



UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

IN RE:

DENIS NEIL LINEHAN

Debtor.

) Case # 20-10020-cab
) Chapter 12 Case **ORDER**
) **Overruling Debtor's Objection to CNH Motion,**
) **Granting CNH Conditional Relief from Stay, and**
) **Directing Debtor Make Adequate Protection Payments**

This matter came before the Court for consideration of the Motion by CNH Industrial Capital LLC ("CNH") for Relief from the Automatic Stay and Adequate Protection dated June 10, 2020 (doc. #75, the "Stay Motion"). The Stay Motion was properly noticed and served (doc. # 75). The Debtor filed an Objection (doc. # 80) and a hearing was held on the Stay Motion and Objection on July 14, 2020. At that hearing counsel for the two parties reported they had resolved the matter based on the terms set forth on the record at that hearing, and the only issue to be finalized was the amount of the adequate protection payment and the Debtor's attorney indicated she believed the proposed \$600 per month payment would be acceptable but needed to verify that. The Court continued the hearing to August 11, 2020, based on the parties' representation that they would file a stipulation memorializing their settlement prior to that date and the Court anticipating no further hearing would be necessary.

On the morning of August 11, 2020, just hours before the continued hearing in this matter, CNH filed the instant proposed stipulated order (doc. # 85, the "Stipulation"). It includes the same terms the parties announced at the July 14th hearing, including an adequate protection payment of \$600 per month. The Debtor filed neither a consent nor an objection to the Stipulation. At the continued hearing on August 11th, the Debtor's attorney reported she had just recently notified CNH's attorney that the Debtor objected to a substantive term of the Stipulation, namely the surrender or sale of the round baler and associated bale thrower, and instead wanted to retain and pay for those two pieces of equipment over the five-year term of a chapter 12 plan the Debtor intends to file very soon. The Debtor's attorney took the position that the parties did not have a settlement of the Stay Motion but did not address CNH's assertion that Vermont law would deem it so. Rather, she asked that the Court honor the Debtor's change of mind, deny CNH's Stay Motion and reject the Stipulation, regarding CNH's collateral:

Loan #	Collateral Description	S/N	PRICE
01819021	BC5070 NH SQ Baler	YEN118418	\$10,500
	72 NH Baler Thrower	YEN160987	
01819022	T6030 NH Tractor	Z7BD03137	\$42,500
01819024	FR450 NH Round Baler	53170006M	\$25,500
	350 John Deere Mower	A15240	
	LQ3548 Bradco Forks	136632	

CNH insists that the parties had a complete, final, and clear settlement of the Stay Motion, points out that CNH gave up rights in reliance upon that settlement, the only term that had been open is not the subject of a dispute at this time, it is too late for the Debtor to seek revision of the substantive terms of the settlement, and, under Vermont law, CNH is entitled to enforce the settlement, as articulated on the record on July 14, 2020 and set forth in this proposed stipulated order.

When the Court inquired of the Chapter 12 Trustee as to his position, he urged the Court to permit the Debtor to renegotiate the terms of the settlement in order to maximize the likelihood of success in this case. He did not address the issue of whether, under controlling law, the settlement is enforceable under the circumstances present here.

1. CNH is granted conditional relief from the automatic stay as to the foregoing listed equipment (hereinafter the “CNH Collateral”). Debtor has or will place all the CNH Collateral (except for the BC 5070 NH SQ Baler and 72 NH Baler Thrower) for immediate sale with Champlain Valley Equipment, and CNH hereby consents to sale of same at prices no less than as set forth in the “price” column above. Debtor intends to use the BC 5070 NH SQ Baler and 72 NH Baler Thrower, and agrees to pay CNH adequate protection payments with regard to same in the amount of \$600 per month commencing no later than July 31, 2020, and continuing until that equipment is sold or turned over to CNH as provided herein.

2. Debtor shall have until September 30, 2020, to pay CNH in full the amount set forth in the CNH Proof of Claim (Claim No. 10-1) with respect to the three financing contracts for the CNH Collateral, including post-petition interest at the contract rate set forth in the contracts. All net sale proceeds will be paid over to CNH until its secured claim is paid in full. The only deductions permitted from sale proceeds will be the 10% commission payable to the selling dealer. In the event the Debtor fails to pay as agreed, Debtor shall turn over possession of any unsold CNH Collateral to CNH as directed by CNH, and relief from stay shall be effective immediately, and CNH shall be authorized to proceed immediately with its state law remedies with respect to the CNH Collateral, including the sale of same pursuant to Article 9 of the Uniform Commercial Code, without any further Order of this Court. Debtor shall peaceably assemble and either deliver the CNH Collateral to CNH, or make it available for pick-up.

5. Within thirty (30) days after completing its disposition of the CNH Collateral, CNH shall provide the Debtor with a report of all sales, and will remit to the Debtor surplus funds, if any, after satisfaction of the amounts due to CNH.

6. Debtor agrees that the amount due to CNH shall include post-petition interest due under its contracts in accordance with their terms and applicable law.

7. Debtor voluntarily agrees to waive and release any right to appeal from this Stipulated Order.

8. The objection the Debtor asserted at the August 11, 2020 hearing is overruled, based on the following analysis.

The Vermont Supreme Court has observed:

Parties are free to enter into a binding contract without memorializing their agreement in a fully executed document. See Restatement (Second) of Contracts § 4 (1981). In such an instance, the mere intention or discussion to commit their agreement to writing will not prevent the formation of a contract prior to the document's execution.

Catamount Slate Prod., Inc. v. Sheldon, 2003 VT 112, ¶ 15, 176 Vt. 158, 163, 845 A.2d 324, 329 (2003) (some citations omitted). In that decision the Supreme Court adopted the four factor test the Second Circuit had articulated for determining whether the parties intended to be bound in the absence of a fully executed document, namely

(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) where there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Id. at 164, citing Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir.1986). Moreover, this is a question courts must address with some regularity, in both Vermont and the Second Circuit:

Preliminary agreements are not a novel concept. Courts have long acknowledged that there is a range of preliminary agreements, some of which are enforceable and some of which are not. ... On the one hand, 'mere agreement to agree at some future time is not enforceable.' But on the other hand, '[a] contract is not necessarily lacking in all effect merely because it expresses the idea that something is left to future agreement.'

Miller v. Flegenheimer, 2016 VT 125, ¶ 12, 203 Vt. 620, 625, 161 A.3d 524, 528 (2016) (quoting Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 95 (2d Cir. 2007) (other citations omitted)).

Applying this controlling law to the facts and circumstances presented, THE COURT FINDS the agreement between CNH and the Debtor satisfies the Winston test because (1) it has no express reservation of the right not to be bound in the absence of a writing; (2) it has been partially performed in that the Debtor has already delivered certain pieces of the CNH Collateral to an equipment dealership for sale; (3) it is complete since the Debtor and CNH were in agreement as to all terms of agreement as of July 14th, other than the amount of the adequate protection payment and that term was finalized shortly after that date; and (4) it is the type of contract that is usually committed to writing, both attorneys understood they would need to be put it in writing for CNH to obtain an Order, and they represented they would do so shortly after the July 14th hearing.

Therefore, IT IS HEREBY ORDERED the parties' agreement, as recited on the record at the July 14th hearing, is enforceable and the Debtor is bound by the terms of that settlement, which are memorialized in this Order.



Colleen A. Brown
United States Bankruptcy Judge

August 14, 2020
Burlington, Vermont