

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

POINT PETER, LLLP,

Case No. 6:08-bk-10173-ABB

Chapter 11

Debtor.

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ORDER

This matter came before the Court on the Joint Motion (Doc. No. 91) filed by the Debtor Point Peter, LLLP and KeyBank National Association (“KeyBank”) (collectively, “Movants”) seeking the release of a bid deposit of \$300,000.00 paid by Catalyst Development, LLC (“Catalyst”). Catalyst objects to the Joint Motion (Doc. Nos. 101, 103).¹ A hearing was held on September 20, 2010 at which the respective counsel for Catalyst, KeyBank, and the Debtor appeared. The parties, pursuant to the Court’s directive, filed post-hearing briefs (Doc. Nos. 106, 107).

Event Chronology

The Debtor and several related affiliates, including Land Resource, LLC, filed bankruptcy cases on October 30, 2008. They developed vacation and second home residential communities in Florida, Georgia, North Carolina, Tennessee and West Virginia. The Debtor owns assets in Georgia known as the Cumberland Harbour Development, which includes two marinas. KeyBank is the Debtor’s secured lender. It filed a secured claim for \$21,227,819.00 asserting security interests in the debtor entities’ assets (Doc. No. 22).

¹ Doc. No. 101 incorporates various allegations contained in Catalyst’s Doc. No. 92.

The Debtor desires to sell all or substantially all of its assets free and clear of liens pursuant to 11 U.S.C. Section 363. KeyBank and Catalyst have been involved in the sale process. KeyBank tendered a credit bid of \$6,000,000.00 for all of the assets. Catalyst submitted a bid deposit of \$300,000.00 in connection with a purchase agreement dated May 6, 2010. The Debtor and KeyBank assert Catalyst defaulted on the purchase agreement and has forfeited the deposit. Catalyst disagrees asserting no written binding purchase agreement was executed by the parties.

The following events are relevant to the adjudication of this matter:

March 2010 - Sale Motion: The Debtor filed its Sale Motion on March 13, 2010 (Doc. No. 59) seeking authority to sell its assets at auction and to approve bidding procedures. The Motion sets forth KeyBank is “deemed a Qualified Bidder” and “may exercise its right at the Auction to credit bid its indebtedness under section 363(k).” Catalyst is not mentioned in the Sale Motion and was not served with the Sale Motion.

The Debtor issued a Notice of Hearing on the Sale Motion setting a hearing for March 17, 2010 (Doc. No. 60). The Notice was not served on Catalyst. A hearing was held on March 17, 2010 and the Sale Motion was approved in open Court. The sale confirmation hearing was set for April 15, 2010. An Order was entered on March 24, 2010 (Doc. No. 66): (i) approving the Sale Motion and Bidding Procedures; (ii) requiring all “Qualified Bids” to be submitted by April 9, 2010; and (iii) setting the auction for April 14, 2010; and (iv) setting the sale confirmation hearing for April 15, 2010.

April 15, 2010 Hearing: The Debtor informed the Court a continuance was needed to conduct due diligence. Catalyst did not appear at the hearing. The Court

deferred the auction to May 7, 2010 and continued the sale confirmation hearing to May 10, 2010 pursuant to the Order entered on May 4, 2010 (Doc. No. 76).

May 2010 – Document 11512518.10: Catalyst, through its Managing Member Bryce Grafton (“Grafton”), executed a written Purchase Agreement dated May 6, 2010 (Doc. No. 92, Ex. A) pursuant to which it agreed to purchase the Cumberland Harbour development, including the marinas, and other assets for \$6 million. Catalyst was required to pay a bid deposit of \$300,000.00 to the escrow agent Berger Singerman, P.A. by April 9, 2010 (a date preceding the Purchase Agreement date). The document contains a document designation code of 11512518.10 in the lower left corner of each page. This document contains a signature block for the Debtor, but was not executed by the Debtor.

May 2010 – Asset Split: The Debtor, sometime after Catalyst executed Document 11512518.10, determined it would not sell all of its assets to Catalyst, but would essentially divide the assets in half, with Catalyst to bid on the residential lots and KeyBank to credit bid on the marina assets. Debtor’s counsel, in open Court at the continued sale hearing on May 10, 2010, informed the Court that the Debtor and Catalyst did not have a finalized agreement and were continuing to negotiate purchase terms (Doc. No. 107, Ex. C, pp. 5-7).

Counsel for KeyBank sent an email to Grafton on May 19, 2010 stating a revised purchase agreement would be transmitted to him and explaining: “You will note that we have referenced the need for preservation of certain easements and rights of access given the fact that the ownership of Cumberland Harbour will now be split” (Doc. No. 107, Ex. D).

May – June 2010 – Revised Agreements: Counsel for KeyBank presented revised purchase agreements to Catalyst pursuant to which the assets being sold were redefined (as the residential lots with the marina assets excluded) and the purchase price of \$6 million was reduced to \$3 million. Catalyst executed a revised Purchase Agreement dated May 6, 2010 pursuant to which it agreed to purchase various assets for \$3 million and was required to pay a bid deposit of \$300,000.00 by 5:00 p.m. on May 6, 2010 (Doc. No. 92, Ex. B). The document contains a document designation code of 11412518.14 in the lower left corner of each page. The date on which Catalyst executed this document is undocumented. The Debtor did not execute this document.

Catalyst, sometime after May 10, 2010, transmitted a bid deposit of \$300,000.00 to the Escrow Agent. The bid was transmitted with no documentation

Counsel for KeyBank presented to Catalyst an undated Amended and Restated Purchase and Sale Agreement bearing document designation 11527794.3 sometime in late May or early June 2010. The document sets forth the bid deposit of \$300,000.00 was received by the Escrow Agent. Catalyst did not execute the document.

June to September 2010: Catalyst, KeyBank, and the Debtor continued to engage in negotiations regarding the sale of the Debtor's assets and revisions were made to Documents 11412518.14 and 11527794.3, as reflected by the redline copies circulated amongst the parties (Doc. No. 107, Exs. D-H). No finalized purchase terms were reached. No written purchase agreement was executed by both Catalyst and the Debtor. Catalyst demanded the return of its \$300,000.00 deposit. An employee of KeyBank issued an email to an interested purchaser on September 20, 2010 (Doc. No. 107, Ex. H)

stating: “[W]e are not willing to sell the asset separately. It is not possible to split up the marina and the lots. They must be sold together.”

Analysis

Three written purchase agreements were presented to Catalyst: Documents 11412518.10, 11412518.14, and 11527794.30 (collectively, the “Documents”). The Documents were prepared by counsel for KeyBank. Each Document sets forth it is governed by Florida State law. Movants assert Catalyst breached Document 11412518.14 by failing to tender the \$300,000.00 bid deposit by May 10, 2010 and to purchase the “Non-marina Assets.”

This matter is governed by Florida State law and is subject to the statute of frauds. FLA. STAT. § 725.01; de Vaux v. Westwood Baptist Church, 953 So.2d 677, 681 (Fla. 1st DCA 2007). Movants have the burden to establish Catalyst breached a written contract pursuant to Florida State law. Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1272 (11th Cir. 2009). Movants must establish by a preponderance of the evidence: (i) the existence of a contract; (ii) a material breach of that contract; and (3) damages resulting from the breach. Id. For a contract to exist, Movants must establish: (i) an offer; (ii) acceptance; (iii) consideration; and (iv) sufficient specification of the essential terms. Id. Additionally, a breach of contract claimant “must also prove performance of its obligations under the contract or a legal excuse for its nonperformance.” Rollins, Inc. v. Butland, 951 So.2d 860, 876 (Fla. 2d DCA 2006).

Movants have not established by a preponderance of the evidence Catalyst materially breached a written contract because no written contract exists as defined by Florida State law. Catalyst originally offered to purchase all or substantially all of the

Debtor's assets, including both the residential lots and marina assets, for \$6 million pursuant to Document 11412518.10. The Debtor did not accept the offer. It did not execute Document 11412518.10 and it presented to Catalyst an amended purchase agreement, Document 11412518.14, which altered the scope of the sale. The assets were "split" through the removal of the marina assets. Catalyst executed Document 11412518.14, but the Debtor did not execute the document.

Catalyst, the Debtor, and KeyBank continued to negotiate the terms of a purchase agreement through early June 2010. No finalized agreement was reached as evidenced by the parties' email communications and the Debtor's statements in open Court. KeyBank would not permit the assets to be split, but required a sale of the assets as a whole. Catalyst and the Debtor did not reach a meeting of the minds as to the essential terms of a purchase agreement.

[A] meeting of the minds of the parties on all essential elements is a prerequisite to the existence of an enforceable contract, and where it appears that the parties are continuing to negotiate as to essential terms of an agreement, there can be no meeting of the minds.

de Vaux, 953 So.2d at 681 (citation omitted). No enforceable written contract was created between Catalyst and the Debtor pursuant to Florida State law.

The Documents do not satisfy the statute of frauds because a material component is missing. The Documents do not contain an Exhibit A. Each document references and incorporates an Exhibit A which particularly describes the real property to be sold. Exhibit A is a material component of each Document; it defines the real property to be purchased in Paragraph 2.1 and is referenced in defining the "Excluded Assets" which are not subject to sale.

Catalyst did not breach a legally enforceable written purchase agreement. There is no legally enforceable written purchase agreement between Catalyst and the Debtor. No binding contract of sale and purchase was ever in effect. The Debtor, nor KeyBank, acquired any right, title or interest in the \$300,000.00 bid deposit. Movants' Joint Motion is due to be denied and the deposit funds are due to be turned over to Catalyst.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Movants' Motion (Doc. No. 91) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that the Escrow Agent Berger Singerman, P.A. is hereby directed to turn over to Catalyst the deposit of \$300,000.00 plus all accrued interest thereon forthwith.

Dated this 27th day of December, 2010.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge