

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-11087-JMD
Chapter 11

Shepherds Hill Development Co., LLC,
Debtor

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Court is a motion entitled “W.O. Brisben Companies, Inc.’s Motion To Direct Trustee to Execute Letter of Authorization and to Establish Time for Performance Pursuant to Purchase and Sale Agreement,” (the “Motion”) filed on March 2, 2000, by W.O. Brisben Companies, Inc. (the “Movant”). See Ct. Doc. No. 113. The Court granted the Movant’s motion to expedite the hearing on the Motion

over the objection of Edmond J. Ford, the Chapter 11 trustee (the “Trustee”), and the Motion was heard on March 6, 2000 contemporaneously with a motion to vacate approval of the sale of certain property to the Movant. See Ct. Doc. Nos. 114 and 116. At the hearing, the Movant indicated that it believed that it had reached an agreement with the Trustee on the first prayer for relief in the Motion, namely the Trustee’s execution of a letter of authorization for the Movant’s submission of applications and plans to the Town of Hudson Planning Board. On March 10, 2000, the Movants and the Trustee filed a stipulation dated March 9, 2000, resolving the letter of authorization issue and reserving for the Court the Movant’s request to extend the time for performance under paragraph 8 of the purchase and sale agreement between the Movant and Shepherds Hill Development Co., LLC (the “Debtor”). See Ct. Doc. No. 122. At the conclusion of the hearing on a motion to vacate the sale order authorizing the Debtor to sell certain property to the Movant on March 17, 2000, the Court ordered that the parties had until March 24, 2000 to submit objections and memoranda of law regarding the Movant’s request to extend the time for performance. See Ct. Doc. No. 127.

II. BACKGROUND

The Debtor filed for bankruptcy under Chapter 11 on April 2, 1999. The Debtor’s primary asset consists of 68.1 acres of land in Hudson, New Hampshire (the “Property”), a lot that has been approved for the development of 400 housing units. The Debtor’s main creditor is Leonard A. Vigeant (“Vigeant”), whose secured claim is estimated by the Debtor’s schedules to be in the amount of \$3 million.

On December 1, 1999, the Debtor filed motions to sell the Property and to approve bidding procedures. See Ct. Doc. Nos. 40 and 42. Several prospective purchasers for the Property and/or the membership interests in the Debtor had been identified, and written offers had been submitted to the Debtor, some of its equity holders (the “Owners”), or their respective counsel. The Court approved bidding procedures and scheduled a hearing on the motion to sell on December 21, 1999 (the “Sale Hearing”). See Ct. Doc. No. 50. On December 15, 1999, the Owners filed an objection to the Debtor’s sale motion. See Ct. Doc. No. 58. They had attached as exhibits to their objection to the Debtor’s sale motion a copy of

an executed purchase and sale agreement for all of the membership interests in the Debtor from RAD Investments, LLC (“RAD”) for \$19 million and an affidavit from a principal of RAD stating that it was prepared to close on its purchase by December 31, 1999.

At the Sale Hearing, the Owners indicated that the RAD purchase would require additional time to secure the funding necessary to close the purchase. At the Owners’ request, the hearing on their motion to dismiss the case, as required under the terms of the RAD proposal, was continued to January 18, 2000. See Ct. Doc. No. 64. The Movant was the high bidder for the Property and development rights. On December 23, 1999, this Court entered an order authorizing the sale of the Property and the development rights to the Movant free and clear of liens for \$4.15 million (the “Sale Order”) pursuant to 11 U.S.C. § 363(f),¹ and approved the Purchase and Sale Agreement dated December 20, 1999 between the Debtor and the Movant (the “Purchase Agreement”). See Ct. Doc. No. 67. Under the terms of the Sale Order, the Debtor had the right to rescind the Purchase Agreement with the Movant on or before January 24, 2000, subject to payment to the Movant of a break-up fee, if the obligations of RAD under its purchase and sale agreement became final. The Court denied without prejudice the motion to appoint a Chapter 11 trustee and a motion for relief filed by Vigeant. See Ct. Doc. Nos. 65 and 66.

Under the terms of the Purchase Agreement, the Movant had sixty days from the date of its execution and approval to make a physical inspection and to perform due diligence on the Property (the “Due Diligence Period”). See Purchase Agreement at ¶ 5(a). During the Due Diligence Period, or until the Due Diligence Period was waived by the Movant, the Movant was prohibited, without the written consent of the Debtor, from filing for any permits, licenses, or approvals with any governmental authority. See id. at ¶ 5(b). The Movant had the right to terminate the Purchase Agreement by written notice to the Debtor at any time before the end of the Due Diligence Period if it determined that the Property was not suitable or economically feasible for the Movant’s intended use. See id. at ¶ 5(d).

¹ Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

The Movant's obligations under the Purchase Agreement are also contingent upon approval of modifications to the existing "developmental approvals" by the Town of Hudson. See id. at ¶ 5A. If the modifications that the Movant requires are not approved by the sixtieth day following approval of the Purchase Agreement by the Court, or within two thirty-day extensions (the "Modification Period"), the Movant's obligations under the Purchase Agreement automatically terminate, unless such modifications are waived by the Movant within the Modification Period. The Purchase Agreement defines the term "development approvals" as including "the approved development plan, and, to the extent necessary, any and all other permits and approvals necessary to the construction of the development improvements and the structures to be built therein." See id. at ¶ 5A and ¶ 8 (emphasis added). If the modifications are obtained or waived by the Movant within the Modification Period, the closing shall occur on the first business day to occur after thirty days have elapsed from the date of such approvals or waiver. See id. at ¶ 8. Time is of the essence under the Purchase Agreement. See id.

On January 18, 2000, the Owners stated that the RAD proposal was not going to close, but that an alternate purchaser had been located. They requested additional time to finalize the new proposal. The Movant objected to any additional time. The Movant argued that the Sale Order only allowed the Debtor until January 24, 2000 to rescind the Purchase Agreement and that time was of the essence. The Court continued the hearing on the Owners' motion to dismiss to January 24, 2000, the last day available to the Debtor to rescind its Purchase Agreement with the Movant. See Ct. Doc. No. 69. At the January 24, 1999 hearing, counsel for the Owners indicated that they did not have a binding proposal for the purchase of the Debtor's membership interests and, therefore, could not support their motion to dismiss. The Court denied without prejudice the motion to dismiss. See Ct. Doc. No. 72. Immediately before the hearing on January 24, 2000, the Owners filed a motion to vacate the Sale Order. See Ct. Doc. No. 71. The Court denied the Owners' motion to vacate on March 24, 2000. See Ct. Doc. Nos. 133 and 134.

The Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court

for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

III. DISCUSSION

The Motion asks this Court to extend the time for performance pursuant to paragraph 8 of the Purchase Agreement. Notwithstanding the provision that time is of the essence under the Purchase Agreement, the Movant claims that this Court should extend the time for performance because:

1. The Purchase Agreement contemplated that the Movant would seek modification of the development approvals for the Property and that the Debtor was obligated to cooperate with the Movant with respect to applications for such approvals.
2. On or about February 16, 2000, the Movant requested the Debtor to authorize the Movant to submit applications to the Hudson Planning Board and other Town officials or boards having jurisdiction over site plan modifications by executing a proposed letter of authorization, a request to which the Debtor neither objected or responded.
3. Under the Purchase Agreement, the Movant could not apply for modifications without the consent of the Debtor and the failure of the Debtor to execute the proposed letter of authorization frustrated the Movant’s attempts to apply for the modifications contemplated by the Purchase Agreement.
4. The time for the Movant’s performance under the Purchase Agreement, as extended by the Movant, assumed the Debtor’s cooperation, failing which, the Movant’s time to complete a closing under paragraph 8 should be extended.

During the Due Diligence Period, the Movant had the right to terminate the Purchase Agreement and receive a refund of its \$50,000 deposit at any time it determined that the Property was not suitable for its development concept. The Purchase Agreement specifically provided that during the Due Diligence Period, the Movant could not submit any applications to any governmental authority without the consent of the Debtor. Prior to the end of the Due Diligence Period, the Movant had no absolute right under the terms of the Purchase Agreement to compel the Debtor’s consent to any application it wished to submit. The Due Diligence Period would terminate either sixty days after approval of the Purchase Agreement by the Court on February 21, 2000, or when waived by the Movant. The Movant does not contend that it waived the Due Diligence Period. Accordingly, the Court must determine that it expired in accordance with its terms.

In a letter to the Debtor and its counsel dated February 15, 2000, the Movant's counsel purported to extend the Due Diligence Period or the term of the Purchase Agreement for two thirty-day increments. See Ex. 8, Letter dated February 15, 2000. However, the Purchase Agreement does not provide a right for either party to extend the Due Diligence Period. The Movant's argument fails to distinguish between the Due Diligence Period and the Modification Period. What the Movant's counsel intended to do, and actually accomplished, was to exercise the Movant's right to extend the Modification Period for the two thirty-day periods provided in the Purchase Agreement until April 21, 2000, which the Movant had the right to do under the Purchase Agreement.

All of the Movant's reasons for extending its time for performance essentially amount to an argument that the Debtor breached the implied covenant of good faith and fair dealing in its performance under the Purchase Agreement by not authorizing the Movant to file applications when requested. New Hampshire law imposes an implied obligation of good faith and fair dealing on parties to a contract. See Centronics Corp. v. Genicom Corp., 132 N.H. 133, 139-40 (1989). See also Harper v. Healthsource New Hampshire, Inc., 140 N.H. 770, 775 (1996). The Centronics decision sets forth the questions to be examined in context of this proceeding:

1. Does the agreement allow the Debtor a degree of discretion in performance tantamount to a power to deprive the Movant of a substantial value of the Purchase Agreement's value?
2. If the discretion is of that requisite scope, does competent evidence indicate that the parties intended the Purchase Agreement to be a legally enforceable contract?
3. Assuming an intent to be bound, did the Debtor's exercise of discretion exceed the bounds of reasonableness?
4. Is the cause of the damage complained of due to the Debtor's abuse of discretion, or does it result from events beyond the control of either party, against which the Debtor had no obligation to protect the Movant?

See Centronics, 132 N.H. at 143-44.

The first question is answered in the affirmative. The Purchase Agreement contemplated that the Movant might apply for modification of the existing development approvals for the Property. The Movant had a short period of time within which to either obtain modifications or waive such approvals and complete

the purchase. Time was of the essence under the Purchase Agreement. If the Debtor unreasonably delayed cooperating with the Movant in filing applications for such approvals, the Movant could be denied the benefit of the Due Diligence Period and/or the Modification Period despite the expenditure of time and money. In such event, the Movant could be left with the choice of walking away from the deal and losing its investment in due diligence and applications for modifications or waiving such modifications and purchasing the Property with more risk than it may have reasonably contemplated when it signed the Purchase Agreement. The Court finds that the Purchase Agreement gave the Debtor sufficient power to exercise, or fail to exercise, its discretion in a manner that could deprive the Movant of a substantial portion of the value of the Purchase Agreement.

The second question is answered in the affirmative. The Debtor filed a motion to sell and a motion to establish bidding procedures with this Court. As a result of those filings, the Movant was the successful bidder at the Sale Hearing and the Sale Order was entered. Subsequently, principals of the Debtor filed a motion to vacate the Sale Order. The Court finds that both parties intended to be bound by the Purchase Agreement.

The third question is answered in the negative. At a hearing held on February 17, 2000, counsel for the Debtor withdrew from representing the Debtor and the U.S. Trustee indicated that she would be moving for appointment of a Chapter 11 trustee, which no party present in person or through counsel, including the Movant, opposed. After the end of the Due Diligence Period, a motion to appoint a Chapter 11 trustee was filed and granted on February 22, 2000. See Ct. Doc. Nos. 100 and 101. Prior to its filing of the Motion on March 2, 2000, the Movant's attempts to secure the consent of the Trustee are not apparent in the record. However, the absence of motions to compel or other correspondence between the appointment of the Trustee and the filing of the Motion lead the Court to conclude that the Movant's efforts were not characterized by a sense of urgency. The Court finds that the resignation of the Debtor's counsel and the appointment of the Trustee occurred simultaneously with the Movant's request for authorization. There is no evidence that the Trustee unreasonably delayed responding to the Movant's request. Once the Motion was filed on Thursday, March 2, 2000, the Movant secured the attention of the Court, the agreement of the

Trustee, and the authorization of the Trustee for the filing of one or more applications two business days later on Monday, March 6, 2000.² Based upon the facts of this case, the Court cannot find that the questions posed by the recently appointed Trustee in a contentious case were beyond the bounds of reasonableness.

The answer to the third question alone is sufficient justification for denial of the Motion. However, in order to complete the analysis, the Court will review the fourth question under the Centronics decision. The Movant is a company that has completed and manages more than 11,000 units of residential housing comparable to the units proposed for the Property. During the Due Diligence Period, the Movant utilized not only the services of its own personnel, but also retained local legal, civil engineering, and environmental experts. See Affidavit of Ronald C. Dillon dated February 8, 2000, Ct. Doc. No. 85. The Movant does not maintain that it was unaware of the difficulty of obtaining approval for modification of an amended development plan and “all other permits and approvals necessary to the construction of the [amended] development improvements” prior to the end of the Modification Period. Yet it did not bring the problem concerning alleged delays by the Debtor to the attention of the Court until March 2, 2000, and appears not to have had an amended site plan ready until March 6, 2000, the day the Court addressed the Motion and the agreement of the Trustee was secured.

At the December 21, 1999 hearing, the Court approved the sale of the Property to the Movant subject to the terms and conditions of the Purchase Agreement. Among those conditions was a tight deadline for due diligence and modifications of governmental approvals. In attempting to balance the interests of the Debtor’s creditors with the interests of the first mortgagee, the Court had insisted that a time is of the essence provision be added to the Purchase Agreement. See Sale Order at ¶ 3; Purchase Agreement at ¶ 8. Based upon its experience in other states, the advice it received or should have received from its local legal and civil engineering experts, and this Court’s stated concerns over adequate protection

² As discussed below, at the hearing on the Owners’ motion to vacate, a copy of a portion of an amended site plan for the Property was introduced without objection by the Movant as Exhibit 17. The legend on that portion of the site plan reflected an amendment dated “3-6-00” for “Consolidate Duplexes into Multiplexes (Townhouses).” Accordingly, it does not appear that the Movant was ready to file an application for an amended site plan prior to that date.

of the first mortgagee's interests, the Movant knew or should have known that it needed to aggressively pursue its due diligence and any applications to modify approvals for the Property. However, its modified site plan was not completed until March 6, 2000, some 46 days before the end of the Modification Period. Accordingly, the Court finds that the fourth question would be answered in the negative. Although there was some delay in securing the authorization of the Debtor, through the Trustee, it does not appear that such delay was within the control of the Trustee or that any damages claimed by the Movant were the result of any delay by the Trustee.

IV. CONCLUSION

Based upon the record before the Court, it does not appear that the Trustee's delay in authorizing the Movant to apply for modifications to existing development approvals was unreasonable, or that any damages caused by such delay were the result of events within the control of the Trustee. The Motion is therefore denied. Accordingly, the Modification Period will expire on April 21, 2000. If, on or before that date, the Movant obtains all required approvals, or notifies the Trustee that it waives such approvals, it will be obligated to close on the purchase of the Property on the first business day occurring after thirty days have elapsed from the date of such approval or waiver. If all required approvals are not obtained, or such approvals are not waived by the Movant, on or before the end of the Modification Period, the Purchase Agreement will terminate in accordance with its terms.

V. ORDER

For the reasons stated above, the Court denies the second prayer for relief in the Motion. This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7051.

DONE and ORDERED this 28th day of March, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge