UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 02-13086-JMD
Chapter 11

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Debtor

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MEMORANDUM OPINION

I. INTRODUCTION

On July 11, 2003, the Court held a hearing on the Debtor's Motion for Order (a) Authorizing and Approving Sale of Substantially All of Debtor's Assets Free and Clear of All

Liens, Claims, Encumbrances and Other Interests, and (b) for Approval of the Assumption and Assignment of Certain Executory Contracts dated June 11, 2003 (Doc. No. 321) (the "Sale Motion"). The Court took evidence and heard arguments on the objection of L. John Davidson (individually "Davidson") to the Sale Motion (Doc. No. 355) (the "Davidson Objection") and the objection of Louis S. Polster (individually "Polster") (Doc. No. 356) (the "Polster Objection") to that portion of the Sale Motion dealing with the sale of substantially all of the Debtor's assets. The hearing was continued to July 15, 2003 for the purpose of hearing evidence on the Polster Objection to that portion of the Sale Order dealing with the assumption and assignment of a certain executory contract between the Debtor and Polster.

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

Both Davidson and Polster object to the Debtor's proposed sale of some or most of the property listed in Schedule 1.24A of the proposed Asset Purchase Agreement between the Debtor and National Pasteurized Eggs, LLC ("NPE") which was attached to the Sale Motion as an exhibit ("Schedule A"). Schedule A lists property which the Debtor proposes to sell to NPE "free and clear of all liens and other property interests." Schedule 1.24B of the proposed Asset Purchase Agreement ("Schedule B") is a non-exhaustive list of assets to be sold to NPE free and clear of all liens and other interests other than liens and property interests of Davidson.

Davidson disputes the Debtor's right, title and interest in the following assets listed on Schedule A:

a) Patent applications 10/084,444, 09/954,462, 60/271,746, 60/ 271,726 and 60/335,031 (collectively the " '444 Patent Application");

b) Trademarks registered with the United States Patent and Trademark Office (the "USPTO") as Reg. No. 2,590,242 and Reg. No. 2,606,118 (collectively the "Trademarks"); and

c) The European rights under Patent No. 5,843,505 and No. 6,165,538 (collectively the " '505 Patent").

Polster disputes the Debtor's right to sell any and all of the patents and patent applications listed on Schedule A free and clear of his claimed right to an assignment of the Debtor's ownership interest in any or all of such patents and patent applications, upon demand, pursuant to the terms of a certain license agreement between the Debtor and Polster dated July 22, 1995 (the "Polster License") which agreement the Debtor is seeking the right to assume and assign to NPE under the terms of the Sale Motion.

III. DISCUSSION

Davidson and Polster both argue that (1) the Court lacks jurisdiction to authorize the sale of intellectual property which is not property of the bankruptcy estate because the Debtor had no ownership or other rights whatsoever in such property on the petition date and (2) even if the Debtor has an interest in such property, it is jointly owned with others and cannot be conveyed free and clear of their interests without an adversary proceeding as required under 11 U.S.C. § 365(h) and Fed. R. Bankr. P. 7001(3). At the hearing, the Debtor conceded that to the extent that the Debtor was a co-owner of any of the intellectual property listed on Schedule A, it was only seeking authority through the Sale Motion to sell the Debtor's interest in such property and not the interests of any other co-owner. The Debtor and NPE also agreed that any property listed in Schedules A or B and conveyed to NPE would be without prejudice to any future demand by Polster for an assignment of such intellectual property under the terms of the Polster License or any

objection by NPE to such a demand. Accordingly, the only remaining issues under the Davidson and Polster Objections are that portion of the Davidson Objection dealing with the Debtor's ownership interest in certain property listed in Schedule A and the Polster Objection to the assumption and assignment of the Polster License. The remaining portion of the Polster Objection shall be heard by the Court at the continued hearing on July 15, 2003.

A. The Davidson Objection

The Debtor contends that Davidson has participated as a founder, shareholder, officer or director of the Debtor since its inception and has been involved in the bankruptcy proceeding as both an equity owner and a principal in the entity which made the Court approved, debtor in possession loan to the Debtor. The Debtor argues that Davidson's failure to raise any of his objections earlier in the bankruptcy case is evidence that he is raising the disputed ownership issues only in an attempt to either prevent the proposed sale to NPE or to obtain negotiating leverage over the terms of the sale. Davidson contends that the Sale Motion is the first attempt by the Debtor during the bankruptcy case to adversely affect his ownership rights and that there was no opportunity or necessity to raise any of the issues earlier.

The Debtor contends that it is operating at an administrative loss and absent an infusion of additional capital, which is not in prospect, or a quick sale, as contemplated in the Sale Motion, it will cease operations and convert to a chapter 7 liquidation proceeding. If the transaction contemplated by the Sale Motion is approved, the Debtor believes that administrative and secured creditor claims will be satisfied and unsecured creditors may receive some distribution. The Official Committee of Unsecured Creditors supports the Sale Motion.

The Court has an obligation to determine if the Davidson Objection to the Sale Motion, filed by an insider, founder and postpetition lender to the Debtor, are well based in law and fact or imposed for some other purpose. However, if the Davidson Objection raises bona fide disputes

over the Debtor's title to some or most of the property on Schedule A, it is not possible, under the circumstances of this case, for the Court to conduct a full evidentiary hearing on the merits of such objections within the time frame which the Court must rule on the Sale Motion. If the Davidson Objection is well based in law and fact, the Court must either resolve the issues on the merits or impose conditions on the proposed sale which will preserve the rights of the parties. A determination of the extent of the Debtor's interest in property is a lengthy and time consuming undertaking because such determination may only be made in an adversary proceeding. See Fed. R. Bankr. P. 7001(2).

The failure of the Court to render a prompt decision on the Sale Motion would be tantamount to a denial of the motion and will likely result in the immediate liquidation of the Debtor. Therefore, the Court must strike a balance between the legitimate objections of a party in interest and the best interests of the bankruptcy estate in maximizing the value of the Debtor's assets. The Court intends to strike that balance by approaching the Davidson Objection in a manner similar to that prescribed by the First Circuit for stay relief motions, namely consideration on a summary basis. See Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33 (1st Cir. 1994). Unlike a motion for relief from stay, the Sale Motion is not statutorily entitled to an expedited decision, 11 U.S.C. § 362(e), and a decision on the Sale Motion may determine the underlying substantive objection. The Court shall first examine the issues raised by the Davidson Objection in order to determine if the objection on a particular issue appears well based in law and fact and, if so, whether the Court can enter an order granting the Sale Motion in a manner which protects the legitimate interests of the parties pending a resolution of disputed issues in an appropriate forum.

1. The '444 Patent Application

The Debtor claims a co-ownership interest in the '444 Patent Application by virtue of two assignments from Myron A. Wagnor, co-inventor, to the Debtor dated April 10, 2002 and recorded

with the USPTO on May 23, 2002 and May 28, 2002. See Attachments B & C to Exhibit 1, Exhibit 6 and Exhibit 10.[1] Davidson contends that although he and Myron A. Wagnor filed the '444 Patent Application as co-inventors they signed a written memorandum of understanding on April 9, 2002, the day before Wagnor's assignment to the Debtor, wherein they agreed to limit ownership of 82 of the 88 claims of inventiveness in the application to Davidson and 6 of the 88 claims of inventiveness to Wagnor. See Exhibit 101. The Debtor denies any knowledge of the agreement between Davidson and Wagnor prior to a few days before the hearing. In any event, as of the commencement of this chapter 11 proceeding on October 5, 2002 (the "Petition Date"), Debtor was a co-owner of record of the '444 Patent Application in the USPTO .

On or about February 3, 2003, the Debtor received a letter from Birch, Stewart, Kolasch & Birch, LLP, the Debtor's former patent counsel (hereinafter "Birch") requesting the Debtor to consent in writing to Birch's representation of Davidson "in connection with intellectual property matters." See Exhibit 3. James Rand, a director of the Debtor, and its bankruptcy counsel, Charles Dale, testified that after receipt of Birch's request they contacted a lawyer at the law firm and were assured that the representation only involved routine administrative matters necessary to prosecute the '444 Patent Application. The Debtor subsequently consented to the law firm's representation of Davidson subject to Birch's agreement to withdraw if the representation ever extended to "disputes with regard to ownership, management or inventiveness between Mr. Davidson and [the Debtor] as to such property." Exhibit 4. Birch accepted the Debtor's consent in writing. Id.

[1] In this opinion reference to "Exhibit __" is a reference to the exhibit of the same number marked at the July 11, 2003 hearing and entered into evidence by either the stipulation of the parties or a ruling by the Court.

On March 12, 2003, Birch requested that the Debtor and Davidson execute a power of attorney appointing Birch to prosecute the '444 Patent Application on their behalf (the "POA"). Exhibit 5. On behalf of the Debtor, James Rand executed the POA on March 19, 2003. See Exhibit 7. It appears that the execution of the POA was not authorized by the Debtor's board of directors or approved by this Court. On March 24, 2003, Birch filed an amendment to the '444 Patent Application under the authority granted in the POA. Id. Birch also filed a "Petition and Amendment Under 37 C.F.R. § 1.48(b)" reflecting that Myron A. Wagnor was no longer an actual inventor of any of the claims in the amended application as a result of the claims canceled by the amendment. Id. On July 7, 2003 the USPTO issued a Notice of Allowance and Fee(s) Due stating that the amended '444 Patent Application has been examined and allowed for issuance as a United States patent and that prosecution of the patent on the merits was closed. Id. The issuance of the '444 Patent Application without Wagnor as co-inventor would result in the Debtor losing its claim as an assignee of Wagnor's co-ownership interest because that interest has been extinguished by the amendment filed by Birch under the POA. James Rand testified that he never had knowledge of any intent to file or the actual filing of the amendment to the '444 Patent Application until a day or two before the hearing on the Sale Motion and that he never authorized the filing of the amendment. Davidson points to a memorandum to James Rand and the Debtor's bankruptcy counsel from Arthur Blasberg, a director of the Debtor, dated January 16, 2003 referring to the necessity of dividing the '444 Patent Application between Davidson and Wagnor.

The Davidson objection to the Debtor's claim as a co-owner of the '444 Patent Application raises many difficult and factual issues. Federal patent law incorporates the common law bona fide purchaser for value rule. When a legal title holder of a patent, or a patent application, transfers his or her title to a third party purchaser for value without notice of an outstanding equitable claim or title, the purchaser takes the entire ownership of the patent, free of

any prior equitable encumbrance. Filmtec Corp. v. Allied-Signal Inc.. 939 F.2d 1568, 1573 (Fed. Cir. 1991) citing Hendrie v. Sayles, 98 U.S. 546, 549 (1879); TM Patents, L.P. v. Int'l Bus. Mach. Corp., 121 F.Supp 2d 349, 365 (S.D.N.Y. 2000). Accordingly, the question of the Debtor's notice of the April 9, 2002 memorandum of understanding between Davidson and Wagnor at the time the Debtor accepted the assignment of Wagnor's interest in the '444 Patent Application, and the consideration paid for that assignment, appear to be material factual issues. In addition, the circumstances surrounding the grant of the POA to Birch by the Debtor and Birch's actions in prosecuting the amendment to the '444 Patent Application under the POA may raise issues of whether Birch met its obligations to its principal, the Debtor, while representing its client, Davidson, and whether such actions were outside the scope of the Debtor's consent to that representation. It is also possible that the Debtor could argue that Birch and or Davidson may have fraudulently filed the amendment with the USPTO in order to eliminate the Debtor's interest in the '444 Patent Application. Finally, the question of Rand's authority to execute the POA without authorization by the Debtor's board of directors or approval by this Court raise questions regarding the validity and effect of the POA.

The Court takes no position with respect to the merits of any of the above issues. It is enough that the issues have been raised by Davidson with respect to the '444 Patent Application, are not insubstantial and not without some factual predicate. Accordingly, the Court shall not approve the Sale Motion with the '444 Patent Application listed in Schedule A, but will only approve the Sale Motion with language which will preserve the ability of NPE and Davidson to pursue a decision on the merits of any dispute over the ownership of the '444 Patent Application, and the prosecution of such application, in any appropriate forum(s).

2. The Trademarks

The Debtor claims ownership of the Trademarks by virtue of USPTO trademark registrations Nos. 2,596,242 and 2,606,118. See Exhibit 2. The Debtor's title to the Trademarks is claimed under an Assignment of Trademarks from Davidson dated December 7, 2001 (the "Assignment"). See Exhibit 8. Davidson testified that the signature on the Assignment was not his. However, he conceded that the person who notarized his signature on the Assignment on January 23, 2002 was his long time personal assistant whom he had no reason to believe was not an honest person. No evidence was presented that the Debtor had any knowledge that Davidson's execution of the Assignment was forged, or unauthorized.

The certified copies of the USPTO certificates of registration for the Trademarks are prima facie evidence of the Debtor's ownership of the marks. See 15 U.S.C. § 1057(b). In order to demonstrate that the federal registration was fraudulently procured, Davidson must adduce evidence that the Debtor actually knew or believed that Davidson's signature was a forgery, or unauthorized, and that he retained rights to the marks. Marshak v. Treadwell, 240 F.3d 184, 196 (3d Cir. 2001) citing Metro Traffic Control, Inc. v. Shawdow Network Inc., 104 F.3d 336, 340 (Fed. Cir. 1997). Based upon the evidence presented at the hearing, Davidson has not established a likelihood that he could successfully establish that the federal registration of the Trademarks was fraudulently induced. Accordingly, the Court shall not disturb the inclusion of the Trademarks in Schedule A. However, the Court is making no decision on the merits of the Davidson's objections to the Debtor's claim to the Trademarks. Any approval of the Sale Motion shall be without prejudice to any determinations which the USPTO, or a court of appropriate jurisdiction, may make regarding the status of the Debtor's ownership of the Trademarks on the petition date.

3. The ‘505 Patent

The Debtor claims ownership of the ‘505 Patent by virtue of an Assignment of U.S. Patents executed by Davidson on January 1, 2001 and recorded with the USPTO on January 9, 2001 (the “Patent Assignment”). See Exhibit 1. In the Patent Assignment Davidson assigned to the Debtor all of his right, title and interests in and to the ‘505 Patents. The Patent Assignment, by its terms, covers all rights acquired by Davidson through the issuance of the two United States patents comprising the ‘505 Patent. There is no evidence in the Patent Assignment that Davidson reserved any territorial rights under the United States patents included in the ‘505 Patent. Davidson has not articulated to the Court his argument on why the European rights to the ‘505 Patent are not covered by the Patent Assignment. However, the Court notes that the Patent Assignment, by its terms, was limited to the United States Patents and included all of Davidson’s rights thereunder.

Therefore, all of Davidson’s rights under the two United States patents which comprise the ‘505 Patent belong to the Debtor. Davidson has established no rationale for excluding the ‘505 Patent from Schedule A. Whatever rights the Debtor held under the Patent Assignment on the Petition Date shall pass to NPE as purchaser, if the Court grants the Sale Motion and the transaction closes in accordance with such order. The Davidson objection with respect to the inclusion of the ’505 Patent in Schedule A will be overruled.

This opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

IV. CONCLUSION

For the reasons set forth above, the Court shall enter one or more separate orders providing that:

1. Any order granting the Sale Motion shall include provisions providing that:

   (a) the proposed sale shall only include the Debtor's interest in property, whether as sole owner or as joint owner;

   (b) the assets purchased from the Debtor shall remain subject to whatever rights Polster may have under the assumed License Agreement to demand an assignment of ownership;

   (c) the sale of the '444 Patent Application shall preserve for the purchaser and Davidson all respective rights and claims involving the prosecution of the application, the ownership the application and any patent that may issue and any claims against third parties;

   (d) the sale of the Trademarks shall be subject to any claim which could have been raised against the Debtor in the USPTO, or a court of appropriate jurisdiction, on the Petition Date;

   (e) the sale of the '505 Patent shall include all of the rights held by the Debtor on the Petition Date under the Patent Assignment recorded in the USPTO.

2. The Polster Objection shall be denied in part, to the extent that it objects to the proposed sale of assets listed in Schedule A and Schedule B.

3. The Davidson Objection shall be denied to the extent that it objects to the proposed sale of certain assets listed in Schedule A under any circumstances.

4. The Motion to Strike Objection of L. John Davidson to Debtor's Motion to Authorize Asset Sale (Doc. No. 364) shall be denied.

5. Davidson's oral motion to permit the testimony of Fred S. Whisenhunt, Esquire shall be denied.

DATED at Manchester, New Hampshire.

July 15, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge