IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
MURPHY MARINE SERVICES, INC., et al.,	)	Case Nos. 01-926 (MFW) through 01-950 (MFW)
	)	
Debtors.	)	(Jointly Administered Under Case No. 01-926 (MFW))

MEMORANDUM OPINION[1]

Before the Court is the Motion of NPR, Inc. ("NPR") for a determination that it is owed liquidated damages from Tianjin Tianma Shipbreaking Co., Ltd. ("Tianjin") for breach of a contract for sale of a vessel and the cross-motion of Tianjin for damages from NPR for breach of that contract. After a hearing and consideration of the affidavits and exhibits proffered, we conclude that NPR's motion must be denied and damages awarded in favor of Tianjin.

I. FACTUAL BACKGROUND

On March 21, 2001, Murphy Marine Services, Inc., and several of its affiliates, including NPR (collectively "the Debtors"), filed voluntary petitions under chapter 11 of the Bankruptcy Code. The Debtors provide integrated cargo transportation and logistics management services in the marine industry. These

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

services are performed in New Jersey, Pennsylvania, Delaware, Florida and Puerto Rico.

Shortly after the filing, NPR entered into a contract with Tianjin by which NPR agreed to sell the vessel SS Nuevo San Juan ("the Vessel") in an "as is, where is" condition to Tianjin for $700,000 in cash ("the Sale Contract"). Because NPR was in chapter 11, NPR advised Tianjin at the time the contract was executed that Bankruptcy Court approval was required and a provision to that effect was added to the Sale Contract. (Sale Contract at § 26.) On April 10, 2001, the Sale Contract was revised and signed by all the parties via facsimile. On April 12, 2001, Tianjin paid a deposit of $140,000. The Sale Contract provided for delivery of the Vessel by NPR to Tianjin between April 20 and May 10 at NPR's option.

On April 11, 2001, Tianjin hired a towing company to tow the Vessel to China ("the Towing Contract"). The Towing Contract required Tianjin to pay a delay fee of $5,500 for each day the tug remained in port waiting for the Vessel, as well as a cancellation fee of $80,000. The contract provided for delivery of the Vessel to the towing company between April 25 and May 10, 2001.

NPR filed a motion on April 24, 2001, for approval of the Sale Contract. A hearing on the Motion was held on May 14, 2001, at which time the Sale Contract was approved. (Exhibit 7 to Cai

Affidavit.) Although the Sale Contract originally required delivery of the Vessel between April 20 and May 10, because the sale was contingent on Bankruptcy Court approval, delivery was not possible within that period.

The parties commenced discussions in early May regarding whether the time for delivery under the Sale Contract would be extended and when the Vessel would be delivered. In a fax dated May 4, 2001, Tianjin agreed to extend the deadline from May 10 to May 18, 2001, if NPR would agree to reimburse it for the costs of the tug caused by the delay in delivery. (Exhibit 6 to Cai Affidavit.) On May 18, 2001, Tianjin sent a notice cancelling the Sale Contract as a result of NPR's failure to deliver the Vessel on time. (Exhibit 9 to Cai Affidavit; Exhibit 5 to Yu Affidavit.)

Despite the cancellation notice, the parties continued discussions and on July 12, 2001, Tianjin's attorney confirmed by letter that NPR had agreed to reduce the purchase price by $124,000 and that the Vessel would be delivered after government approvals had been obtained at a date mutually agreed by the parties. (Exhibit 14 to Cai Affidavit.)

NPR advised the Court of this modification of the Sale Contract at the next hearing held in the case, on July 17, 2001. At that hearing, the Debtor advised the Court that it did not believe it needed an Order of the Court approving that modification, asserting that the original Order was sufficient.[2] At that time, the Official Committee of Unsecured Creditors ("the Committee") consented to the modification but the lenders asked for additional time to consider it. As a result of these representations, we stated that we would approve the modification without further Order if the Debtors obtained the consent of the secured lenders to the modification.

Immediately after that hearing, NPR advised Tianjin of the Court's direction and stated that rather than a reduction of $124,000 in the purchase price, NPR would agree only to reduce the price by the actual amount that Tianjin had to pay the towing company in damages and demanded proof of payment of those damages as well as evidence that the towing company was not an affiliate of Tianjin. (Exhibit 15 to Cai Affidavit.) By fax dated July 23, 2001, Tianjin protested these changes. (Exhibit 16 to Cai Affidavit.) However, two days later Tianjin did provide evidence that it was not related to the towing company and that it had made arrangements to pay $118,500 in compensation to the towing company over time. (Exhibit 3 to Hausmann Affidavit.)

On July 27, 2001, NPR advised Tianjin's counsel that the Vessel was available for delivery immediately. (Exhibit 5 to

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[2] It is unclear why the Debtors felt no further Court order was necessary. The original Sale Order approved the sale pursuant to the terms of the Sale Contract, which specified a purchase price of $700,000 with "final sale subject to Bankruptcy Court approval" and no provision for modification.

Hausmann Affidavit.) At that time NPR stated that it expected to receive any portion of the reduction in the purchase price which was not actually paid by Tianjin to the towing company. (Id.) In response, Tianjin asserted that additional damages were being suffered by it as a result of the delay (and the depression in the market for scrap metal) and requested an additional reduction in the purchase price. (Exhibit 6 to Hausmann Affidavit.) On August 1, 2001, counsel for Tianjin advised that it was prepared to accept delivery of the Vessel subject to additional modifications to the Sale Contract, including the requirement that NPR obtain a certificate attesting that the Vessel was towage-worthy. (Exhibits 7 & 8 to Hausmann Affidavit.)

At this point NPR declared Tianjin in default. (Exhibit 9 to Hausmann Affidavit.) Tianjin responded by asserting that the Sale Contract had already been terminated on May 18, 2001, because of NPR's default. (Exhibit 10 to Hausmann Affidavit.) NPR advised Tianjin that it would agree to the towage certificate requirement if Tianjin would accept delivery of the Vessel promptly. (Id.) There is no evidence that Tianjin responded.

Consequently, NPR filed the instant Motion for Order Terminating Agreement for the Sale of a Certain Vessel Free and Clear of Liens, Claims, Encumbrances, Rights of Offset and Rights of Recoupment to Tianjin Tianma Shipbreaking Co., Ltd., and Authorizing Debtors to Collect Liquidated Damages. In response, Tianjin filed an Objection to the Debtors' Motion and a Motion to Compel the Debtors to Abide by Terms of a Post-Petition Contract Regarding the Sale of a Certain Vessel and Return Deposit Funds and Pay Damages Fees and Costs According to the Default Clause and Plain Language of the Contract.

At the hearing on the Motions, both NPR and Tianjin agreed that the Court could declare the Sale Contract terminated. A subsequent hearing was set for October 23, 2001, to determine which party had defaulted on the Sale Contract and what damages would be assessed for that default. At the hearing evidence was presented and the matter was taken under advisement. On or about November 14, 2001, additional briefs and affidavits were submitted to clarify certain facts.

II. JURISDICTION

This Court has core jurisdiction under 28 U.S.C. § 157(b)(2)(B), (C), (N) and (O).

III. DISCUSSION

To provide stability and finality to judicial sales of a debtor's assets pursuant to section 363 of the Bankruptcy Code, debtors and buyers are bound and obligated to consummate a sale once it has been authorized by the bankruptcy court. In re Chateaugay Corp., 186 B.R. 561, 593 (Bankr. S.D.N.Y. 1995); In re

Oyster Bay Cove, Ltd., 161 B.R. 338, 342 (Bankr. E.D.N.Y. 1993). See also In re Winston Inn & Restaurant Corp., 120 B.R. 631, 635 (E.D.N.Y. 1990)("To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final"). A debtor and a buyer in a bankruptcy sale is bound by the contract as stated and as embodied in the approval order. In re Silver Bros. Co., Inc., 179 B.R. 986, 1007 (Bankr. D.N.H. 1995). This is especially so because judicial sales, unlike ordinary private commercial transactions, involve parties other than the particular parties to the transaction. Id. at 1007.

A. Original Contract Performance

The Sale Contract as executed on April 14, 2001, established a deadline for delivery of the Vessel between April 24 and May 10. However, the Sale Contract also provided for approval by the Bankruptcy Court as a condition precedent to closing, which was not obtained until May 14, 2001.[3] Further, pursuant to Rule 6004(g) of the Federal Rules of Bankruptcy Procedure: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." Thus, the sale

[3] That date was the first omnibus hearing at which the Motion could be heard consistent with the 20-day notice requirements of Fed. R. Bankr. P. 2002.

order was not final and delivery could not have taken place before May 24, 2001.

The Sale Contract thus contains two conflicting clauses. It provides for delivery of the Vessel no later than May 10, 2001, while requiring Bankruptcy Court approval which was not final until May 24, 2001.

An implied covenant of good faith and fair dealing inheres in every contract. Chamison v. HealthTrust, Inc., 735 A.2d 912, 920 (Del. Ch. 1999); Wilgus v. Salt Pond Inv. Co., 498 A.2d 151, 159 (Del. Ch. 1985); Chateaugay, 186 B.R. at 594 (an implied covenant of good faith under New York law). The boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract. See Restatement (Second) of Contracts, § 205 comment a (1981)(good faith performance "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party"). "In attempting to construe the contracting parties' intent fairly and reasonably, a court must consider the specific language of the contract and the context within which that contract was formed." Chateaugay, 186 B.R. at 594 (citing Cross & Cross Properties, Ltd. v. Everett Allied Co., 886 F.2d 497, 502 (2d Cir. 1989)).

The Sale Contract was originally executed on March 29, 2001. However, in light of NPR's recent bankruptcy filing, the parties agreed to add a requirement for Bankruptcy Court approval of the Sale Contract. That intent was manifested by the modification of the Sale Contract executed on April 14, 2001. We conclude that the parties intended to effect delivery only after the Order approving the Sale Contract became final. Thus, the deadline for delivery of the Vessel was May 24, 2001.

However, it is clear that NPR was not able to tender delivery of the Vessel on May 24, 2001, because of other factors. Specifically, NPR had not obtained government approval of the sale, as required by section 24 of the Sale Contract. In fact, NPR did not tender delivery of the Vessel until July 27, 2001; over two months later.

Although Tianjin's notice of default dated May 18, 2001, was premature, it did not preclude NPR from tendering delivery of the Vessel on May 24, 2001. Had NPR tendered delivery on May 24, 2001, and had Tianjin not accepted delivery, then Tianjin would have been liable for breach of contract. Consequently, we conclude that as of May 24, 2001, NPR was in breach of the Sale Contract for failure to tender delivery of the Vessel.

B. Modification of Sale Contract

NPR alleges, however, that the parties agreed to modify the Sale Contract by extending the deadline for delivery of the Vessel. NPR further alleges that, following the modification of the Sale Contract, Tianjin breached by failing to accept delivery of the Vessel. Based on the evidence presented, however, we are unable to conclude Tianjin and NPR had a "meeting of the minds" on a modified Sale Contract. There was never an offer by one side that was unconditionally accepted by the other side. Basic contract law supports this conclusion.

"The common law rule is that 'a reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.'" Honeywell, Inc. v. American Standards Testing Bureau, Inc., 851 F.2d 652, 659 (3d Cir. 1988) (quoting Restatement, § 59).

The communications between Tianjin and NPR were merely a series of offers and counteroffers that were never accepted by either side. On July 12, 2001, Tianjin's attorney asserted that NPR had agreed to reduce the purchase price by $124,000 and that the Vessel would be delivered after the government approvals had been obtained at a date mutually agreed by the parties. The letter constitutes a valid offer to modify the Sale Contract on those terms. In response, on July 17, 2001, NPR advised Tianjin that rather than a reduction of $124,000 in the purchase price, it would agree only to reduce the price by the actual amount that Tianjin had to pay the towing company in damages (and demanded proof of payment of those damages as well as evidence that the towing company was not an affiliate of Tianjin). This constitutes a counteroffer as there is a difference in price plus the additional requirement of evidence of non-affiliation. By fax dated July 23, 2001, Tianjin protested this change, thus rejecting the July 17 counteroffer.

On July 27, 2001, NPR advised Tianjin's counsel that the Vessel was available for delivery immediately. At that time NPR reiterated that it expected to receive any portion of the reduction in the purchase price which was not actually paid by Tianjin to the towing company. This communication constitutes a new offer from NPR to Tianjin. Tianjin again protested (asserting additional damages). This response was not an acceptance of NPR's offer but a rejection of it.

On August 1, 2001, Tianjin stated it was prepared to accept delivery of the Vessel subject to additional modifications to the Sale Contract, including the requirement that NPR obtain a certificate attesting that the Vessel was towage-worthy. This constitutes a counteroffer. NPR rejected this counteroffer, by declaring Tianjin in default.

As the communications between NPR and Tianjin demonstrate, there was nothing more than offers and counteroffers between the parties. There was never an instant where there was a "meeting of the minds" on the terms of a modified contract. Thus, the only contract that existed between Tianjin and NPR was the

April 14 Sale Contract. That contract was breached by NPR's failure to tender delivery of the Vessel to Tianjin on May 24, 2001. Following the termination of the Sale Contract, the parties attempted to agree to new terms but never did.

C. Damages Due for Breach of Contract

Under the Sale Contract, upon breach by NPR, Tianjin is entitled to the return of its deposit for the purchase of the Vessel from NPR plus interest at 12%. (Sale Contract at § 14.) In addition, the Sale Contract provides that Tianjin is entitled to "due compensation for the losses caused to [Tianjin] by [NPR's] failure to exercise a legal transfer or to deliver the vessel in the manner and within the time specified." (Id.)

Tianjin asserts it incurred losses in the form of the amounts paid by Tianjin to the towing company under the Towing Contract. The Towing Contract required Tianjin to pay a delay fee of $5,500 for each day the tug remained in port waiting for the vessel, as well as a cancellation fee of $80,000.

When the modification to the Sale Contract was executed on April 10, 2001, Tianjin reasonably contracted with the towing company for the pick up of the Vessel. However, it was unreasonable for Tianjin to expect the Vessel to be tendered before May 24, 2001, or ten days after the hearing on the Motion to approve the sale. Thus, Tianjin is not entitled to damages for delay costs prior to May 24, 2001.[4] However, the $80,000 cancellation fee under the Towing Contract is a loss caused by NPR's failure to tender delivery of the Vessel.

IV. CONCLUSION

For the foregoing reasons, we deny the Debtor's motion for an award of liquidated damages and award damages to Tianjin for (1) its deposit plus interest at 12% per annum from May 24, 2001, to date of payment, and (2) the cancellation fee of $80,000 due by Tianjin to the towing company.

An appropriate order is attached.

BY THE COURT:

Dated: April 5, 2002

Mary F. Walrath
United States Bankruptcy Judge

[4] Tianjin asserts delay costs for seven days from May 11th to the 17th at the rate of $5,500 per day totaling $38,500. (Exhibit 10 to Cai Affidavit.)

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Debtors.	)	(Jointly Administered Under Case No. 01-926 (MFW))

ORDER

AND NOW, this **5TH** day of **APRIL, 2002**, upon consideration of the Debtors' Motion for Order Terminating Agreement for the Sale of a Certain Vessel Free and Clear of Liens, Claims, Encumbrances, Rights of Offset and Rights of Recoupment to Tianjin Tianma Shipbreaking Co., Ltd., and Authorizing Debtors to Collect Liquidated Damages and the Objection thereto by Tianjin and the Motion by Tianjin to Compel the Debtors to Abide by Terms of a Post-Petition Contract Regarding the Sale of a Certain Vessel and Return Deposit Funds and Pay Damages Fees and Costs According to the Default Clause and Plain Language of the Contract, it is hereby

ORDERED that the Debtors' Motion is **DENIED**; and it is further

ORDERED that Tianjin's Motion is **GRANTED** and NPR is directed to pay Tianjin (1) the deposit in the amount of $140,000 plus interest accrued at a rate of 12% per annum, and (2) the $80,000 cancellation fee incurred by Tianjin to the towing company as a result of NPR's breach.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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