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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

See #201

In re:

I.F.S. INCORPORATED,
a Utah corporation,

Debtor.

Bankr. No. 86-C-00963

Adv. Proc. No. 86-PC-0334

MEMORANDUM DECISION
AND ORDER

I.F.S. INCORPORATED,
a Utah corporation,

Appellant,

-vs-

NATIONAL CREDIT UNION
ADMINISTRATION BOARD and
ELLSWORTH FINANCIAL
CORPORATION,

Appellees.

Civil No: C-86-0828W

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

MAR 13 1987

PAUL L. BADGER
Clerk

This matter is before the court on appeal from the United States Bankruptcy Court for the District of Utah. The court heard oral argument on February 9, 1987. Appellant, I.F.S. Incorporated ("I.F.S."), was represented by John B. Maycock and Blake D. Miller. Appellee National Credit Union Administrative Board ("NCUAB") was represented by Gary H. Feder and Noel S. Hyde. Peter W. Billings, Jr. and Herbert L. Zarov appeared on behalf of Appellee Ellsworth Financial Corporation ("Ellsworth"). Following oral argument, the court took the matter under

advisement. The court has reviewed and considered carefully the parties' oral arguments, the record on appeal, the briefs, and the pertinent authorities. Now being fully advised, the court affirms the Order of the Bankruptcy Court granting the motions for summary judgment of the NCUAB and Ellsworth.

Background

I.F.S. is a holding company of certain insurance marketing and underwriting companies. On or about July 8, 1983, I.F.S. executed a promissory note in favor of Center Place Savings Credit Union ("Center Place") in the principal amount of $450,000.00. I.F.S. also executed a guaranty to Center Place guaranteeing the payment of the note, together with seven other promissory notes executed by related entities and individuals which were also held by Center Place. The guaranty was in an aggregate principal amount of $3,500,000.00. To secure these obligations, I.F.S. executed a Pledge and Security Agreement, dated July 8, 1983, granting Center Place a security interest in 104,122 shares of common stock in Service Life Insurance Company of Omaha ("SLI") owned by I.F.S.

On July 2, 1985, Center Place notified I.F.S. that its note was in default by virtue of its failure to make the July 1, 1985 interest payment. It thereby demanded that I.F.S. make immediate payment of the unpaid principal, together with all

accrued interest. On July 8, 1985, Center Place was placed into liquidation and pursuant to statutory authority, the NCUAB was appointed liquidating agent. By letter dated July 12, 1985, the NCUAB notified I.F.S. that it intended to commence efforts to sell the SLI shares. On November 14, 1985, the NCUAB had the SLI shares registered in its own name.

Between August 1985 and January 1986, the NCUAB negotiated with various prospective purchases, including Ellsworth, for the sale of the SLI shares. On January 13, 1986, Ellsworth and the NCUAB entered into a Letter of Intent for the purchase of the SLI shares. On January 29, 1986, Ellsworth and the NCUAB entered into a Stock Purchase Agreement for the sale of the SLI shares. Ellsworth's obligation to purchase the shares was expressly conditioned upon approval of the sale by the Nebraska Department of Insurance, as well as the absence of "any order, decree or decision restraining or enjoining or otherwise opposing the consummation" of the sale. However, the Agreement provided that these conditions "may be waived by [Ellsworth] pursuant to a written instrument executed by an officer of [Ellsworth] and delivered to NCUAB and Service Life." The Stock Purchase Agreement also contained warranties by the NCUAB that it was "the lawful, record and beneficial owner of all the shares . . . ." On March 3, 1986, the Nebraska Department of Insurance

approved the sale of the SLI shares to Ellsworth.

On March 7, 1986, I.F.S. filed a Petition for Reorganization under Chapter 11 of the United States Bankruptcy Code (the "Code"). The NCUAB's sale of the SLI shares to Ellsworth was closed on March 10, 1986. Ellsworth received notice of I.F.S.'s bankruptcy filing on March 11, 1986.

On April 11, 1986, I.F.S. brought this adversary proceeding against the NCUAB and Ellsworth pursuant to § 549 of the Code, seeking to avoid the sale of an unauthorized transfer of property of the estate in violation of § 362(a) of the Code. The relief sought included inter alia return of the SLI shares from Ellsworth to I.F.S.

Discussion

The Bankruptcy Court's precisely reasoned opinion assumed, without deciding, that the NCUAB was not absolute owner of the SLI shares on March 7, 1986, the day I.F.S. filed its Chapter 11 Petition. It then found, applying controlling Missouri law, that even assuming arguendo this central point in I.F.S.'s argument, I.F.S. was not entitled to the relief sought because:

1. Center Place, the NCUAB's predecessor, had perfected its security interest in the SLI shares by possession, and the NCUAB properly succeeded to that interest;

2. The NCUAB gave I.F.S. reasonable notice of its

intent to sell the collateral as required by the Uniform Commercial Code ("U.C.C.");

3. The January 29, 1986 Stock Purchase Agreement entered into between NCUAB and Ellsworth was a valid U.C.C. § 9-504 contract for the disposition of collateral which, pursuant to § 9-506, cut off I.F.S.'s fixed right of redemption before it filed its Chapter 11 Petition; and

4. Whatever rights I.F.S. might have possessed at the commencement of the bankruptcy case were contingent and conditional on nonperformance by Ellsworth. Those conditions were removed when Ellsworth actually performed. The existence of the conditions therefore did not entitle I.F.S. to any of the relief it sought in its complaint.

I.F.S. apparently does not take issue with the first two findings. Its sole argument for reversal is based on its quarrel with the Bankruptcy Court's conclusion that the Stock Purchase Agreement was a valid contract for the disposition of collateral pursuant to § 9-504.

I.F.S argues that the Stock Purchase Agreement was not a § 9-504 contract for two reasons. First, it contends that the agreement purported to transfer the NCUAB's and not the debtor's interest in the collateral. It concludes that because all that the NCUAB possessed in the SLI shares was a security interest,

the most that could have been conveyed to Ellsworth pursuant to the Stock Purchase Agreement was this security interest.

But as the Bankruptcy Court correctly found, § 9-504 does not require that a contract for the disposition of collateral must expressly represent that the secured party is selling the debtor's interest in the collateral. On the contrary, § 9-504 expressly provides that when a secured party sells the collateral, it thereby effectively "transfers to a purchaser for value all of the debtor's rights therein . . . " Missouri Revised Statutes § 400.9-504(4). Since the Stock Purchase Agreement was a contract to sell the collateral - i.e. the SLI shares - it effectively transferred to Ellsworth, by operation of law, all of I.F.S.'s rights therein. Moreover, it is disingenuous to suggest that Ellsworth negotiated and paid $2.5 million for the NCUAB's interest in the stock and not for the stock itself.

I.F.S.'s second argument is that no binding § 9-504 contract was formed because the Stock Purchase Agreement was expressly conditional on the validity of the NCUAB's warranty that it was owner of the SLI shares and on the absence of a court order restraining consummation of the transaction. In its view, because the Stock Purchase Agreement was so conditioned, and because Ellsworth could arguably have invoked one or both of

these conditions and refused to close, the contract was not binding and did not extinguish I.F.S.'s right of redemption.

But § 9-506 provides that a debtor's right of redemption is extinguished when

> the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 . . . .

Between the time a contract for disposition of collateral is "entered into" and the time of the collateral's actual "disposition," every § 9-504 contract is "contingent," if only in the sense that the purchaser may be unable or unwilling to close. But § 9-506 does not preserve a debtor's continuing right of redemption pending the removal - generally by closing - of all conditions and contingencies. Rather, it expressly cuts off that right when the secured party enters into a contract for disposition of collateral. I.F.S.'s contention to the contrary - that entry into such a contract does not cut off redemption rights where closing is conditional - effectively writes the "entered into a contract" provision out of § 9-506.

In addition, I.F.S. argues that the Stock Purchase Agreement is not a § 9-504 contract because the express conditions it contains makes it illusory. But this argument is squarely contrary to black letter contract law. A bilateral contract containing express conditions is nevertheless binding

and enforceable. M. K. Metals, Inc. v. Container Recovery Corp., 645 F.2d 583, 588 (8th Cir. 1981); Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 36 (8th Cir. 1975); Jump v. Manchester Data Sciences Corp., 424 F. Supp. 442, 445 (E.D. Mo. 1976). Moreover, the "conditions" at issue here were expressly intended for the benefit of Ellsworth, which was the only party with standing to enforce or waive them. Koedding v. Slaughter, 634 F.2d 1095, 1097 (8th Cir. 1980); Safer v. Perper, 569 F.2d 87, 91-92 (D.C. Cir. 1977). The NCUAB was unconditionally bound to perform under the contract. I.F.S., which was not even a party to the contract, has no standing to attack its enforceability. Maggard Truck Line, Inc. v. Deaton, Inc., 573 F. Supp. 1388, 1393 (N.D. Ga. 1983), aff'd in part, 783 F.2d 203 (11th Cir. 1986) (Defendant who was not a party to a contract "cannot claim as such to be subject to, or benefit from the contractual provisions.") As counsel for Ellsworth points out, I.F.S.'s argument would require the court to find that the right of Ellsworth, a non-breaching party to a contract, may be defeated where I.F.S. a non-party, invokes a contractual provision intended to protect the non-breaching party.

The Bankruptcy Court held that "[a]ll that the debtor is entitled to is protection of its right of redemption upon non-performance by Ellsworth." The final issue addressed by the

Bankruptcy Court was whether the purported post-petition transfer of I.F.S.'s remote contingent right of redemption entitles it to retrieve the SLI shares pursuant to § 549 of the Code. Noting that Ellsworth has now actually performed, the lower court held that "it would be improvident to grant the debtor any relief under § 549." This court fully agrees.[1] When Ellsworth closed the contract on March 10, 1986 any rights or interest I.F.S. may have had in the SLI shares was forever extinguished.

Accordingly,

The decision of the Bankruptcy Court is AFFIRMED.

Dated this 13th day of March, 1987.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 13th day of March, 1987.

Peter W. Billings, Jr., Esq.
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1 Because Ellsworth actually closed the Stock Purchase Agreement this court need not decide the correctness of the Bankruptcy Court's finding that a contingent right of redemption remains in the debtor, after the secured party has entered into a § 9-504 contract for the disposition of collateral, and which would become fixed upon nonperformance of a third party.