UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. RI 98-032

IN RE AMERICAN SHIPYARD CORPORATION,
Debtor.

AMERICAN SHIPYARD CORP. DISTRIBUTION TRUST,
Plaintiff-Appellee,

v.

WATER STREET CORPORATION and
HARBOR MARINE CORPORATION OF RHODE ISLAND,
Defendants-Appellants.

Appeal from the United States Bankruptcy Court
for the District of Rhode Island
[Hon. Arthur N. Votolato, U.S. Bankruptcy Judge]

Before

HILLMAN, BOROFF and CARLO, U.S. Bankruptcy Judges.

Douglas A. Giron, with whom Temkin & Associates LTD., were on brief for appellant.

Andrew S. Richardson and Thomas P. Quinn, with whom Boyajian, Harrington & Richardson, were on brief for appellee.

July 8, 1999

Per Curiam.

Water Street Corporation ("Water Street") and Harbor Marine Corporation of Rhode Island ("Harbor Marine"), the defendants/appellants, challenge a Decision and Order issued by the United States Bankruptcy Court concluding that there was an enforceable contract between Harbor Marine and the debtor, American Shipyard Corporation (hereinafter "American Shipyard" or "the debtor") and that Harbor Marine breached the contract without a legal justification that would absolve Harbor Marine of liability. Water Street and Harbor Marine also challenge the Bankruptcy Court's assessment of damages. Finding no error, we affirm the bankruptcy court's judgment.

JURISDICTION

The Bankruptcy Appellate Panel has jurisdiction to review final decisions from the United States Bankruptcy Court pursuant to 28 U.S.C. § 158(b)(1). See also Sanford Institution for Savings v. Gallo, 156 F.3d 71, 74 (1st Cir. 1998). The bankruptcy court's finding of facts may not be disturbed unless clearly erroneous, Fed. R. Bankr. P. 8013, and "[t]he bankruptcy court's legal conclusions, drawn from the facts so found, are reviewed de novo." Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997).

BACKGROUND

American Shipyard owned and operated a shipyard in Newport, Rhode Island. On May 31, 1996, the debtor filed a voluntary

petition under Chapter 11. Stephen Gray was appointed as a Chapter 11 Trustee on June 11, 1996. The Trustee continued to operate the shipyard. On September 30, 1996, the debtor was awarded contracts to repair two U.S. Army Reserve tug boats. The debtor was required to pick up the vessels at Curtis Creek, Maryland and tow them to the debtor's repair facilities in Newport, Rhode Island. The contracts required the debtor to repair the tug boats within a 90 day term to commence upon the earlier of debtor's pick up of the vessels from Curtis Creek or seven days after notification of activation of the contracts.

Initially, the debtor contracted with a certain Conrad Roy to tow the tugs to Newport at a price of $15,000 per tug boat. However, the Army activated the contracts two weeks later than the debtor expected and Conrad Roy was no longer available to pick up the tug boats. Two days after the contracts were activated, on October 25, 1996, David White ("White") of American Shipyard contacted Raymond DiSanto ("DiSanto") of Harbor Marine to see whether Harbor Marine could perform the tow. White thereafter spoke to Harbor Marine's Captain, Robert Oatway ("Oatway"). DiSanto agreed to pick up the tug boats for the same price that Conrad Roy had quoted.

On October 28, 1996, at DiSanto's request, the debtor issued

purchase orders for the tow to Water Street.[1] The purchase orders were sent by fax. They indicated that the vessels were each 128 feet in length and that the Pennington Avenue Bridge would have to be raised to accommodate their height.

On October 29, 1996, Harbor Marine dispatched two tug boats, the "Ray Me" and the "John B" to Curtis Creek. White went to Curtis Creek to prepare the two Army tugs for the marine tow. On November 1, 1996, after Oatway signed acknowledgments that the debtor had prepared the Army tugs for the tow, the Ray Me and the John B left Curtis Creek for Newport with the Army tugs in tow. But the Ray Me experienced engine problems, and even when the engine was repaired, the captains of the Ray Me and the John B believed that because of the size of the Army tugs, they could not make sufficient speed to safely complete the tow to Newport. Thus, without notifying the debtor, the Ray Me and John B returned the Army tugs to Curtis Creek and returned to Newport.

On November 2, 1996, White called Harbor Marine to see how the tow was proceeding. DiSanto informed White that the Army tugs had been returned to Curtis Creek. To avoid delay charges, the debtor had to find another company to perform the tow on short notice. The debtor hired Bay State Towing Company ("Bay State") to do the job for $27,000 per tug. Bay State performed under the contract.

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[1]Both Harbor Marine and Water Street are Rhode Island corporations with their principal offices in Warren, Rhode Island. Both corporations are solely owned by DiSanto.

On April 16, 1997, Harbor Marine submitted an application for allowance of administrative expenses in the amount of $14,125 for the costs incurred in attempting the tow. The Chapter 11 Trustee and the creditor's committee filed objections to the application. On May 30, 1997, the Chapter 11 Trustee filed an adversary complaint against Harbor Marine and Water Street for breach of contract. The debtor sought damages in the amount of $37,963, which included: the difference between its contract price with Harbor Marine and what it paid to Bay State to perform the tow - $24,000; the cost to send a representative to Curtis Creek to prepare the Army Vessels for the marine tow a second time - $553; and delay charges assessed by the Army in the amount of $13,410.

The bankruptcy court held an evidentiary hearing in February, 1998 and issued a published Decision and Order on April 22, 1998, concluding that Harbor Marine's failure to tow the two Army tugs to Newport constituted a breach of contract. Gray v. Water Street Corp.(In re American Shipyard), 220 B.R. 734 (Bankr.D.R.I. 1998). The bankruptcy court awarded the Trustee damages in the amount of $24,553.59, which represented the additional costs that the Trustee incurred hiring Bay State to complete the tow, plus expenses for American Shipyard to prepare the vessels a second time for the marine tow. The court denied the debtor's claim for delay damages. This appeal ensued.

In this appeal Water Street and Harbor Marine challenge the

bankruptcy court's ruling on several grounds. They assert that the bankruptcy court's factual determination that there was not a mutual mistake or other excuse for Harbor Marine's failure to perform under the towing contract was clearly erroneous. They also assert that the bankruptcy court did not apply the correct law in making this determination. They argue that the bankruptcy court erred as a matter of law in concluding that the debtor had no duty to investigate whether Harbor Marine was capable of performing under the towing contracts. They assert that the bankruptcy court failed to balance the equities. They allege that the bankruptcy court's factual finding that there was a contract between Harbor Marine and the debtor was clearly erroneous. Finally, they argue that the bankruptcy court's determination of damages was erroneous as a matter of law or unsupported by the record. Each will be discussed in turn.

DISCUSSION

A. Existence of a contract between the debtor and Harbor Marine

The bankruptcy court ruled that the debtor contracted with Harbor Marine rather than Water Street for towing services. The court stated:

> White testified that he called Harbor Marine directly to arrange for the tow and that DiSanto requested, for internal reasons of concern only to him and his solely owned corporations, that the purchase orders be in the name of Water Street Corporation. DiSanto, the sole shareholder and president of both Water Street and Harbor Marine, stated that Harbor Marine owned the tugs that would be used, and that Water Street Corporation

> primarily buys and sells real estate and presently owns a restaurant. Additionally, Harbor Marine invoiced the Debtor for the services rendered, and it is Harbor Marine which filed the application for administrative expenses. . . . Based on the uncontradicted evidence, we find and conclude that Harbor Marine is in privity of contract with American Shipyard, and that it is the entity liable for the damages awarded herein."

In re American Shipyard, 220 B.R. at 738.

Water Street and Harbor Marine argue that the bankruptcy court erred in holding Harbor Marine liable since the purchase orders from American Shipyard were issued to Water Street. While the purchase orders were issued to Water Street, no agreement was reached between the debtor and Water Street. Except for the issuance of the purchase orders to Water Street, all other evidence suggests that the contract was between American Shipyard and Harbor Marine. As the bankruptcy court found, Harbor Marine was contacted by the debtor to perform the towing services. Id. DiSanto testified that American Shipyard contacted Harbor Marine to tow the Army tugs. (Trial Transcript of 2/12/98 p. 81). DiSanto also testified that Water Street did not own tug boats. (Trial Transcript of 2/12/98 p. 78). Harbor Marine's tug boats and employees were used to attempt the tow. Oatway, the captain of one of Harbor Marine's tugs attempting the tow, testified that despite having worked for Harbor Marine for six years, he had never heard of Water Street. (Trial Transcript of 2/12/98 p. 11). After the failed tow attempt, Harbor Marine invoiced the debtor for the attempted tow. (Supplemental Appendix to Brief of Appellee,

American Shipyard p. 51). Harbor Marine also filed the application for payment of administrative expenses with the bankruptcy court. (Id. p. 52). The bankruptcy court's finding that American Shipyard and Harbor Marine were in privity of contract was not clearly erroneous. Likewise, the bankruptcy court did not err in making the legal determination that a contract existed between the debtor and Harbor Marine.

B. Mutual Mistake or Impossibility of Performance

The parties do not dispute the bankruptcy court's finding that the Harbor Marine tug boats were not powerful enough to perform the tow of the Army tugs. The bankruptcy court concluded, however, that "[t]his was not a case of mutual mistake, but rather a garden variety inability to perform by Harbor Marine, which does not excuse it from its obligation under the contract." In re American Shipyard, 220 B.R. at 737. Harbor Marine argues that the bankruptcy court erred in reaching this conclusion since it alleges that both parties operated under the mistaken belief that Harbor Marine's tugs were capable of performing the tow.

As the bankruptcy court stated, to excuse performance due to a mutual mistake:

> it must appear that by reason of a mistake, common to the parties, their agreement fails in some material respect correctly to reflect their prior completed understanding. ... A mutual mistake is one common to both parties wherein each labors under a misconception respecting the same terms of the written agreement sought to be canceled.

In re American Shipyard, 220 B.R. at 737 (quoting Dubreuil v. Allstate Ins. Co., 511 A.2d 300, 302-03 (R.I. 1986)). As the bankruptcy court correctly concluded, citing Vanderford v. Kettelle, 64 A.2d 483, 489 (R.I. 1949), Harbor Marine had the burden of establishing such mistake by clear and convincing evidence. In re American Shipyard, 220 B.R. at 737. See also Dubreuil, 511 A.2d at 303.

The bankruptcy court's conclusion that there was no mutual mistake was premised on a finding that testimony on behalf of American Shipyard was more credible and that Harbor Marine was in possession of the pertinent specifications of the tug boats or that Harbor Marine's own failure to investigate and obtain the specifications was the cause of its inability to perform.

Harbor Marine argues that the "mistake" as to Harbor Marine's ability to perform the tow, resulted from the debtor's failure to provide Harbor Marine with the specifications of the Army tugs. The evidence presented at trial was that American Shipyard knew the specifications of the Army tugs. The specifications were provided in the contracts between American Shipyard and the United States. (See Supplemental Appendix to Brief of Appellee, American Shipyard pp. 3, 14).[2] White testified that this information was provided to DiSanto of Harbor Marine. (Trial Transcript of 2/10/98 pp. 34-35).

[2]The specifications included the length, beam, displacement (light), displacement (heavy), mean draft light, mean draft heavy and construction.

White also testified that this information was provided to Oatway. (Id. pp. 35-36). White's testimony was that Oatway indicated that he was familiar with the vessels and that Harbor Marine could perform the tow. (Id. pp. 36-37). DiSanto testified that White did not give him the specifications for the Army tugs. (Trial Transcript of 2/12/98 pp. 85). DiSanto testified that had he known the specifications, they would have come up with the right tugs to perform the tow. (Id. p. 91). Oatway testified that the only specifications he was given was the length of the Army tugs. (Trial Transcript of 2/12/98 pp. 15, 35). Oatway agreed that he told White that Harbor Marine could perform the tow. (Id. p. 16). The bankruptcy court found, accepting White's testimony, that Oatway did not express any reservations about being able to accomplish the tow, even after seeing the tugs at Curtis Creek. Based on the evidence presented, a finding that Harbor Marine had the specifications for the Army tugs is not clearly erroneous.

Harbor Marine argues that "[i]t would be ridiculous to suggest that HMC [Harbor Marine] would have traveled to Maryland, and incurred the substantial expenses concomitant therewith, had it known that the Army tugs were too large for its tug boats safely to tow." (Brief of Appellants p. 15). Likewise, it would have been improvident for Harbor Marine to send tugs to attempt the tow without specifications for the tugboats, given that the specifications were crucial in the determination of whether Harbor

Marine could complete the tow. As the bankruptcy court stated "[t]o find a mutual mistake in this instance would amount to relieving a breaching party from its obligations on account of its own incompetence." In re American Shipyard, 220 B.R. at 738. "Equity does not grant relief to a party on the ground of accident or mistake, if the accident or mistake has arisen from his own gross negligence, or want of reasonable care . . ." Torek v. Butler, 147 A. 872 (R.I. 1929). Stated in other terms,

> [a] party bears the risk of a mistake when . . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient . . . .

Restatement (Second) Contracts § 154(b)(1979). Harbor Marine should have acquired the specifications for the Army tugs prior to agreeing to and attempting to tow the Army tugs. If Harbor Marine failed to do so, the bankruptcy court properly denied Harbor Marine's request to excuse its performance based on a mutual mistake.

Harbor Marine also argues that its failure to tow the Army tugs to American Shipyard's facilities in Newport is excused by the doctrine of impossibility of performance. One of the requirements for the plea of impossibility to succeed is that "a contingency- something unexpected- must have occurred." Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966). See also United States v. Winstar Corp., 116 S.Ct. 2432, 2470, n.53

(1996)(collecting cases requiring occurrence of unexpected and unforseen event). Likewise, the doctrine of frustration or impracticability requires that a supervening event occur after the contract is made. Iannuccillo v. Material Sand and Stone Corp., 713 A.2d 1234, 1238 (R.I. 1998). The Supreme Court of Rhode Island has stated that "a contract's performance will not be set aside merely because the performance under the contract becomes more difficult or expensive than originally anticipated." Id. (citing Grady v. Grady, 504 A.2d 444, 447 (R.I. 1986)).

In the present case, nothing unexpected occurred. There was no supervening event that occurred after Harbor Marine agreed to tow the Army tugs to the debtor's repair facilities. DiSanto testified that had he known the specifications for the Army tugs, Harbor Marine could have come up with the right tugs to perform the tow. (Trial Transcript of 2/12/98 p. 91). This Panel concludes, as did the bankruptcy court, that the doctrine of impossibility of performance or impracticability did not excuse Harbor Marine's performance under the towing contracts.

C. Determination of Damages

Harbor Marine argues that the bankruptcy court's assessment of damages was unsupported in the record. Harbor Marine argues that the price charged by Bay State to perform the tow was unreasonable and that Harbor Marine's breach did not proximately cause the damages.

The bankruptcy court, citing National Chain Co. v. Campbell, 487 A.2d 132, 135 (R.I. 1985) and In re Newport Offshore Ltd., 155 B.R. 616, 620 (Bankr.D.R.I. 1993), *aff'd*, 24 F.3d 353 (1st Cir. 1994), sought to place American Shipyard in the position that it would have been in but for Harbor Marine's breach of contract. The bankruptcy court's assessment of damages was clearly supported by the record. The uncontroverted evidence was that Bay State charged the debtor $54,000 to tow the Army tugs. (See Supplemental Appendix to Brief of Appellee, American Shipyard p. 31). This sum was $24,000 more than the price agreed to between the debtor and Harbor Marine. The only other item of damages allowed was the sum of $553.59, which was required to send White to Baltimore a second time to prepare the Army tugs for the tow. (Id. pp. 36-38). The argument that Harbor Marine's breach was not the proximate cause of the debtor's damages is frivolous. Harbor Marine's breach was the direct cause of the debtor's damages. If Harbor Marine had performed under the agreement, the debtor would not have incurred the additional towing charges nor the additional expenses in sending White to Baltimore to prepare the tugs a second time.

Harbor Marine argues that the best evidence of a reasonable price for the tow is that itself and another towing company agreed to do the tow for $30,000. Time was of the essence in performing the tow of the Army tugs. At the outside, the debtor was initially granted ninety-seven days to perform the repairs to the tugs from

the time the contracts were activated. The contracts provided for delay damages for failure to timely perform. The contracts were activated on October 23, 1996. On November 2, 1996, the debtor became aware that Harbor Marine had returned the Army tugs to Curtis Creek. White testified that he looked on the Internet and along with David Cardino, American Shipyard's General Manager, made "a lot of phone calls" to secure another company to perform the tow. (Trial Transcript of 2/10/98 p. 45). White testified that they were having a hard time getting a tug on such short notice and that Bay State provided the lowest bid. (Id.). The bankruptcy court found that the extra $24,000 expended by the debtor to hire Bay State was pricey but unavoidable. In re American Shipyard, 220 B.R. at 738. Under the circumstances, Harbor Marine has failed to show that this amount was unreasonable. We conclude that the bankruptcy court committed no error.

CONCLUSION

The record before us shows that the bankruptcy court properly held that the contract was between the debtor and Harbor Marine. The bankruptcy court properly concluded that neither the doctrine of Mutual Mistake nor the doctrine of Impossibility of Performance excused Harbor Marine's failure to perform under the contract. Neither equity nor an alleged duty of the debtor to investigate Harbor Marine's ability to perform, excused Harbor Marine's breach of contract. The bankruptcy court did not err in its computation

of damages. Accordingly, we AFFIRM the bankruptcy court's decision in all aspects. Costs to the Appellee.

SO ORDERED.