IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

IN RE: HEIDTMAN MINING, LLC, Debtor **No. 2:09-bk-72912**
Ch. 11

HEIDTMAN MINING, LLC **PLAINTIFF**
v. **No. 2:10-ap-07093**
OHIO HOLDINGS, INC. **DEFENDANT**

ORDER GRANTING HEIDTMAN MINING, LLC'S MOTION TO RECONSIDER AND GRANTING OHIO HOLDINGS, INC.'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Heidtman Mining, LLC's [Heidtman] *Motion to Reconsider Order Denying Summary Judgment in Favor of Debtor* on May 9, 2011, related to Heidtman's motion for summary judgment that was filed on August 26, 2010. Ohio Holdings, Inc. [OHI] filed a combined response and cross-motion for summary judgment on September 13, 2010, to which Heidtman filed its reply on September 27, 2010. For cause shown, the Court grants Heidtman's motion to reconsider. For the reasons stated below, the Court grants OHI's cross-motion for summary judgment.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). The following findings constitute findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Summary Judgment

Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings. Rule 56 states that the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any

material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the movant to establish the absence of material fact and support the assertion by citing to materials in the record. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing to former Fed. R. Civ. P. 56(c)). The burden then shifts to the non-moving party, who must show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). In this instance, the parties have filed competing motions for summary judgment and provided sufficient information for the Court to grant judgment as a matter of law.

Argument of the Parties

In both its complaint and motion for summary judgment, Heidtman argues that it may avoid the transfer of the Royalty Agreement between it and OHI under 11 U.S.C. § 544(a) because the Royalty Agreement is an interest in real property that was not recorded prior to the commencement of the bankruptcy case. Heidtman alleges that OHI's failure to record the Royalty Agreement resulted in an unperfected transfer under Arkansas law, which law governs because the real property interest at issue is located in Arkansas. Heidtman argues that it may avoid the transfer of the Royalty Agreement as a debtor-in-possession assuming the rights and powers of the trustee under § 544(a). According to Heidtman, after the transfer is avoided, the royalty interest contemplated under the Royalty Agreement would revest in the bankruptcy estate under § 541.

In its response and counter motion for summary judgment, OHI argues that § 544(a) is not applicable because the Royalty Agreement is an executory contract that was listed on the debtor's schedules, assumed by the debtor, and sold or assigned to a third party in a post-petition sale of assets. Upon the assignment of the Royalty Agreement, the agreement was no longer part of the bankruptcy estate and the assignee remains bound to OHI to perform under the terms of the Royalty Agreement.

The Court disagrees with each party's argument. First, Heidtman's argument presupposes its right to bring an avoidance action in the first place, under any subsection of § 544. As will be explained below, upon the sale of Heidtman Mining, LLC, Heidtman assigned its rights relating to the Royalty Agreement, and any related avoidance action, to the purchaser of Heidtman Mining, LLC. Generally, once property is sold, the property ceases to belong to the estate, and the rights and powers of a trustee or debtor-in-possession under § 544(a) cease to exist. *See In re Parrish*, 171 B.R. 138, 141 (Bankr. M.D. Florida 1994). That is what occurred in this instance.

Second, OHI's insistence that the Royalty Agreement is an executory contract is misplaced. While it is true the Royalty Agreement was assigned to a third-party and is no longer property of the estate, the Royalty Agreement is not an executory contract, regardless of its characterization as such by Heidtman in Schedule G: Executory Contracts and Unexpired Leases. The Eighth Circuit has adopted the "Countryman" definition of an executory contract. *In re Daugherty Const., Inc.*, (188 B.R. 607, 612 (Bankr. D. Neb. 1995) (citing *In re Knutson*, 563 F.2d 916, 917 (8th Cir. 1977)). Under the Countryman definition, "contracts are executory if they are so far unperformed that the failure of either party to complete performance would constitute a material breach excusing the performance of the other." *Id.* In this instance, it appears that the remaining obligation relating to the Royalty Agreement is simply the payment of the royalty interest under the terms of the contract.[1]

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[1] The preamble to the Royalty Agreement states, in relevant part:

WITNESS THAT:

> WHEREAS, Heidtman Mining, LLC, an Ohio limited liability company ("HMLLC"), OHI and the shareholders of OHI have entered into an agreement dated as of August 19, 2005 (the "Purchase Agreement"), under which HMLLC has agreed to purchase from OHI all of the issued and outstanding common stock of the Grantor, for the price and upon the terms and conditions set forth therein; and

Findings of Fact and Conclusions of Law

On March 23, 2010, the Court entered two orders in the underlying bankruptcy case of Heidtman Mining, LLC: (1) *Order (A) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases and (B) Establishing Cure Amounts* [Order 1], and (2) *Order Approving the Sale of Assets Free and Clear of All Liens, Claims and Encumbrances* [Order 2], which incorporated as Exhibit "A" an Asset Purchase Agreement [APA]. It is from these two orders and the APA the Court makes its finding of summary judgment.

Order 1 authorized the assumption and assignment of what was purported to be executory contracts and unexpired leases that were listed on an attached exhibit. Specifically, paragraph 4 states, "The Debtor is authorized to take all actions and execute all documents necessary or appropriate to assume and assign each Contract listed on Exhibit 'A.'" Included on Exhibit A were documents in the column titled Contract/Lease Description described as follows: "Royalty Agreement between Hartshorne Carbon Company, an Arkansas corporation, and Ohio Holdings, Inc., a Delaware corporation, dated March 16, 2006, as amended by First Amendment to Royalty Agreement dated January 30, 2006, and a Coal Security Agreement dated October 31, 2005." Paragraph 5 of the order states, "On the terms described in this order, each Contract is hereby assumed by the Debtor, and at the Closing Date (hearafter defined) may be assigned to the Purchaser identified in the order granting the Debtor's motion and supplemental motion to sell its assets [Docket #268 and 327] (the "Assignee")."[2] Paragraph 7 of the

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> WHEREAS, under Section 2, paragraph 2.4 of the Purchase Agreement HMLLC is to deliver to OHI an agreement for the payment of OHI of a royalty on coal produced and sold by the Grantor from and after the closing of the transaction contemplated in the Purchase Agreement (the "Closing"); . . . .

[2] The Order approving the sale--Order 2--identifies the Purchaser as Georges Colliers, Inc. The *Notice of Sale*, which was filed approximately six weeks later on May 7, 2010, identified the Purchaser as Shriram Sebastian, LLC and Shriram Sebastian

order contains terms specific to the Royalty Agreement and related documents:

> The Royalty Agreement between Hartshorne Carbon Company and Ohio Holdings, Inc., originally dated March 16, 2006 as amended, and the corresponding Coal Security Agreement dated October 31, 2005 (all as identified in Exhibit "A") *are assumed subject to and without waiver or compromise of any avoidance claim available to the Debtor as provided in the Bankruptcy Code*, all of which avoidance claims, if any, are hereby preserved for the benefit of the bankruptcy estate.

(emphasis added). In Heidtman's reply to OHI's response to the motion for summary judgment, it states that this paragraph preserved for the benefit of the estate the avoidance action against OHI that is the subject of this adversary proceeding. However, even though this paragraph appears to preserve any potential avoidance claim, the paragraph relates specifically to the *assumption* of the listed documents subject to and without waiver or compromise of any available avoidance claim.[3]

The paragraph that assigns the assumed agreements appears later in the order. When Heidtman assigned the contracts to the purchaser, it assigned all of the debtor's rights and obligations without reservation of any avoidance action relating to the Royalty Agreement. Paragraph 11 states,

> The Assignee shall succeed to and assume all rights and obligations of the Debtor under each Contract as of the Closing Date. *Nothing herein shall modify any of the terms of the leases and contracts hereby assumed and assigned or modify, increase or decrease the rights or obligations of the parties thereto*.

(emphasis added).

Leasing, LLC, assignees of George Colliers, Inc.

[3] Recognizing that the Court should not speculate as to the inclusion of the specific language in this paragraph and its omission from the assignment paragraph (¶ 11), it is possible that Heidtman may have included the language in the assumption paragraph to assure that any pre-merger action (or non-action) by any of the related parties was preserved so the debtor-in-possession could bring an avoidance action under § 544, had it chosen to do so.

The omission of a reservation of an avoidance action comports with Order 2, also. Paragraph 15 of Order 2 mirrors the language contained in Order 1 and states: "Nothing herein or in the APA shall modify any of the terms of the leases and contracts hereby assumed and assigned pursuant to the APA or modify, increase or decrease the rights or obligations of the parties thereto." According to paragraph 7 of Order 2, the assets being sold were conveyed "at Closing to the Purchaser free and clear of all liens, claims, encumbrances, and interests, whether known or unknown, including, without limitation, any of the Debtor's creditors, vendors, suppliers, employees, executory-contract counterparties, lessors or any other party." No reservation of an avoidance claim appears. Paragraph 8 provides that "any party asserting a claim or interest in the Assets as to which the Assets are hereby sold free and clear of such claim or interest, shall promptly at or following Closing take steps to release said claim or interest." Finally, in paragraph 10, the order states that the order

> shall constitute due and sufficient evidence that, upon closing and funding of the sale, *all liens, claims, and encumbrances against the Assets that existed prior to and through the Closing* (except as to the assumed liabilities described in the APA or as otherwise provided in this order [Order 2]) *have been unconditionally released, discharged, and terminated*, and have instead attached to the sale proceeds.

(emphasis added).

The APA is also instructive. Again without reservation, the APA states in paragraph 1 that

> Heidtman agrees to sell to PURCHASER, and PURCHASER agrees to purchase from Heidtman, on the terms and conditions hereinafter set forth, the following ("Property"):
> (a) The coal leaseholds, surface leaseholds, easements, fee coal interests and other rights described in Exhibit A, including all fixtures thereon, hereinafter referred to as "Coal Estate";
> . . .
>
> (d) To the extent that any of the assets listed above are the subject of unexpired leases or executory contracts, Heidtman shall, at closing and after obtaining Bankruptcy Court approval, assume and assign its rights under such leases and contracts to the PURCHASER; . . . .

Exhibit A is the same list that was attached to Order 1 (also titled Exhibit A) and also included the earlier referenced documents in the column titled Contract/Lease Description: "Royalty Agreement between Hartshorne Carbon Company, an Arkansas corporation, and Ohio Holdings, Inc., a Delaware corporation, dated March 16, 2006, as amended by First Amendment to Royalty Agreement dated January 30, 2006, and a Coal Security Agreement dated October 31, 2005."

Paragraphs 6 and 7 of the APA concern the assumption of liabilities and obligations of the purchaser and the retention of liabilities and obligations by Heidtman. Paragraph 6 reflects that the purchaser shall assume "(d) all liabilities and obligations arising out of, relating to or in connection with any transaction, status, event, condition, occurrence or situation which relates to the ownership, operation or use of the Property on or after the closing." As stated above, "Property" included the interests listed on Exhibit A and, presumably, would include the obligations to pay royalty interests pursuant to any valid agreement. Paragraph 7 lists the liabilities and obligations retained by Heidtman and subsection (i) states that Heidtman will retain "all other liabilities related to the Property not expressly assumed pursuant to Paragraph 6 of this Agreement." Because the interests listed on Exhibit A were expressly assumed in paragraph 6, subsection (i) of paragraph 7 is not applicable to the Royalty Agreement.

Conclusion

Based on the two previous orders of the Court and the APA, the Court finds that when Heidtman assigned the Royalty Agreement and Coal Security Agreement as one of the identified contracts on Exhibit A of the APA to the purchaser of Heidtman's assets, it unequivocally transferred all of the associated rights, liabilities, and obligations arising under the agreement to the purchaser. Based on Heidtman's reservation of any potential avoidance claim when it assumed the Royalty Agreement as debtor-in-possession, the Court believes that Heidtman also had the ability to reserve any potential avoidance claim when it assigned the Royalty Agreement. It did not do so.

Accordingly, the Court finds that § 544(a) is not applicable in this adversary proceeding and grants summary judgment in favor of OHI. When Heidtman assigned the Royalty Agreement in accordance with the APA, the agreement was no longer property of the estate. Any associated rights, liabilities, and obligations arising under the agreement now belong to OHI and the purchaser, not Heidtman.

IT IS SO ORDERED.

August 2, 2011
DATE

Ben Barry
BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: George H. Tarpley, attorney for Heidtman Mining, LLC
Mark W. Hodge, attorney for Heidtman Mining, LLC
G. Christopher Meyer, attorney for Ohio Holdings, Inc.