UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 09-54101
	)	Jointly Administered
AKRON THERMAL LIMITED PARTNERSHIP and AKRON THERMAL COOLING, LLC,	)	CHAPTER 11
	)	JUDGE MARILYN SHEA-STONUM
DEBTORS.	)	
	)	MEMORANDUM OF OPINION AND
	)	ORDER OVERRULING OBJECTION TO
	)	DEBTORS' MOTION TO REJECT LEASE

This matter came before the Court on the Motion of Debtors and Debtors-in-Possession to Reject Lease or Executory Contract (Docket #19), the Limited Objection of the City of Akron (Docket #44), and Debtors' Reply to the Limited Objection (Docket #53). This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), over which this Court has

jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and the Standing Order of Reference entered in this District on July 16, 1984.

I. Background

The Debtors in this case, Akron Thermal Limited Partnership ("ATLP") and Akron Thermal Cooling, LLC ("ATC"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on September 11, 2009 (the "Petition Date"). Their cases are jointly administered pursuant to this Court's Order of September 23, 2009 (Docket #34).

Debtors filed the Motion to Reject Lease on September 17, 2009 (Docket #19), wherein they requested court approval of their rejection, *nunc pro tunc* to the Petition Date, of several agreements, specifically:

1. The Operating Lease Agreement (the "Lease"), between ATLP and the City of Akron (the "City"), in which ATLP, as tenant, leased from the City, as landlord, the property from which it operated;
2. Amendatory Agreements altering the payment and billing arrangement for rent payments under the Lease;
3. License Agreements entered into by the City and ATLP permitting ATLP's use of certain City-owned land other than that named in the Lease;
4. A Franchise Ordinance, incorporated into the Lease, in which the City authorized ATLP to maintain equipment, such as pipes, across City property, for providing utility service within Akron; and
5. An Asset Purchase Agreement (the "Purchase Agreement"), entered into by the City and ATLP in connection with the Lease, giving ATLP the option to purchase certain assets which were the subject of the Lease.

The City filed a Limited Objection to the Debtors' Motion (Docket #44) and requested, *inter alia*, that this Court order the Debtors to return to the City "any and all permits." Ltd. Obj. ¶16.[1] The City also disputed whether the Lease was still in effect as of the Petition Date. Ltd.

[1]In a telephone conference with the Court on November 24, 2009, both parties waived any objection to the Court addressing this issue on the Motion to Reject rather than in an adversary proceeding.

Obj. ¶14. In a hearing on October 13, 2009, the parties agreed that, to the extent the Lease and related agreements were executory, they were rejected *nunc pro tunc*; the Court reserved the question of whether they were, in fact, executory until such time as it might become necessary to determine that issue. It remains undisputed that the Lease terminated no later than the Petition Date.

In their Reply (Docket #53), the Debtors dispute that the Lease and Purchase Agreement require ATLP to transfer to the City the Title V Permit ("the Permit") issued by the Ohio Environmental Protection Agency (the "Ohio EPA"). The parties filed Joint Stipulations of Fact (Docket #68) prior to a hearing before this Court on October 27, 2009. Subsequent to the October 27 hearing, the parties also filed Supplemental Stipulations Concerning Title V Permit (Docket #103).

Although these two parties' history is complex, the facts relevant to this particular issue are not. The Court finds that the following facts are undisputed:

1. ATLP and ATC provided steam and chilled water service to customers in Akron, Ohio.
2. ATLP leased from the City the facility from which it operated (the "Facility") pursuant to agreements more fully discussed below.
3. ATLP suspended operations on Tuesday, September 8, 2009.
4. When ATLP suspended its operations, the City and Akron Energy Systems, LLC, acting as a manager on the City's behalf, took possession of the Facility.
5. The City, operating from the Facility, has provided utility service to ATLP's customers since ATLP suspended operations.
6. The Permit was issued by the Ohio EPA authorizing operation of boiler #32 at the

Facility.

7. Boiler #32 may not be operated without this permission from the Ohio EPA.

II. ATLP is the Permit Holder

To resolve the present dispute, the Court must first determine to whom the Permit was issued. The parties have stipulated as follows:

1. The first application for a permit was filed with the Ohio EPA in 1996 with the following information:

Facility name:	Akron Thermal Energy Corporation
Address:	226 Opportunity Parkway, Akron, Ohio
Facility Owner:	Thermal Ventures, Inc.
Facility ID:	166-77-01-0757

J. Stip. ¶ 3.

2. The parties agreed during the October 27 hearing that the 1996 application was signed and submitted by James Mullen. In 1996, Mr. Mullen was President of ATLP. Supp. Stip. ¶ 1.

3. The Ohio EPA issued a permit in 1999 to the permit holder "Akron Thermal Energy Corporation." A correction was submitted in 2002 listing the facility name as "Akron Thermal Limited Partnership." J. Stip. ¶¶ 5, 6.

4. "Akron Thermal Limited Partnership" was listed as the facility name on the 2003 and 2008 renewal applications, but the 2004 and 2009 permits identified "Akron Thermal Energy Corporation" as the respective permit holders. J. Stip. ¶¶ 7-9.

5. There is no record of an entity by the name of "Akron Thermal Energy Corporation" in either Ohio or Delaware. J. Stip. ¶ 12.

Because none of the documents filed in this matter suggest that these discrepancies were anything other than clerical oversight, the Court concludes that ATLP was the original applicant for the permit in 1996 and has been the permit holder since its original issue in 1999.

III. Interpretation of the Lease

Although the parties did not specifically stipulate to the contents of the agreements named in Debtors' Motion, copies of these documents were attached as exhibits to the Debtors' Motion. The language of these agreements is not in dispute, but only the meaning to be ascribed to that language.

The Lease provides that "[u]pon the expiration or termination of this Lease … Tenant [ATLP] shall surrender (i) the Leased Property to Landlord [the City] … (ii) the Acquired Inventory, … and (iii) the Acquired Equipment[.]" Lease § 18. It also requires ATLP to "take all reasonable action requested by Landlord" and "execute any and all agreements, certificates, and other documents which may be reasonably required by Landlord, in order to transfer possession of the Leased Property and the rights and obligations of Tenant under the Assigned Contracts and Authorizations to Landlord[.]" Lease § 19.2.

A. "Leased Property"

The Lease defines "Leased Property," as used in the above-quoted § 18 of the Lease, to include, "without limitation, all of the assets and properties contemplated by Section 2.1 of the Purchase Agreement." Lease § 1. In turn, § 2.1 of the Purchase Agreement includes a list of many types of property, the most relevant being:

> all of *Seller's* right, title, and interest in, to, and under the certificates, registrations, licenses, permits, grants, franchises, variances, waivers, approvals, and consents relating to or used in connection with the operation of the System and the Business (the "Acquired Authorizations") *issued or to be issued to Seller* by

> any federal, state, or local governmental entity or municipality or subdivision thereof … including, *without limitation*, those listed or described on Schedule 2.1(f) hereto[.]

Purchase Agreement § 2.1(f) (emphasis added). The referenced Schedule 2.1(f) (the "Schedule") contains a list of 13 permits. Although § 2.1(f) names only permits issued "to Seller," the Schedule indicates that five of the permits listed were issued to ATLP rather than the City. One column on the Schedule lists expiration dates for each permit. The entry in this column for the "Air Contaminant Source Permit to Operate" for boiler #32 is "Determined with Title V." The City argues that this is a reference to the Permit and that it demonstrates the Parties' intention that it be included as part of the "Leased Property" to be transferred under § 18 of the Lease and that the Permit was intended to be included in § 2.1(f) of the Purchase Agreement by the words "without limitation," which are repeated in the Lease § 1.

However, the reference to the Permit in the Schedule is not conclusive. It does show the parties' awareness of the Permit's existence, but raises the question of why the Permit was not specifically named anywhere in the Lease or Purchase Agreement. The reference in the Schedule shows the parties were aware of the Permit and did not list it, suggesting that they did not intend the Lease to provide for its transfer.

More importantly, the section of the Purchase Agreement that references the Schedule names only authorizations "issued or to be issued to Seller," meaning the City. The Permit was issued to ATLP. Section 2.1(f) does not describe the Permit. The Purchase Agreement does not provide for the disposition of authorizations, like the Permit, that were not issued to the City.

This reading of the contract language does not undermine the words "without limitation." Other permits or licenses that fit the description given in § 2.1(f) of the Purchase Agreement must

be transferred to the City. However, the Permit does not fit the description given. Excluding the Permit is therefore not a "limitation," but adherence to the parties' intent as demonstrated by the language they employed.

B. Assigned Contracts and Authorizations

Section § 19.2 also requires that "the rights and obligations of Tenant under the Assigned Contracts and Authorizations" be transferred to the City. "Assigned Contracts and Authorizations" is defined as "all contracts and authorizations listed on Schedule 6.1 hereto which would constitute an Acquired Contract or Acquired Authorization," except those which the City was unable to assign to ATLP. Lease §§ 6.1, 6.2. The definitions of Acquired Contracts and Acquired Authorizations refer back to § 2.1 of the Purchase Agreement, which contains the language discussed above, "all of *Seller's* right, title, and interest in, to, and under the [various contracts and authorizations]." Section 19.2 therefore only provides for the transfer of rights and obligations that the City transferred to ATLP under the terms of the Lease. The Permit has never been transferred between the parties and so is not included in the language of § 19.2.

C. Purpose of the Agreements

The City argues that the Lease and Purchase Agreement, taken together, ensure that at the termination of the Lease, the City might occupy the Facility and continue to provide utility service from that location. Consequently, the City argues, § 2.1 and related provisions provide that when retaking the property, the City will also have the permits necessary to operate the Facility. In the October 27 hearing, the parties acknowledged that it is possible for the City to apply for its own Title V permit, but also that this process is time-consuming and expensive.

The City's argument seeks to stretch the interpretation of the Lease so as to include more

than the written agreements. To the extent that the language of the written agreement is unambiguous, the Court may not alter its provisions due to the burden imposed on one of the parties, onerous though it may be. *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.*, 544 N.E.2d 920, 924 (Ohio 1989). Furthermore, to the extent that the parties' intentions are not captured by the language of the written agreements between them, they may not be enforced by the Court. *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 150 (Ohio 1978). Consequently, in seeking to understand the agreements as a whole, the Court continues to look only at the specific language these documents contain.

In support of its interpretation, the City cites § 13.2 of the Lease, which provides that in the event of ATLP's default, "Landlord shall be entitled to take any and all necessary action against Tenant to obtain immediate delivery of all permits needed to operate the System" in addition to liquidated damages. This provision does seem to expect that the City will have some right to "all permits needed to operate the system" in the event of the Lease's termination, but it does not create that right. The Lease allows the City to pursue, but does not require ATLP to deliver, "permits needed to operate the system." Read narrowly, the provision leaves it to the City seek delivery of the permits and provides only that the right to pursue these permits is not modified by the liquidated damages clause. Indeed, the parties' use of this language in § 13.2 makes conspicuous their failure to use it elsewhere. This language strongly indicates that the parties did not intend to give the City a right to all permits, but rather only the right to protect what rights the City had without impairing its claim to liquidated damages.

ATLP, in contrast, argues that the total effect of the Lease and Purchase Agreement is to provide for the transfer of only property the City leased to ATLP and not for the transfer of ATLP

property to the City. Under this interpretation, the Lease was intended to provide to ATLP everything that was both under the City's control and necessary for the operation of the Facility. It was further intended to provide that in the event the Lease terminated without consummation of the Purchase Agreement, ATLP would return to the City what it had been provided under the Lease. In this view, property acquired separately by ATLP would not transfer to the City at the Lease's termination, regardless of whether it was necessary to operate the Facility.

Supporting this interpretation, § 2.1 addresses only the Seller's rights in the listed property. Section 2.1(f) requires ATLP to return to the City all of the *Seller's* interest in permits issued to the City, including those listed in the Schedule. The City has cited no other provision in the Purchase Agreement or elsewhere giving it any right, title, or interest in the Permit. As discussed above, this provision seems to provide that to the extent that ATLP has an interest in any property listed in the Schedule, that interest need not be transferred. Rather, only the City's interest must be transferred. The City must first show some interest in the Permit; only then is ATLP required to transfer that interest back to the City at the termination of the Lease.

Additionally, the Lease provides, "Landlord does hereby lease to Tenant, and Tenant does hereby lease and take from Landlord, [the Leased Property]." Lease § 1. It is in this context that the Lease defines "Leased Property." It would stretch the plain meaning of this provision to understand "Leased Property," described as taken from the Landlord, to include property that has never belonged to the City.

It is also worth noting that the language at issue in the Lease arises under the definition of "Leased Property." The parties would presumably not have chosen these words to describe property which was not transferred to ATLP under the terms of the Lease Agreement and in

which the Landlord had no interest, but which ATLP obtained separately by its own effort and expense. Similarly, the language quoted above as part of § 2.1 is part of the definition of "Purchased Assets." The Permit was neither "Leased" nor "Purchased" from the City, but obtained separately by ATLP from the Ohio EPA. While not determinative, the terms "Leased Property" and "Purchased Assets" support this Court's conclusion that the Lease does not require ATLP to transfer the Permit to the City.

The City's Limited Objection requesting an Order requiring the Debtors to transfer the Permit to the City is therefore overruled. The Court will hold a status conference to discuss any further disposition of the Permit at 2:00 pm on Friday, December 4, 2009.

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