Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

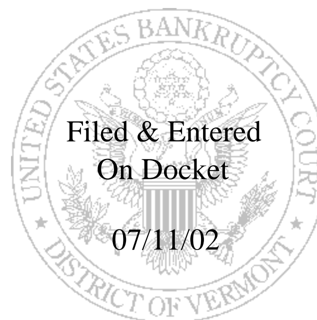
In re:	
EARTH WASTE SYSTEM, INC., Debtor.	**Case # 98-11675** **Chapter 11 - Jointly Administered**
In re:	
EWS OF MAINE, Inc., Debtor.	**Case # 98-11676** **Chapter 11 - Jointly Administered**

Appearances:	*Cynthia Dill, Esq.* *Portland, ME* *Attorney for M. Murray*	*Marshall J. Tinkle, Esq.* *Portland, ME* *Attorney for KeyBank*

MEMORANDUM OF DECISION
ON COURT'S RECONSIDERATION OF MISTYN MURRAY'S CLAIM

In its Memorandum of Decision Dismissing Appeal as Untimely and Granting Reconsideration and Vacatur *Sua Sponte* Regarding Claim of Mistyn Murray (dated March 27, 2002) [Dkt. #668-1], this Court vacated its Order Confirming Status of Mistyn Murray's Claims (dated December 27, 2001) [Dkt. #657] and directed Mistyn Murray ("Murray")and KeyBank National Association ("KeyBank") to submit memoranda of law on the merits of their dispute as to the ownership and allowance of Mistyn Murray's claims. Pursuant to 28 U.S.C. §§ 157 and 1334, this Court has jurisdiction over this matter.

Having considered the parties' submissions and for the reasons stated below, the Court finds that KeyBank materially breached its contract for the assignment of Murray's claims in the above-captioned jointly administered bankruptcy cases and that Murray is therefore entitled to rescind the contract and retain all rights to her claims against the debtors. Accordingly, this Court reinstates its Order Confirming Status of Mistyn Murray's Claims.



I. BACKGROUND

In 1997, Murray was an employee of debtor EWS of Maine, Inc. ("EWS") That year, Murray filed a complaint with the Maine Human Rights Commission alleging sexual and racial discrimination by EWS Vice President Frank Elnicki, Sr. In March 1999, after EWS filed for chapter 11 bankruptcy protection, Murray filed a proof of claim for "up to $150,000" based upon her sexual and racial discrimination cause of action. Over a year later, in April 2000, Murray filed a similar proof of claim in Earth Waste's jointly administered bankruptcy case. It is undisputed that, although there were objections to other proofs of claim, no objections where made regarding either of Murray's proofs of claim.

Murray was treated as an unsecured creditor of both EWS and Earth Waste, as was KeyBank. Under EWS's confirmed plan, EWS was to issue a $350,000 bond that would be used to satisfy the unsecured creditors' claims of approximately $1.3 million.[1] To secure a larger percentage of the distribution to unsecured creditors, KeyBank began claim assignment negotiations with Murray in April 2000. In mid-April, 2000, the parties reached an agreement that KeyBank would pay Murray $2,500 for the assignment of her claims. However, KeyBank's $2,500 payment was not made within the fourteen-day period agreed to by the parties.

On April 26, 2000, to ensure her claim was not lost due to statute of limitation considerations and so she could liquidate her claim, Murray filed a Motion for Relief form Stay *Nunc Pro Tunc* [Dkt. #584] seeking to litigate her discrimination causes of action in the United States District Court, District of Maine. KeyBank objected to Murray's Motion, arguing she lacked standing to request relief since she had agreed to assign her claim to KeyBank. This objection was later withdrawn when KeyBank and Murray resolved their differences about the assignment. This is evidenced by the Supplemental Motion for Relief from Stay [Dkt. #608], filed on July 28, 2000, which included a copy of the settlement agreement resolving KeyBank's earlier objections (as Exhibit A). Under the terms of this agreement, KeyBank was to pay

[1]General Electric Capital Corporation was appointed agent with respect to EWS's note issued for the benefit of unsecured creditors.

Murray the "sum of $2,500.00 *following the approval by this Honorable Court of the pending Motion for Relief from Stay as supplemented and the expiration of any appeal periods relating thereto*." See Exhibit A to Murray's Supplemental Motion at ¶1 (emphasis added). On September 11, 2000, this Court entered an Order granting Murray's Motion for Relief from Stay; no appeal was filed.

More than a year passed before the United States District Court, District of Maine entered a Judgment in Murray's racial and sexual discrimination case. On October 9, 2001,the district court found the defendants jointly and severally liable to Murray for $150,000. Murray filed a copy of the Judgment with this Court on November 15, 2001 [Dkt. #648].

During this greater-than-one-year time span (from this Court's granting relief from stay to the Maine district court's entering judgment in Murray's favor) KeyBank never made the $2,500 payment to Murray. However, KeyBank's non-payment did not come to the attention of this Court until the December 18, 2001 hearing on debtors' Motion for Final Decree when, on oral motion, GE requested a confirmation of the status of Murray's claim in order to make proper distribution to the unsecured creditors. Since there had been no objection to this claim, the Court allowed Murray's claims in full. KeyBank objected, arguing its settlement agreement and assignment contract with Murray precluded such a holding. Murray argued that KeyBank had not performed under the agreement because it had not paid Murray the $2,500 contemplated in the agreement, and, therefore, the agreement should be considered null and void. The Court issued a written Order dated December 21, 2001 [Dkt. #657-1] allowing Mystin Murray's claims as filed and overruling KeyBank's objection.

II. DISCUSSION

A. This Court's Jurisdiction

KeyBank challenges the Court's jurisdiction over this matter, claiming the issue raised is non-core and asserting that the Court lacks jurisdiction to adjudicate the dispute between Murray and KeyBank. Clearly, the issue of claims allowance is a core proceeding, see 28 U.S.C. § 157 (b)(2), and the Court has

jurisdiction to decide whether to allow a claim. However, here the dispute here is over the *ownership* of Murray's claims.

Additional inquiry must be made when a dispute arises that does not involve the debtor or is otherwise non-core. The Court provided an in-depth legal analysis of its concurrent jurisdiction of non-core matters previously in this case. See Order Denying Motion to Enforce Court's August 9, 2000 Confirmation Order at pp. 4-6 [Dkt. #621-1]. That Order provided that as set forth in 28 U.S.C. § 1334(b), original, but not exclusive, jurisdiction over civil proceedings arising under Title 11 or arising in or related to cases under Title 11, resides with the Unites States district courts, which may be subject to reference to bankruptcy courts, pursuant to 28 U.S.C. § 157. In determining whether a matter is a core or non-core proceeding, the Second Circuit instructs that "matters that merely concern the administration of the bankrupt estate tangentially are related, non-core proceedings." Ben Cooper, Inc. v. Ins. Co. of the State of Pennsylvania, 896 F.2d 1394, 1398 (2d Cir. 1990); see also Northern Pipeline Construction Co. v. Marathon, 458 U.S. 50 (1982). Once the core/non-core determination has been made, a bankruptcy court may then determine whether to exercise jurisdiction over a related, non-core proceeding subject to considerations of judicial economy, fairness, convenience to the parties and comity. See In re Porges, 44 F.3d 159, 162-63 (2nd Cir. 1995).

This matter concerns an alleged post-petition breach of contract between two creditors, Murray and KeyBank, as to the ownership of claims in the case. KeyBank's contract for the assignment of the claims has already been brought before this Court in the context of Murray's Motion for Relief from Stay [Dkt. #608]. Further, payment under the contract was contingent upon bankruptcy court action. Specifically:

> Key shall pay Murray the aforesaid sum of $2,500.00 *following the approval by this Honorable Court of the pending Motion for Relief form Stay as supplemented and the expiration of any appeal periods relating thereto.*

Exhibit A to Supplemental Motion for Relief from Stay [Dkt. # 608] (emphasis added).

Recognizing this breach of contract dispute is a non-Bankruptcy Code matter arising in the debtors'

bankruptcy case, the Court determines that it is appropriate to exercise its concurrent jurisdiction in this instance. This Court has already considered the parties' agreement in the context of Murray's Motion for Relief from Stay, which, in turn, related to the determination of the amount of her claims. As the agreement is essentially a by-product of the bankruptcy case, the Court is very familiar with the facts of this disputed matter. Moreover, it has already considered the parties' arguments at the December 2001 hearing. Finally, the Court can effectively apply the appropriate contract law to resolve the parties' dispute. Thus, for reasons of judicial economy, fairness, convenience to the parties and comity, the Court finds it is appropriate to exercise its concurrent jurisdiction over this matter.

B. Missing Term in Contract is Imputed by Law

It is undisputed that the subject agreement was missing a payment term, namely, the time within which payment was to be made. KeyBank contends that its tendering payment in January 2002– more than one full year after the agreement was entered–satisfies its obligation to pay Murray according to the terms of the agreement (i.e., "*following the approval by this Honorable Court of the pending Motion for Relief form Stay as supplemented and the expiration of any appeal periods relating thereto").* The Court is unpersuaded. Whenever time is an essential term of a contract, either expressly or by implication, and is omitted or imperfectly specified therein, *the law implies that the event mentioned shall take place within a reasonable time.* A reasonable time becomes an implied term of the agreement. Farmers' Feed & Grain Co. v. Longway et al., 154 A. 674, 675, 103 Vt. 327 (1931) (emphasis added); see also Rudolph et al. v. Cuomo et al., 916 F. Supp. 1308 (S.D.N.Y. 1996) (law will imply missing term in contract); Nora Beverages, Inc. v. Perrier Group of America, Inc., 164 F.3d 736 (2nd Cir. 1998) (state law allows missing terms in contract to be implied).

In this instance, while the agreement did not provide a specific time frame within which payment was to be made, it provides sufficient information for the Court to determine the reasonable time within which the payment should have been made. See, e.g., Farmers' Feed & Grain Co., 154 A. at 675 ("What is

a reasonable time in a given case depends upon the circumstances, and is usually a question of fact, though the circumstances may be such . . . that the question can to be disposed of by the court.") (citation omitted)). Our analysis begins on September 11, 2000, the date the Court approved Murray's Supplemental Motion for Relief from Stay [Dkt. #619]. KeyBank had ten days to appeal that order. See Fed. R. Bankr. P. 8002(a). Therefore, KeyBank should have paid Murray the contract price within a reasonable period after September 21, 2000. Given the facts that: (a) the assignee is a large institution; (b) the purchase price was relatively small; (c) the purpose of the assignment was to provide Murray with funds promptly so that she did not have to wait until distribution under the confirmed plan; and (d) the previously contemplated contract for the assignment of Murray's claims called for payment within 14 days', the Court finds a reasonable time for payment is 60 days. Thus, if KeyBank had tendered the $2,500 by November 21, 2000, this Court would have found that payment to be timely under the agreement. However, KeyBank's attempted tender of payment in January 2002–after the Court's December 21, 2001 Order Confirming Status of Mistyn Murray's Claims [Dkt. #657-7]– is well outside the reasonable time frame in this instance.[2] Thus, the Court finds that by failing to make the required payment under the agreement in a timely fashion, KeyBank breached its contract with Murray.

C. Material Breach of Contract Entitles Assignor to Rescind the Contract

A material breach is one that goes to the essence of the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979)[3]; see also BLACK'S LAW DICTIONARY 189 (6th ed. 1990) ("*Material breach.* A violation of a contract which is substantial and significant and which usually excuses the aggrieved party from further performance under the contract and affords a right to sue for damages."). Whether a breach

[2] The Court is unpersuaded that a change in bank personnel in 2001 rises to the level of excusable neglect excusing KeyBank's very tardy payment.

[3] See also Sisters & Brothers Investment Group v. Vermont National Bank, 773 A.2d 264 (Vt. 2001) (Vermont Supreme Court relying on RESTATEMENT (SECOND) OF CONTRACTS to adjudicate contract dispute).

is material is a question of law. See, e.g., Frank Felix Assoc., Ltd. v. Austin Drugs, Inc., 111 F.3d 284, 289 (2nd Cir. 1997) (interpreting New York law).

In this instance, the only reason Murray agreed to assign her claims to KeyBank was to receive the $2,500 assignment payment sooner rather than she would have received payment on her claims under the confirmed plan. In essence, Murray was agreeing to accept a deeply discounted payment now to get "cash in hand" versus waiting until later (when payments to unsecured creditors would be made under a court-approved plan) when she expecter she would receive a larger sum. If KeyBank had tendered payment within a reasonable time, Murray would have received the benefit of her bargain–getting her cash well before payments began under debtors' plans. However, KeyBank's non-payment within a reasonable time is a breach that goes to the essence of the contract. Given the circumstances in this instance, the Court finds KeyBank's breach to be material.

Finding KeyBank's failure to make payment to Murray within a reasonable time to be material, the Court will allow Murray the remedy of rescission. See RESTATEMENT (SECOND) OF CONTRACTS § 237 comment b (1979) (instructing that a party is relieved of continued performance under a contract when the other party's breach is "material"); see, e.g., Brown v. Aitken, 92 A. 22, 88 Vt. 148 (1914) (for general contention that whether breach of a contract is so material that it warrants the remedy of rescission depends on the circumstances of the case); Auer & Twitchell v. Robertson Paper Co., 111 A. 570, 94 Vt. 473 (1920) (failing to pay under contract justifies seller's rescinding contract); Sisters & Brothers Investment Group v. Vermont National Bank, 773 A.2d 264 (Vt. 2001) (instructing that when giving equitable remedies, courts are given considerable discretion to do justice between the parties and citing Willard v. Taylor, 8 U.S. (Wall.) 557, 568 (1869) ("The relief which the complainant seeks rest . . . in the sound discretion of the court.")); 11 U.S.C. § 105.

III. CONCLUSION

Based upon the foregoing, the Court finds: (1) KeyBank breached its contract with Murray by not

paying Murray within a reasonable time; (2) given the circumstances of this dispute, KeyBank's breach was material; (3) Murray may rescind the contract; and (4) Murray's claims in the underlying bankruptcy cases are allowed in full. Thus, the Court will reinstate its Order Confirming Status of Mistyn Murray's Claims dated December 21, 2001 [Dkt. #657-1].

July 10, 2002
Rutland, Vt

Colleen A. Brown
United States Bankruptcy Judge