

Dated: November 06, 2009
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
FAYE FOODS, INC.,
Debtor.

Case No. 05-23072-L
Chapter 11

KABB PARTNERSHIP,
Plaintiff,
v.
FAYE FOODS, INC.,
Defendant,
and
DEAN GRAVES,
Intervenor-Plaintiff.

Adv. Proc. No. 07-00056

MEMORANDUM OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT are two motions for summary judgment. The first was filed on June 29, 2009, by the Debtor-Defendant, Faye Foods, Inc. ("Faye Foods"), against the Plaintiff, KABB Partnership ("KABB"). The second was also filed on June 29, 2009, by the Plaintiff, KABB, against Faye Foods and the Intervenor, Dean Graves. At issue is \$184,000 plus accrued interest representing the net sales proceeds from the sale of real property at one time owned by KABB and

leased to Faye Foods. Faye Foods argues that it exercised an option to purchase the property prior to sale and thus that it is entitled to the net proceeds of the sale.

KABB responds that any option that Faye Foods held expired or was extinguished, and thus that it, KABB, is entitled to all proceeds of sale. Further, KABB argues that under no theory is Graves entitled to be paid from those proceeds. Graves filed no response to KABB's motion.

Graves was employed as real estate agent by Faye Foods, and was awarded a commission of \$48,800 as an administrative expense against the bankruptcy estate of Faye Foods. Fearing that the bankruptcy estate is administratively insolvent, Graves filed his intervening complaint claiming that he is entitled to be paid from the proceeds of the sale.

After receiving responses from Faye Foods and KABB, the court conducted a hearing on August 26, 2009. At the close of the hearing, Faye Foods asked that it be permitted to supplement the record. Its motion was granted in part by order entered September 8, 2009. Faye Foods filed its Supplemental Memorandum with exhibits on September 10, 2009, and KABB filed its response on September 21, 2009. Having carefully reviewed the record and considered the briefs and arguments of counsel, the court concludes for the following reasons that the motion of KABB should be granted and the motion of Faye Foods should be denied.

JURISDICTION

KABB asserts that this court has jurisdiction to hear its complaint for declaratory judgment "pursuant to 28 U.S.C. §§ 157 and 1334." Doc. No. 1, ¶ 1. Faye Foods simply admits the jurisdiction of the court without comment. Doc. No. 5, ¶ 1. Bankruptcy judges may hear and determine all cases under title 11 and any and all core proceedings arising under title 11 or arising in a case under title 11, referred to the bankruptcy court by the district court, and may enter appropriate orders and judgments subject to appellate review. *See* 28 U.S.C. § 157(b)(1). All bankruptcy cases in this judicial district have been referred to the bankruptcy court. *In re Bankruptcy Jurisdiction and Procedure Under The Bankruptcy Amendments Act of 1984*, Misc. No. 84-30 (W.D. Tenn. July 11, 1984). A core proceeding "either invokes a substantive right created

by federal bankruptcy law or [is] one which could not exist outside of the bankruptcy.” *Lowenbraun v. Canary (In re Lowenbraun)*, 453 F.3d 314, 320 (6th Cir. 2006), quoting *Sanders Confectionary Prods., Inc. v. Heller Financial, Inc.* 973 F.2d 474, 482 (6th Cir. 1992). In *Sanders Confectionary* the court of appeals indicates that an action is a core proceeding where “a successful action on the plaintiffs’ part could have affected the outcome of the bankruptcy proceeding.” This seems to broaden the class of core proceedings to include those which might have been brought had the bankruptcy case not been filed, but will nevertheless affect the outcome of the bankruptcy proceeding because the debtor is a party. Indeed, that is the opinion of Seventh Circuit:

The reference to cases related to bankruptcy cases is primarily intended to encompass tort, contract and other legal claims by and against the debtor, claims that, were it not for the bankruptcy, would be ordinary stand-alone lawsuits between the debtor and others but that section 1334(b) allows to be forced into bankruptcy court so that all claims by and against the debtor can be determined in the same forum.

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994), citing *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987).

KABB’s claim for declaratory judgment arises out of a lease agreement that predates the bankruptcy case, but also out of an order that was entered in the bankruptcy case resolving KABB’s motion to compel assumption or rejection of the lease. The outcome of this dispute will substantially affect the outcome of the bankruptcy case because it will determine whether or not the bankruptcy estate will receive the remaining proceeds of the sale. Therefore, this is a core proceeding.

ISSUES

The ultimate issue is who is entitled to the net proceeds from the sale of the real property leased to the Debtor. A second issue is whether the court may determine as a matter of law that Graves is not entitled to be paid a commission from that sale.

SUMMARY JUDGMENT STANDARD

Summary judgment under Federal Rule of Civil Procedure 56(c), made applicable to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, is appropriate

when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For purposes of summary judgment, the materiality of a fact is determined under the applicable substantive law. If under the substantive law, a fact would effect the outcome of the litigation, it is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2502, 2510 (1986). A factual issue is “genuine” if there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party. *Id.* at 249. When cross motions for summary judgment are filed, the court must examine each motion separately in accordance with the above standards and determine that no genuine issue of material fact exists. *Appolini v. United States*, 450 F.3d 185, 189 (6th Cir. 2000); *Metro. Gov’t of Nashville and Davidson County, Tenn. v. BellSouth Telecomm., Inc.*, 502 F. Supp. 2d 747, 750 (M.D. Tenn. 2007). When a court denies summary judgment to one party on the ground that it is granting summary judgment to another party, the denial of summary judgment is based on a legal conclusion rather than the court’s finding of a genuine issue of material fact. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003). It may be appropriate to deny summary judgment to both parties if inferences may be drawn in favor of either one. *Metro Gov’t*, 502 F. Supp. 2d at 751.

FACTS CONCERNING THE SALE PROCEEDS

Both Faye Foods and KABB agree that there are no genuine issues of material fact. The operative facts are the following. Faye Foods operated several Krystal restaurants in Shelby County including a Krystal restaurant at 1730 North Germantown Parkway in Cordova, Tennessee. The Debtor leased the facilities and real property at that location from KABB pursuant to a lease agreement dated November 4, 1996 (the “Lease”). Ex. A. to Answer to Complaint for Declaratory Judgement. Doc. No. 5. The initial term of the Lease expired November 3, 2006. Faye Foods filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code on February 28, 2005. KABB filed its Motion to Compel Assumption or Rejection of Nonresidential Lease on March 3,

2005. Bankruptcy Case, Doc. No. 15. This motion was resolved by an agreement memorialized in a consent order entered July 13, 2005 (the "Consent Order"). Bankruptcy Case, Doc. No. 110. That order provides in pertinent part:

That the initial term only of the lease with KABB Partnership is deemed to be assumed by the debtor. The initial term so assumed shall expire November 3, 2006. Any renewal of any leasing agreement between the debtor and landlord of the subject properties from and after November 3, 2006 (including any options to purchase or extensions of the lease term) shall be accomplished only upon such terms and conditions as the parties may then agree.

Bankruptcy Case, Doc. No. 110, ¶ 3 (emphasis in the original).

On October 4, 2006, Faye Foods filed its Motion to Sell Real Property. Bankruptcy Case, Doc. No. 211. Faye Foods sought permission to sell the real property which is the subject of the Lease to First Capital Bank. Faye Foods asserted that it had an option to purchase the real property from KABB for the sum of the appraised value plus 10%. Faye Foods further admitted that at that time, it was indebted to KABB in the amount of \$89,000 for taxes paid on the real estate. It proposed that this debt be paid from the sale proceeds, eliminating an administrative expense of the estate. Bankruptcy Case, Doc. No. 110, ¶¶ 4-7.

KABB objected to the motion, asserting that Faye Foods had no enforceable option to purchase the real property and was not authorized to proceed with its sale. Bankruptcy Case, Doc. No. 215. The court conducted a hearing on October 26, 2006, at which another prospective purchaser, Waymon H. Welch, Jr., appeared. After some discussion, the parties agreed that it was in the interest of all concerned that the property be sold. The parties agreed that their respective claims to the property would attach to the net proceeds of sale. In an informal bidding process, First Capital ultimately offered the high bid of \$1,220,000. An order was entered December 6, 2006, memorializing the parties' agreement. Bankruptcy Case, Doc. No. 216. In this order, KABB agreed to waive all claims against Faye Foods, including its administrative expense claim. KABB then filed its Complaint for Declaratory Judgment on February 13, 2007, and its motion for summary judgment on June 29, 2009. Doc. No. 49. Faye Foods likewise filed its motion for summary judgment on that day. Doc. No. 48.

ANALYSIS CONCERNING SALE PROCEEDS

Faye Foods argues that it retained an option to purchase the real property from KABB under the terms of the Consent Order entered July 13, 2005. Moreover, the Debtor asserts that it exercised this option when it filed its Motion to Authorize Sale on October 4, 2006. KABB counters that the language of the Consent Order could not be more clear: all that was assumed pursuant to that order was the original lease term as modified.

The operative language from the Consent Order is quoted above, but will be repeated here for ease of reference:

That the initial term only of the lease with KABB Partnership is deemed to be assumed by the debtor. The initial term so assumed shall expire November 3, 2006. Any renewal of any leasing agreement between the debtor and landlord of the subject properties from and after November 3, 2006 (including any options to purchase or extensions of the lease term) shall be accomplished only upon such terms and conditions as the parties may then agree.

Bankruptcy Case, Doc. No. 110, ¶ 3 (emphasis in the original). This language clearly contemplates the “assumption” of the initial term of the lease only, which expired November 3, 2006. The parties differ about whether the assumption of the initial lease term included an option to purchase during that term. Faye Foods argues that the requirement for approval by KABB applied only to options and extensions *from and after* November 3, 2006. KABB argues that the option to purchase was extinguished or could only be exercised with the approval of KABB.

Although the language under consideration occurs in the context of an order of the court, it was not drafted by the court, and thus must be treated as a contract. The contract was made in Tennessee and works as a modification of the Lease, which is governed by Tennessee law. Lease, ¶ 24. Therefore, Tennessee law applies. In Tennessee, a written and signed contract is prima facie evidence of the true intentions of the parties and is to be enforced as written. Tenn. Code Ann. § 47-50-112(a). In resolving disputes concerning contract interpretation, the courts are to determine the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language. *City of Cookeville v. Humphrey*, 126 S.W.3d 897, 903 (Tenn. 2004). The court may look beyond the contract to ascertain the parties’ intention only if the contractual language is found to

be ambiguous. *See Allstate Insurance Co. v. Watson*, 195 S.W.3d 609, 612 (Tenn. 2006); *Planters Gin Co. v. Fed. Compress & Warehouse*, 78 SW.3d 885, 890 (Tenn. 2002). Contractual language is ambiguous “when it is of uncertain meaning and may fairly be understood in more ways than one.” *Allstate Insurance Co. v. Watson*, 195 S.W.3d at 611. “A contract is not ambiguous merely because the parties have different interpretations of the contract’s various provisions, nor can [the] court create an ambiguity where none exists in the contract.” *Four Eights, LLC v. Salem*, 194 S.W.3d 484, 488 (Tenn. Ct. App. 2005) (internal citations omitted).

Reluctantly, the court agrees with Faye Foods that the quoted language from the Consent Order is ambiguous. While it is clear that all that was assumed by Faye Foods was the initial lease term, which expired on November 3, 2006, it is not clear that the parties intended that the option to purchase, which was available to Faye Foods during the ninety days preceding the expiration of the initial lease term, was to be extinguished. Surprisingly, the Lease does not limit the ability of Faye Foods to exercise the option in the event of default. The language of the second sentence in the quoted paragraph is capable of two interpretations. KABB asserts that it means that the terms of all options to purchase and all extensions provided under the Lease were subject to further negotiation and agreement. Under KABB’s reading, all that Faye Foods retained as the result of the Consent Order was the right to remain in the leased property until November 3, 2006, at a reduced rent. The court notes that this in itself was a substantial benefit. Faye Foods, on the other hand, asserts that the quoted language means that the terms of any extension of the Lease beyond the initial term, including the terms of any options to purchase arising in that first extension, or any further extensions of the Lease, were subject to negotiation. Under Faye Food’s reading, as the result of the Consent Order, it retained the right to remain in the leased premises until November 3, 2006, at a reduced rent, *and* the option to purchase the property under the terms and conditions set forth in the Lease. For reasons that will become apparent below, the court need not resolve this issue, but notes that if it were called upon to resolve the issue, it would require additional proof. This issue is a genuine issue of disputed fact. The court does not believe that it is a material issue, however.

KABB maintains that even if the option to purchase was assumed by Faye Foods together with the initial lease term, Faye Foods did not properly exercise the option. Faye Foods counters that it exercised the option when it filed its Motion to Authorize Sale of Real Property on October 4, 2006, within ninety days prior to the end of the initial lease term. The option to purchase is set forth at paragraph 14 of the Lease. That paragraph provides in pertinent part:

14. Option to Purchase. Tenant shall have the right and option to purchase the Premises at the conclusion of the initial term or during any of the first, second or third additional terms, if any there be. If during the initial term, Tenant shall give written notice of her intent to exercise this option within ninety (90) days preceding the expiration of the initial term on November 3, 2006. . . . The purchase price to be paid by Tenant at closing shall be a sum equal to the appraised value of the Premises as determined by an independent and qualified real estate appraiser, knowledgeable of commercial real estate values in Shelby County, who is mutually agreeable to the parties, plus ten percent (10%) of such appraised value. Notwithstanding anything to the contrary set forth herein below, the purchase price shall in no event be less than the outstanding indebtedness owed by Landlord and secured by the Premises.

The parties shall close the sale of the Premises to Tenant as soon as practicable following the determination of the purchase price at a mutually agreeable date, time and location. At closing, Landlord shall convey merchantable, fee simple title to the Premises by General Warranty Deed subject to easements and restrictions of record, and Tenant shall pay the purchase price in full. Real estate taxes and assessments shall be prorated through the date of closing and Purchaser shall pay the transfer tax assessed upon recordation of the deed. All other closing costs, including the cost of appraisal, shall be equally borne by the parties.

KABB does not argue that the Motion to Authorize Sale of Real Property was inadequate to give notice of Faye Food's intention to exercise the option to purchase – the motion is rather clear on that point, and that is precisely why KABB objected to it – rather, KABB argues that Faye Foods failed to exercise the option because it did not obtain an appraisal for the property.

Had no bankruptcy case been filed and no default occurred, Faye Foods was entitled to purchase the real property at the conclusion of the initial term for a purchase price equal to the appraised value of the property plus 10% of the appraised value. Lease, ¶ 14. Closing was to occur as soon as practicable following the determination of the purchase price and the purchase price was to be paid in full at that time. *Id.* At the hearing, the court was interested in determining whether or not the fulfillment of the contractual requirement that a purchase price be determined in order for Faye Foods to purchase the real property would assist the court in determining the intent of the

parties and/or would help it to determine how the net sale proceeds should be distributed. Faye Foods asked permission to supplement the record with respect to this provision of the Lease, which was granted. Faye Foods filed a supplemental memorandum and KABB filed a response in opposition.

Faye Foods asserts that the lease clause in question was merely a contractual provision and not a condition precedent to its exercise of the option to purchase. The court agrees. The Lease clearly contemplates that closing of the sale will be delayed in order to permit the parties to obtain the referenced appraisal and further provides that the parties will share the cost of the appraisal. Lease, ¶ 14. Given the parties' agreement to sell the property with their respective claims attaching to the proceeds, it is not surprising that they have not obtained an appraisal of the property. Nonetheless, the court cannot imagine how this provision could work to Faye Foods' advantage as the appraised value at the time of sale would surely equal or exceed the auction price.¹

In order to avoid this difficulty, Faye Foods asserts that KABB waived the right to demand a third-party appraisal of the property on the condition that it receive a minimum offer to purchase the property for not less than \$1,036,000. Faye Foods asserts that this waiver occurred by declaration in a conversation between Kenneth Alford and Dean Graves that occurred sometime in July of 2005. Faye Foods asserts that it satisfied this condition when it brought the offer that was the subject of its Motion to Authorize Sale of Real Property, filed October 4, 2006, and that this motion should be considered to be the notice required to exercise the option to purchase. Faye Foods relies upon the deposition testimony of Dean Graves, Kenneth Alford, and Kenneth Brunson in support of its position.

KABB counters that the parties never intended a waiver of the appraisal requirement and never discussed a price at which the tenant could purchase the property, but instead discussed the

¹ Fair market value is generally defined as the price a willing seller not under compulsion to sell and a willing buyer not under compulsion to buy agree upon after the property has been exposed to the market for a reasonable time. *See, e.g., In re West*, 328 B.R. 736, n.8 (Bankr. S.D. Ohio 2004).

minimum bid that would be required to release Faye Stiles, the owner of Faye Foods, from her obligation to KABB in the amount of approximately \$90,000.² KABB relies upon the testimony of Faye Stiles in support of its position.

The apparent factual dispute between the parties concerning the purported waiver of the appraisal requirement need not be resolved. The Lease clearly provides that it “may not be modified in any manner other than by agreement in writing signed by both parties and their successors in interest.” Lease, ¶ 17. Even if Faye Food’s assumption of the initial term of the Lease included the option to purchase, that option retained the requirement that Faye Foods pay 110% of the appraised value of the property in order to purchase it. No appraisal has been obtained. Therefore, the best indication of the value of the property at the time of sale is the sales price, \$1,220,000. In order for Faye Foods to exercise its option, it would be required to pay not less than \$1,342,000, with the result that it is not entitled to any of the net proceeds from the actual sale. KABB is entitled to summary judgment against Faye Foods.

FACTS CONCERNING GRAVES’ CLAIM FOR COMMISSION

Graves was employed by Faye Foods as debtor-in-possession as the listing agent for four properties, including the property that is the subject of the Lease. The order approving the employment of Graves was entered April 27, 2005. Bankruptcy Case, Doc. No. 75. The listing contract, which was appended as Exhibit 1 to the Application to Employ, is undated, but gave Graves an exclusive right to sub-lease the property for a period of six months. Bankruptcy Case, Doc. No. 74. If the court uses the date of the entry of the order as the date of the listing agreement, then Graves’ exclusive listing expired on October 27, 2005. Thereafter, he was entitled to be compensated in the event that he located a sub-tenant for the property, but not otherwise.

² This was the amount of accrued but unpaid charges owed under the Lease when the bankruptcy petition was filed. Apparently, Faye Stiles was personally liable for this amount. The Consent Order provided for cure of this amount in connection with the assumption of the initial term of the Lease over a period of sixty months. Consent Order, ¶ 2, Bankruptcy Case, Doc. No. 110.

The property was not sub-leased, but was sold as the result of an auction that occurred at the bankruptcy court on October 26, 2006. Graves filed a motion for allowance of a commission on this sale as an administrative expense on September 17, 2007. Bankruptcy Case, Doc. No. 237. Both Faye Foods and KABB filed objections and, after numerous continuances, the court conducted a hearing on October 24, 2007. The court concluded that Graves had been employed as a professional person with the court's approval pursuant to 11 U.S.C. § 327; that the estate had benefitted from the sale of the property; and that Graves' commission in the amount of 4% of the sale price, or \$48,888, should be allowed as reasonable compensation for actual and necessary services rendered to the estate. The court denied the request of Graves' attorney to be paid an attorney fee from the bankruptcy estate. *See Order Granting Request for Payment of Administrative Expense and Denying Request for Attorney Fee, Without Prejudice*, entered September 17, 2007, Bankruptcy Case, Doc. No. 236.

Graves responded by filing the Intervening Complaint, which claims that, "[t]he agreed real estate broker's commission was 'four percent (4%) of the gross sales price or the total of the lease payments (whichever is applicable) in case at closing.'" Intervening Complaint, ¶ 1, Doc. No. 9. The source of the quoted language is not identified. Graves prays for the payment of his commission. As noted, Graves' commission has been approved as an administrative claim against the bankruptcy estate. Graves has produced no document, however, that indicates that he is entitled to be paid from the proceeds of the sale of the real property. In its answer to the Intervening Complaint, KABB admitted that Graves had an approved employment agreement with Faye Foods, but denied that Graves is entitled to the commission he asserts. Doc. No. 13. In its motion for summary judgment, KABB asserts that, "Graves was hired by the Debtor and not by Plaintiff. His fee, which has been allowed as an administrative expense by order of this court, should not be allowed as an assessment against the Property." Doc. No. 49.

ANALYSIS OF GRAVES' CLAIM FOR COMMISSION

Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings in bankruptcy by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that, “A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.” This is what KABB, defending against Graves’ claim to be paid from the sales proceeds, has done. In this face of KABB’s motion for summary judgment, it was incumbent upon Graves to respond by affidavits or otherwise to “set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2). If an opposing party fails to do this, as Graves has, summary judgment may be entered against that party. *Id.* The record before the court seems clear. Graves had a listing agreement with Faye Foods that provided for a commission to him in the event the property was sub-leased. Graves never had an agreement with KABB, the owner of the real property, for a commission in the event of sale of the property. Accordingly, KABB’s motion for summary judgment against Graves should be granted.

CONCLUSION

For the reasons set forth herein, the motion of KABB for summary judgment against Faye Foods is **GRANTED** and the motion of Faye Foods for summary judgment against KABB is **DENIED**. Faye Foods is not entitled to any portion of the net proceeds of sale from the property subject to the Lease. Further, the motion of KABB for summary judgment against Graves is also **GRANTED**. Graves is not entitled to be paid a real estate commission from the sale proceeds. The court will enter separate orders consistent with this opinion.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff
Intervenor
Attorney for Intervenor