IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re GENEVA STEEL LLC, Debtor,	Bankruptcy Case No. 02-21455 GEC Chapter 11
OLSEN PROPERTIES, LLC, Plaintiffs, v. GENEVA STEEL, LLC, UNIVERSAL SCRAP METALS, INC., and ARCH INSURANCE CO. Defendants.	Adversary Proceeding No. 04 - 02804 ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION TO DISMISS

The motion of the Debtor, Geneva Steel, LLC ("Geneva"), to dismiss adversary proceeding and the motion of Olsen Properties, LLC ("Olsen") for summary judgment came before the Court on November 30, 2004. Stephen E. Garcia of Kaye Scholer LLC and Adelaide Maudsley of Leboeuf, Lamb, Greene & Macrae LLP appeared in behalf of Geneva, Barry N. Johnson and Shane L. Keppner of Bennett, Tueller, Johnson & Deere appearing in behalf of Olsen. Because the motions were heard jointly with Geneva's motion to dismiss adversary proceeding No. 04-02803, appearances were also made by Annette W. Jarvis and Douglas Monson of Ray Quinney & Nebeker,

P.C. who appeared in behalf of Texas Iron & Metals Co.. Having heard the argument of counsel and after considering the pleadings, the court rules as follows:

FACTS

1. On January 25, 2002, Geneva commenced a voluntary case under Chapter 11 of the Bankruptcy Code.
2. During the pendency of its Chapter 11 case, Geneva has undertaken, with court approval, an orderly, self-managed liquidation which employs a demolition and remediation strategy for the idle Geneva steel mill.
3. This liquidation strategy, and the environmental remediation and asbestos abatement that accompany it, is to be funded in part through the scrap sales of ferrous and non-ferrous materials and other personal property recovered from the demolition of the facility.
4. On January 26, 2004, Geneva and Grant Mackay Company, Inc. entered into a demolition agreement with respect the facility.
5. The demolition agreement specifies that demolition work for the Geneva Mill site ("Mill Site") will be conducted in various zones.
6. On March 16, 2004, Geneva and Universal Scrap Metals, Inc. ("USM") entered into a demolition and salvaged materials sale agreement (the "Universal Agreement") which replaced Grant Mackay Company, Inc. as the contractor under the demolition agreement and authorized the sale to USM of scrap metal recovered during the demolition process pursuant to the terms of the USM Agreement.

7. The Universal Agreement incorporated the terms of the Grant Mackay demolition agreement, and the demolition agreement was attached as Exhibit A to the Universal Agreement.

8. On April 6, 2004, the Court entered its "Order Authorizing the Debtor to Enter Into a Postpetition Agreement with Universal Scrap Metals, Inc. to Perform Demolition Contract that Includes the Sale (Subject to Higher and Better Offers) of Certain Assets (Salvaged Scrap Metal Materials) Outside the Ordinary Course of Business and Free and Clear of All Interests, Liens, Claims, and Encumbrances, Pursuant to 11 U.S.C. § 363" (the "Sale Order").

9. The Sale Order authorized Geneva to enter the Universal Agreement with USM as the buyer.

10. After entry of the Sale Order, Geneva and USM entered into an Amended and Restated Promissory Note dated as of April 23, 2004 (the "Note"), and a Security Agreement dated April 23, 2004 (the "Security Agreement").

11. On May 21, 2004, Geneva filed a UCC-1 financing statement which perfected its security interest in the salvaged materials under the Security Agreement.

12. Among other things, the Sale Order provided that transfer of the salvaged materials to USM would be a legal, valid and effective transfer of the salvaged materials, and the transfer would vest in USM all rights, title and interest of Geneva in the salvaged materials free and clear of all interests.

13. Paragraph 26 of the Sale Order provides that the Universal Agreement may be modified, amended or supplemented by the parties, provided that any such modification does not have a material adverse effect on Geneva's estate.

14. Geneva and USM amended the Universal Agreement. The third amendment to the Universal Agreement dated April 5, 2004, provided that the Contract Price was to be paid on or before April 23, 2004.

15. The Universal Agreement provided that USM shall remove salvaged materials from the Mill Site within a commercially reasonable period, such period not to exceed, in any event, sixty (60) days after the date such materials are generated and stockpiled on Geneva's property and that USM shall not unreasonably encumber the Mill Site with salvaged materials, equipment or other facilities.

16. In the fourth amendment to the Universal Agreement, Geneva agreed to accept a $12,500,000.00 promissory note secured by a first position in the salvaged materials. The promissory note was taken in satisfaction of the remaining balance of the contract price. Performance on USM's part to demolish was also required under the contract.

17. On or about April 23, 2004, USM signed a security agreement granting to Geneva a security interest in the salvaged materials.

18. On April 27, 2004, Geneva filed a motion for entry of an order authorizing Geneva to enter into a fourth amendment to the Universal Agreement. The motion disclosed that USM was unable to pay the balance of the contract price as contemplated by the Sale Order.

19. On June 1, 2004, the Court entered an order authorizing Geneva to enter into the fourth amendment with USM.

20. USM is a scrap metal dealer that engages in scrap metal disposal and sells scrap materials in the ordinary course of its business affairs. Sonny Nguyen ("Nguyen") is the president of USM.

21. Olsen purchases scrap materials in the ordinary course of its business.

22. As of July 12, 2004, Geneva knew that USM was removing loose scrap from the Mill Site and selling such loose scrap to customers of USM. Geneva did not object to this process until August 4, 2004.

23. The following procedure for the sale of movable scrap was established between Geneva and USM: (i) Movable Scrap would be specifically identified; (ii) Geneva's consent must be obtained for the release of the movable scrap by issuing a pre-demolition release form to USM; (iii) Geneva would inspect the movable scrap to ensure that it was the material identified in the pre-demolition release form; and (iv) Geneva would issue a materials release form which authorized USM to purchase the scrap metal and remove it from the Mill Site. It is unclear whether or not this procedure was always observed by the parties.

24. In May 2004, Craig Olsen, a manager of Olsen, approached Paul Peterson ("Peterson"), a Geneva employee, about purchasing cables and lifting apparatuses from Geneva. Craig Olsen also inquired from Peterson whether any of Geneva's buildings were available for purchase.

25. Peterson told Craig Olsen that the sale of Geneva material was being handled by USM and to go to USM's office located at the north end of the Mill Site to negotiate any purchases.

26. After talking with USM representatives and Geneva foremen Clyde Gabbitas and Howard Ford, Craig Olsen purchased approximately twelve truckloads of structural steel and round rod from the Mill Site in late May or early June 2004.

27. While driving around the Mill Site, Craig Olsen observed other parties purchasing material from USM, and Geneva employees releasing the materials as they left the Mill Site.

28. Geneva approved the structural steel and round rod sale to Olsen, and after the truckloads had been weighed, Gabbitas or Ford signed forms releasing the scrap metal as the trucks left the Mill Site.

29. Gabbitas also showed Olsen an electric shop with cranes inside and directed Olsen to talk with USM about purchasing the electric shop.

30. Craig Olsen told Gabbitas that Olsen was interested in buying the electric shop. In response, Gabbitas told Craig Olsen that he would help dismantle the electric shop if Olsen was successful in negotiating the purchase of the electric shop.

31. Olsen entered an agreement with USM to purchase the electric shop for $175,000.00. Olsen paid USM for the electric shop by check on July 1, 2004.

32. Olsen entered an agreement with USM to purchase the Cranes for $10,000.00 and paid USM by check on July 9, 2004.

33. At the time that Olsen purchased the electric shop and the Cranes, Geneva was using the electric shop to store machinery and wire. As a courtesy to Geneva, Olsen agreed to wait to remove the electric shop and Cranes until Geneva found another location to store the machinery and wire or until USM sold the machinery and wire.

34. A few days later, Craig Olsen advised Gabbitas that the electric shop had been purchased. Gabbitas told Craig Olsen he had drawings and blueprints of the electric shop available and he also told Craig Olsen about two 5-ton cranes (the "Cranes").

35. On July 28, 2004, USM forwarded a payment of $1,000,000.00 to Geneva.

36. Geneva knew that USM was removing salvaged materials from the Mill Site and selling such materials to customers of USM and Geneva never objected to the process until August 4, 2004.

37. On August 4, 2004, Geneva sent notice to USM that it was declaring a default under the Universal Agreement.

38. On August 4, 2004, Geneva began denying USM access to the Mill Site.

39. Geneva has not permitted Olsen to remove the purchased materials from the Mill Site.

40. USM was prepared to and intended to deliver the materials to Olsen.

41. USM would presently deliver the materials to Olsen if it was allowed access by Geneva to the Mill Sited to do so.

DISPUTED FACTS

Olsen argues

1. USM had the right, up until August 4, 2004, to remove and sell, free and clear of Geneva's security interest, all of the salvaged materials located above the ground at the Mill Site.

2. USM was contractually authorized to assist Geneva in marketing and selling salvaged materials for the best possible price.

3. USM assisted Geneva in marketing and selling additional salvaged material to customers including compressors, generators and other pieces of equipment and scrap materials.

4. USM assisted Geneva in selling an electric shop with existing overhead cranes and other material in the building, together with two additional cranes to Olsen.

5. USM assisted Geneva in selling the materials to Olsen pursuant to the terms of the Universal Agreement.

6. Geneva explicitly authorized the sale of the materials to Olsen, and that Geneva entrusted possession of the materials to USM.

7. Geneva has allowed approximately $400,000.00 in salvaged materials to be removed from the Mill Site.

8. A portion of the $1,000,000.00 payment forwarded from USM to Geneva on July 28, 2004 was derived from and is traceable to the $185,000.00 paid to USM by Olsen on July 1, 2004 and July 9, 2004.

9. Because USM was Geneva's authorized agent, Geneva is bound by USM's acts and should not be permitted to deny such authority against innocent third parties who have relied on that authority.

10. USM had actual authority, either express or implied, to sell the material to Olsen.

11. Geneva gave USM apparent authority to sell the materials through its acts or conduct that created an appearance which caused Olsen, a third party, to reasonably believe that USM had authority to act on Geneva's behalf.

Geneva argues

1. Geneva did not represent to anyone, including Olsen, that the salvaged materials sold to Olsen were the property or inventory of USM.
2. Sonny Nguyen was fully aware of the Pre-Demolition Release Procedures and followed such procedures.
3. In the past, USM complied with pre-demolition release procedures in purchasing loose scrap from Geneva.
4. Purchasers other than Olsen paid USM for salvaged materials only after the materials were released pursuant to the Universal Agreement and removed from the Mill Site.
5. Neither USM nor any other party has produced any document or other information suggesting that the funds paid by Olsen on July 1, 2004 and July 9, 2004 are traceable to the $1,000,000.00 paid by USM to Geneva on July 28, 2004.
6. Regarding salvaged materials that Geneva allowed to be removed from the Mill Site by buyers, Geneva typically gave a release in the form of an acknowledgment that the salvaged materials were leaving the plant.
7. Geneva never ceded control of possession of the Mill Site to USM.
8. Geneva never explicitly authorized the sale of materials.
9. Geneva never entrusted possession of the materials to USM and that Geneva maintained control and possession of the materials at all times, except to the extent that the materials were released to USM as expressly provided in the Universal Agreement.

10. Prior to removal of materials from the Mill Site, on each and every occasion, Geneva issued a Materials Release Form which authorized the release of the scrap specified in the Materials Request Form and allowed removal of the material from the Mill Site.

11. Only after completion of the pre-demolition release procedures, could USM take possession of scrap and sell it to third parties.

ANALYSIS

Geneva's Motion to Dismiss: Granting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice. Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001). The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted. Well pled allegations in a complaint are accepted as true and construed in the light most favorable to the plaintiff. Ford v. West, 222 F.3d 767 (10th Cir. 2000). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Disposition under rule 7012(b) is inappropriate when the court examines matters outside the pleadings, rather, the court must proceed under Federal Rule of Bankruptcy Procedure 7056 which incorporates the summary judgment standard. Edmonds v. Edmonds, 924 F.2d 176 (10th Cir. 1991).

Geneva argues that Olsen's complaint should be dismissed because: 1) USM did not have sufficient title to convey the materials to Olsen, 2) Geneva's security interest is superior to Olsen's

rights to the materials, 3) The equitable title doctrine argued by Olsen is inapplicable to the sale of personal property, 4) Olsen is not entitled to declaratory judgment because the harm has already occurred, 5) Olsen is not entitled to specific performance because no contract exists, 6) Olsen is not entitled to replevin because Olsen is not entitled to possession of the materials, 7) Olsen is not entitled to breach of contract or unjust enrichment relief because no contract exists, 8) Olsen is not entitled to recovery for injury to goods because Olsen does not hold title to the goods, and 9) Olsen is not entitled to an award of attorney fees because there is no contractual or statutory basis for an award of attorney fees.

Ownership - With respect to Geneva's argument that USM was not the owner of the materials, Olsen argues that because Geneva ceded control or possession of the scrap metal or entrusted the scrap metal to USM, ownership of the materials passed from Geneva to USM upon court approval of the Universal Agreement and the execution and delivery of the $12.5 million promissory note and security interest in favor of Geneva. Olsen's argument that ownership passed to USM succeeds if Geneva turned over control or possession or entrusted USM by failing to maintain control and possession of the scrap metal at all times. Because Olsen argues that Geneva did not maintain control and possession of the scrap metal and permitted USM to sell scrap metal to third parties without interference from Geneva. Olsen has stated a cause of action for which relief may be granted. A factual dispute over ownership of the scrap metal exists and the Court must deny this portion of Geneva's motion to dismiss.

Priority of Security Interest - Geneva argues that even if ownership of the materials passed to USM, because of Geneva's UCC-1 filing and because it maintained control and possession of the

Materials at all times, its interest in the Materials is superior to Olsen's interest in the Materials. In response, Olsen argues that it's interest is superior because of three exceptions to Utah Code Ann. § 70A-9a-315(1)(a), which, if Olsen's allegations are true, would operate to place Olsen's interests ahead of Geneva. All three exceptions relied upon by Olsen turn on whether or not Geneva maintained control and possession of the scrap metal at the Mill Site. Olsen has stated a claim for which relief may be granted, and for that reason, this portion of Geneva's motion to dismiss will be denied.

Equitable Title Doctrine - Geneva asserts that under Utah Code Ann. § 70A-2-102, the equitable title doctrine argued by Olsen, is inapplicable to the sale of goods. The Court does not find that Utah Code Ann. § 70A-2-102 precludes Olsen's equitable argument and for that reason, this portion of Geneva's motion to dismiss will be denied.

The Remaining Grounds - Geneva retains possession of the specific materials purchased by Olsen. Geneva's retention of the specific materials combined with the allegations set forth in Olsen's complaint and read in a light most favorable to Olsen requires that this Court deny Geneva's motion to dismiss the remaining grounds for relief sought by Olsen.

Olsen's Motion for Summary Judgment: Summary judgment is appropriate if the record reveals that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. When applying this standard, the court must examine the factual record in the light most favorable to the party opposing summary judgment, extending to that party all reasonable factual inferences. While the movant bears the burden of showing the absence of a genuine issue of material fact, the movant need not negate the nonmovant's claim. If the movant

carries this initial burden, the nonmovant may not rest on its pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. Jenkins v. Wood, 81 F.3rd 988 (10th Cir. 1996). A "genuine" issue of fact exists if the evidence is such that the trier of fact could resolve the issue either way. An issue of fact is "material" if it is essential to the proper disposition of the claim. Bennett v. Quark, Inc., 258 F.3d 1220 (10th Cir. 2001).

Olsen argues that USM was the owner of the Materials purchased by Olsen, and that Olsen's interest in the Materials is superior to Geneva's because of three exceptions to Utah Code Ann. § 70A-9a-315(1)(a), which place Olsen ahead of Geneva's security interest. Olsen's argument depends upon first establishing that USM was the owner of the Materials.

Ownership - Olsen argues that because Geneva ceded control or possession of the scrap metal or entrusted the scrap metal to USM, ownership of the Materials passed from Geneva to USM upon court approval of the Universal Agreement and the execution and delivery of the $12,500,000.00 million promissory note and security interest in favor of Geneva. For Olsen's argument with respect to ownership to succeed, the Court must find that Geneva ceded control and possession of the scrap metal or entrusted the scrap metal to USM. Because Geneva argues that it maintained control and possession of the scrap metal at all times, a factual dispute exists and the Court must deny Olsen's motion for summary judgment.

Agency - Olsen argues that Geneva either expressly authorized USM to act as its agent with respect to the sale of salvaged materials, or that USM had apparent authority to sell the salvaged materials. Geneva responds arguing that Geneva never gave USM the express consent to sell

salvaged materials without its consent, that Geneva never permitted USM to actually sell materials without Geneva's consent and that Olsen knew or had reason to know that USM possessed no authority to sell salvaged materials without Geneva's consent. Geneva's arguments raise disputed facts, and the Court must deny Olsen's motion for summary judgment with respect to Olsen's agency argument.

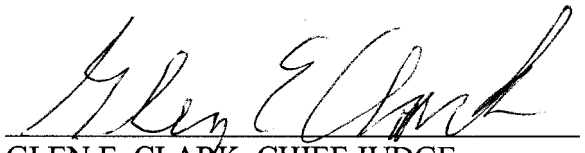
For the above reasons, it is hereby:

ORDERED that Geneva's motion to dismiss adversary proceeding is DENIED, and it is further;

ORDERED that Olsen's motion for summary judgment is DENIED.

DATED this 3 day of January, 2005.

BY THE COURT:



GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT