UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re

PRUETT RANCHES, INC.,

Debtor

Case No. Bk-N-95-32230

Chapter 11

/

AGEAN INTERNATIONAL,

Plaintiff,

vs.

PRUETT RANCHES, INC.,

Defendant.

/

Adv. No. 97-3020

DECISION AND JUDGMENT

This matter came on regularly for trial before U.S. Bankruptcy Judge Gregg W. Zive on plaintiff Agean International's ("Agean") complaint against Debtor Pruett Ranches, Inc. ("Debtor"). Appearing on behalf of plaintiff was Richard W. Horton, Esq., of Lionel Sawyer & Collins and appearing on behalf of Debtor was John A. Snow, Esq. and Mark G. Simons, Esq.

The court, having heard and considered the oral testimony presented at trial, having read and considered all of the documentary evidence and the written memoranda and briefs submitted by counsel for the parties, having heard and considered oral argument from counsel and having reviewed all of the exhibits and electronic tapes of the proceedings, and good cause appearing therefore, makes the following decision and enters the following judgment.

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DECISION

Chester F. Millar ("Millar") was the agent for Agean in all of its dealings with Pruett Ranches while David L. Pruett ("Pruett"), the principal of the Debtor, was acting on behalf of the Debtor.

Agean, through Millar, was primarily in the business of investing in gold mining operations. Millar wanted to develop a process known as agglomeration bio-leach to recover the gold encapsuled in pyrite that could not be removed by any other process.

For more than two years, Millar had been unsuccessfully attempting to buy pyrite tailings from Sonora Mining Corporation ("Sonora") that were located in Douglas County, Nevada. Sonora had a processing plant that was commonly known as the Buckskin processing plant that included buildings, equipment, mining claims and approximately 250,000 tons of pyrite tailings all as set forth in the Purchase Agreement and Escrow Instructions entered into between Debtor and Sonora on November 9, 1993. Millar wanted to acquire the pyrite tailings so Agean could test its bio-leach technology.

When Millar became aware the Debtor had either acquired or was going to acquire an interest in the Buckskin plant he then attempted to communicate with Pruett. Eventually a meeting was arranged and Pruett traveled to Vancouver, Canada to meet with Millar.

Pruett was interested in pursuing a business relationship with Agean not only to recover the gold contained in the pyrite tailings and to participate in any recovery, but also to use the residual by-products generated from the treatment of the tailings to reduce alkaline soil levels in ranch properties that he had bought in Douglas County adjacent to the Buckskin plant.

Millar and Pruett met on September 28 and 29, 1993 and eventually entered into a Letter Agreement dated September 28, 1993 ("Agreement") that attempted to define "the intent of the parties to participate in the Buckskin tailings treatment

project, Lyon and Douglas Counties, Nevada." The Agreement required that all modifications be written.

The parties failed to define the "Buckskin tailings treatment project." The Agreement identified the parties, identified the property the Debtor either owned or was to purchase, stated that the Debtor intended to treat the Buckskin pyrite tailings "by the most economic and environmentally feasible methods available," noted that Agean had proprietary technology relating to agglomerated biological leaching, that Agean "is willing to participate further in the project as and when additional funding is required," and that the Debtor was to provide 10,000 tons of pyrite tailings, a site for Agean's bio-leach test and then to dispose of the by-products with Agean having no liability from the use of the residual by-products.

Agean was to pay the Debtor $300,000 and to receive the following:

a. A site to perform an agglomerated bio-leach test.

b. 10,000 tons of Buckskin pyrite tailings having an average grade of 0.19 ounces of gold per ton.

c. The right to participate in the "Buckskin Project" on an equal basis with Pruett as set forth in the portion of the Agreement entitled, "Future Participation."

The $300,000 was paid. Apparently that sum was arrived at in an attempt to equalize roughly the Debtor's investment in the Buckskin plant that it was purchasing from Sonora.

Debtor was required to obtain the necessary permits and bonds at its cost and to purchase the Buckskin plant from Sonora. The Agreement refers to an Exhibit "A" that was not attached to the Agreement. Nevertheless, it is undisputed that the Debtor did purchase the Buckskin plant pursuant to Trial Exhibit 2 from Sonora. Agean was not to have any liability for the Debtor's agricultural use of acid waters and an iron sludge landfill disposal nor would Agean have any liability for existing ground water conditions at the Buckskin project. In sum, the Debtor was responsible for all

permitting, bonding and any potential liability arising from environmental or reclamation matters.

There was a separate provision in the Agreement regarding future participation. The parties agreed that "at a reasonable conclusion of the bio-leach test, a feasibility study and operational plan will be done, including budgets for commercial operations." However, the bio-leach test was never completed, a feasibility study was never conducted and an operational plan was never prepared.

Agean was provided with the "option to participate 50/50 in the Buckskin Project" with the Debtor by contributing "as much as $250,000 in project financing." However, once again, the term "Buckskin Project" was not defined and neither was the term "project financing."

The parties recognized in the Agreement's final paragraph that the Agreement had "been hastily drawn up and that clarifications or addendums may be needed from time to time in order to carry out the meaning and terms of this Agreement." Both parties agreed to negotiate in good faith to resolve the issues that had not been agreed upon by September 29, 1993.

The Agreement is vague and uncertain. It appears that the parties were able to agree about Agean's original investment and the bio-leach testing, but were not able to define the terms of Agean's option regarding future participation. The Agreement is totally silent regarding what would occur if the testing were not completed, which is important because it appears that any future participation is conditioned upon the conclusion of the testing, a feasibility study and an operational plan, none of which came to fruition. It is not possible to determine "project financing" based upon the Agreement in the absence of any of those factors because the project was the "Buckskin tailings treatment project" and, in the absence of a tailings treatment plan, there is, by definition, no project. The Agreement does not provide a method or basis upon which Agean can exercise its option if the pyrite tailings were not treated and the residual by-products were not available to be used by the Debtor. The Agreement

does not contemplate the sale of the pyrite tailings if any of the alternative treatments set forth on page 3, subparagraph e of the Agreement were not utilized.

Millar testified that the purpose of the Agreement was to provide an opportunity to test Agean's bio-leaching process so it could be used at other locations rather than making a profit.

As Millar stated, until the bio-leach tests were completed, the situation was too fluid for a definitive agreement and, in any event, he was too busy with other matters to reflect on the terms of the Agreement, which he wanted to do before preparing a definitive agreement.

The final paragraph of the Agreement acknowledges that clarifications or addendums would be necessary. The parties were never able to agree as to any clarification or addendum that resulted in required written modifications.

During the late fall and early winter of 1993, Pruett discovered that the property purchased from Sonora contained groundwater contamination far greater than had been anticipated. He researched methods of resolving those issues and provided Millar with information regarding those developments.

On January 10, 1994 Agean paid an additional $20,000 to the Debtor to defray the cost for the bio-leach test. In mid-February of 1994 meetings were conducted between representatives of the Debtor and Agean regarding the bio-leach test project. At that time Agean was provided an engineering test report regarding the agglomeration bio-leach which showed marginal to negative results. Pruett did not consider bio-leach to be economic.

During the pendency of the bankruptcy case, Agean did receive the 10,000 tons of pyrite tailings called for in the Agreement and was provided with a site to conduct the bio-leach test. However, Agean never demanded to complete the test and the $20,000 that had been paid for that purpose was returned to Agean. Agean elected to attempt to participate in the sales of the pyrite tailings, as opposed to the treatment of the pyrite tailings.

The opportunity to sell the pyrite tailings arose in February and March of 1994. By letter dated February 22, 1994, Pruett solicited mining companies to purchase the pyrite tailings. There was interest from mining companies to purchase the pyrite tailings to be used in their mining operations.

As both Pruett and Millar testified, while the Agreement was premised upon the treatment of the tailings and not the sale of the tailings, Pruett did notify Millar about the potential sales. They attempted to negotiate an agreement regarding Agean's option and how Agean could participate in the sales proceeds since the underlying purpose of the Agreement had changed.

Pruett and Millar met on March 1 and 2, 1994 to negotiate Agean's participation in the sales and the sales-related costs of the pyrite tailings. Pruett prepared financial projections, either prior to or during the meeting, that were reviewed and discussed. Trial Exhibits 36 and 37. Those projections included a required $250,000 investment by Agean. That amount is consistent with the September 28, 1993 Agreement that provided that Agean would have the option to participate equally in the tailings treatment project by contributing as much as $250,000 in project financing. Other projections contained various estimates of costs for capital assets and reclamation. Of course, pursuant to the Agreement, costs of reclamation had been Debtor's responsibility but Debtor was to obtain the benefit of the use of the by-products resulting from treatment of the tailings. Since there was not going to be any treatment there would not be any by-products. The sale rather than the treatment of the tailings precluded Debtor from obtaining that bargained-for benefit. The projections and negotiations illustrate the fluidity of the situation and further demonstrate that the Agreement was not intended to be, nor did it contain, the final meeting of the minds between the parties regarding prospective participation by the parties in anything other than in the treatment of the tailings.

Pruett testified that on March 2, 1994 Millar orally agreed to accept 23 percent of the gross sales proceeds after contributing the $250,000. Based upon the

projections used at the meeting, 23 percent of the gross approximated 50 percent of the net sales proceeds.

Following the meeting, the parties exchanged a series of correspondence. Trial Exhibit 7 is an undated letter sent by Pruett to Millar to which an understanding of the modified agreement was attached. The putative modification (Trial Exhibit 146) is dated March 7, 1994. It is on the Debtor's letterhead and states that it is a letter agreement between the Debtor and Agean to modify the September 28, 1993 Agreement. It contains various terms including that Agean was to receive 23 percent of gross sales conditioned upon Agean's transfer of $250,000 to the Debtor's account at First Interstate Bank of Nevada in Minden, Nevada.

That same day, March 7, 1994, Millar sent by telefax a letter to Pruett at Pruett's hotel in Elko, Nevada, stating that the calculations prepared by Pruett "in the papers you left with me are wrong." Millar also stated, "And I am having second thoughts about some aspects of reclamation and further financing. We need to talk some more. I can come to Reno on the 17th. Can we meet then?" Trial Exhibit 8.

Millar also made notes dated March 8, 1994. Trial Exhibit 147. In his notes, Millar referred to the fax he received from Pruett the day before, and wrote, "What was agreed to was a 23% payment to Agean based on the numbers Pruett gave Millar about February 28." These notes are consistent with Pruett's testimony that he and Millar agreed on March 2, 1994 that Agean would receive 23 percent of the gross sales proceeds upon payment of $250,000.

Millar's notes refer to his fax to Pruett that states Millar was having "second thoughts" about the transaction. The notes also reflect that Pruett had called and during that conversation Millar explained to Pruett what he believed were errors in the projections. Millar said he wanted to increase Agean's participation to 27 percent of gross sales.

Pruett responded with his own telefax dated March 8, 1994. Trial Exhibit 6. In that letter he referred to the putative modification (Trial Exhibit 146), and said that

if Millar wanted to proceed as set forth in that putative modification that Millar should immediately deposit the $250,000. Pruett continued to say that if Millar chose not to participate on that basis, equal participation would only exist if Millar participated in the costs of reclamation and property acquisition. He said that he had offered Agean "a massive favor" and concluded by saying that Agean's demand for 27 percent of the gross sales proceeds was rejected.

Trial Exhibits 160 and 161 are additional notes that Millar prepared to show how he arrived at his demand for 27 percent of the gross sales proceeds. Trial Exhibit 161 is entitled "Second Agreement between Agean International A.G. and Dave Pruett." These exhibits are also consistent with Pruett's testimony that the parties were not able to reach an agreement regarding the exercise of Agean's option to future participation.

The next correspondence is Trial Exhibit 9, a letter from Agean's counsel, Richard W. Horton, Esq., to the Debtor. In that letter Horton, on behalf of Agean, states that Agean would pay $145,000 (apparently that is approximately half of the projected costs as contained in the various projections) in two payments of $50,000 and $95,000, respectively, for which Agean would obtain an equal participation with Debtor. Horton asks the following at page 2 of his letter , "would Pruett agree to this arrangement?" This offer shows that Agean did not believe an agreement had been made. Horton's letter does not make any reference to the $250,000 referred to in both the Agreement and the putative modification (Trial Exhibit 146).

By letter dated March 14, 1994 Pruett, on behalf of Debtor, rejected Agean's offer as set forth in Horton's letter. Trial Exhibit 5. His March 14, 1994 letter goes on at some length reviewing the history of the transactions and the disagreement regarding participation in the sales proceeds. Pruett recognized that Agean "has a right to demand a share of the project based only on some respective equity" but rejects the notion that it is to be an equal division. Pruett states he only agreed to accept $145,000 if Agean would agree to the terms of the putative modification he

believed were orally accepted on March 2, 1994, which limited Agean's participation to 23 percent of the gross sales proceeds and not the 27 percent later demanded by Millar. Pruett did not unconditionally accept the offer contained in Horton's letter.

The parties continued to negotiate through August 2, 1994. On or about July 28, 1994 Pruett sent to Agean two proposals to conclude the negotiations, but both required the payment of $250,000. Millar responded by sending a letter to an Alfred Jager on August 2, 1994 (Trial Exhibit 148) in which he states, "I am now trying to come up with a counter-offer which would be based on my own appraisal of the environmental cost." He indicates that his feeling was that they would have to proceed with a lawsuit to force Pruett "into something reasonable."

The foregoing chronology shows the parties were unable to reach any agreement how Agean could exercise its option regarding Agean's future participation in the Buckskin project no matter how that project was defined.

The parties were prescient when they included the last provision of the Agreement noting the Agreement would need to be clarified or modified. The Agreement did need to be modified to define the nature, scope and exercise of Agean's option, especially because the Buckskin project was no longer a "tailings treatment project" but had been transmuted into a tailings sales program that materially altered the parties' goals that existed when they entered into the Agreement.

Pruett insisted throughout the negotiations after February of 1994, that Agean's participation in the sales proceeds be limited to 23 percent of the gross and that Agean make a financial contribution of approximately half of the program's costs if Agean wanted to exercise its option. Agean's right to participate in the future as set forth in the Agreement was premised upon the conclusion of a bio-leach test with a subsequently prepared feasibility study and operational plan. The parties did agree to proceed with sales of the tailings rather than treatment of the tailings, but could not agree as to the extent of Agean's participation. Agean had the option to seek to

participate but it was under no obligation to do so unless an agreement could be arrived at with the Debtor regarding the extent of such participation.

The court finds that the attempt to enter into a joint venture regarding the sales of the pyrite tailings failed. There was not an agreement on the essential terms of the such a joint venture. All the September 28, 1993 Agreement contained was an agreement to agree and, in the absence of any subsequent agreement, Agean has no claim for either specific performance or damages. All the Agreement required was good faith negotiations. Those occurred. Unfortunately, no modified agreement was obtained regarding the unanticipated pyrite sales program. Agean got what it bargained for in 1993: 10,000 tons of pyrite tailings, a site on which to conduct its bio-leach test and the option, if agreement could be reached, to participate in the future operation of the Buckskin tailings treatment project. Sale of the pyrite tailings was not contemplated by the parties to the Agreement. The September 28, 1993 Agreement was performed so far as it could be pursuant to its terms.

Agean is seeking specific performance of the Agreement and a determination that it owns a half interest in the pyrite tailings. In substance it is asking this court to determine the essential terms of Agean's option that would allow Agean to participate in the proceeds from the pyrite sales and gold production. However, the contract is not sufficiently definite to allow the court to determine the exact meaning and fix the legal liabilities of the parties and, therefore, the Agreement is not capable of being specifically performed. *Chung v. Atwell*, 103 Nev. 482, 745 P.2d 370 (1987). As noted by Millar, he and Pruett were "winging it" when they drafted the Agreement. While a contract may be so uncertain, vague and indefinite that the intention of the parties regarding material elements cannot be ascertained so as to preclude specific performance, an agreement may still be definite enough to provide a basis for damages for a material breach.

The future participation clause of the Agreement, when coupled with the recognition that the Agreement may be incomplete and the parties subsequent failure

to agree regarding the sales program, leads to the conclusion that the nature and scope of the option granted Agean by the Agreement was to be the subject of negotiation and a subsequent meeting of the minds between Millar and Pruett regarding its essential terms. In other words, an agreement to agree. As noted in *City of Reno v. Silver State Flying Service, Inc.*, 84 Nev. 170, 176, 438 P.2d 257, 261 (1968), quoting, *Salomon v. Cooper*, 98 Cal.App.2d 521, 220 P.2d 774 (Cal. App. 1950), "'[a]n agreement to agree at a future time is nothing and will not support an action for damages.'" Moreover, the majority rule is that courts will not enforce agreements to negotiate. See, e.g., *Honolulu Waterfront Ltd. Partnership v. Aloha Tower Dev. Corp.*, 692 F.Supp. 1230 (D. Haw. 1988), aff'd 891 F.2d 295 (9th Cir. 1989).

The Agreement and the parties' correspondence and notes contain jargon and idioms that are not satisfactorily defined in the Agreement or other writings except to demonstrate that there were ongoing negotiations regarding Agean's attempt to participate in the sales of the pyrite tailings, attempts to determine certain costs and attempts to allocate the environmental and property acquisition costs between the parties; all matters which were never agreed upon by Pruett or Millar.

The Agreement was directed towards the treatment of the pyrite tailings by Agean's bio-leach process and expressly provided what was to occur upon "a reasonable conclusion" of that test. Pruett offered Agean the ability to participate in the sales of the pyrite tailings even though sales were not contemplated by the Agreement. However, he insisted that for Agean to participate, it must pay an appropriate amount of the costs regarding environmental remediation and property acquisition. Millar, on behalf of Agean, refused to enter such an agreement and even prepared his own draft of a "Second Agreement." The court cannot fashion or hobble together an agreement the parties could not successfully negotiate.

There simply is no contract regarding the sale of the pyrite tailings. Since no agreement was ever arrived at regarding Agean's future participation in the sale of the pyrite tailings, there cannot be any damages.

JUDGMENT

Based upon the foregoing Decision, the court hereby ORDERS, ADJUDGES AND DECREES that judgment be entered in favor of Pruett Ranches, Inc. and against Agean International with each party to bear its own attorneys' fees.

DATED this 8th day of November, 1999.

Gregg W. Zive
Chief U.S. Bankruptcy Judge

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