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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
BANK BUILDING PARTNERSHIP,
Debtor.

Case No. 95-56933-MM
Chapter 11

**ORDER DENYING DEBTOR'S MOTION
FOR SUMMARY JUDGMENT ON THE
OBJECTION TO CLAIM FILED BY
LIMAR REALTY CORPORATION #20**

For the reasons set forth herein and good cause appearing, it is ORDERED that:

1. The Debtor's Motion for Summary Judgment on the Objection to Claim filed by Limar Realty Corporation #20 is denied for the debtor's failure to sustain its burden on a motion for summary judgment.

Standard on Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Only genuine disputes over material facts that might determine the outcome of the suit under the applicable law will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). The evidence is to be viewed in the light most favorable to the non-moving party. Id. at 2513. All justifiable inferences are also to be drawn in favor of the non-moving party. Matsushita Elec. Industrial Co. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The non-

1 moving party must therefore counter the motion with specific facts showing that there is a genuine issue
2 for trial. Anderson, 196 S.Ct. at 2513.

3 The Court must also consider the applicable standard of proof and which party bears the burden
4 of proof. Id. at 2512. Summary judgment is proper if a party fails to make a sufficient showing of an
5 element essential to that party's case, and on which that party bears the burden of proof at trial. Celotex
6 Corp. v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 2552 (1986). If the moving party bears the burden of
7 persuasion at trial, that party must support the motion with credible evidence that would entitle it to a
8 directed verdict at trial. Such an affirmative showing shifts the burden of production to the party
9 opposing the motion for summary judgment and requires that party either to produce evidence that
10 demonstrates a genuine issue for trial or to request additional time for discovery. Id. at 2556.

11 Limar Realty Corporation #20's claim is based on an alleged breach by Bank Building Partnership
12 of the October 20, 1995 prepetition Purchase and Sale Agreement for the purchase of the debtor's
13 commercial property located at 1151-1251 McKay Drive, San Jose, California. A proof of claim
14 executed and filed constitutes prima facie evidence of the validity and amount of the claim. B.R. 3001(f).
15 After an objection is raised, the objecting party bears the burden of going forward to produce evidence
16 sufficient to negate the prima facie validity of the filed claim. In re Pugh, 157 B.R. 898 (Bankr. 9th Cir.
17 1993). If the objecting party produces evidence sufficient to negate the validity of the claim, the ultimate
18 burden of persuasion remains on the claimant to demonstrate by a preponderance of the evidence that
19 the claim deserves to participate in the distribution of the debtor's assets. Id. The validity of a
20 creditor's claim is determined by rules of state law. Grogan v. Garner, 498 U.S. 279, 283, 111 S.Ct. 654,
21 657, 112 L.Ed.2d 755 (1991); In re Johnson, 756 F.2d 738, 741 (9th Cir. 1985), cert. denied, 474 U.S.
22 828, 106 S.Ct. 88, 88 L.Ed.2d 72 (1985); Pugh, 157 B.R. at 901. Under California law, the elements
23 of an action for breach of contract are the contract, plaintiff's performance or excuse for non-
24 performance, defendant's breach, and damage to the plaintiff therefrom. Regan Roofing Co., Inc. v.
25 Superior Court of San Diego County, 24 Cal. App. 4th 425, 434-35, 29 Cal. Rptr. 2d 413, 418 (Cal.
26 App. (4th Dist.) 1994). Limar must establish these elements by a preponderance of the evidence to
27 prevail at trial.

28 Bank Building Partnership has the burden of producing evidence sufficient not only to negate the

1 prima facie validity of Limar’s proof of claim but also to entitle it to judgment as a matter of law. Under
2 this standard, Bank Building Partnership has failed to satisfy its burden on summary judgment.

3 2. With respect to the debtor’s argument that the purchase agreement is not an executory
4 contract because it is unenforceable against Limar, which paid no consideration under the agreement and
5 had no unperformed duties under the agreement, the Court concludes that summary judgment cannot be
6 granted on that basis because Bank Building Partnership failed to establish as a matter of law that Limar
7 failed to furnish any consideration for the purchase agreement. An executory contract is “one in which
8 performance is due to some extent on both sides . . . [I]n executory contracts the obligation of both
9 parties are so far unperformed that the failure of either party to complete performance would constitute
10 a material breach and thus excuse the performance of the other.” In re Texscan Corp., 976 F.2d 1269,
11 1272 (9th Cir. 1992). Although it is true that determination of whether a contract is executory within
12 the meaning of the Bankruptcy Code is a matter of federal law, In re Wegner, 839 F.2d 533, 536 (9th
13 Cir. 1988), state law determines contract construction, the existence of a claim arising from the breach
14 of an executory contract, and the measure of damages. In re Aslan, 909 F.2d 367, 369 (9th Cir. 1990);
15 In re Kirkpatrick, 160 B.R. 560, 564-65 (Bankr. E.D. Mich. 1993); In re Besade, 76 B.R. 845, 847
16 (Bankr. M.D. Fla. 1987). Bank Building Partnership asserts that Limar was not obligated to perform
17 under the purchase agreement prior to its waiver of conditions under the due diligence provision.
18 However, California law provides that an agreement that is subject to one party’s unilateral satisfaction
19 or approval may be enforceable. The party granted the discretion to terminate under the agreement has
20 an implied duty to exercise that discretion in good faith to ensure that the other party is not unreasonably
21 deprived of the benefits of the agreement such that the party’s promise is not illusory. Jacobs v. Freeman,
22 104 Cal. App. 3d 177, 190, 163 Cal. Rptr. 680 (Cal. App. (5th Dist.) 1980). The obligation to exercise
23 good faith supplies the consideration necessary to support the contract. Converse v. Fong, 159 Cal. App.
24 3d 86, 90-91, 205 Cal. Rptr. 242 (Cal. App. (1st Dist.) 1984). Moreover, the issue of executoriness is
25 neither controlling nor significant in this dispute because the estate is able to pay all claims in full from
26 the proceeds of the sale of its real property.

27 3. Although not specifically briefed by the parties, the court is concerned that the
28 declarations of the parties suggest that there may be genuine issues of material fact regarding the

1 following issues:

2 a. No evidence has been presented regarding the intention of the parties with respect
3 to the imminent foreclosure sale by VLSI at the time of entering into the purchase agreement. Although
4 the contractual due diligence period extended beyond the date of the scheduled foreclosure sale, the
5 agreement is silent as to the rights and liabilities of the parties in the event that VLSI foreclosed its
6 interest in the property prior to Limar's completion of its due diligence or the close of escrow. These
7 facts would be directed to Bank Building Partnership's prospective defenses of mutual mistake and
8 discharge of Bank Building Partnership's duty of performance by impossibility, impracticability, or
9 frustration of purpose. The Court notes that the Restatement 2d of Contracts §§ 261, 265 and California
10 caselaw focus on factors such as the expectations of the parties, assumption of risk, and foreseeability
11 to determine the applicability of defenses as impossibility and frustration of purpose. See Gold v Salem
12 Lutheran Home Ass'n of Bay Cities, 53 Cal.2d 289, 291, 347 P.2d 687, 689 (1959); Federal Savings &
13 Loan Ass'n v Marina View Heights Development, 66 Cal. App. 3d. 101, 154, 135 Cal. Rptr. 802 (Cal.
14 App. (4th Dist.) 1977); Glendale Guthrie v Times Mirror Co., 51 Cal. App. 3d 879, 888, 124 Cal. Rptr.
15 577 (Cal. App. (4th Dist.) 1975). A related issue exists whether Bank Building Partnership actually
16 breached the purchase agreement and may be held liable for damages where the Court issued an order
17 approving the sale to VLSI.

18 b. Repudiation of a contract must be clear and unequivocal. April Enterprises v.
19 KTTV, 147 Cal. App. 3d 805, 824, 195 Cal. Rptr. 421 (Cal. App. (2d Dist.) 1983); Whitney Investment
20 Co. v. Westview Development Co., 273 Cal. App. 2d 594, 602, 78 Cal. Rptr. 302 (Cal. App. (4th Dist.)
21 1969). Limar has introduced evidence that gives rise to the issue whether its letter of November 15,
22 1995, which Bank Building Partnership argues to be a repudiation by Limar, was in fact unequivocal.
23 Limar contends that is was merely a proposed modification to the agreement and not a repudiation.
24 Relating to the issue of repudiation of the agreement, California law also provides that the repudiation
25 of an agreement may be withdrawn so long as the other party has not placed any reliance on the
26 repudiation. Taylor v. Johnston, 15 Cal.3d 130, 138 (1975). A genuine issue of material fact may also
27 exist as to whether the November 17, 1995 letter served as a retraction of the November 15, 1995 letter,
28 effectively reinstating the original agreement.

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c. Limar's failure to waive contractual conditions under the due diligence provision may constitute a failure of a condition precedent, excusing Bank Building Partnership from performance under the purchase agreement. However, paragraph 7.3 of the contract provides that Bank Building Partnership would furnish a current property survey and other documentation to facilitate Limar's due diligence review. Limar argues that Bank Building Partnership defaulted under its obligation to furnish the necessary reports, but Bank Building Partnership disputes this contention. Genuine issues of material fact may exist whether the condition of Limar's waiver is excused by Bank Building Partnership's alleged failure to cooperate and whether that alleged default by Bank Building Partnership constitutes a material or a minor breach.