2002 BNH 007 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-11899-JMD
Chapter 7

Blue Fin Technologies, Inc.,
Debtor

Timothy P. Smith, Trustee,
Plaintiff

v. Adv. No. 01-1203-JMD

WinBook Computer Corporation,
Defendant

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Chapter 7 Trustee

MEMORANDUM OPINION

I. INTRODUCTION

On February 8, 2002, the Court held a hearing on WinBook Computer Corporation's Motion to Dismiss Cross-Complaint (the "Motion to Dismiss"), filed by the Defendant WinBook Computer Corporation ("WinBook"). WinBook was seeking to have all counts of the Plaintiff's (hereinafter the "Trustee") complaint dismissed under Federal Rule of Civil Procedure ("Rule") 12(b)(6) as made applicable

to this proceeding by Federal Rule of Bankruptcy Procedure 7012. After hearing from all parties the Court took the matter under submission.

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. FACTS

On August 9, 1999, WinBook and Blue Fin Technologies (the "Debtor") entered into a servicing contract wherein the Debtor would provide computer repair services for WinBook's customers. Under the contract the Debtor performed repair services for WinBook's customers and on a periodic basis billed WinBook for work that had been performed. The contract expressly provided that it could be "amended only by a written document executed by duly authorized personnel" of the parties. Further, neither party was allowed to assign the contract, in whole or in part, without obtaining the consent of the other. The parties also agreed that the contract was to be governed by Ohio law.[1]

When the Debtor began experiencing financial difficulties late in 2000 the parties began discussing the possibility of having the Debtor assign its repair duties to another company. The Debtor and WinBook eventually found a third party, Solectron Global Services ("Solectron"), who was willing to take over the repair responsibilities. In order to maintain a consistent level of service for WinBook's customers, WinBook required and the Debtor agreed to sell the Debtor's repair facility in Louisville, Kentucky (the "Louisville facility") to Solectron. In addition to discussing the assignment of the Debtor's duties to Solectron, the parties also began discussions about what the Debtor was owed for services that had been performed for WinBook's customers, but not yet paid for by WinBook.

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[1] It should be noted that the parties agree, at least as to Counts I through V, that Ohio law should apply to this case.

During negotiations the parties had agreed that the deal had to be completed by March 12, 2001. At the beginning of March 2001 the negotiations between the parties began moving on an accelerated track. On March 5, 2001, Ron Hildebrand, Vice-president of Operations and lead negotiator for WinBook, was leaving the country on a business trip. However, due to the time constraints on completing the negotiations, he designated other personnel at WinBook with the responsibility of completing the negotiations. The Trustee alleges that eventually an agreement was reached, although never signed by the two parties. The Trustee alleges that the agreement reached called for the Debtor to assign its repair duties to Solectron and for the Debtor to sell its Louisville facility to Solectron all in exchange for the Debtor being paid $200,000.00 for services the Debtor had performed for WinBook's customers through February 28, 2001.

Although negotiators at WinBook circulated a draft of a document containing what the Trustee alleges was the agreement between the parties, no written agreement was executed by WinBook or the Debtor. The Debtor subsequently did assign its duties to Solectron and did sell its Louisville facility to Solectron. WinBook has not raised any objection to the assignment despite the absence of its written consent. However, no payment was ever received by the Debtor from WinBook for services the Debtor had performed for WinBook's customers prior to the assignment.

III. DISCUSSION

The Trustee has filed an Objection to Claim of WinBook Computer Corporation and Cross-Complaint to Recover Money or Property (the "Complaint") against WinBook seeking the payment that the Debtor had allegedly been promised by WinBook during the aforementioned negotiations and damages stemming from WinBook's failure to provide such payment. The Trustee's Complaint contains six separate counts and WinBook's Motion to Dismiss seeks dismissal of all counts. In ruling on WinBook's Motion to Dismiss the Court "must accept as true the well-pleaded allegations of the complaint, draw all reasonable inference therefrom in the plaintiff's favor, and determine if the complaint contains facts sufficient to justify recovery on any cognizable theory." Bezanson v. Gaudette (In re R & R Assocs. of Hampton), 248 B.R.

1, 4 (Bankr. D.N.H. 2000) (citing LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998)).

A. Fraud/Bad Faith (Count I)

In Count I of his Complaint the Trustee seeks to recover from WinBook under a theory of bad faith and/or fraud. Under Ohio law fraud is defined as

> (a) a representation or, where there is a duty to disclose, concealment of a fact,
> (b) which is material to the transaction at hand,
> (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
> (d) with the intent of misleading another into relying upon it,
> (e) justifiable reliance upon the representation or concealment, and
> (f) a resulting injury proximately caused by the reliance.

Williams v. Aetna Fin. Co., 700 N.E.2d 859, 868 (Ohio 1998).

The Trustee claims that WinBook induced the Debtor to assign its service contract to Solectron and sell its Louisville facility to Solectron in return for an agreed upon payment of the amount due for services performed. The Trustee claims that the Debtor never would have assigned its rights or sold its Louisville facility to Solectron if the amount of the promised payment by WinBook had not been agreed upon. The Trustee further claims that the representation that the Debtor would be paid was made falsely or with reckless disregard by WinBook or its agents and that WinBook intended for the Debtor to rely upon these false statements. The Trustee claims that the Debtor's reliance was reasonable and that as a result of the reliance the Debtor has been harmed in that the Debtor has not been paid for services performed for WinBook's customers.

WinBook claims that this count should be dismissed because the contract required all modifications to the contract to be in writing. As WinBook never signed a document agreeing to pay the Debtor the amount discussed during the negotiations, WinBook claims that the Trustee has no basis for asserting a claim based upon fraud. WinBook also claims that the Trustee cannot maintain a cause of action for fraud because the Trustee is required to show false statements were made with regards to past or existing facts and not future promises.

It appears to the Court that the negotiations relating to the assignment of the Debtor's duties to Solectron and the amount of payment due to the Debtor for services performed may not constitute a modification to the terms of the contract. If the parties were simply negotiating on how to effectuate the terms of the contract, no modification would be involved. The Debtor needed WinBook's consent in order to assign its duties to Solectron and the parties were working out the details of how to obtain that consent. Further, it is clear to the Court that there was some dispute with regards to how much the Debtor was owed for services it had previously performed for WinBook's customers. Negotiations leading to an agreement between the parties to resolve the amount owed according to the terms of the contract would not be a modification of the contract. Therefore, the requirement that modifications to the contract be in writing may not apply to the agreement allegedly reached between the parties in March of 2001.

Even if the alleged agreement constitutes a modification of the contract, the Trustee has cited at least one case wherein an Ohio court of appeals has held that parties can orally waive a clause requiring changes to be in writing. See Fahlgren & Swink, Inc. v. Impact Res., Inc., No. 92AP-303 (regular calendar), 1992 Ohio App. LEXIS 6766 (Ohio Ct. App. Dec. 24, 1992).[2] Accordingly, under Ohio law the Trustee may be able to establish that WinBook's statements and conduct result in a waiver of the contract clause requiring such modifications to be in writing.

With regards to WinBook's claim that the Trustee must show false statements were made with regards to existing facts, the Court finds that in certain circumstances Ohio law does allow a cause of action based upon fraud when the false statement relates to future promises. See Dunn Appraisal Co. v. Honeywell Info. Sys., Inc., 687 F.2d 877, 883 (6th Cir. 1982) (interpreting Ohio law); Tibbs v. Nat'l Homes Constr. Corp., 369 N.E.2d 1218, 1223 (Ohio App. 1977).

Therefore, WinBook's Motion to Dismiss Count I of the Complaint is denied.

B. Breach of Contract (Count II)

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[2] As noted earlier, the parties agree, at least as to Counts I through V, that Ohio law should apply to this case.

In Count II of his Complaint the Trustee seeks recovery from WinBook under a breach of contract theory. The Trustee claims that WinBook had promised to pay the Debtor for services performed at an agreed upon amount in exchange for the Debtor assigning its duties to Solectron and the Debtor selling its Louisville facility to Solectron. In not providing the promised payment the Trustee claims that WinBook breach the agreement. In the Motion to Dismiss WinBook once again argues that the contract required modifications to be in writing.

As discussed in section A above, the alleged agreement between the parties may not constitute a modification of the contract terms, in which event the writing requirement may not apply, or WinBook may have waived the writing requirement. Accordingly, WinBook's Motion to Dismiss Count II of the Complaint is denied.

C. Unjust Enrichment/Quantum Meruit (Count III)

In Count III of the Complaint the Trustee seeks recovery from WinBook under the theory of unjust enrichment. The Trustee claims that WinBook has been unjustly enriched in that the Debtor performed services for WinBook and the Debtor has not been paid for such services. WinBook claims that a party can only rely upon a theory of unjust enrichment when there is the absence of a contract.

Under Ohio law unjust enrichment is a quasi-contractual theory of recovery that applies in the absence of an express contract or a contract implied in fact. See Daup v. Tower Cellular, Inc., 737 N.E.2d 128, 138 (Ohio App. 2000). Since the Trustee's claims are based either upon the original contract, or upon an enforceable oral modification of that contract, quasi-contract or unjust enrichment would not be available. Id. at 138-39.

WinBook's Motion to Dismiss Count III of the Complaint is granted.

D. Promissory Estoppel (Count IV)

In Count IV of his Complaint the Trustee seeks recovery from WinBook under a promissory estoppel theory. The Trustee claims that WinBook promised to pay the Debtor for services performed in exchange for the Debtor assigning its rights and selling its Louisville facility to Solectron. The Trustee

claims that the Debtor justifiably relied upon WinBook's promise and that the Debtor has been injured as a result of WinBook's failure to pay the Debtor. WinBook claims that in order to recover under this theory the Trustee must prove reasonable reliance. WinBook claims that since the contract required modifications to be in writing the Debtor could not have reasonably relied upon any oral statements WinBook made regarding payment. Accordingly, WinBook argues that the Trustee's claim under promissory estoppel must fail and should, therefore, be dismissed.

As discussed above, the alleged agreement between the parties may not constitute a modification to the original contract or may be an enforceable modification under a waiver of the writing requirement. In either event WinBook, as a party to a contract, may be bound by the action, or inaction, of its agents in connection with the negotiation and performance under the contract. See Pertz v. The Edward J. DeBartolo Corp., 188 F.3d 508 (6th Cir. 1999) (interpreting Ohio law).

WinBook's Motion to Dismiss Count IV of the Complaint is denied.

E. Equitable Estoppel (Count V)

In Count V of the Complaint the Trustee alleges that WinBook made statements that it would pay the Debtor if the Debtor assigned its rights and sold its Louisville facility to Solectron. The Trustee claims that the Debtor reasonably relied upon such statements and the Debtor performed the actions that were required to effectuate its end of the deal. WinBook claims that since the contract required modifications to be in writing the Debtor could not have reasonably relied upon any oral statements WinBook made regarding payment. Accordingly, WinBook argues that the Trustee's claim under promissory estoppel must fail and should, therefore, be dismissed.

For the reasons discussed in subsections A, B and D above, the writing requirement may not apply or may have been waived. Accordingly, WinBook's Motion to Dismiss Count V of the Complaint is denied.

F. Unfair and Deceptive Trace Practices under RSA 358-A (Count VI)

The Trustee alleges that the Debtor and WinBook were engaged in trade or commerce within the meaning of New Hampshire Revised Statutes Annotated ("RSA") 358-A. The Trustee claims that WinBook's conduct in inducing the Debtor to assign its rights and sell its Louisville facility in return for payment by WinBook for an amount due to the Debtor constitutes a violation of RSA 358-A and entitles the Debtor to recover treble damages, costs, and attorneys' fees. WinBook claims that the Trustee is estopped from bringing Count VI under New Hampshire law because he has agreed that Ohio law applies to Counts I through V. Further, WinBook claims that the Trustee has failed to state a claim under RSA 358-A. WinBook claims that modifications were required to be in writing and accordingly, the most WinBook can be guilty of is backing out of negotiations.

WinBook's estoppel argument regarding the Trustee's position on choice of law under Count VI is unavailing. In his complaint the Trustee specifically stated that he was agreeing that Ohio law would apply to Counts I through V simply to avoid "choice of law litigation." See Doc. No. 1, p. 12 footnote 1. The Trustee went on to further clarify that Count VI was being brought under New Hampshire law and was a claim separate and apart from the underlying service agreement. Id. Accordingly, the Court finds that the Trustee has not agreed that Ohio law applies to the entire case, but has simply conceded to the application of Ohio law to Counts I through V in order to avoid litigation expense.

However, the allegations against WinBook which form the basis for the Trustee's claim in Count VI all arose under or in connection with the subject matter of the original contract between the parties. Although the Trustee did not agree to the application of Ohio law to Count VI of the Complaint, the contract between the parties does contain a choice-of-law provision stating that Ohio law is to apply to the contract. Under both Ohio and New Hampshire law such a choice-of-law provision will be enforced if the forum chosen by the parties has a significant relationship to the contract. See Allied Adjustment Serv. v. Heney, 125 N.H. 698, 700 (1984); Blaushild v. Smartcars, Inc., No. 1:92 CV 0308, 1992 U.S. Dist. LEXIS 21755, at *5-7 (N.D. Ohio Dec. 2, 1992). In this particular case Ohio does have a significant relationship to the contract as WinBook is located in Ohio and the Trustee has not argued that either Ohio or New Hampshire

law would not enforce the choice-of-law provision contained in the contract. Therefore, the choice-of-law provision contained in the contract should be enforced and Ohio law applies to Count VI of the Complaint.

Since the Trustee's claim under Count VI rests entirely under New Hampshire law, WinBook's Motion to Dismiss Count VI of the Complaint is granted.

V. SUMMARY

For the reasons articulated above, WinBook's Motion to Dismiss is granted with respect to Counts III and VI and is denied with respect to Counts I, II, IV, and V. This opinion constitutes the

Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 14th day of February, 2002, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge