

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

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In re

MARY KATHRYN SHEPHERD,

Case No. 95-29173-K  
Chapter 11

and

GRIFFIN ENTERPRISES,

Case No. 96-30091-K  
Chapter 11

Debtors.

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**ORDER RE DEBTORS' MOTION IN LIMINE TO EXCLUDE EVIDENCE PROPOSED TO BE OFFERED BY JAMES A. GRIFFIN IN SUPPORT OF ORIGINAL AND AMENDED MOTION OF JAMES A. GRIFFIN FOR AN ORDER SETTING AN EFFECTIVE DATE OF A CERTAIN COMPROMISE AND SETTLEMENT COMBINED WITH NOTICE OF THE ENTRY THEREOF**

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Debtors, Mary Kathryn Shepherd ("Ms. Shepherd") and Griffin Enterprises ("Griffin Enterprises") (collectively the "Debtors"), have filed a *Motion in Limine to Exclude Evidence Proposed to be Offered by James A. Griffin in Support of the Amended Motion of James A. Griffin for an Order Setting an Effective Date of a Compromise and Settlement, by and between, and among Mary Kathryn Shepherd, James Arthur Griffin and Griffin Enterprises*. For the reasons mentioned below, the court grants the debtors' motion in limine.

By virtue of 28 U.S.C. § 157(b)(2)(A) and (O) this is a core proceeding.

Based on statements of counsel for the parties and consideration of the entire case record as a whole, the court renders the following findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The general background facts are not in substantial dispute and are set forth in the attached document marked Exhibit 1 to a hearing held on November 24, 1998, on a motion filed by the debtors under 11 U.S.C. § 505. The background facts as set forth in Exhibit 1 are incorporated herein by reference.

Additionally, the court finds that in December 1996 Ms. Shepherd and James A. Griffin (“Mr. Griffin”) were encouraged by the court to pursue alternative dispute resolution measures which ultimately resulted in United States Bankruptcy Judge William H. Brown serving as a settlement judge. Many complicated legal issues existed between Ms. Shepherd and Mr. Griffin in both the State Court and the Bankruptcy Court.

Bankruptcy Judge Brown met with Ms. Shepherd, and her attorney William Ernest Norcross, Esquire (“Mr. Norcross”), and Mr. Griffin and his then attorney Robert F. Miller, Esquire (“Mr. Miller”). After almost 15 years of litigation and hours of settlement negotiations conducted by Judge Brown, Ms. Shepherd and Mr. Griffin eventually reached a global settlement, in principal, of all legal matters pending between them. After reaching the, in principal, global settlement, Ms. Shepherd and Mr. Griffin, acting by and through their respective attorneys, Messrs. Norcross and Miller, completed the process of reducing the, in principal, global settlement to writing. See Ex. 1, “D”, titled Agreement.

After the settlement agreement was completed, Ms. Shepherd executed the agreement both individually and also on behalf of the debtor, Griffin Enterprises. Mr. Miller, on behalf of Mr. Griffin, had agreed to the terms of the settlement agreement. Notwithstanding Mr. Miller’s agreeing on behalf of Mr. Griffin to the terms of the settlement agreement, Mr. Griffin later refused to sign the agreement.

On September 29, 1997,<sup>1</sup> the debtors filed a motion seeking this court’s approval and enforcement of the settlement agreement. This court scheduled a hearing on the debtors’ settlement motion for October 20, 1997. At that hearing, Mr. Griffin was represented by John P. Byrne, Esquire (“Mr. Byrne”), who replaced Mr. Miller as Mr. Griffin’s attorney. Debtors called Mr.

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<sup>1</sup>Debtors also filed, on September 29, 1997, a motion, pursuant to section 505(a)(1) of the Bankruptcy Code, in which the debtors sought to have this court determine that there will be no federal tax liabilities resulting from the transfers to be made by the debtor, Griffin Enterprises, to the transferees pursuant to the terms of the settlement agreement.

Miller to testify about facts related to the settlement agreement. Mr. Miller essentially testified that the settlement agreement memorialized and represented the settlement reached between Ms. Shepherd and Mr. Griffin.

In November 1997, after hearing the evidence and arguments of counsel for both the debtors and Mr. Griffin, this court made oral findings and conclusions of law in accordance with FED. R. BANKR. P. 7052 resulting in the November 19, 1997 Order Enforcing and Approving Settlement Agreement. In that Order, this court ordered as follows:

1. The compromise and settlement between Shepherd, Griffin, and Griffin Enterprises, which is memorialized and evidenced by the Settlement Agreement attached as Exhibit "A" to the Settlement Motion and introduced as Trial Exhibit 1, is a valid and binding agreement between and among Shepherd, Griffin, and Griffin Enterprises, and enforceable in accordance with the terms and provisions of the Settlement Agreement. (emphasis added.)
2. The compromise and settlement, as set forth in the Settlement Agreement, is hereby approved.

The settlement agreement sets forth how the assets as defined in that agreement, are to be divided and distributed. See sections III.A through E of the settlement agreement, at pages 6-10. As of the Effective Date (as defined in section II.E. of the settlement agreement), all Royalty Rights' and Publishing Rights' Income are to be distributed and transferred in trust to Mr. Miller. *Id.* at 6-7. Mr. Miller is required to distribute such income, on a monthly basis, to Ms. Shepherd and Mr. Griffin in accordance with the provisions set forth on pages 6-7 of the settlement agreement. As of the Effective Date, the Southampton Apartments located in California are to be distributed to Mr. Griffin. *Id.* at 9. As of the Effective Date, full and complete title to the BREAD Servicemark is to be transferred to Griffin.

The effective date is defined in Section II.E of the settlement agreement which provides, at 5-6:

- E. EFFECTIVE DATE. The Effective Date of this Agreement shall be fifteen (15) days from the latest date upon which the

following events occur:

1. The parties' hereto reaching a written agreement with American Savings Bank ("ASB") regarding (a) the satisfaction of the arrearages which ASB claims is owed pursuant to the first mortgage which it holds on the Southhampton Apartments; and (b) the treatment of ASB in the proposed Plan of Reorganization in the *Griffin Enterprises* bankruptcy case;

2. Shepherd's either (a) obtaining an opinion from a tax attorney or certified public accountant advising her that the distribution of the Southhampton Apartments to Griffin shall not cause her directly or indirectly, to incur any tax liabilities; or (b) a ruling by the bankruptcy court, in a proceeding brought pursuant to section 505 of the United States Bankruptcy Code, to the effect that the distribution of the Southhampton Apartments to Griffin shall not cause her, directly or indirectly, to incur any tax liabilities; and

3. The approval of this Agreement by the bankruptcy court in the *Shepherd* bankruptcy case and in the *Griffin Enterprises* bankruptcy case.

Section IV.A. of the Settlement Agreement provides, at 13-14:

This agreement is specifically conditioned upon the happening of the following events:

1. The parties' hereto reaching a written agreement with American Savings Bank ("ASB") regarding (a) the satisfaction of the arrearages which ASB claims is owed pursuant to the first mortgage which it holds on the Southhampton Apartments; and (b) the treatment of ASB in the proposed plan of reorganization in the *Griffin Enterprises* case;

2. Shepherd's either (a) obtaining an opinion from a tax attorney or certified public accountant advising her that the distribution of the Southhampton Apartments to Griffin shall not cause her, directly or indirectly, to incur any tax liabilities; or (b) a ruling by the Bankruptcy Court, in a proceeding brought pursuant to section 505 of the United States Bankruptcy Code, to the effect that the distribution of the Southhampton Apartments to Griffin shall not cause her, directly or indirectly, to incur any tax liabilities; and

3. The approval of this Agreement by the Bankruptcy Code in the *Shepherd* bankruptcy case and in the *Griffin Enterprises* bankruptcy case.

The above three conditions precedent to the settlement agreement are the same as the events that must occur 15 days before the effective date of the agreement.

On or about March 23, 1998, Mr. Griffin filed the "*Amended Motion of James A. Griffin for an Order Setting Effective Date of a Compromise and Settlement by, between, and among, Mary Kathryn Shepherd, James Arthur Griffin, and Griffin Enterprises*". In that motion, Mr. Griffin essentially seeks to unilaterally, through new counsel, alter or modify the court approved settlement agreement so that it will have an effective date of August 15, 1997, or September 29, 1997, or October 20, 1997. In response, the debtors filed the instant motion in limine.

It has long been established in Tennessee that a contract must be interpreted and enforced according to its clear, plain and unambiguous terms. The language used in a contract must be taken and understood in its plain, ordinary and popular sense. The courts are precluded from creating a new contract for the parties. See, for example, *Bob Pearsall Motors, Inc. v. Regal Chrysler Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975).

When the language of a contract is unambiguous and there is no claim of fraud or mistake, the court must give effect to the intention of the parties as expressed in the language used in the contract. *Jennings v. Hayes*, 787 S.W.2d 1,2 (Tenn. App. 1990). In Tennessee neither the parties to a contract nor the courts can create an ambiguity where none exists. *N. C. Edwards v. Travelers Indemnity Co.*, 300 S.W.2d 615, 617-18 (Tenn. 1957).

Parol evidence is not admissible to contradict the express terms of a written contract. See, for example, *Litlerer v. Wright*, 151 Tenn. 210, 268 S.W.2d 624 (1924); *Farmers & Merchants Bank v. Petty*, 664 S.W.2d 77 (Tenn. App. 1983); *McQuiddy Printing Co. v. Hirsig*, 134 S.W.2d 197, 204 (Tenn. App. 1939). The parol evidence rule is both an evidentiary rule and a rule of substantive contract law. *Maddox v. Webb Const. Co.*, 562 S.W.2d 198 (Tenn. 1978). Parol evidence is inadmissible to contradict or vary the terms of a written contract, when the parties intentions are readily ascertained from the contract as reduced to writing. The law conclusively presumes that the

parties to a contract understood their obligations and evidence is not admissible to show that their understanding was in fact otherwise.

Considering a totality of the circumstances, the court finds that the terms of the settlement agreement in question are sufficiently clear, precise and unambiguous. There are, *inter alia*, three conditions that must occur before the division and distribution provisions of the settlement agreement becomes effective. See pages 13-14 of the settlement agreement. The words “conditions precedent” are actually set forth on page 13 of the settlement agreement. When the words “conditions precedent” and the clear and concise remaining other words set forth in section IV.A are given their normal and customary meaning, there can be no ambiguity here regarding the effective date. See *N.C. Edwards v. Travelers Indemnity Co.*, *supra*, 300 S.W.2d 615, 617. Two of the conditions, namely, this court’s approval of the settlement agreement and the tax determination have now been obtained. (On November 24, 1998, after notice and hearing, the court granted the debtor’s motion under section 505 of the Bankruptcy Code.) The third condition precedent involving an agreement with American Savings Bank has not yet been accomplished. The division and distributive provisions of the settlement agreement are not to control the rights and duties of the parties until all of the conditions precedent have been satisfied. Since there are no ambiguities and the intent of the parties is ascertainable from the settlement agreement itself, parol evidence is inadmissible to contradict or modify the terms of the agreement. Simply put, Ms. Shepherd and Mr. Griffin have agreed to an effective date under the agreement. See section II.E at pages 5-6 of the settlement agreement. The effective date previously agreed upon is 15 days after the latest date upon which all three conditions precedent occur. No fraud or mutual mistake related to the entering of this settlement agreement exists. The affairs of these parties are quite complex and prior litigation has been extremely protracted. The end result, however, is in sight. Parol evidence is inadmissible under these circumstances to allow Mr. Griffin to vary, alter, or modify the effective date of the agreement.

The court is satisfied, at this point, that the debtors and Mr. Griffin all have performed their duties and obligations in good faith in mutual efforts to satisfy the three conditions precedent. Such complicated matters require time to resolve. As noted earlier, the debtors, for example, reasonably filed a section 505(a)(1) motion in which they sought to have this court determine that there will be no tax consequences to the debtors if the distributions contemplated in the settlement agreement are made. The Internal Revenue Service (“IRS”) sought and received from this court additional time in which to prepare for a hearing on the debtors’ section 505(a)(1) motion. A substitution of the Justice Department lawyers also occurred. Debtors and Mr. Griffin did everything reasonably possible to assist the IRS in obtaining the information needed to prepare for the hearing under section 505 of the Bankruptcy Code. Debtors and Mr. Griffin have done nothing to cause a delay in the happening of the three conditions precedent.

In a separate notice, the court will now schedule a prompt hearing on Mr. Griffin’s original and amended motion seeking specific adjustments of the agreement as set forth in his motion.

Based on the foregoing, the court grants the debtors’ motion in limine.

The Bankruptcy Court Clerk shall promptly mail a copy of this Order and Notice (without the attached Exhibit 1) to the following:

William Ernest Norcross, Esquire  
Attorney for Debtors  
890 Willow Tree Cr., #8  
Cordova, TN 38018

John P. Byrne, Esquire  
Attorney for Mr. Griffin  
4264 Overland Avenue  
Culver City, CA 90230

Madalyn Scott Greenwood, Esquire  
Asst. United States Trustee  
200 Jefferson #400  
Memphis, TN 38103

Henry C. Shelton, III, Esquire  
Attorney for American Savings Bank  
6410 Poplar Ave., #300  
Memphis, TN 38119

**IT IS SO ORDERED AND NOTICE IS HEREBY GIVEN:**

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**DAVID S. KENNEDY  
CHIEF UNITED STATES BANKRUPTCY JUDGE**

**DATE: November 25, 1998**

Mary Kathryn Shepherd, Chapter 11 Case No. 95-29173-K  
Griffin Enterprises, Chapter 11 Case No. 96-30091-K  
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