

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Case No. 03-60137
)	
HARRY LONDON CANDIES, INC,)	Chapter 11
)	
Debtor.)	
)	
)	Judge: RUSS KENDIG
)	
)	
)	MEMORANDUM OF DECISION
)	

This matter is before the Court upon the objection of Harry London Candies, Inc. ("Debtor") to the cure claim of Jarrett Logistics Systems, Ltd. ("Jarrett"). Jarrett filed a response and opposition to Debtor's objection and Debtor, in turn, filed a reply. For the reasons that follow, Debtor's objection will be **SUSTAINED**. Jarrett's cure claim will be **DENIED**.

I. SUMMARY OF THE CASE

Debtor filed its petition for relief under Chapter 11, Title 11 of the United States Code on January 15, 2003. At the time, transactions between Debtor and Jarrett were governed by a shipping contract executed in October, 1999 (the "Jarrett contract").

On June 24, 2003, Debtor filed its Amended Plan of Reorganization and Modified Disclosure Statement. The Jarrett contract was included as an executory contract on Exhibit A of the Modified Disclosure Statement. On July 22, 2003, the Court entered the Confirmation Order approving the Amended Plan, which became effective on or about August 5, 2003. On September 2, 2003, Jarrett filed a Notice of Cure Claim ("Cure Claim"), seeking \$146,862.92 for services provided prepetition, and \$34,192.91 for services rendered postpetition.^{1,2}

On November 3, 2003, Debtor filed an objection to the Cure Claim, notice of failure to reach agreement on final cure amount, and deemed rejection of the executory contract between Debtor and Jarrett.

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Unless otherwise stated, references to "the Code" or "the Bankruptcy Code" are to Title 11 of the United States Code. Unless otherwise stated, a reference to a "section" is a reference to a section within the Bankruptcy Code

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In its response to Debtor's objection to the cure claim, Jarrett acknowledged that the postpetition claims had been paid in full, leaving a balance outstanding on the cure claim of \$146,862.92, the amount of prepetition invoices.

II. ARGUMENTS

As grounds for its objection, Debtor asserts that Jarrett is bound by the terms of the Amended Plan, that Section 9.1 of the Amended Plan requires, as a condition precedent, agreement regarding contract terms and cure amounts prior to assumption of any executory contract, and that without such agreement, the contract is deemed rejected.

Jarrett responds that Debtor cannot reject the Jarrett contract because Debtor included the contract in the list of executory contracts appended to the Modified Disclosure Statement as Exhibit A. Jarrett also relies on Section 9.1 of the Amended Plan, but focuses on other language in that section which states that the Confirmation Order will constitute an order of the Court approving assumption of the contracts described in Exhibit A. Jarrett also relies on 11 U.S.C § 365 and Sixth Circuit case law which holds that court approval is required to assume or reject executory contracts in Chapter 11 cases. Jarrett argues that Section 9.2 of the Amended Plan provides the procedure for rejection of executory contracts, that Debtor did not follow that procedure, and therefore the Jarrett contract was assumed by virtue of its inclusion in Exhibit A.

In response to Jarrett's arguments, Debtor notes that the Amended Plan must be interpreted as a contract, and that well-settled principles of contract interpretation require that a contract be construed in such a manner as to give effect to every provision. Further, Debtor identifies Paragraph 18 of the Confirmation Order as contemplating a Final Order to resolve any disputes regarding executory contracts and cure amounts associated therewith. Debtor notes that the Final Order has not been entered in this case.

III. ISSUES

- A. The court must determine whether the executory contract between Jarrett and Debtor was automatically assumed as a result of the Confirmation Order approving the Amended Plan.
- B. The court must rule on Debtor's objection to Jarrett's Cure Claim.

IV. ANALYSIS

A. Jurisdiction

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A) and (B). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409(a).

B. Section 365

Section 365(a) permits the trustee, subject to court approval, to assume or reject any executory contract or unexpired lease of the debtor, and the debtor in possession in a Chapter 11 case has all the rights and powers of a trustee. 11 U.S.C. § 1107(a). If the debtor has defaulted on an executory contract, the trustee may not assume the contract unless the trustee cures or provides adequate assurance that the trustee will cure the default. 11 U.S.C. § 365(b). The effect of these provisions is to provide a creditor whose contract is assumed by the debtor with an administrative claim entitled to priority under 11 U.S.C. § 503(b)(1)(A).

The debtor in possession ordinarily can wait until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, although a creditor may ask the court to make such a determination within a particular time. See 11 U.S.C. § 365(d)(2); NLRB v. Bildisco and Bildisco, 465 U.S. 513, 529, 104 S.Ct. 1188, 1198, 79 L.Ed.2d 482. In contrast, a Chapter 7 liquidating trustee has only 60 days from the order for relief to accept or reject contracts. See 11 U.S.C. § 365(d). "This difference between the two types of proceedings reflects the considered judgment of Congress that a debtor in possession seeking to reorganize should be granted more latitude in deciding whether to reject a contract than should a trustee in liquidation." Bildisco and Bildisco, 465 U.S. at 529, 104 S.Ct. at 1198, 79 L.Ed.2d 482. "The authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede successful reorganization." Id. at 528, 1197. If the debtor in possession elects to assume the contract, however, the assumption is *cum onere*, the expenses and liabilities incurred are treated as administrative expenses, and the contracting party's prepetition claim is afforded the highest priority for payment of claims from the debtor's estate. Id. at 531-532, 1199. Therefore, if Debtor assumes the Jarrett contract Debtor is obligated to pay the amount of prepetition invoices comprising Jarrett's cure claim.

Jarrett insists that Section 365 provides authority for its position that Debtor cannot unilaterally reject a contract without this court's approval. The argument correctly states a legal proposition while ignoring other relevant provisions of the bankruptcy code, the principles of contract interpretation, and the language of the Amended Plan.

C. Section 1141

Section 1141(a) of the Bankruptcy Code announces the general rule that the provisions of a confirmed plan "bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor." Case law has established the ability of a confirmed plan to bind creditors. Miller v. Meinhard-Commercial Corp., 462 F.2d 358 (5th Cir.1972); Denver & R.G.W.R. Co. v. Goldman Sachs & Co., 212 F.2d 627 (10th Cir.1954); Evans v. Dearborn Machinery Movers Co., 200 F.2d 125 (6th Cir.1953). This rule binds all creditors, even taxing authorities, regardless of whether or not they have accepted the confirmed plan. See In re Talon Automotive Group, Inc., 284 B.R. 622 (Bankr. E.D. Mich. 2002); In re St. Louis Freight Lines, Inc., 45 B.R. 546, 552 (Bankr. Dist. Mich. 1984). Jarrett is consequently bound by the terms of the Amended Plan, regardless of whether it voted to accept the plan.

D. Applicability of Principles of Contract Interpretation

A confirmed plan holds the status of a binding contract between the debtor and its creditors. McFarland v. Levh (In re Texas Gen. Petroleum Corp.), 52 F.3d 1330, 1335 (5th Cir. 1995) (citing In re Stratford of Texas, Inc., 635 F.2d 365, 368 (5th Cir. 1981)). Interpretation of a Chapter 11 plan is therefore a matter of contractual interpretation. In re Beta International, Inc., 210 B.R. 279 (E.D. Mich. 1996). "As with any contract, the starting point for review of a plan is its plain language." Charter Asset Corp. v. Victory Markets, Inc. (In re Victory Markets, Inc.), 221 B.R. 298, 303 (B.A.P. 2nd Cir. 1998). Unless the plan is ambiguous, the court has no basis to look beyond its text. Id. The question of whether the language of a written agreement is ambiguous is one of law. Parrett v. American Ship Bldg. Co., 990 F.2d 854, 858 (6th Cir.1993). "If a contract is clear and unambiguous, its interpretation is a matter of law and no issues of fact exist." Alexander v. Buckeye Pipe Line Co., 53 Ohio St.2d 241, 246, 374 N.E.2d 146, 150 (1978). "In making the determination of whether language is ambiguous, courts must generally give words and phrases their plain, ordinary, natural or commonly accepted meaning." Gomolka v. State Auto. Mut. Ins. Co., 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347 (1982). Wherever possible, a court should settle on an interpretation that harmonizes and gives effect to all of the provisions of the contract. Golden v. Kelsey-Hayes Co., 73 F.3d 648, 654 (6th Cir. 1996), *cert denied*, 519 U.S. 807, 117 S.Ct. 49, 136 L.Ed. 13 (citing International Union, United Automobile

Workers v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983)). Therefore, the plain text of the Amended Plan provides the starting point for the court's review of Debtor's objection.

E. Analysis

Section 1123 is a substantive checklist of the components of a Chapter 11 reorganization plan. Plan provisions are separated into mandatory items listed in Section 1123(a), and permissive items included in 1123(b). Section 1123(b)(2) states that the plan "may provide for the assumption, rejection or assignment of any executory contract ... not previously rejected." Accordingly, Section 9.1 of the Amended Plan provides for executory contracts, and reads as follows:

Subject to agreement of final terms and cure amounts with respect thereto, on the Effective Date, pursuant to section 365 of the Bankruptcy Code, the Debtor or the Reorganized Debtor, as appropriate, will have assumed, *or will assume* pursuant to the Plan, each of the executory contracts and unexpired leases listed on Exhibit A to the Plan.

(Emphasis added).

"There is general agreement in the definition that a condition precedent is one that is to be performed before the agreement becomes effective." Mumaw v. Western & Southern Life Ins. Co., 97 Ohio St. 1, 119 N.E.132,135 (1917). In the context of the Amended Plan, the phrase "subject to agreement of final terms and cure amounts" expresses Debtor's intent that final agreement between Debtor and a creditor is necessary prior to assumption of any executory contract. If Debtor objects to the cure amount necessary to assume an executory contract, the condition precedent is not satisfied, and there can be no argument that Debtor wishes to assume the contract.

"Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement." Thomasville Furniture Industries, Inc. v. Elder-Beerman Stores Corp., 250 B.R. 609 (Bankr. S. D. Ohio 1998) (citing Shifrin v. Forest City Enters., Inc., 64 Ohio St.3d 635, 638, 597 N.E.2d 499, 501 (1992)). The plain language of the Amended Plan therefore contemplates a process in which Debtor intended to delay final decision regarding assumption or rejection of certain of its executory contracts until Debtor and its creditors had negotiated and agreed upon terms and cure amounts. The purpose of the "subject to" language is reinforced by the fact that Section 9.1 includes the phrase "or will assume," indicating that Debtor was negotiating with creditors and expected to assume some contracts, but that final agreements had not been reached in some cases.

Jarrett ignores the “subject to” in the first sentence of Section 9.1 and focuses on a later portion of the same paragraph which states that on the Effective Date, the Debtor “will have assumed, or will assume pursuant to the Plan, each of the executory contracts and unexpired leases listed on Exhibit A to the Plan.” Amended Plan, Sec. 9.1. Jarrett’s position ignores the requirement that contracts must be read in a manner that harmonizes and gives effect to all provisions of the contract. If the Court were to adopt Jarrett’s interpretation of the Amended Plan, it would effectively strike the first clause of Section 9.1 of the Amended Plan, and ignore Debtor’s intent. Such a result is proscribed by the principles of contract interpretation.

Paragraph 18 of the Confirmation Order also acknowledges that negotiations respecting certain executory contracts might be ongoing as of the Effective Date of the Amended Plan, because it provides that “in the event of any dispute as to the assumption or assumption and assignment of any executory contract or unexpired lease, the Debtor or Reorganized Debtor, as appropriate, shall make any Cure Payment after entry of a Final Order resolving all disputes relating thereto.” Here the plain language of the Confirmation Order reinforces the language of the Amended Plan, and expressly requires agreement between the parties before assumption of an executory contract. Paragraph 18 negates Jarrett’s argument that the court’s approval of the Amended Plan is *res judicata* as to all contracts listed in Exhibit A. If all negotiations were concluded and Debtor intended for all executory contracts to be conclusively assumed as of the Effective Date of the Amended Plan, there would be no need for “subject to” language in Section 9.1, nor any need for the Final Orders established in Paragraph 18 of the Confirmation Order.

IV. CONCLUSION

The provisions of a confirmed plan bind the debtor and its creditors. A confirmed plan must be interpreted consistent with well-established principles of contract interpretation, which require the court to give words their ordinary meaning, to read the contract in a manner that harmonizes and gives effect to every provision, and to give effect to the parties’ intent.

The court finds that the Jarrett contract was not automatically assumed by operation of the Confirmation Order because the Amended Plan specifically contemplated ongoing negotiations between Debtor and its creditors, and reserved assumption of executory contracts subject to final agreement regarding terms and cure amounts. As Debtor has objected to Jarrett’s cure claim, there can be no final agreement on terms and cure amounts. In reaching this conclusion, the court has considered all arguments of the parties, whether or not specifically addressed in this Memorandum of Decision.

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Debtor's objection to the Jarrett cure claim is hereby **SUSTAINED**, and Jarrett's request for payment of its claim as a cure amount entitled to administrative priority under 11 U.S.C. § 503(b) is **DENIED**. Jarrett's claim shall be allowed as a general unsecured claim.

An appropriate order shall enter.

/s/ Russ Kendig

JUN 10 2004

RUSS KENDIG
United States Bankruptcy Judge

SERVICE LIST

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