

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CORTLAND PAVING COMPANY, INC.

CASE NO. 95-61438
Chapter 11

Debtors

APPEARANCES:

LESLIE N. REIZES, P.C.
Attorney for Debtor
106 East Court Street
Ithaca, New York 14850

BROWN, PINNISI & MICHAELS, P.C.
Attorneys for Credit
400 M&T Bank Building
118 North Tioga Street
Ithaca, New York 14850

MICHAEL D. PINNISI, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on March 31, 1998, on behalf of Cortland Paving Company, Inc. ("Debtor") seeking enforcement of a stipulation made in open court on September 15, 1997 ("September Settlement") between the Debtor and Cayuga Daedalus, Inc. ("CDI" or "Cayuga Daedalus"). The Debtor also requests that the terms of the September Settlement be modified to reflect a credit in the purchase price of a Caterpillar 225B Excavator ("Cat 225") and that sanctions be imposed against CDI for an alleged breach of the September Settlement.

The Court heard oral argument on the motion at its regular motion term in Binghamton, New York, on April 14, 1998. The Court provided the parties with an opportunity to file

memoranda of law, and the matter was submitted for decision on April 30, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), (b)(2)(A), (L) and (O).

FACTS

According to the Debtor's Third Amended Disclosure Statement, filed November 10, 1997, the "Debtor is a New York corporation which was formed in 1979 for the purpose of providing paving and excavating services to institutional and middle market commercial customers in the Ithaca and Cortland [New York] area." *See* Third Amended Disclosure Statement at 4.

Allegedly, on or about April 1, 1993, the Debtor, as lessee, and CDI, as lessor, executed a lease in connection with the Cat 225, secured by an interest in a Komatsu PC 40-5 Excavator and a Brockway truck owned by the Debtor. According to CDI, the term of the lease was to expire in April 1998. Although the lease apparently does not reflect it, Martin L. Ottenschot ("Ottenschot"), the Debtor's president, contends that it was the intent of the parties that at the end of the lease the Debtor would be entitled to purchase the CAT 225 for a nominal amount.

The Debtor filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code") on April 28, 1995. On August 22, 1996, CDI sought relief from

the automatic stay in order to repossess the Cat 225 based on, *inter alia*, the Debtor's alleged default in its lease payments in the fall of 1994. The motion was denied by the Court in a written Order dated September 23, 1996. Thereafter, on October 1, 1996, CDI filed a motion to compel the Debtor to assume or reject the lease. A hearing was held on the motion on October 15, 1996. According to the Order, signed by the Court on October 18, 1996, Debtor's counsel represented at the hearing that the Debtor intended to reject the lease. The Cat 225 was returned to CDI by the Debtor on November 6, 1996.

CDI on or about November 26, 1996, sought a declaration from the Court that it was entitled to an administrative expense claim in the amount of \$26,139.02 pursuant to Code § 365(d)(10) for rental which accrued during the period from a point 60 days after the filing of the Debtor's petition until the return of the Cat 225 on November 6, 1996. A hearing was held on the motion on December 9, 1996, at which time the Court found that CDI was entitled to an administrative expense claim and directed the parties to resolve the actual amount and agree upon the form of an order. Although a proposed order was filed with the Court by CDI on or about July 3, 1997, no order has ever been signed as a result of a dispute which arose subsequent to the substitution of new counsel representing the Debtor on July 10, 1997.¹

On September 15, 1997, a hearing was held in Binghamton, New York, on Debtor's Second Amended Disclosure Statement, dated August 6, 1997. At that time, the parties indicated to the Court that they had resolved CDI's motion for an administrative expense claim and asked that they be permitted to put the material terms of the September Settlement on the record:

¹ On May 14, 1997, the Court signed an Order granting the motion of Martin, Martin & Woodard, LLP to withdraw as attorneys of record for the Debtor, effective on or about July 6, 1997.

Under the terms of the settlement, CDI was to (1) convey the Cat 225 excavator to the Debtor; (2) release its security in the Komatsu PC40-5 Excavator and Brockway truck, and (3) release its claim for administrative expenses found by this Court on December 6, 1996. In exchange, the Debtor and Ottenschot agreed to (1) transfer \$52,000 in certified funds to CDI and (2) provide a general release to CDI, Mr. Matyas and his family² and all attorneys who acted on behalf of CDI or Mr. Matyas with regard to Ottenschot and the Debtor. The September Settlement was conditioned on (1) approval by this Court of all of its terms; (2) transfer by the Debtor of all consideration before CDI was obligated to convey its consideration, and (3) closure of the terms before confirmation of plan and disclosure statement; otherwise, the “deal is void and Cayuga Daedalus shall retain all its rights in this bankruptcy, including without limitation its right to payment of administrative expenses.” *See* tr. of Sept. 15, 1997 hearing at 4-5.

The above terms were set forth on the record by CDI’s counsel without any disagreement or opposition from Debtor’s counsel other than to indicate that he did not represent Ottenschot personally and, therefore, could only agree that the Debtor would pay the \$52,000 in certified funds. CDI’s counsel stated that CDI did not care where the money came from as long as it obtained the releases from Ottenschot personally.

On October 27, 1997, the Court issued a Letter Decision in which it indicated that the Second Disclosure Statement was to be amended “to reflect generally the proposed stipulation with Cayuga” The Debtor was required to file and serve a copy of the Third Amended Disclosure Statement containing, *inter alia*, said modification on or before November 10, 1997.

² The original lease was signed by Betty W. Matyas in her role as President of CDI on or about May 3, 1993.

The Debtor filed a draft of the Third Amended Disclosure Statement on November 10, 1997, and a final version on December 15, 1997. Both contain a provision stating that

Cayuga Daedalus is a secured creditor herein. Cayuga Daedalus is secured in two pieces of equipment owned by the Debtor for lease payments which may be determined by this Court to be an administrative expense of the Debtor. On September 15, 1997, Debtor and Cayuga Daedalus agreed that upon Court approval, Debtor would pay Cayuga Daedalus \$52,000 for equipment formerly subject of a lease between the parties and the parties and others would exchange releases. In the event such agreement is not consummated, the Debtor intends to move against the claim of Cayuga Daedalus

Third Disclosure Statement, filed December 15, 1997, at 16-17.

In the interim, on November 25, 1997, the Debtor filed a motion seeking approval of the September Settlement. The motion was scheduled to be heard on December 8, 1997, in Binghamton, New York. Counsel representing CDI did not appear, having apprised the Court that the motion had not been timely served on him. While the Court made a finding that the motion had been timely served, the Court indicated that it was not going to grant the motion without affording CDI an opportunity to appear and respond. *See* Transcript (“Tr.”) of Dec. 8, 1997 Hearing at 4. The Court indicated that a determination of whether or not CDI should be bound by the terms of the September Settlement would await the date of the confirmation hearing.

On February 27, 1998, the Debtor filed its Third Amended Plan, which provides that

CDI is a partially secured creditor herein. Cayuga Daedalus is secured in two pieces of equipment owned by the debtor for lease payments which were contested as to which the debtor and Cayuga Daedalus agreed to compromise, together with the administrative claim of Cayuga Daedalus. Cayuga Daedalus has breached the compromise, and the dispute is subject to a motion to compel compliance. Debtor will pay the agreed to compromise, less a credit for income received by Cayuga Daedalus for rental of the collateral since the date it was to be conveyed to the debtor.

See § 5.7 of the Third Amended Plan.

The confirmation hearing was held on March 13, 1998, at which time the Court considered the Debtor's motion to approve the September Settlement. Also before the Court was again a motion by CDI for allowance of an administrative claim. The Court noted its understanding that the two parties had entered into another stipulation which "will not only be incorporated in the plan of confirmation, but will resolve these motions." ("March Settlement"). *See* Tr. of March 13, 1998 Hearing at 5.

Before placing the stipulation on the record, CDI's counsel indicated that "my understanding is that there would be a settlement on the terms much as announced to this court in my September 18 . . . On terms as expressed to this court at a September 15 hearing and confirmed in a September 18, 1997 letter" *See* Tr. of March 13, 1998 hearing at 5. According to CDI's counsel, CDI was to receive \$52, 000 in certified funds in return for transferring title to the Cat 225 to the Debtor. Payment of the \$52,000 was to be made before delivery of the Cat 225 to the Debtor. In addition, there was to be an exchange of releases "as described previously to the Court. Both by the Debtor and by Mr. Ottenschot personally." *Id.* at 6. In addition, the Debtor was to pay CDI \$4,000 over 24 months as a compromise of its administrative claim as part of the Debtor's plan. CDI also acknowledged the request of Debtor's counsel that CDI and its principals "not disparage the client or his business in any public comments and they have no intention of doing so." *Id.* Debtor's counsel also indicated that it was his understanding that CDI would release its liens on the other equipment in which CDI asserted a security interest. CDI's counsel stated on the record that CDI intended to continue to use the Cat 225 "until this deal closes." *Id.* at 7-8. Any lease it might enter into with respect to the Cat 225 would be subject to delivery to the Debtor pursuant to the March

Settlement.

The Court asked counsel, “Do we have any idea what kind of time frame we’re talking about to implement this arrangement?” *See* Tr. of March 13, 1998 hearing at 7. Debtor’s counsel responded, “As soon as it’s approved by the Court. Your Honor.” *Id.* CDI’s counsel also indicated that there would be no performance by CDI until it received the monies. In response, the Court indicated, “Well, maybe we need a separate order then, that resolves both of these motions since there needs, apparently, to be a separate court order that triggers getting the wheels turning, apparently.” *Id.* at 8-9.

CDI’s counsel agreed to revise the order he had prepared in connection with the September hearing and send it to Debtor’s counsel for comment before submitting it to the Court.

At the hearing on April 14, 1998, Debtor’s counsel indicated that he did not receive the proposed March Settlement until approximately two weeks following the confirmation hearing on March 13, 1997. According to him, the written settlement agreement submitted by CDI contains provisions that were never agreed to by the parties. Specifically, the Debtor contends that it never agreed to the payment of interest on the \$4,000 payable over 24 months. Debtor also takes issue with the release provision which includes Mr. and Mrs. Matyas. Allegedly, the Matyas’ owe the Debtor approximately \$7,000 in accounts receivable, which are subject to a lien of Tompkins County Trust. Debtor’s counsel represented to the Court that Tompkins County Trust would not release its lien the monies owed by the Matyas’ to the Debtor.

It is the Debtor’s position that by delaying in sending the proposed stipulation to the Debtor and by modifying the terms that were set forth on the record at the March 13th confirmation hearing, CDI has repudiated the March Settlement. Accordingly, the Debtor asserts

that the March Settlement should be rescinded and CDI should be bound by the terms of the September Settlement. In response, CDI argues that it did not change the terms of the March Settlement but merely clarified its terms and added procedural details. *See* Letter from CDI's counsel, dated May 13, 1998. CDI requests that the Court enter an order enforcing the March Settlement.

DISCUSSION

Whether a settlement agreement is binding on the parties is a matter of state law.³ *See In re Masters, Inc.*, 141 B.R. 13, 15 (Bankr. E.D.N.Y. 1992) (citation omitted). A “stipulation by counsel which is spread on the record is as binding as a written contract (cf. CPLR 2104).” *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.* 144 A.D.2d 518, 525, 534 N.Y.S.2d 399, 404 (N.Y. App. Div. 1988), *rev'd on other grounds*, 74 N.Y.2d 475, 548 N.E.2d 203, 548 N.Y.S.2d 920 (1989); *Samerson v. Mather Memorial Hosp.*, 166 Misc.2d 228, 235, 632 N.Y.S.2d 948, 953 (N.Y. Sup. Ct. 1995), *aff'd* 235 A.D.2d 413, 652 N.Y.S.2d 103 (N.Y. App. Div.), *rev'd on other grounds*, 90 N.Y.2d 870, 684 N.E.2d 271, 661 N.Y.S.2d 822 (1997). In interpreting a stipulation made in open court, the Court must examine the record as a whole to determine the intent of the parties, “giving a practical interpretation to the language employed which conforms to the parties’ reasonable expectations.” *Blake v. Blake*, 229 A.D. 509, 510-511, 645 N.Y.S.2d

³ “The federal rule regarding oral stipulations does not differ significantly from the New York rule.” *Monaghan v. SZS 33 Associates, L.P.*, 73 F.3d 1276, 1283 n. 3 (2d Cir. 1996); *Ciaramella v. Reader’s Digest Ass’n, Inc.*, 131 F.3d 320, 322 (2d Cir. 1997) (citations omitted). The Court notes that neither of these two decisions addressed an oral agreement made in open court as is the case herein.

851, 852 (N.Y. App. Div. 1996) (citations omitted); *see also De Gaust v. De Gaust*, 237 A.D.2d 862, 655 N.Y.S.2d 670, 671 N.Y. App. Div. 1997); *Wolstencroft v. Sassower*, 212 A.D.2d 598, 599, 623 N.Y.S.2d 7, 9 (N.Y. App. Div. 1995).

First, with respect to the September Settlement which the Debtor would have the Court enforce, the Court notes that in response to the terms of the agreement set forth by CDI's counsel at the September 15, 1997 hearing, Debtor's counsel responded, "I thought I had made a deal but I hear so many conditions now that it's a little beyond me but I don't represent Mr. Ottenschot personally, I didn't know if he was party to this . . . transaction." *See* Tr. of September 15, 1997 hearing at 7. CDI's counsel also prefaced his remarks concerning the parties' agreement by stating that "there are conditions to that settlement that have not yet cleared . . ." *Id.* at 4. "A contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement." *Conopco, Inc. v. Wathne Ltd.*, 190 A.D.2d 587, 588, 593 N.Y.S.2d 787 (N.Y. App. Div. 1993) (citations omitted). However, the intention to accept the offered terms must be unequivocal. *See Kleinberg v. Ambassador Associates*, 103 A.D.2d 347, 348, 480 N.Y.S.2d 210, 211 (N.Y. App. Div.), *aff'd* 64 N.Y.2d 733, 475 N.E.2d 119, 485 N.Y.S.2d 748 (1984) (emphasis added). In this case, the Court concludes that there was no meeting of the minds of all parties and acceptance was far from unequivocal as evidenced by the statements referenced above. The fact that the agreement set forth certain conditions with respect to Ottenschot, who was not represented individually at the September 15, 1997 hearing provides further support for the Court's conclusion that the September Settlement is not enforceable.

Because the September Settlement is unenforceable, it is unnecessary for the Court to consider either the Debtor's request to modify the September Settlement or the request for

sanctions against CDI for an alleged breach of the September Settlement.

Having concluded that the September Settlement is unenforceable, the Court deems it appropriate to address CDI's suggestion that the March Settlement is enforceable although not as yet executed by the parties. On March 13, 1998, the parties attempted to place a stipulation of settlement on the record which, according to CDI's counsel, contained, *inter alia*, the terms expressed at the September 15, 1997 hearing. The Court does not agree with the Debtor's assertion that the March Settlement was repudiated by CDI as a result of a delay of two weeks in furnishing the Debtor with a copy for review and comment. There was no indication on the record that time was of the essence, other than an acknowledgment by the Court that inclusion of the March Settlement in the plan might delay implementation of the terms of the agreement and, therefore, it would prefer a separate order to be submitted by the parties.

Debtor's argument that CDI repudiated the March Settlement by expanding or clarifying the terms that CDI's counsel placed on the record depends in part on whether the terms placed on the record on March 13, 1998, were intended to bind the parties on that day or whether the parties intended to be bound only upon the entry of a written order by this Court approving the March Settlement.

At the March 13, 1998 hearing, in response to the Court's inquiry concerning implementation of the agreement, Debtor's counsel indicated that it would be "as soon as it's approved by the Court." There has been no evidence presented which indicates that either party has taken any steps to carry out any of the terms of the March Settlement in the belief that it was final and binding. In his letter to the Court, dated May 13, 1998, CDI's counsel indicates that with respect to the proposed written stipulation provided to Debtor's counsel, he felt it necessary

to clarify the terms of the agreement and to add certain procedural details before submitting it to the Court for approval. It appears that the parties contemplated an Order of the Court approving a written agreement between them, as well as Ottenschot.

Included with the “Stipulated Settlement Order” provided to Debtor’s counsel for his review on or about March 27, 1998, were two releases with a place for the signature of Ottenschot on behalf of the Debtor and in his individual capacity. This comports with a statement made by Debtor’s counsel at the September 15, 1997 hearing that he represents only the Debtor and has no authority to bind Mr. Ottenschot. Therefore, if, as CDI has indicated, the release from Mr. Ottenschot was critical to the settlement agreement, it would be necessary that Mr. Ottenschot sign any agreement, particularly since neither he nor his attorney appeared on the record at the March 13, 1998, hearing.

It is also clear from the record of that hearing that CDI intended to use the Cat 225 “until this deal closes.” (emphasis added). The inference to be drawn from this statement is that CDI did not believe that the matter had been finally resolved at the hearing.

The Court concludes that there was no contract binding the parties. “At best, there was an agreement to agree to the amplified terms of a future writing.” *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 11, 286 N.E.2d 228, 234, 334 N.Y.S.2d 833, 841 (1972); *see also Kleinberg*, 64 N.Y.2d at 734, 475 N.E.2d 120, 485 N.Y.S.2d at 749 (noting that “[a]lthough it appears that the parties may have agreed orally to settle a prior proceeding, the terms of such settlement were not made “definite and complete” in open court.). For example, CDI’s counsel merely referenced the releases previously set forth on the record of the September 15, 1997 hearing without defining the exact nature of the releases, including the fact that it required a release from the Debtor with

respect to the obligation owed to it by the Matyas. Under these circumstances, the Court concludes that performance and enforceability of the March Settlement were dependent upon the Court signing an order approving written terms mutually agreed upon by all parties, including Ottenschot.

Until the parties are able to come to some sort of consensus regarding the Cat 225 and CDI's claim for administrative expenses, as well as the various releases, there is nothing for the Court to enforce. It is also obvious to the Court that any agreement will need to be in writing and signed by all necessary parties if the matters are to be resolved and confirmation of the Debtor's plan is to go forward.

Based on the foregoing, it is hereby

ORDERED that Debtor's motion seeking enforcement of the September Settlement is denied, and it is further

ORDERED that the confirmation hearing be reopened and a hearing scheduled for 10:00 a.m. on Friday, September 18, 1998, in Utica, New York, for the purpose of receiving evidence concerning the amount of CDI's administrative claim and the Debtor's ability to pay the claim in accordance with Code §1129 (a)(9)(A).

Utica, New York

this 21st day of August 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge