

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

In re:

Bk. No. 00-11090-JMD
Chapter 11Stephen Camann,
Debtor

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MEMORANDUM OPINION

I. PROCEDURAL HISTORY

The Court has before it the Debtor's motion to reject an alleged executory contract to which Joan Camann ("Joan"), the Debtor's former spouse, and Gregory Camann ("Greg"), the Debtor's son, have objected.¹ See Doc. Nos. 4, 35, 36, 37, and 38. After conducting two preliminary hearings on the motion

¹ In his motion, the Debtor requests that the Court enter an order authorizing the Debtor to reject an alleged executory contract between him and his son, Greg, for the sale of Camco, Inc. At the close of the evidence at the four-day trial on whether the Debtor entered into an enforceable contract, the Court questioned Debtor's special counsel regarding the scope of the Debtor's motion, which appeared limited to rejecting an alleged contract with Greg. From the testimony at trial, it appeared that both the Debtor and Joan were presenting evidence with respect to an alleged executory contract between the two of them. In response to the Court's questioning, Debtor's special counsel acknowledged that the Debtor's motion should be amended to include a request to reject an alleged executory contract between the Debtor and Joan on all property division issues of which Greg arguably is a third-party beneficiary, and any related separate agreement with Greg. The Court agreed to treat the motion as amended.

on May 10 and 15, 2000, the Court entered several procedural orders in which it ruled that the motion should be treated as a contested matter and that the matter should be tried in two phases. See Doc. Nos. 46, 51, 68, and 78. The parties agreed that the first phase would be limited to two issues: (1) whether the Debtor and Joan and/or Greg entered into an enforceable contract; and (2) whether such contract, if it exists, is executory in nature such that it can be assumed or rejected pursuant to 11 U.S.C. § 365(a). The second phase, if necessary, would address three issues: (1) whether the contract could be rejected; (2) the Debtor's defense that any such contract was unconscionable; and (3) what damages would result from the Debtor's rejection of the contract.

The Court heard testimony relative to the first phase on May 25, 26, and 30 and June 1, 2000. Five witnesses testified in court, including Charles Leahy, Esq., Gregory Camann, Daniel Muller, Esq., Luke O'Neill, Jr., Esq., and Theodore Medrek, C.P.A. Because of her unavailability, the parties agreed to admit into evidence the deposition testimony of Connie Rakowsky, Esq., subject to certain evidentiary rulings by the Court. See Exhibit 307. After considering the testimony of these witnesses, the exhibits and pre-trial statements submitted by the parties, the argument of counsel, and the parties' requests for findings of fact and rulings of law, the Court issued an order on June 2, 2000 finding that the parties had not entered into an enforceable contract. This memorandum opinion shall set forth the Court's reasoning for making its ruling.

This 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).

II. FACTUAL BACKGROUND

The Debtor and Joan separated in 1989 and began divorce proceedings in state court in 1990. On December 15, 1995, the Debtor and Joan executed a proposed final decree in order to resolve their divorce

proceeding (the “Stipulation”). See Exhibit 1. On December 22, 1995, Judge William Groff of the Hillsborough County Superior Court approved the recommendation of the marital master and entered a decree of divorce, approving the Stipulation and incorporating it into a final order (the “Final Decree”). See id. The Final Decree was subject to the parties’ compliance with various agreements made with Bonham, as agent for the FDIC, “as reflected in ‘Bonham’s’ Conditional Assent to Proposed Decree of Divorce.” See id. It appears that the parties have complied with the terms of their agreements with Bonham and the FDIC.

Under the terms of the Stipulation the parties divided all of the marital property into the following categories:

1. Life Insurance on the Debtor (Section VII);
2. Primary Residences (Section IX.4);
3. Joan Camann Parcels of Land (Section IX.4);
4. Camco, Inc. (Section IX.5.a);
5. Manchester Realty Co. (Section IX.5.b);
6. Lake Winnepesaukee Property (Section IX.5.c);
7. Hooksett Land (Section IX.5.d);
8. Household Furniture and Furnishings (Section X);
9. Other Personal Property (Section XI); and
10. Personal Motor Vehicles (Section XII).

Under the Stipulation, the assets in categories 3, 4, 5, 6 and 7 are referred to as the “Designated Assets.” Pursuant to the Stipulation, if the parties had not entered into any other agreement with respect to the Designated Assets as of May 1, 1996, the Debtor was to immediately place the Designated Assets on the market for sale. It is undisputed that the parties had not reached any “other agreement” with respect to the Designated Assets by May 1, 1996 and that such assets have never been placed on the market for sale. In addition, the Stipulation provided that if any of the Designated Assets remained unsold on April 30, 1998, “Joan Camann may move for the appointment of a commissioner effective May 1, 1998 to conduct the sale.” See Exhibit 1 at Sections IX.5 and IX.6.

In late 1995 and early 1996, Attorneys Leahy and O’Neill, counsel for the parties, began negotiating the division of the Designated Assets. See Exhibits 2 and 3. Negotiations on an agreed division of the Designated Assets appear to have proceeded slowly for a number of reasons including (1) the parties’

perceived need to continue the interdependent operation of certain income producing assets in categories 3 and 5 with the business of Camco, Inc. (“Camco”), (2) tax considerations, (3) each party’s income needs, and (4) the parties’ goal of attempting to divide the marital assets in a manner “advantageous” to their children. After May 1, 1996, both the Debtor and Joan were frustrated with the snail-like pace of the negotiations, and threats of invoking the liquidation provisions of the Stipulation were made by both parties. Yet, negotiations continued. See Exhibits 11 through 15 and 17 through 20.

Throughout 1997 and early 1998, the parties jointly explored a variety of concepts and proposals that could meet their mutual goals for a division of the Designated Assets. Early in this time frame, Mr. Medrek, the accountant for the Debtor, Camco and Manchester Realty Co. (“Manchester Realty”), worked to develop a structure that would meet the parties’ business, income, and tax goals while at the same time accomplishing their joint desire to see their son Greg become the owner and operator of the Camco business. Although Mr. Medrek was an advisor for the Debtor, his financial and tax analysis (i.e., “number crunching”) was relied upon by counsel for both parties in evaluating the financial and tax impact of various proposals. In early 1998, Mr. Medrek proposed a structure under which (1) the income producing real estate assets would be divided into two “baskets” which, after readjustment of the debt on various properties, would provide the owner of each basket with approximately the same after-tax net cash flow; (2) the non-income producing real estate assets would be sold with the net proceeds divided equally between the parties; and (3) after the Debtor gifted a 50% stock interest in Camco to Joan, they would sell their aggregate 100% stock interest in Camco to their son Greg. Both parties agreed in concept with the basic structure proposed by Mr. Medrek and proceeded to negotiate the details and terms of the transactions necessary to accomplish the proposal. See Exhibits 23, 24, 28, 205, 206, 209, 210, 211 and 213.

Despite the parties’ apparent agreement on the basic structure regarding the division of the Designated Assets, by the summer of 1999, the majority of the marital assets had not yet been distributed and/or liquidated as provided by the terms of the Stipulation and/or the Medrek proposal.² On July 19,

² As of the date of filing of the Debtor’s bankruptcy petition, the division of assets in categories 2, 6, and 10 outlined above had been accomplished and all of the assets in category 8 except the division of the

1999, Joan Camann filed a petition to enforce certain alleged post Final Decree agreements or, in the alternative, appoint a commissioner under section IX.6 of the Stipulation. She also sought the imposition of sanctions against the Debtor. On April 12, 2000, just minutes before the trial on the petition to enforce was scheduled to commence, the Debtor filed a Chapter 11 bankruptcy petition. To date, neither Joan nor Greg has filed a motion to dismiss the Debtor's bankruptcy case nor a motion for relief seeking to have the divorce-related issues decided in state court. Rather, all parties have continued to litigate the disputed matters here in this Court.

III. DISCUSSION

Before the Court can determine whether the Debtor may reject the alleged executory contract with Joan relating to the division and disposition of the Designated Assets, including Camco, which the Court characterizes as an alleged settlement agreement,³ the Court must first determine that a contract exists, and, if a contract exists, whether it is executory for purposes of the Bankruptcy Code.

Settlement agreements are in the nature of contracts and are generally governed by principles of contract law. See Clark v. Mitchell, 927 F. Supp. 110, 113 (D.N.H. 1996). Pursuant to New Hampshire contract law, the party alleging that a contract exists has the burden of producing evidence from which the intention of the parties may be discovered, the nature and extent of their obligations ascertained, and their

Robert Eschoo paintings contemplated in Schedule B of the Stipulation appear to have been divided between the Debtor and Joan.

³ Pursuant to the Stipulation, “[i]f, as of May 1, 1996, Joan Camann and Stephen Camann have not entered into any other agreement with respect to the following assets (the ‘Designated Assets’) Stephen Camann will immediately place the Designated Assets on the market for sale, balancing Stephen and Joan Camann’s shared desire to obtain the best possible price, and in the case of Camco, payment terms.” Exhibit 1 at Section IX.5. Similarly, “[i]f Stephen Camann and Joan Camann have not entered into an other agreement concerning Camco, Inc. as of May 1, 1996, Camco, Inc. will be placed on the market.” Id. at Section IX.5.a. The Stipulation further provides that “[i]f, as of May 1, 1996, Stephen and Joan Camann have not entered into any other agreement concerning Manchester Realty Co., its real estate will immediately be placed on the market.” Id. at Section IX.5.b. The record is clear that the Debtor failed to place these assets on the market as required by the Stipulation. Accordingly, the Court will treat the parties’ negotiations and alleged agreements as attempts to settle litigation regarding the Debtor’s default under the Stipulation.

rights determined. See O'Donnell v. Cray, 109 N.H. 223, 225 (1968) (quoting Maloney v. Boston Dev. Corp., 98 N.H. 78, 81 (1953)); see also H & B Constr. Co. v. James R. Irwin & Sons, Inc., 105 N.H. 279, 281 (1964). “This is established by what the parties said or did, their overt acts, and what they gave each other to understand.” O'Donnell, 109 N.H. at 225; see also Dedes v. Dedes, 93 N.H. 215, 217 (1944) (stating that the making of a contract may be proved wholly or partly by written or spoken words or by other acts or conduct). “Any undisclosed meaning or intention which one of the parties might have had is immaterial in arriving at the existence and terms of a contract between the parties.” O'Donnell, 109 N.H. at 225; see also Simonds v. City of Manchester, 141 N.H. 742, 744 (1997) (“[U]ndisclosed meanings and intentions are ‘immaterial in arriving at the existence of a contract between the parties.’”).

The inquiry into whether a contract has been formed is an objective one. See Simonds, 141 N.H. at 744; McConnell v. Lamontagne, 82 N.H. 423 (1926). “In order for a contract to be formed there by must be a meeting of the minds as to the terms thereof. The parties must have the same understanding of the terms of the contract and must manifest an intention, supported by adequate consideration, to be bound by the contract. Mere mental assent is not sufficient; a ‘meeting of the minds’ requires that the agreement be manifest. The question of whether a ‘meeting of the minds’ occurred is a factual question to be determined by the trier of fact, provided there is some evidence on which to base such a finding.” Fleet Bank–NH v. Christy’s Table, Inc., 141 N.H. 285, 287-88 (1996) (citations omitted). Where there is a conflict in the evidence, the existence and the terms of the contract are issues to be resolved by the trier of fact who may accept or reject in whole or in part any testimony of the parties. See O'Donnell, 109 N.H. at 225; Al Saucier & Son, Inc. v. McVetty, 107 N.H. 419, 421 (1966). “[R]easonable certainty that a meeting of the minds occurred is all that is necessary to evidence a contract.” Estate of Younge v. Huysmans, 127 N.H. 461, 465-66 (1985).

A. MEETING OF THE MINDS

The key issue for the Court is whether the Debtor and Joan had a meeting of the minds with respect to the disposition of the undivided and unsold Designated Assets including Camco (i.e., categories 3, 4, 5 and 7 outlined above), and any remaining marital assets, such as the life insurance policies and the boats, cars, and paintings. Joan points to a number of exhibits to demonstrate that she and the Debtor had an agreement on all material terms with respect to the division and distribution of the Designated Assets. See Exhibits 209 (which references Exhibits 205-208), 210-217, and 222. She also contends that the division of any remaining marital assets (i.e., life insurance, cars, boats and paintings) were not part of any post Final Decree agreement. The Debtor argues that the Debtor and Joan did not have a meeting of the minds because (1) he insisted on a global agreement on all remaining Designated Assets and other marital assets; (2) no agreement had been reached with respect to at least seven material items; and (3) three conditions precedent had not been met. The Court finds that there was no meeting of the minds with respect to at least one material term of the agreement being negotiated between the parties, the disposition of the Manchester Realty insurance policy on the Debtor's life.

As early as September 1996, the parties indicated that their intent was to divide the marital assets in a fashion which would be "advantageous" not only to the Debtor and Joan but to their children as well. See Exhibit 12. As negotiations progressed, Attorney O'Neill and Mr. Medrek raised an issue with respect to the Debtor's life insurance policies with Joan's counsel, Attorney Leahy. Mr. Medrek's notes evidence a January 1997 meeting with Attorneys Leahy and O'Neill at which life insurance was discussed. See Exhibit 28. According to Mr. Medrek, the Debtor wanted to keep the \$1 million Manchester Realty life insurance policy, with a \$400,000 to \$500,000 cash value, without providing Joan half the cash value as required by the Stipulation. See Exhibit 1 at Sections VII and IX.5. The Debtor wanted use of the life insurance policy to pay estate taxes upon his death, which would provide a benefit to the parties' daughters. Mr. Medrek's notes indicate that Attorney Leahy thought it could be acceptable for the Debtor to keep the life insurance policy without providing Joan half the cash value so long as the named beneficiaries were the parties'

daughters. Attorney Leahy represented to Mr. Medrek and Attorney O'Neill at the January 1997 meeting that he thought this was a reasonable request and that he could obtain Joan's agreement on this issue. The Court finds that counsel for both parties had sufficient estate planning experience to recognize the significance of the Debtor's proposal to use one of the life insurance policies to provide liquidity in his estate plan for the benefit of his daughters.

The record contains evidence that into 1998 the Debtor remained concerned about how to treat the parties' daughters fairly given the proposed sale of Camco to Greg. In Mr. Medrek's notes of a meeting dated January 15, 1998, a question was raised as to how to make the estate fair to the parties' daughters. See Exhibit 270. In Mr. Medrek's notes dated January 20, 1998, there is an example, which he went through with the Debtor, of how to treat the daughters fairly should Camco be sold to Greg for \$1 million. See Exhibit 272.

While the life insurance issue was not specifically mentioned in Attorney O'Neill's July 27, 1998 letter to Attorney Leahy, Attorney O'Neill does mention that the Debtor, Joan, and "other members of the family" will be looking for "adequate protections in the [Camco] transaction." See Exhibit 209. This is consistent with the notion that the Debtor wanted to treat his daughters fairly given the sale of Camco to their brother and the representation by Attorney Leahy at the January 1997 meeting that he thought he could obtain Joan's consent regarding the Debtor's purchase of the Manchester Realty life insurance policy without providing an offset to Joan for half its cash value.

Attorney Leahy's letter to Attorney O'Neill dated October 28, 1998 also omits any mention of the Manchester Realty life insurance policy. See Exhibit 37. Mr. Medrek testified that he was surprised by this omission and he so informed Attorney O'Neill. Mr. Medrek's notes of a meeting with the Debtor and Attorney O'Neill roughly two weeks later on November 10, 1998 question "what to do with life insurance policies." See Exhibit 39. Again, in his notes of a November 12, 1998 meeting with the Debtor, Attorney O'Neill, and Greg, Mr. Medrek mentions the Manchester Realty life insurance policy and the need to have a meeting with Attorney Leahy regarding the same. See Exhibit 40. The evidence supports the testimony of

Attorney O'Neill and Mr. Medrek that the life insurance policy owned by Manchester Realty was an important issue for the Debtor throughout the negotiations and that they did not concede or remove the life insurance issue from the negotiating table.

While it is unclear whether Attorney O'Neill and/or Mr. Medrek ever met with Attorney Leahy after November 12, 1998 to discuss the Manchester Realty life insurance policy, it is uncontested that as of April 1999 Attorney Rakowsky was put on notice by Greg that the Manchester Realty life insurance policy was still an issue with his father. Her notes of an April 2, 1999 conversation with Greg reflect that the Debtor still wished to keep the Manchester Realty life insurance policy without payment to Joan so that it could be given to his "kids" and used for estate purposes. See Exhibit 60.

Despite the Debtor's continued interest in purchasing the policy without providing Joan with half the cash value, Attorney Leahy testified at trial that he would not have advised Joan to give up her entitlement under the Stipulation to this asset which was worth approximately \$200,000 to \$250,000.

Given all of this the evidence, the Court finds that the terms of the disposition of the Manchester Realty life insurance was a material element of the negotiations between the parties, which term was never agreed upon. While the Stipulation provided that the Debtor could purchase the Manchester Realty life insurance policy and give Joan half the cash value, it is clear that the Debtor was seeking a modification of these Stipulation provisions as part of the negotiations. The Debtor and Joan did not agree on the terms of how the Manchester Realty life insurance policy should be treated. Accordingly, while the parties may have agreed on many of the material terms of their settlement agreement, Joan has not met her burden of proving that she and the Debtor had a meeting of the minds on all material elements of their alleged settlement agreement.

The facts of this case are similar to those in Clark v. Mitchell, 937 F. Supp. 110 (D.N.H. 1996), a case decided by Judge Stephen McAuliffe of the U.S. District Court for the District of New Hampshire. In that case, the court found that, even where there had been acceptance of some elements of a settlement offer, there was no agreement even as to those parts nominally "accepted" where counsel had rejected other

parts of the settlement offer. See id. at 113. “The parties either have a complete, enforceable settlement agreement, requiring no further negotiation on any material point, or they have no settlement agreement at all.” Id. at 114.

Here, the Debtor does not dispute that the parties reached agreement on many material elements with respect to the disposition of the Designated Assets. For example, the parties agreed on what properties would be included in each of the income producing property “baskets” and who would receive each basket. The parties were also in agreement that Camco would be transferred to Greg. Attorney O’Neill testified that pieces of what could have become a final agreement had in fact been resolved by the parties. The problem, as the Court sees it, is that the parties did not reach agreement on all material elements of the settlement. Therefore, under the Clark decision, there is no enforceable settlement agreement between the parties.

In addition to the life insurance issue, the Court notes that correspondence from Attorney Rakowsky to Attorney O’Neill in late June 1999 shows that the parties did not have a meeting of the minds with respect to the cash payment for the cars and boats and whether the written agreement should contain an integration clause. See Exhibits 54 and 55. The Court notes that the draft agreement prepared by Attorney Rakowsky contains the first written mention of these personal property assets. The record suggests that the disposition of the boats and cars were not being negotiated by the parties during the time they were negotiating disposition of the Designated Assets. Although it is unclear whether the parties considered an agreement regarding their cash value a material term of any settlement between them, it is clear the parties had not reached agreement on the amount to be distributed to Joan on account of the cars and boats.

With respect to the other issues raised by the Debtor relating to a “global settlement,” proximity, pre-payment penalties, the Debtor’s future role in Camco, and the need for state court approval of any modification of the Final Decree, the evidence is not as compelling as to whether such issues were raised in the negotiations, and, if raised, whether they were later removed from the negotiating table. In any event, the Court finds it unnecessary to consider whether the parties ever had a meeting of the minds with respect

to those issues as the failure to agree on the terms of the disposition of the Manchester Realty life insurance policy is sufficient to support the Court's finding that the parties did not enter into an enforceable settlement agreement. Similarly, the Court need not address whether the conditions precedent asserted by the Debtor, namely, the final Stone appraisal, the two-week review period, and state court approval, were actual pre-conditions to the enforceability of any agreement. The Courts notes, however, that it is apparent that none of these three conditions were actually satisfied.

As for the Debtor's alleged agreement to transfer Camco to Greg, the Court finds that this agreement was part and parcel of the Debtor's attempted settlement with Joan as the transfer to Greg was to occur in two stages with the first being a transfer of 150 shares of Camco from the Debtor to Joan. It makes no difference whether the alleged agreement with Greg was part of the alleged settlement agreement between his parents or were separate agreements between him and each of his parents. The evidence at trial revealed that the Debtor was not prepared to close the Camco transaction without first reaching final agreement with Joan regarding the transfer of the income producing properties, on which the Camco donut shops were located, and other marital assets. The record is replete with evidence that both the Debtor and Joan considered the transfer of the income producing real property and the donut shops to be interconnected. Indeed, the terms of the agreement alleged by Greg would require the consent of Camco's franchisor and a loan commitment from a bank, neither of which would likely be available if Camco's leasehold rights in the income producing real estate were to be subject to unknown future multiple owners and lease terms. Accordingly, absent a valid enforceable agreement between his parents on the division of the such assets, Greg cannot have an enforceable agreement with the Debtor to acquire Camco.

B. AUTHORITY OF AGENT TO ENTER INTO AN ENFORCEABLE SETTLEMENT AGREEMENT

In this case, Joan argues that Attorney O'Neill had authority to enter into a settlement of the divorce litigation on behalf of his client, the Debtor. "Representation of a client by an attorney is based upon the law of agency. In general, an agency relationship occurs only when one, as principal, gives authority to another to act as agent on the principal's behalf. Authority to act as an agent may be express or may be implied from actions and conduct." Fleet Bank–N.H. v. Chain Constr. Corp., 138 N.H. 136, 139 (1993) (citations omitted). "Whether an attorney is acting within the scope of his or her authority is a question of fact." Clark, 937 F. Supp. at 114.

Here, it is undisputed that Attorney O'Neill represented the Debtor during the period when the parties were negotiating the disposition of the Designated Assets. Joan argues that Attorney O'Neill was expressly or impliedly authorized to enter into a settlement agreement implementing the division of the Designated Assets under the Stipulation and that Attorney O'Neill had apparent authority to bind the Debtor, his client and principal. According to Joan, the evidence relating to Attorney O'Neill's authority can be found in Exhibits 209 (which references Exhibits 205-208), 210-217, and 222.

Upon review of these exhibits, the Court finds that Attorney O'Neill was careful in his representation regarding authority. In the only written letter to Joan's counsel contained in her list of exhibits that she alleges constitute an agreement, Attorney O'Neill stated that the letter had not been reviewed by the Debtor, making it clear that any proposed settlement needed to be reviewed and approved by the Debtor. See Exhibit 209. The Court notes further that Attorney O'Neill testified that the terms of the final agreement required the Debtor's approval, hence the need for the Debtor's two-week review period to which Attorney Rakowsky agreed in June 1999.

While action taken in the conduct and disposition of civil litigation by an attorney within the scope of his authority is binding on his client, see Bock v. Lundstrom, 133 N.H. 161, 163-64 (1990) (quoting Manchester Housing Auth. v. Zyla, 118 N.H. 268, 269 (1978)), in this case, it should have been clear to Joan and her counsel that Attorney O'Neill needed to obtain final approval of any alleged settlement

agreement from the Debtor. Attorney O'Neill testified that he only had authority to negotiate for the Debtor; he had no authority to enter into a binding agreement without the Debtor's consent. Attorney O'Neill further testified that he thought Joan's attorneys were working under the same limited authority.

Accordingly, the Court finds that Attorney O'Neill did not have actual or apparent authority to bind his client with respect to the alleged settlement between the Debtor and Joan. For this additional reason, the Court finds that there is no enforceable contract between the Debtor and Joan. See Clark, 937 F. Supp. at 114 (stating that an attorney's authority only becomes a critical issue if a settlement agreement has in fact been reached by counsel).

IV. CONCLUSION

As discussed above, the Court finds that the parties have not entered into an enforceable contract because the Debtor and Joan did not have a meeting of the minds with respect to all material terms regarding the disposition of the Designated Assets and the life insurance policies. In addition, the Court finds that Attorney O'Neill did not have actual or apparent authority to enter into a settlement agreement with Joan. For these reasons, there is no executory contract for the Debtor to reject pursuant to 11 U.S.C. § 365(a). This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court has previously issued a separate order consistent with this opinion.

DATED this 6th day of June, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge