

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**
REGION 1

'03 DEC 15 14:06

In re	:	Chapter 7
	:	
PERMAGRAIN PRODUCTS, INC.,	:	Bankruptcy No. 02-37895DWS
	:	
Debtor.	:	

MEMORANDUM OPINION

BY: DIANE WEISS SIGMUND, United States Bankruptcy Judge

Before the Court is the Motion of Third Party Purchaser Prism Enterprises ("Prism") to Compel Turnover of Debtor's Assets (the "Motion") by JoyFor Joint Venture ("JoyFor").¹ An initial hearing was held on October 27, 2003 at which time it became apparent that an evidentiary hearing would be required. The parties agreed to an adjournment until November 18, 2003 to allow the record to be made and the issue of this Court's subject matter jurisdiction to be briefed. At the conclusion of the evidentiary hearing and at the strong urging of the Court, the parties agreed to discuss a resolution of the Motion along lines suggested by the Court that would protect each parties' positions pending litigation of all issues inter se. Regrettably, and inexplicably, the parties now advise me that they could not

¹ The use of the word "turnover" is unfortunate as it suggests a proceeding brought pursuant to 11 U.S.C. § 542, a right granted under the Code to trustees, not third parties. However, on scrutiny of the Motion, it is clear that Prism does not seek § 542 relief but rather the implementation of this Court's Order authorizing the sale of certain Permagrain assets to it under § 363. As this is not an action commenced under § 542, JoyFor's argument that an adversary proceeding to seek turnover is required is not relevant.

agree on the terms of an Order.² Accordingly, I will enter one that accomplishes what they could not.

BACKGROUND

On February 27, 2003 the Chapter 7 Trustee (the "Trustee")³ of the estate of the debtor Permagrain products, Inc. (the "Debtor") filed a motion to sell certain of the Debtor's assets to Prism free and clear of liens, claims and encumbrances pursuant to § 363 of the Bankruptcy Code ("Sale Motion"). Exhibit P-3. After notice and hearing, the assets were sold by Order dated March 27, 2003 (the "Sale Order") for \$1.7 million. The Sale Order provided in pertinent part:

ORDERED that, pursuant to Section 363(b) and (f) of the Bankruptcy Code, the Trustee shall be authorized to sell to Prism Enterprises LLC certain assets of the Debtor (including assets covered by option if it is exercised) in

² Prism contends that the failure to obtain possession of the purchased assets has caused and continues to cause harm to its business. While operations have commenced utilizing the purchased assets formerly located in the Debtor's manufacturing facilities, Prism has not been able to secure the benefit of the books and records located in the former business headquarters leased by JoyFor. At the first hearing when it was apparent to me that JoyFor was holding the assets to compel payment for their storage, I suggested that they be released without prejudice to JoyFor's litigation position in order to mitigate Prism's claim for damage to its business and to allow JoyFor to relet the Premises. JoyFor refused. I raised that interim solution again at the second hearing. JoyFor was concerned about losing its claimed landlord's lien by releasing the property. I advised its counsel that I was prepared to enter an order that would preserve that lien, and Prism even agreed that the lien could attach to all its property (not just the purchased assets) to the extent of the value of the landlord's lien it asserts. JoyFor still resisted, apparently taking offense at Prism's view that the asserted landlord's lien had no value. I also informed Joyfor's counsel that its claim for continuing storage charges after Prism sought to recover the property was unfounded so it was only harming itself by its continued refusal to allow the property to be removed. I urged the parties to negotiate a resolution of this Motion along these lines, leaving for another day and perhaps court, the question of their respective claims to damages. They apparently attempted to do so but were unsuccessful.

³ The Trustee in this case is Gary Seitz, Esquire. He did not appear at either hearing on this Motion although his counsel did, explaining that he was merely "observing."

accordance with the terms of that certain Letter of Intent dated February 21, 2003, and the Trustee shall consummate the transactions as set forth in said Letter of Intent, all of which shall be sold and consummated free and clear of all interests, liens, claim and encumbrances....

Exhibit P-5.

The purchased assets were located in several facilities used by the Debtor, one of which was leased to it by JoyFor (the "Premises"). Used as the headquarters of Debtor's business operations, the Premises held the executive offices, and the research and development, marketing and customer support functions of the Debtor. Significantly, it was the location of all the Debtor's books and records, including contracts, purchase and work orders, compensation records, market research, and historical information of the business (the "Books and Records").⁴

Prior to the entry of the Sale Order, Prism asked for a date to review the Books and Records at the Premises. Exhibit P- 4-D, 4-E. That visit did not occur prior to the closing of the sale, and Prism continued to seek the Trustee's assistance in gaining access to the Premises after closing.⁵ While Prism took possession of the hard assets located in the manufacturing facilities in April 2003, it was not until July 2003 that Prism secured access to the Premises to inspect the Books and Records located there, and then only in conjunction with the access granted to the Trustee for other purposes.

⁴ Of the assets identified in the Letter of Intent, subsections 1.1(c),(d) and (g) and 3.2(c), (d), (e) refer to property located at the Premises.

⁵ After closing, Prism made no contact with JoyFor relying on the Trustee to make arrangements for the turnover of the assets located in the Premises. As the Trustee did not testify, this record does not reveal what efforts he made to gain access for Prism. When that had not happened by late May or early June, Prism made its own contact with JoyFor for the first time. Shortly thereafter, the July 8 visit was arranged by the Trustee.

On June 17, 2003, Joyfor had requested the entry of an Order directing the immediate payment of post-petition rent in the amount of \$11,119.96 for the 60 day period after the filing date. Exhibit P-7. That request generated a motion by the Trustee seeking authorization to pay the administrative rent claim ("Rent Motion"). Another creditor objected as its administrative claim was not being contemporaneously paid. Notwithstanding the possibility that the estate might subsequently be found administratively insolvent, I authorized payment to Joyfar based on its representation that it would provide the Debtor with continued access to the Premises to review and remove Debtor's books, records and financial information stored there. Exhibit P-9 (Affidavit of Dina Daubenberger in Support of Motion).⁶ That agreement to cooperate with both the Debtor and the Trustee to review and remove files and other documents necessary to administer the estate had no termination date. Because JoyFor's commitment conferred a new benefit on the estate to which there was no legal entitlement given the automatic rejection of the Lease that had occurred pursuant to 11 U.S.C. § 365(d)(1), I allowed the Trustee to give preferential treatment to JoyFor by accelerating the payment of its rent claim. Exhibit P-10 (Order dated August 21, 2003).

As a result of that Order, JoyFor's leasing agent Vince Barbieri ("Barbieri") gave access to the Premises on July 8th to the Trustee and his counsel. Various representatives of Prism also appeared. As a courtesy, Prism was permitted to walk through the Premises and take what it could carry away but the removal of all the purchased Books and Records

⁶ It also agreed to disgorge the payment to the extent it exceeded the *pro rata* share to which it was ultimately entitled.

was not permitted at that time.⁷ Douglas Murray who represented Prism in negotiating this sale testified that during that visit he had a cordial conversation with Barbieri who encouraged Prism to remove the property by August as he was "anxious to get the stuff out." There was no discussion about storage charges or any other contingency to removal. However, when Prism made arrangements to pick up the property the third week of July, it was told not to come. JoyFor then made a demand for money. Apparently when Barbieri consulted with his principals Paul and Claude DeBattone, he was directed not to allow the Books and Records to be removed without payment for their storage since the closing on March 28, 2003.⁸

DISCUSSION

On March 27, 2003 I entered an Order authorizing the Trustee to sell assets of the estate to Prism pursuant to a Letter of Intent. Exhibit P-5. The Order provides, inter alia, that the Trustee shall consummate the transactions set forth in the Letter of Intent. The Letter of Intent obligates the Trustee to sell certain assets located at the Premises free and clear of lien, claim and encumbrance. Prism has fully performed its obligation under the Letter of Intent by making payment of the contract amount of \$1.7 million for the purchased assets.

⁷ Anticipating removal of the assets, Prism had arranged for a moving company to be present. Instead the movers provided a moving estimate on July 14, 2003. Exhibit P-11.

⁸ JoyFor claims a \$5,500 monthly charge for storage based on the rental charge under Debtor's lease. On this basis, the accrued charges from closing until Prism appeared to recover the assets on July 8 and was refused would be \$16,500.

While the Trustee takes no position on this dispute between Prism and JoyFor, Prism contends that the Trustee has not fulfilled his obligations to consummate the transactions set forth in the Letter of Intent by reason of his failure to deliver the assets at the Premises. Prism testified that until late May or June when its frustration with the Trustee's lack of progress in getting it access to the Premises caused it to directly contact JoyFor, it relied on the Trustee to implement the sale transaction. While not asserted in this proceeding which merely seeks to gain delivery of what it has paid for, Prism's continued inability to secure the assets it owns may give rise to a claim against the Trustee. Leaving for another day that issue, Prism has instead sought to enforce the Order intended for its benefit.⁹

While JoyFor is not a party to the Letter of Intent and did not participate in the bankruptcy sale, it is no stranger to this bankruptcy case. It extracted a payment of its administrative claim before other similarly situated administrative claimants on the representation that its cooperation with the Trustee conferred and would continue to confer a benefit on the estate. The Rent Motion, Affidavit and Order make clear that JoyFor received a special early distribution because of its promise to grant access to the Trustee to review and remove books and records, the precise assets that Prism purchased. The site visit on July 8th was tied to receipt of the Order and concomitantly the payment.

JoyFor takes the position that its duty of access and removal was only to the Trustee. The record indicates multiple requests to the Trustee by Prism for access. Since the Trustee was not called to testify, I cannot conclude what he did to facilitate Prism's articulated

⁹ The issuance of the sale order was a condition to closing. Exhibit 1, Letter of Intent ¶ 5.3.

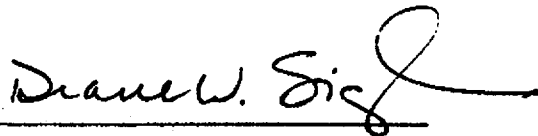
desire to visit the Premises and retrieve the assets located there. However, Joyfor, Prism and the Trustee (with counsel) were on the Premises on July 8 at which time it was clear that the Trustee had sold the Books and Records to Prism and it wanted to remove them. Prism's refusal to release the Books and Records continues to frustrate the consummation of the bankruptcy sale and is inconsistent with the spirit of the representations made to this Court by which they received early payment in this case.

JoyFor contends that I have no jurisdiction to address this problem. While I agree with JoyFor that the Books and Records are not property of the estate under § 541 so as to confer jurisdiction on that basis, I respectfully disagree that there is no basis for this Court to assume jurisdiction. Finding that the issue before me now relates directly to two orders that I have issued, I conclude that I have subject matter jurisdiction to enter the order accompanying this Memorandum Opinion. A bankruptcy court retains jurisdiction to enforce its orders. Precision Industries, Inc. v. Qualitech Steel SBO, LLC, 201 WL 699881, at *1, 6 (S.D. Ind. 2001), rev'd on other grounds, 327 F.3d 537 (7th Cir. 2003); Matilla v. Radco Merchandising Services, Inc. (In re Radco Merchandising Services, Inc.), 111 B.R. 684, 689 (N.D. Ill. 1990).¹⁰ However, my role is a limited one: to ensure that the sale transaction is consummated and to enforce Joyfor's representation to cooperate with the Trustee by

¹⁰ Because the jurisdictional foundation for this ruling is my prior Orders, I disagree with JoyFor that an adversary proceeding is necessary to secure the relief requested. However, I also disagree with Prism that jurisdiction exists because the Books and Records are property of the estate under § 541. The estate retains neither legal nor equitable title in this property, both having been transferred at the closing.

allowing the removal of the Books and Records.¹¹ I will fulfill that role by ordering JoyFor to allow Prism to remove the Books and Records it has purchased as part of the court-ordered § 363 sale. Because JoyFor contends it holds a landlord's lien on this property to secure a claim for storage, my order will provide that such lien will remain attached to the Books and Records notwithstanding JoyFor's loss of possession.¹² I make no ruling on whether JoyFor is entitled to additional consideration from Prism for the use of the Premises for storing the Books and Records after the closing nor if it is, whether and to what extent it holds a landlord's lien to secure all or any part of that claim. Nor do I determine whether Prism has a claim against JoyFor or the Trustee for alleged damages flowing from its failure to secure immediate possession of the Books and Records. Rather this Order is the logical resolution to the presenting problem which shall preserve rights and remedies while mitigating further harm to all parties.

An Order consistent with this Memorandum Opinion shall issue.



DIANE WEISS SIGMUND
United States Bankruptcy Judge

Dated: December 8, 2003

¹¹ This Court's involvement is necessary to protect the integrity of bankruptcy sales. To refuse to hear a dispute involving a bankruptcy sale on the grounds of lack of jurisdiction would undermine the force of a bankruptcy sale order and ultimately the price realizable for assets sold in a bankruptcy proceeding.

¹² A landlord's lien requires possession. The substitute lien I am granting does not. As such, JoyFor is in the same position as it was while it held the Books and Records.

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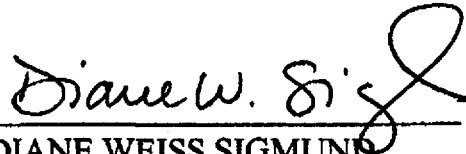
ORDER

AND NOW, this 8th day of December 2003, upon consideration of the Motion of Third Party Purchaser Prism Enterprises to Compel Turnover of Debtor's Assets (the "Motion"), after notice and hearing, and for the reason stated in the accompanying Memorandum Opinion;

It is hereby **ORDERED** that:

1. JoyFor Joint Venture ("JoyFor") shall provide access to its premises located in Newtown Square, Pennsylvania to representatives and agents of Prism Enterprises ("Prism") for the sole purpose of removing the assets of the Debtor Permagrain Products, Inc. sold to it by Permagrain's Chapter 7 trustee on March 28, 2003. The removal shall take place at a date and time convenient to Prism and JoyFor but no later than ten (10) days from the date of this Order. All costs of removal shall be borne by Prism.

2. To the extent that JoyFor has a landlord's lien on the assets being removed, such lien shall remain attached to the assets notwithstanding JoyFor's release of possession of the property. The substitute lien shall be of the same validity and amount as the landlord's lien asserted. Prism shall retain all defenses to the validity and amount of the lien other than lack of possession.



DIANE WEISS SIGMUND
United States Bankruptcy Judge

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