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U.S. BANKRUPTCY COURT

New Mexico

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Case Number: 02-17878-s11
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Docket Text:
Memorandum Opinion in Support of Order Denying Motion to Enforce Settlement Agreement (RE: related document(s)[489] Motion to Enforce). (jeb)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
INVESTMENT COMPANY OF THE SOUTHWEST, INC.,
Debtor. No. 11-02-17878 SA

MEMORANDUM OPINION IN SUPPORT OF ORDER DENYING MOTION TO ENFORCE SETTLEMENT AGREEMENT

Debtor's Motion to Enforce Settlement Agreement (doc 489) came before the Court for trial on the merits.[1] Having considered the evidence and the arguments of the parties, the Court finds good cause to deny the motion.

The evidence consisted of copies of letters and e-mails exchanged between counsel for the two parties, and the testimony of the two counsel, Daniel J. Behles for the Debtor and R. Thomas Dawe for FH Partners.[2] The dispute is encapsulated in the text of two of the last e-mails exchanged by the parties, as follows:[3]

> From Thomas Dawe to Dan Behles
> Tuesday, February 6, 2007, 10:09 AM
> Dan: FH Partners will agree to continue the terms extended to your client on [sic] February 5 email with

[1] The Court has subject matter and personal jurisdiction pursuant to 28 U.S.C. §§1334 and 157(b); this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) and (J); and these are findings of fact and conclusions of law as required by Rule 7052 F.R.B.P.

[2] The Court found both witnesses to be eminently credible.

[3] The letters and e-mails show the trail of negotiations and the changes in positions of the parties up to the point where only one issue separated them. That issue is discussed in this opinion. By quoting only these two communications, the Court excludes quoting the many items that the parties had already agreed upon by this stage of the negotiations.

> the change that FH Partners will agree to accept a subordination of its psoition [sic] to the extent of payment received on the Four Hill [sic] Associates property and FH Partners will even agree to release the Menaul office building but the release of the home is rejected and is a non-negotiable issue. It is a "line in the sand."
> Please advise me if we have a settlement or not. There will be no further concessions by FH Partners.
>
> From Dan Behles to Thomas Dawe
> Tuesday, February 6, 2007, 10:55 AM
> Tom: Based on your last e-mail to me, I think we have a deal. Release on the office bldg., subordination on Four Hills, no change in the house (as it stands now, the release is on appeal and it requires a court order to do anything). <u>This is subject to making a deal w/Jacobvitz so we don't get converted, but we have a proposal from him that we are very close on,</u> so I think we should proceed with a more formal memorialization of our agreement. Call me.

(Emphasis added.)

A comparison of the texts makes clear that the reply e-mail from the Debtor to FH Partners in effect mirrors the FH Partners' offer but adds the language of the deal with Four Hills Associates (whose counsel is Robert H. Jacobvitz). The question at trial was what was the effect of the additional language.

Mr. Behles explained that this was not intended as an additional term, but rather was simply informing Mr. Dawe that the Debtor and Four Hills were working on, and very close to, an agreement whereby Four Hills would not pursue the conversion motions (docs 220 and 449) that it had filed.[4] Mr. Dawe argued

[4] The motions were scheduled for a final hearing on the afternoon of February 6, 2007, and in fact the Court had already informed the parties that the Court was preparing an order

that the additional language comprised a term in addition to the terms that mirrored each other in FH Partners' offer and the Debtor's acceptance.

The Court finds that while Mr. Behles did not think that he was in effect making a counteroffer to FH Partners (and thus the language about formalizing "our agreement"), the words "This is subject to making a deal w/Jacobvitz so we don't get converted,...." constituted an additional material term. It is one thing to have an agreement that is not subject to change or to becoming inoperative. It is another thing to have an agreement which is subject to change or to becoming inoperative. In this instance, the response from Mr. Behles in essence accepted (or mirrored) the terms proposed by Mr. Dawe but added that the terms might become inoperative upon the occurrence of a certain condition; namely, that the Debtor and Four Hills Associates could not reach an agreement on the conversion motion. As unlikely to occur as that condition may have been, it was not a minor or immaterial addition, since whether an agreement will be subject to becoming inoperative will ordinarily be of considerable importance.[5]

---

granting one of the motions (doc 220) based on the record and without the need for the evidentiary hearing.

[5] This is so, even if FH Partners may not have relied on the addition of that term in concluding that there was no binding agreement between the parties.

> At common law, the "mirror image" rule applied to the formation of contracts, and the terms of the acceptance had to exactly imitate or "mirror" the terms of the offer. If the accepting terms were different from or additional to those in the offer, the result was a counteroffer, not an acceptance.

Gardner Zemke Company v. Dunham Bush, Inc., 115 N.M. 260, 263, 850 P.2d 319, 322 (1993). The Restatement (Second) of Contracts is in accord:

> Counter-Offers
> (1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposed a substituted bargain differing from that proposed by the original offer.
> (2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

Restatement (Second) of Contracts, § 39 (current through June 2006).

In summary, the Debtor's response to FH Partners' offer was a counter-offer, and therefore could not be treated as an acceptance of FH Partners' offer. In consequence, there was no agreement that could be enforced, and so the motion must be denied. An order will enter.[6]

Honorable James S. Starzynski
United States Bankruptcy Judge

[6] As already mentioned, the Court was prepared to enter an order converting this case to one under chapter 7 on February 6. In light of developments, the Court will refrain from entering a conversion order for ten days following the entry of the order.

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