IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
DURA AUTOMOTIVE SYSTEMS, INC., *et al.*,	)	Case No. 06-11202 (KJC)
	)	
	)	Jointly Administered
Debtors,	)	

MEMORANDUM [1]

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

BACKGROUND

On October 30, 2006 (the "Petition Date"), Dura Automotive Systems, Inc. and related entities (the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware. On May 13, 2008, an Order was entered confirming the Debtors' Revised Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (docket no. 3332). Before the Court is the Motion of Allied Motion-Motor Products, Inc. for Clarification of the Terms of Sale and the Assets Conveyed to the Purchaser of the Assets of Atwood Mobile Products and for the Allowance and Payment of Claim for an Administrative Expense (docket no. 2239) (the "Clarification Motion").

In the Clarification Motion, Allied Motion-Motor Products, Inc. ("Allied") asks this Court to enter an order clarifying the terms of sale and the assets conveyed to the purchaser, in particular, whether Allied's executory contract assumed by the Debtors was among the assets the purchaser was obligated to accept. In the alternative, Allied seeks an order for the allowance and

[1]This Memorandum constitutes the findings of fact and conclusions of law, as required by Fed.R.Bankr.P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. 157(b)(1) and (b)(2)(N) and (O).

immediate payment of an administrative expense claim pursuant to 11 U.S.C. § 503(b). For the reasons set forth below, the relief requested by Allied in the Clarification Motion will be granted.

UNDISPUTED FACTS

On April 14, 2008, the parties submitted an Amended Joint Pre-Argument Statement (docket no. 3125)(the "Joint Statement") which contained the following undisputed facts. The following factual recitation is taken largely from the parties' Joint Statement, supplemented by other facts which do not appear to be in material dispute.

As of the Petition Date, Allied and the Debtors' Atwood Division were parties to a Consigned Stock Agreement (the "CSA"). Joint Statement, ¶ A.2. Post-petition, Allied and the Debtors renegotiated this agreement and agreed that the Debtors would request approval of the assumption of the CSA by the Debtors' Atwood Division. Joint Statement, ¶ A.3. In March 2007, the Court approved the assumption of the CSA (docket no. 856) (the "Assumption Order"). Joint Statement, ¶ A.4.[2]

Subsequently, the Debtors entered into an Asset Purchase Agreement (the "APA") with Atwood Mobile Products LLC[3] to sell substantially all of the assets of the Debtors' Atwood Division. Joint Statement, ¶ A.6. Included among the Debtors' Atwood Division assets were assumed contracts (such as the CSA), which the APA defined as:

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[2]It is apparently undisputed that the post-petition modifications to the CSA provided better pricing and payment terms to the Debtor, and, ultimately, to the purchaser of the Atwood Division assets.

[3]Atwood Acquisition Co LLC was the "Purchaser" in the APA; however, a name change was noted in the Order dated August 15, 2007 (docket no. 1659) approving the sale of the Debtors' Atwood Division, and the prevailing bidder was described as "Atwood Mobile Products LLC f/k/a Atwood Acquisition Co. LLC." This entity shall be referred to herein as the "Purchaser" or "Atwood LLC".

> (i) Subject to Section 7.7., all Contracts and purchase orders listed on Schedule 2.1(c), (ii) all other Contracts of the Business and all purchase orders for the sale of Products which were entered into the Ordinary Course of Business, and (iii) all Contracts and purchase orders of the Business which are made between the date hereof and Closing either (x) in the Ordinary Course of Business and (y) if not in the Ordinary Course of Business, as listed on Schedule 2.1(c) pursuant to Section 8.13.

Joint Statement, ¶ A.7. Section 7.7 of the APA., entitled "Cure of Defaults," limited the above language in the following way:

> Purchaser shall, at or prior to the Closing, cure any and all monetary defaults under the Assumed Contracts and Assumed Leases, which defaults are required to be cured under the Bankruptcy Code in the amounts set forth in Schedules 2.1(b)(ii) and 2.1(c), respectively, so that such Assumed Contracts and Assumed Leases may be assumed by Sellers and assigned to Purchaser in accordance with the provisions of section 365 of the Bankruptcy Code. *Prior to the closing, Purchaser, at its sole discretion, shall retain the right to refuse assignment of or otherwise reject any of the Assumed Contracts and Assumed Leases that may remain subject to rejection in the Chapter 11 Cases by providing Seller written notice thereof five days prior to Closing.* In the event that Purchaser shall determine to reject or refuse assignment of any such Assumed Contract or Assumed Lease prior to the Closing, Purchaser shall have no obligations with respect to such Assumed Contract or Assumed Lease, including any obligation to cure any defaults thereunder.

Joint Statement, ¶ A.8 (emphasis added).

In response to the Debtors' Assumption and Cure Notice (*see* docket no. 1541), sent in connection with the proposed sale of the Atwood Division assets, Allied filed its *Limited Response of Allied Motion-Motor Products, Inc. to (1) Lease and Executory Contract Assumption and Cure Notice and (2) Payment of Outstanding Receivables* (docket no. 1564) (the "Limited Response"). Joint Statement, ¶ A.11. In its Limited Response, Allied asserted, among other things, that:

1. Allied did not oppose assumption by the proposed Purchaser (i.e., Atwood LLC) of the Debtors' Atwood Division;[4]

2. Allied wanted to ensure that any amounts owing to it at the time of closing under the APA would be timely paid by the Debtors or the Purchaser; and

3. Allied sought confirmation that the Purchaser would assume and pay Atwood's post-petition ordinary course of business accounts payable arising at the time of closing.

Allied's Limited Response was resolved when the Debtors, Atwood LLC (ultimately, the Purchaser), and Allied agreed on language to be inserted into the proposed Sale Order approving the asset sale to Atwood LLC. Joint Statement, ¶ A.12. This new, agreed, language provided that:

> Allied Motion Motor Products, Inc. ("Allied") filed its Response to (1) Lease or Executory Contract Assumption and Cure Notice and (2) Payment of Outstanding Receivables [Docket No. 1564] dated August 8, 2007 (the "Allied Objection") for clarification of payment of outstanding obligations not currently in default. The Debtors, Prevailing Bidder, and Allied resolved the Allied Objection as set forth herein. Any account payable incurred post-petition and in the ordinary course of business by the Debtors owing to Allied shall be paid when due by the Debtors or the Prevailing Bidder, as applicable, with the Debtors paying any such payable that becomes due on or before the Closing, and the Prevailing Bidder paying any such payable that becomes due after the Closing, in each case regardless of when such payable accrued or was incurred or invoiced.

Joint Statement, ¶ A.14. The Sale Order was entered on August 15, 2007 (docket no. 1659) (the "Sale Order"). Joint Statement, ¶ A.13.

On August 21, 2007, counsel for Atwood LLC purported to have sent, via

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[4]If the successful bidder was an entity other than Atwood LLC, Allied reserved its right to demand adequate assurance of future performance.

overnight delivery, to the chief financial officer of the Debtors, and outside counsel for the Debtors, its letter, with attachment, indicating those 101 contracts on Schedule 2.1(c) to the APA of which Atwood would *not* take assignment (the "Refusal Letter"). The Refusal Letter indicates it was copied to two attorneys at the Debtors' outside counsel. The Debtors' counsel identified as copied on the letter have no record of ever receiving the Refusal Letter from Atwood LLC. The Refusal Letter was not sent to Allied. The Refusal Letter was not required to be delivered to Allied under the APA. Joint Statement, ¶ A.15.

On August 21, 2007, counsel for Atwood LLC also purported to have sent, via electronic mail, a copy of the Refusal Letter to counsel for the Debtors, who have no record of ever receiving the Refusal Letter from Atwood LLC. Joint Statement, ¶ A.16. The Refusal Letter listed the CSA as one of the contracts to be stricken from Schedule 2.1(c) to the APA. The Debtors did not respond to the Refusal Letter, nor did they advise Allied that the CSA had been listed in the Refusal Letter. Joint Statement, ¶¶ A17 - A18.

The Debtors' sale of its Atwood Division assets to Atwood LLC closed on August 27, 2007 (the "Sale Date"). Joint Statement, ¶ A.19. After the Sale Date, Atwood LLC purchased motor products from Allied and paid Allied for the products in the same manner as such goods were purchased and paid for prior to the Sale Date. Joint Statement, ¶ A.20. In March 2008, prior to the termination of the CSA, Atwood LLC ceased purchasing motor products from Allied. Joint Statement, ¶¶ A.21 and A.22.

In November 2007, Allied filed the Clarification Motion, in which it asked this Court to enter an order clarifying the terms of sale and the assets conveyed to the

purchaser, specifically whether Atwood LLC is obligated to accept the CSA as part of its purchase of the Debtors' Atwood-Division assets. Joint Statement, ¶ C.1. Atwood LLC and the Debtors filed responses to the Clarification Motion (docket nos. 2385 and 2410, respectively). Joint Statement, ¶¶ C.2 and C.3. The Official Committee of Unsecured Creditors joined the Debtors' response. (docket no. 2417). Joint Statement, ¶ C.3. Allied subsequently filed a Reply in further support the Clarification Motion. (docket no. 2424). Joint Statement, ¶ C.5. The Court conducted a hearing on the Clarification Motion in late December 2007 and entered an order dated January 3, 2008, denying the Motion, without prejudice (docket no. 2571). Joint Statement, ¶ C.6.

On January 9, 2008, Allied filed a motion pursuant to Federal Rule of Civil Procedure 59(e) and Federal Rule of Bankruptcy Procedure 9023, asking the Court to reconsider its January 3, 2008 Order (docket no. 2606) (the "Reconsideration Motion"). Joint Statement, ¶ C.7. Atwood LLC filed a response to the Reconsideration Motion, and Allied subsequently filed a reply. (docket nos. 2729 and 2746, respectively). Joint Statement, ¶¶ C.8 and C.9. On February 12, 2008, the Court conducted a hearing on the Reconsideration Motion and advised the parties that it would consider and address the substantive issue and request for relief contained in Allied's Clarification Motion. Joint Statement, ¶ C.10. Subsequently, on April 14, 2008, the parties filed the Joint Statement. On April 23, 2008, the Court conducted a hearing to consider the merits of the Clarification Motion and the matter was taken under advisement.

DISCUSSION

Allied asks this Court to clarify the terms of the APA and the Sale Order, specifically whether Atwood LLC is obligated to perform under the CSA. This requires the Court to interpret the terms of the APA and the Sale Order.

Contract interpretation always begins with examination of the language of the contract, and does not venture beyond those words if they are unambiguous. Eagle Industries, Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997). Allied and the Debtors - - on the one hand - - and Atwood LLC - - on the other - - assert that their respective positions are supported by the express language in the APA and in the Sale Order. However, while no party expressly asserts any ambiguity, their Joint Statement sets out as one of the two issues before the Court whether the APA, the Sale Order, or both, are ambiguous.

Atwood LLC asserts that, under Section 7.7 of the APA, it has the right to refuse assignment of any contract, assumed by the Debtors or otherwise, provided it gives the required notice. Atwood LLC's Position Statement, p. 1. To support this argument, Atwood LLC cites Section 365(g) of the Bankruptcy Code, which states, in relevant part:

> (g) [T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease - -
>
> . . . .
>
> (2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title - -
>
> (A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or
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> (B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title - -

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or
(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

11 U.S.C. § 365(g). Bankruptcy Code Section 365(g)(2) acknowledges the consequences of a debtor's rejection of a previously assumed executory contract. In re Braude Jewelry Corp., 333 B.R. 156, 161 (Bankr. N.D. Ill. 2005) ("Since the leases were breached or rejected after having been assumed, the Landlords are entitled to an administrative priority for the claims arising from that breach."); In re Mushroom Transp. Co., Inc., 78 B.R. 754, 759 (Bankr. E.D. Pa. 1987) ("As such, it is an administrative expense claim, should the debtor elect to reject the lease after it has been assumed, an action permitted by 11 U.S.C. § 365(g)(2)."); In re World Wines, Ltd., 77 B.R. 653, 656-657 (Bankr. N.D. Ill. 1987) ("Leases which are assumed post-petition and then subsequently rejected are accorded administrative expense priority under Section 365(g)(2)."). Therefore, under Section 365(g)(2), all of the Debtors' Atwood Division contracts, including assumed contracts such as the CSA, "remain subject to rejection in the Chapter 11 Cases." Hence, according to Atwood, the fact that the Debtors' previously assumed the CSA does not affect Atwood LLC's right under Section 7.7 of the APA to refuse the assignment of it. The Debtors and Allied disagree with this reading of the APA.

Allied argues that Atwood LLC's interpretation of the APA cannot stand if Section 7.7 is read in connection with the entire APA, specifically Section 7.6. Statement of Position of Allied Motion-Motor Products, Inc., p. 3. Section 7.6 of the APA, entitled "Assignment of Contracts," provides as follows:

> Sellers and Purchaser shall use commercially reasonable efforts to have included in the Sale Order an authorization for Sellers to assume the Assumed Contracts and the Assumed Leases and assign to Purchaser all Assumed Contracts and Assumed Leases, and Purchaser shall be exclusively responsible for any Assumed Liabilities under all such Assumed Contracts and Assumed Leases, other than any Compromised Liabilities related to such Assumed Contracts and Assumed Leases, if any, after Purchaser's cure of all applicable monetary defaults in accordance with Section 7.7 below.

Joint Statement, Exhibit A, p. 33. Allied argues that when Sections 7.6 and 7.7 are read in tandem, it becomes clear that the intent of the parties was that the Debtors "would endeavor to assume those executory contracts listed on Schedule 2.1(c) and would assign those to [Atwood LLC], subject to [Atwood LLC's] right to change its mind as to any executory contract not yet assumed or rejected by the Debtors." Position of Allied Motion-Motor Products, Inc., p. 5. Or, as Allied puts it:

> Stated another way, the terms of the parties' agreement reflects a mutual acknowledgment that there would be two species of executory contracts: those that would remain subject to rejection, and those that would not remain. This bargained for limitation on Atwood's power to remove certain contracts from Schedule 2.1(c) to the APA can have only one reasonable interpretation: that contracts already assumed by the Debtors, such as the CSA, could not be stricken from Schedule 2.1(c). Otherwise, the applicable language would be meaningless.

Id. at pp. 1-2. I agree.

Principals of contract construction caution courts against reading contract provisions in ways which render them meaningless. H.C. Lawton, Jr., Inc. v. Truck Drivers, Chauffeurs and Helpers Local Union No. 384, 755 F.2d 324, 328 (3d Cir. 1985) ("The better approach is to consider the agreement as a whole; 'as in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory.'" *quoting* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Yard-Man, Inc., 716

F.2d 1476, 1480 (6th Cir.1983), *cert. denied*, 465 U.S. 1007 (1984)). The Court will not read Section 7.7 in a way which renders a clause within it meaningless.

Moreover, after consideration of the revised, agreed terms of the Sale Order, no doubt can remain that Allied's view is correct. The language in the Sale Order relevant to the CSA - - representing an agreed resolution of Allied's Limited Response - - unequivocally obligates the "Prevailing Bidder," here, Atwood LLC, as it turned out, to pay payables due after Closing. While by its express terms the language added by the parties to the proposed Sale Order addresses allocation of payment for pre- and post-closing payables to Allied, this language manifests a clear intent by the parties that the CSA, already assumed pre-sale by the Debtors, was to be assigned to the successful bidder for the Atwood Division assets, which turned out to be a party directly involved in adding this new language to the proposed Sale Order.

Finally, to answer specifically the issues as framed by the parties in their Joint Statement:

1. The APA and the Sale Order, read together, are not ambiguous.

2. The Debtors assigned the CSA to Atwood LLC as a result of the APA and the Sale Order.

An appropriate order follows.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: December 30, 2008