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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**
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13 In re:
14 Summit Holdings of Illinois, LLC,
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16
17
18 Debtor.

Case No.: 2:13-bk-36606-TD
CHAPTER 11
**MEMORANDUM DECISION RE: NEMAN
MOTION TO DISMISS CHAPTER 11 CASE**
Date: March 12, 2014
Time: 10:00 a.m.
Courtroom: 1345

19
20 The court heard this matter on March 12, 2014. Appearances were made as set
21 forth on the record. At the conclusion of the hearing, the court took the Neman Motion
22 to Dismiss under advisement.

23 Subsequent to the March 12, 2014 hearing, two events occurred: (1) the Debtor's
24 Motion for an Order Authorizing Sale of Debtor's sole asset, a single family residence
25 valued by the Debtor at \$8 million, was withdrawn by the Debtor for the reason that the
26 proposed third-party buyer had "terminated the [third-party] Purchase Agreement;" and
27 (2) the Debtor withdrew its pending Motion to Compel Arbitration of its dispute with
28 Neman.

1 Having reviewed the pleadings, declarations, and documentary evidence on
2 Neman's pending Motion to Dismiss Debtor's chapter 11 case, the argument of counsel,
3 and the record in this chapter 11 case, the court hereby denies Neman's Motion to
4 Dismiss this case. Neman has failed to persuade the court by a preponderance of the
5 evidence that dismissal of Debtor's chapter 11 case is either necessary or appropriate.

6 On October 26, 2012, Neman filed a Los Angeles Superior Court lawsuit seeking
7 specific performance and damages for Debtor's alleged breach (or perhaps the breach
8 by a related entity, Summit Holdings, LLC), based on a written agreement (Neman
9 Purchase Agreement) entered into between Neman and the Debtor (or its sister entity)
10 on May 12, 2012. Neman had agreed to purchase for \$6,042,500 the real property now
11 listed on Debtor's Schedule A as Debtor's sole, encumbered asset. Neman's lawsuit
12 asserts that Debtor (or its sister entity) had breached the contract and had improperly
13 refused to close the sale. Neman recorded a lis pendens. Debtor and its sister entity
14 moved in the superior court to expunge Neman's lis pendens. The Defendants' motion
15 to expunge was denied by a minute order entered on February 26, 2013. Defendant's
16 [sic] request for a bond was denied by the superior court. The superior court's minute
17 order said, among other things:

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19 Plaintiff establishes that he will more likely than not prevail on his claim:
20 -- There is an enforceable Purchase Agreement.
21 -- There is a breach by Defendant [sic] under Paragraph 12B.
22 -- There is no language in this Paragraph that it is a contingency.
23 -- Plaintiff sustained damage.

24 ***

25 Defendants [sic] fail to show that they are entitled to sell the property to a
26 third party.

27 Trial in the superior court suit was scheduled to commence on November 12,
28 2013. Debtor filed its chapter 11 case on November 1, 2013. Because the bankruptcy
had the initial appearance of a two-party dispute, this court issued its Order to Show
Cause (OSC) re dismissal on December 12, 2013. At a hearing on January 8, 2014,

1 this court continued the OSC for further hearing on April 30, 2014 and *sua sponte*
2 granted relief from the automatic stay to Neman to permit the superior court action to
3 continue to conclusion. The order for relief from stay was entered January 13, 2014.
4 Debtor's now withdrawn motion to sell to a third party followed shortly after, along with
5 Neman's Motion to Dismiss.

6 The evidence on the Neman Motion to Dismiss is fragmentary. It reveals a
7 dispute between Neman and the Debtor and that, as of February 26, 2013, the superior
8 court litigation was moving in Neman's favor, preliminarily. The Debtor (or its sister
9 entity) appeared, to the superior court, to be the party in breach of paragraph 12B of the
10 Neman Purchase Agreement, apparently on the basis that, though Neman had opened
11 escrow and delivered a \$150,000 deposit which now remains in the escrow, Debtor
12 failed to perform its covenants prior to the time for Neman's further performance.

13 Neman's further performance may have been excused by Debtor's prior breach
14 of the Neman Purchase Agreement. While Debtor (or its co-defendant) argued to the
15 superior court that tax and judgment liens excused Debtor's obligations under the
16 Neman Purchase Agreement (see Defendants' Motion to Expunge dated November 19,
17 2012, at 10:17-23), Debtor's later third-party Sale Motion filed in its chapter 11 case
18 stated on January 29, 2014, that the judgment and tax liens in dispute "are not debts of
19 the Debtor entity and there exists [sic] no recorded interests as to these claims." (See
20 Debtor's Sale Motion, at 3:12-23). It also appears to be true that the Debtor has waffled
21 with respect to who is responsible for such liens under the Neman Purchase
22 Agreement.

23 The Neman Purchase Agreement is complex. The post-agreement
24 correspondence and litigation between the parties has been extensive. The superior
25 court lawsuit is unresolved. This court is in no position to determine who is right and
26 who is wrong with respect to any contractual issue presented. For that matter, this
27 court's record contains only part of the superior court record; not enough to enable a full
28 understanding of the issues being litigated there, based on the evidentiary record,

1 pleadings, or oral argument in this court.

2 For example, the following is just a small sampling of the lengthy and very
3 difficult to read Neman Purchase Agreement:

4 12B refers to "covenants:"

5 Title is taken in its present condition subject to all encumbrances,
6 easements, covenants . . . whether of record or not . . . except (i)
7 monetary liens of record unless Buyer is assuming those obligations or
8 taking the Property subject to those obligations; and (ii) those matters
9 which Seller has agreed to remove in writing.

9 12C:

10 Within the time specified in paragraph 14A, Seller has a duty to disclose to
11 Buyer all matters known to Seller affecting title, whether of record or not.

12 14A:

13 SELLER HAS: 7 . . . Days After Acceptance to Deliver to Buyer all
14 Reports, disclosures and information for which Seller is responsible under
15 paragraphs 4, 6A, B and C, 7A, 9A, 11A and B, and 12. Buyer may give
16 Seller a Notice to Seller to Perform . . . if Seller has not Delivered the
17 items within the time specified.

16 14B:

17 (1) BUYER HAS . . . 30 . . . Days After Acceptance, . . . to:
18 (i) . . . approve all disclosures [etc.] . . . which Buyer receives from
19 Seller, and approve all other matters affecting the Property

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21 (3) Within the time specified in 14B(1) . . . Buyer shall deliver to Seller
22 either (i) a removal of the applicable contingency . . . or (ii) a cancellation .
23 . . of this Agreement based upon a remaining contingency or Seller's
24 failure to Deliver the specified items. However, if any . . . disclosure or
25 information for which Seller is responsible is not Delivered within the time
26 specified in 14A, the Buyer has 5 . . . Days After Delivery of any such
27 items, or the time specified in 14B(1), whichever is later, to Deliver to
28 Seller a removal of the applicable contingency or cancellation of this
Agreement.

27 This court is uncertain how the remaining some 30 pages of the Neman
28 Purchase Agreement play out in the state court dispute. Neman argues that two Ninth

1 Circuit decisions support his Motion to Dismiss. This court disagrees with Neman's
2 position. The first case Neman cites, Chinichian v. Campolongo (In re Chinichian), 784
3 F.2d 1440, 1445-46 (9th Cir. 1986), differs importantly from the facts presented by
4 Neman's motion. In Chinichian, after the sellers' breach of an agreement to sell their
5 home and in response to buyer's specific performance suit, sellers filed chapter 11 and
6 attempted to reject the buyer's contract. The sellers' rejection efforts were disallowed
7 by the bankruptcy court. Then the sellers converted their chapter 11 case to chapter
8 13. Their bankruptcy was shortly dismissed for sellers' failure to appear at their 341
9 meeting. At that point, the buyer attempted to proceed with his specific performance
10 suit. In response, the sellers then refiled a second chapter 13 bankruptcy case and
11 tried again to reject their contract to sell their home. In this second bankruptcy case, the
12 bankruptcy court in Chinichian refused to confirm the debtors' plan for the reason that, if
13 confirmed, the plan would have limited buyer's claim to an unsecured debt that would
14 have been subordinate to the debtors' homestead exemption rights. No such
15 homestead rights are asserted here by Debtor. By contrast, Debtor's chapter 11 here is
16 progressing normally, albeit under challenge by Neman.

17 Neman's second Ninth Circuit citation is to Silberkraus v. Dressler (In re
18 Silberkraus), 336 F.3d 864, 870-72 (9th Cir. 2003), where the issue was whether the
19 bankruptcy court could issue a fee-shifting order in favor of the buyer under Rule 9011.
20 In Silberkraus the evidence differed significantly from the evidence Neman asserts here.
21 In Silberkraus, the chapter 11 debtor's initial proposed disclosure statement attempted
22 to gerrymander debtor's specific-performance-seeking creditors' claims. The
23 gerrymander attempt was rejected by the bankruptcy court; the court set a deadline for
24 the debtor to file an amended disclosure statement; and the debtor failed to do so within
25 the court's deadline. In addition, Silberkraus also acknowledged to the court that he
26 could not confirm a chapter 11 plan over the objecting creditors' objections. The
27 bankruptcy court also found that Silberkraus would end up with a substantial equity
28 even if his real property were sold. Each of these critical Silberkraus factors is missing

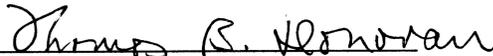
1 from Neman's Motion to Dismiss. Neman's evidence as offered in his Motion to Dismiss
2 is fragmentary; no issue in Neman's specific performance suit has been finally resolved
3 and the outcome in the superior court remains far from certain.

4 In the Neman Motion to Dismiss now pending before this court, the evidence and
5 the bankruptcy factors differ considerably from the circumstances discussed in both
6 Chinichian and Silberkraus. Here, the Neman Purchase Agreement and other pre-
7 closing transactional documents are complex, disputed, and not explained in any
8 thorough and satisfactory detail by Neman. The Neman Purchase Agreement itself is
9 very long and difficult for this court (with good eyesight) to read, and does not lead to a
10 practical, sensible, or satisfactory understanding of the dispute by this court. There has
11 been no superior court trial or determination of the merits of Neman's request for
12 specific performance or his damage claims.

13 Neman has failed to prove by a preponderance that he is entitled to dismissal of
14 Debtor's chapter 11 case.

15 SO ORDERED.

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24 Date: April 22, 2014


Thomas B. Donovan
United States Bankruptcy Judge