

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE
ATG ELECTRONICS, INC.,
Debtor.

Case No. 94-22832WHB
Chapter 7

P. PRESTON WILSON, TRUSTEE,
Plaintiff

v.

Adversary Proc. No. 96-0123

ROGER RICKEY and
R.E. RICKEY AND ASSOCIATES, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING MOTION FOR JUDGMENT ON PLEADINGS

The defendants filed their Motion For Judgment on the Pleadings, pursuant to FED. R. CIV. P. 12(c), the plaintiff Trustee filed a Response, the defendants filed a Reply to that Response, and the motion has been argued, after which the Court took the contested motion under advisement. In this Order, the Court will grant the defendant's motion and dismiss the Trustee's complaint. This is a core proceeding concerning a sale of property of this bankruptcy estate. 28 U.S.C. § 157(b)(2)(A), (M), (N), & (O).

This adversary proceeding is related to a complaint filed by Roger Rickey against the Trustee in adversary proceeding number 95-1274; however, dismissal of the present complaint does not necessarily lead to dismissal of adversary proceeding 95-1274, which remains set for trial on October 28, 1997 at 9:30 a.m. In light of this Order, the Court would urge the parties to explore anew a possible settlement in order to reduce the costs and delay of further litigation.

In the amended complaint filed in adversary proceeding number 96-0123, the Trustee sued the defendants for breach of a contract to purchase certain assets of this bankruptcy estate. For purposes of the defendants' motion for judgment on the pleadings, the allegations in the amended complaint "are taken as true and the motion is, in effect, a motion to dismiss for failure to state a claim upon which relief can be granted." Ahern and MacLean, *BANKRUPTCY RULES MANUAL*, 1997 ED., §7012.05. If, in considering such motions, the court considers matters outside the pleadings, the motion is treated as one for summary judgment under FED. R. CIV. P. 56. FED. R. CIV. P. 12(c). In this motion, the Court is required to look to the Memorandum of Purchase and Sale Agreement ("Memorandum Agreement") entered into between the plaintiff and defendants; however, that does not require consideration of matters outside the pleadings because the plaintiff's amended complaint "incorporated" the Memorandum Agreement as Exhibit A. To the extent the Court refers to other documents made exhibits to the amended complaint, the same conclusion may be reached.

The defendants have been treated in the amended complaint as one and the same entity, with the plaintiff seeking to pierce the corporate veil of R. E. Rickey and Associates, Inc. For purposes of this motion, the Court will assume that such an allegation is correct, which means that the Court's Order approving the sale to Roger Rickey was the equivalent of a sale to R. E. Rickey and Associates, Inc. See Exhibit C to amended complaint for Order approving sale. That Order recognized these defendants as the purchasers of certain assets in the place of Cirris Systems Corporation, and the defendants were obligated under the terms of the Memorandum Agreement. Except for the substitution of purchasers, the Memorandum Agreement's terms remained unchanged. Paragraph 6 of that Memorandum Agreement provides: "If [the purchaser] cancels this

Agreement without cause or defaults in the performance in any of its obligations under this Agreement, [the purchaser] shall forfeit to the Trustee as liquidated damages such earnest money as the Trustee shall hold at the time of such cancellation or default.” That paragraph then goes on to give the purchaser the option of specific performance in the event of the Trustee’s default, but no such remedy is mentioned for the Trustee in the event of the purchaser’s default. Paragraph 8 of the Memorandum Agreement is relevant to the present motion, as it provides: “In the event of default by either party, the non-defaulting party shall be entitled to recover all costs of enforcement, including reasonable attorney’s fees, expenses and court costs.” Under paragraph 8, if the purchaser canceled the Agreement, thereby forfeiting the earnest money, the Trustee would not be entitled to attorney’s fees or costs.

The defendants rely upon paragraph 6 as being the exclusive remedy for the Trustee’s damage claims against them. The Trustee argues that the Memorandum Agreement did not establish the liquidated damages of forfeiture of earnest money as an exclusive remedy. The Trustee relies upon Leeper v. Morelock, 168 Tenn. 192 (1934), for Tennessee authority that a liquidated damages’ clause in a contract is not necessarily the exclusive remedy; however, that case involved suit on a land sales’ contract where specific performance was an available remedy in addition to the specified liquidated damages. In the present case, the Trustee’s amended complaint seeks only monetary damages, with no prayer for equitable remedies such as specific performance.

There is Tennessee case authority, albeit unpublished, where the Court of Appeals discussed liquidated damages as “a sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur.” Loveday v. Barnes, 1992 WL

136176 (Tenn. App. 1992), *3. In that opinion, the Court adopted the word “shall,” as used in a liquidated damages’ clause, as “being mandatory,” compared with the word “may,” which “ordinarily connotes discretion or permission and will not be treated as a word of command.” *Id.*, *4. The language in the Memorandum Agreement at issue uses the word “shall” in referring to the purchasers’ forfeiture of all earnest money, a strong indicator that forfeiture was the Trustee’s exclusive remedy. There is nothing in the pleadings to suggest that paragraph 6 was anything less than a negotiated term of the Agreement. The Trustee signed that Agreement and submitted it to the Court for approval, and the Trustee obviously could have negotiated for more than a forfeiture of the earnest money. The Trustee also could have negotiated for an alternative remedy, but none was included in the Agreement. The fact that paragraph 6 provides a specific performance remedy to the purchaser but not to the Trustee is a clear indicator that the Trustee did not rely upon a remedy other than liquidated damages.

A frequent concern of courts considering enforcement of liquidated damages is that they not be punitive in amount or nature, nor that they be unconscionable in amount, nor contrary to public policy. Levin, et al., “Damages,” 22 AM. JUR.2D § 686. Here, the amount of liquidated damages is fixed as the amount of earnest money on deposit at the time of cancellation or breach, and the amended complaint established that the amount is \$10,000, which the Trustee holds. In that complaint, the Trustee seeks actual damages of \$55,000. A forfeiture of \$10,000 is not excessive compared to the amount of actual damages sought, nor is that amount unconscionable, shocking, punitive, nor does it violate public policy concepts. If, for example, the earnest money had exceeded the amount of actual damages, the courts would not be inclined to enforce such a forfeiture. It is

typically the defendant who alleges that the liquidated damages are excessive, but that is not the case here. This Court concludes that the liquidated damages' clause in paragraph 6 of the Memorandum Agreement is the exclusive remedy for damages and that the Trustee is limited to that contractual term for his recovery.

The Trustee argues that the defendants waived reliance upon this paragraph of the Agreement by filing the separate suit against the Trustee in adversary proceeding number 95-1274. The Court does not agree with the Trustee's argument. At the hearing on this motion, the Court inquired of the defendants' counsel, who stated that in adversary proceeding 95-1274 the plaintiff Roger Rickey seeks only the return of the \$10,000 earnest money deposit. Mr. Rickey is simply taking the position that he is not in default and that the Trustee is the defaulting party. That is not inconsistent with a forfeiture of the \$10,000 in the event the Court rules against Mr. Rickey in adversary proceeding 95-1274. In other words, if Mr. Rickey is correct, he will get the \$10,000 deposit back; if the Trustee is correct, the earnest money remains with the Trustee as liquidated damages. The Court concludes that the defendants in the present adversary proceeding have not waived their motion by one of them first suing the Trustee, who could have elected to file a counterclaim rather than file a separate complaint.

Moreover, while Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted are required to be filed before other pleadings, and a motion for judgment on the pleadings is the functional equivalent of a Rule 12(b)(6) motion, Rule 12(c) permits that a motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed but within such time as not to delay the trial." The defendants' motion is timely and has not been waived by other

pleadings.

The Trustee's amended complaint seeks attorney's fees, and paragraph 8 of the Memorandum Agreement provided for recovery of such fees and costs by the prevailing party who was required to enforce the Agreement. No such enforcement by the Trustee was required here. The Trustee was not required to bring this suit for damages; rather, the Trustee merely could have invoked the liquidated damages' provision. The Court denies the Trustee's relief of attorney's fees and costs due to the absence of an enforcement requirement. It is true that the Trustee has incurred attorney fees in defending the suit brought by Mr. Rickey in adversary proceeding 95-1274, and the Trustee may be entitled to a recovery of fees in that suit if it is deemed to be one covered by paragraph 8 of the Memorandum Agreement and if fees have been prayed for in that proceeding. There may be an issue of waiver of fees by the Trustee's failure to file a counterclaim in proceeding 95-1274, just as there may be an issue of Mr. Rickey opening the door to attorney fees by filing that complaint, but those are issues to be decided in that proceeding. For purposes of the amended complaint filed in the instant adversary proceeding 97-0123, the Court concludes that the Trustee is not entitled to recovery of attorney's fees or costs from these defendants.

IT IS THEREFORE ORDERED that the defendants' motion for judgment on the pleadings is granted, and the Trustee's complaint is dismissed. A separate judgment will be entered.

UNITED STATES BANKRUPTCY JUDGE
Dated: September 8, 1997

Wilson v. Rickey, adv. proc. 96-0123

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