by AAA, Ball maintains that Spera was in material breach of the Purchase Agreement, and that this material breach excused Ball's further performance.

As the assignment of the AAA Contract is not expressly provided for in the Purchase Agreement, Ball has a heavy burden in showing that its assignment was an implied term of the Purchase Agreement. California law provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." CAL. CIV. CODE § 1638. "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." Bank of the W. v. Super. Ct., 2 Cal. 4th 1254, 1264 (1992). "Such intent is to be inferred, if possible, solely from the written provisions of the contract." AIU Ins. Co. v. Super. Ct., 51

[3]Ball's third point – that the purpose of the contract was commercially frustrated – is not supported by California law. Frustration of purpose requires that the frustrating event not be reasonably foreseeable. 1 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 843-846 (10th ed. 2005); RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981). Here, however, the status of the AAA Contract was well known, and the bankruptcy court found that Ball closed the sale transaction initially knowing that assignment of the AAA Contract was not a condition of his performance.

Cal.3d 807, 822 (1990). "If contractual language is clear and explicit, it governs." Bank of the W., 2 Cal. 4th at 1264.

As the bankruptcy court found, the signed Purchase Agreement made no mention of the transfer of the AAA Contract. Moreover, testimony at trial established that Spera told Ball that the AAA Contract was not a salable item. Most tellingly, according to Ball's own testimony, when Ball signed the Purchase Agreement, it was his intention that the AAA Contract would be transferred at some time in the future.

The subsequent actions of the parties also show that there was no implied term related to transfer. In the spring of 2000, Ball and Spera met with representatives of AAA and were told that AAA was terminating the contract. At that time, Spera first learned that the AAA application form had been submitted to Ball months before, and had not been returned to AAA. After the meeting, Ball told Spera that he had not filled out the AAA application form. Ball did not at any time apply for the AAA Contract under his own name.

From this evidence, the bankruptcy court stated,

> I can only conclude that there was a contract entered into in good faith, that the parties pretty much agreed to everything. We know that AAA was material, very material to this contract, but I'm not -- I just can't conclude that the reason that AAA canceled was because of Mr. Spera's failure to act. I think it was because of Mr. Ball's failure to act.

Hr'g Tr. May 11, 2007, p. 160:8-15

There can be no doubt that the AAA Contract was material to the parties to the Purchase Agreement. There is nothing, however, in the record to indicate that transfer of the AAA Contract was a material term in the Purchase Agreement. Nor does

the record reveal that Spera guaranteed either explicitly or implicitly that the AAA Contract would be transferred; only that he would facilitate its transfer.

Giving deference to the bankruptcy court, as the BAP must with respect to factual findings, the bankruptcy court did not clearly err in finding that Ball was not excused from completing payments agreed upon for the purchase of the business. The evidence in the record supports the bankruptcy court's ruling; it is a bedrock rule that if two views of the evidence are possible, as they are here, the trial judge's choice between them cannot be clearly erroneous. Anderson, 470 U.S. at 573-575.

VI. CONCLUSION

The order of the bankruptcy court is AFFIRMED.