UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Whitney Lake, LLC,

Debtor(s).

C/A No. 08-05729-JW

Chapter 11

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law recited in the attached Order of the Court, Debtor's Objection to Claim of Frazier Real Properties, LP ("Frazier") is overruled and the claim in the amount of $2,112,000.00 is allowed.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
May 4, 2009

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FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 08-05729-JW
	Chapter 11
Whitney Lake, LLC,	**ORDER**
Debtor(s).	

ORDER ON OBJECTION TO CLAIM AND GRANTING SUMMARYJUDGMENT

This matter comes before the Court upon the Objection to Claim filed by Whitney Lake, LLC ("Debtor"). Debtor's Objection to Claim seeks to disallow the claim of Frazier Real Properties, LP ("Frazier").[1] The parties appeared at the initial hearing on the Objection, requested the Court enter a Scheduling Order for this contested matter, and agreed to a schedule for discovery, dispositive motions, pre-trial reports, and an evidentiary hearing date. Frazier filed a Motion for Summary Judgment on March 10, 2009, and Debtor filed an objection to the motion on March 24, 2009.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and (b) and 157(a) and (b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052 and 9014, the Court makes the following Findings of Fact and Conclusions of Law.[2]

Findings of Fact

1. On May 30, 2003, Debtor and Frazier entered into a Purchase and Sale and

[1] Frazier filed a Proof of Claim on October 30, 2008, alleging entitlement to $2,112,000. The original claim was filed in the name of W. Frazier Construction, Inc., but amended on December 29, 2008, to correct the name of the claimant.

[2] To the extent that any of the Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent that any of the Conclusions of Law constitute Findings of Fact, they are so adopted.

Option to Purchase Agreement ("Purchase Agreement"). In the Purchase Agreement, Frazier agreed to sell and Debtor agreed to purchase a portion of property ("Phase I") for Debtor to construct not less than two hundred (200) housing units. Frazier also granted to Debtor the option to purchase a second portion of property ("Phase II") for the construction of no less than an additional 200 housing units. Finally, Frazier granted to Debtor the option to purchase a third portion of property ("Phase III").

2. In consideration for the purchase, Debtor agreed to pay Frazier $10,000 for each housing unit provided for on the preliminary plat for Phase I, and $10,000 for each housing unit provided for on the preliminary plats for Phases II and III if Debtor exercised the option to purchase the additional property.[3] Additionally, Debtor agreed to convey a 15% membership interest in its LLC ("membership share") to Frazier and to award Frazier the contract for clearing, grading, and roadway and utility construction services for development of the property at a price of cost plus 21%. Finally, Frazier agreed to loan an unsecured amount of $500,000 to Debtor.

3. Following the execution of the Purchase Agreement, a dispute arose between the parties. The parties engaged in mediation and, consequently, entered into a Settlement Agreement on February 28, 2005.

4. The Settlement Agreement provided, in pertinent part: (a) Debtor would purchase property for an additional 72 units; (b) Debtor would exercise its option to purchase Phase II on or before August 27, 2006, and its option to purchase Phase III on or before August 27, 2008; (c)

[3] The Purchase Agreement provided that the per unit price of $10,000 applied for each phase so long as the approved preliminary plat for each phase showed 520 or more housing units. In the event a plat showed less than 520 housing units, the price for each unit would equal $5,200,000 divided by the number of housing units shown on the plat plus the interest factor.

Debtor would repay the $500,000 loan by December 31, 2006; (d) Frazier's membership share, along with the profits that Frazier would have received from the site work, had a total value "for settlement purposes" of $2,400,000 ("Total Price"), which Debtor would pay Frazier at a per unit price of $4,500, beginning with the 91st unit in Phase I, and an increased price of $6,000 per unit in Phases II and III until the Total Price was paid in full; and (e) Frazier would transfer its membership share to Debtor, although the membership share would be pledged to Frazier to secure the monetary obligation.

5. The Settlement Agreement provided the parties would execute a more detailed agreement.

6. On March 15, 2006, the parties entered into a Modification Agreement as to Purchase and Sale and Option to Purchase ("Modification Agreement"), which contained a detailed recital of the Settlement Agreement, with terms consistent with those of the Settlement Agreement. Notably, the Modification Agreement provided, in pertinent part: (a) Debtor would purchase property from Frazier for an additional 72 units for a purchase price of $720,000 plus interest; (b) Debtor would purchase Phase II from Frazier on or before August 27, 2006, for a purchase price of $10,000 per housing unit, plus interest; (c) Debtor would purchase Phase III from Frazier on or before August 27, 2008, for a purchase price of $10,000 for each housing unit reflected on the approved master plan, plus interest; (d) the membership share was deemed to have a value of $1,900,000, the profits Frazier would have collected from construction services were valued at $500,000, and the total amount of $2,400,000 would be paid by Debtor at a rate of $4,500 per unit closing, beginning with the 91st unit in Phase I, and a rate of $6,000 per unit for all remaining units until the Total Price was paid in full; and (e) Frazier would transfer its

membership share to Debtor, but Frazier would retain the right at its election to reacquire all or part of the membership share to secure Debtor's obligation to pay the Total Price to Frazier. The Modification Agreement also provided that upon one party's default, the other party could proceed at law and/or in equity to enforce its rights under the agreement.

7. The Modification Agreement included two Exhibits, also executed on March 15, 2006, to effectuate the terms of the agreement. Exhibit A, Assignment and Transfer of Membership Share in Whitney Lake, LLC ("Assignment"), carried out the requirement of the Settlement and Modification Agreements that Frazier transfer the membership share to Debtor. The Assignment stated the transfer of the membership share was subject to the terms of Exhibit B, Pledge of Membership Share in Whitney Lake, LLC ("Pledge Agreement").

8. The Pledge Agreement restated the value of the membership share and profits expected from Frazier's construction services and the rate of payment per unit closing, as provided for in the Settlement and Modification Agreements. The Pledge Agreement further stated that if Debtor failed to pay the Total Price to Frazier in accordance with the terms of the Modification Agreement, "upon written notice to [Debtor] by Frazier," Debtor would be required to reissue to Frazier a membership share in the LLC "that is equal to that portion of the 15% Frazier Membership Share which the unpaid balance of the Total Price bears to the Total Price. A Re-issuance of such Membership Share is not intended to relieve [Debtor] of its obligations to pay Frazier any amounts owed pursuant to the Modification Agreement."

Conclusions of Law

I. Standard for Summary Judgment

Pursuant to Fed. R. Civ. P. 56(c), made applicable to this contested matter by Fed. R.

Bankr. P. 7056 and 9014, summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." When a motion for summary judgment is filed, the Court does not weigh the evidence, but determines if there is a genuine issue for trial. Listak v. Centennial Life Ins. Co., 977 F. Supp. 739, 743 (D.S.C. 1997) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510-11 (1986)). In determining whether summary judgment is appropriate, the Court must view all evidence in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

"[T]he party seeking summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact." Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 522 (4th Cir. 2003), cert. denied, 541 U.S. 1042, 124 S. Ct. 2171 (2004). "Once the moving party has met that burden, the non-moving party must come forward and demonstrate that such an issue does, in fact, exist." Id. (citing Matsushita Elec. Indus. Co., 475 U.S. at 586-87, 106 S. Ct. at 1356). "If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial." Listak, 977 F. Supp. at 743 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)).

II. Contentions of the Parties

In its objection to Frazier's Proof of Claim, Debtor alleges the claim is based upon the potential income Frazier would have received if the project envisioned by the parties was

completed. Debtor asserts that pursuant to the Pledge Agreement, Frazier presently has a 13.2% equity interest, and the agreements between the parties do not support Frazier's claim to a liquidated sum of $2,112,000. Debtor contends the agreements render any payments to Frazier contingent upon unit closings, and to the extent Debtor has failed to make required payments, the membership share has been effectively reissued to Frazier, with credit made for payments received by Frazier.[4] Debtor concedes it was unable to close on Phase III, but Frazier should not be allowed to receive payment for units where the property has not been purchased, the option to purchase has expired, and Debtor will never be able to construct the units. Rather, Debtor maintains Frazier's exclusive remedy is to receive payment from any future unit closings and reacquire the membership share. Thus, Debtor submits there are material issues of fact in dispute as to the amount, if any, owed to Frazier, and testimony is necessary to determine the parties' intentions underlying the agreements.

Frazier argues summary judgment is proper because as a creditor, it has the right to elect a remedy. Further, Frazier asserts the agreements between the parties provide for Frazier's right to pursue its desired remedy upon Debtor's default. To this end, Frazier contends the agreements converted its membership interest into a monetary sum of $2,400,000, and while Frazier retained the right to reacquire the membership interest upon Debtor's breach, Frazier was not required to accept the membership interest rather than the monetary sum. Frazier maintains it has elected to pursue the monetary obligation. Finally, Frazier emphasizes the agreements' provision for

[4] Both parties' pleadings and the record in the case support the amount claimed in Frazier's Proof of Claim. Frazier claims entitlement to $2,112,000, and Debtor alleges Frazier has an equity interest of 13.2%. Both values set forth by the parties represent a 12% reduction of the original consideration - $2,400,000 in exchange for the 15% membership share – and thus, it appears both parties recognize Debtor has made some payment toward the monetary obligation of $2,400,000, entitling Debtor to a credit of the percentage interest pledged to Frazier. For this reason, Debtor's contention that the amount due Frazier is incalculable has no merit.

Debtor's payments to Frazier on a per unit closing basis supplied a mechanism for Debtor's payment, but regardless, Debtor remained indebted to Frazier in the amount of $2,400,000.

III. Summary Judgment is Proper

a. Agreements of the Parties

Following a hearing and a review of the agreements between the parties, the Court finds that Frazier is entitled to summary judgment pursuant to the clear terms of the Settlement Agreement, Modification Agreement, Assignment, and Pledge Agreement. See Campbell, Inc. v. N. Ins. Co. of N.Y., 337 F. Supp. 2d 764, 767 (D.S.C. 2004) ("Where a motion for summary judgment presents a question pertaining to the construction of a written contract, the question is one of law if the language employed by the contract is plain and unambiguous."); In re Georgetown Steel Co., 318 B.R. 313, 321 (Bankr. D.S.C. 2004) ("A contract is considered 'ambiguous' only when it may fairly and reasonably be understood in more ways than one . . . . Once a determination is made that the contract is unambiguous, the Court must enforce it according to its terms . . . .").

The Court concludes that the terms of the Settlement and Modification Agreements consistently and clearly provide that Frazier's primary obligation under the agreements is to relinquish its interest in the LLC and transfer such interest back to Debtor. The Assignment specifically carries out that obligation, and thus, Frazier has performed its obligation under the agreements by transferring the membership share to Debtor. The agreements also unambiguously set forth Debtor's monetary obligation of $2,400,000, representing the negotiated value of the membership share and Frazier's lost profits from site work, and a mechanism for repayment of the obligation by providing that Debtor should make payments on a per unit

closing basis. While the closing of housing units initially dictated the timing of Debtor's payments to Frazier, the agreed upon obligation of $2,400,000 was not contingent on Debtor exercising the options to purchase Phases II and III or the construction and closing of housing units. The Modification Agreement obligated Debtor to purchase Phases II and III for a price of $10,000 per housing unit, an amount which is distinct from the $2,400,000 obligation that represents Debtor's purchase of the membership share and payment for profits that Frazier would have received from site work. Furthermore, each agreement states Debtor's obligation to Frazier was payable "at unit closings" and not *if* there were unit closings. The agreements contain no language supporting Debtor's apparent position that if the units were not built, there would be no obligation to pay Frazier. Thus, Debtor's argument is simply not consistent with the terms of the agreements.[5]

The Settlement and Modification Agreements also unambiguously provide that as security for its monetary obligation to Frazier, Debtor would pledge the membership share to Frazier in the event of its failure to comply with the terms of the agreements.[6] The Pledge Agreement effectuates this requirement in the agreements. There is no dispute, however, that Debtor has failed to perform all of its obligations under the agreements. Accordingly, the Court finds the clear and unambiguous terms of the parties' agreements must be enforced, and the

[5] Debtor, in its brief and at the hearing, emphasized that the Pledge Agreement provided the membership share and lost profits amounted to a "potential value" of $2,400,000. This is the only place in any of the agreements that "potential" or any such modifier or qualifier is used. Significantly, the Pledge Agreement also provides that even in the event of a "[r]e-issuance of [the] Membership Share[, it] is not intended to relieve [Debtor] of its obligations to pay Frazier any amounts owed pursuant to the Modification Agreement."

[6] Although the Proof of Claim indicated the parties' relationship was based upon an executory contract, it is apparent to the Court that Frazier has performed its obligation under the Settlement and Modification Agreements, and pursuant to the terms of those agreements, including the attached Assignment and Pledge Agreement, the parties have a secured relationship.

question of law presented to the Court should be resolved in favor of Frazier.

b. Election of Remedies

The Court further finds, as an additional basis to support granting summary judgment to Frazier, that Frazier has the right to elect a remedy in accordance with the terms of the parties' agreements. See GTR Rental, LLC v. DalCanton, 547 F. Supp. 2d 510, 515 (D.S.C. 2008) ("The doctrine of election of remedies involves a choice between different forms of redress afforded by law for the same injury . . . .") (citing Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995)); cf. Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990) (a creditor "has the option of ignoring the security and suing on the note"). The Court also finds support for this conclusion from Frazier's reliance on a secured party's right to elect a remedy under the Uniform Commercial Code ("UCC").[7] Upon default, a secured party may enforce a claim by any available judicial procedure. § 36-9-601(a)(1); see also McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 54, 644 S.E.2d 43, 49 (2007) (recognizing a secured party has "a number of means available for protecting its interest in collateral"). Additionally, a secured party has any rights arising from the agreement of the parties. § 36-9-601(d).

Pursuant to the parties' agreements, Frazier's reacquisition of the membership share is not automatic, and thus, Frazier has no present equity interest in the LLC. While the agreements allow Frazier to demand reissuance of the membership share, the agreements do not provide the same relief to Debtor. Frazier has chosen not to exercise its right to reacquisition of the membership share, but instead, has pursued a claim for monetary damages arising from the

[7] South Carolina has adopted the relevant portion of the UCC that addresses a secured party's right to election of remedies. S.C. Code Ann. § 36-9-601 (2003).

Settlement and Modification Agreements.

IV. Conclusion

Based upon the foregoing, it appears no genuine issues of material fact exist, and the Motion for Summary Judgment should be granted. It is therefore,

ORDERED that Frazier's Motion for Summary Judgment is granted, the Objection to Claim filed by Debtor is overruled, and Frazier's claim in the amount of $2,112,000.00 is allowed.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
May 4, 2009

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question of law presented to the Court should be resolved in favor of Frazier.

b. Election of Remedies

The Court further finds, as an additional basis to support granting summary judgment to Frazier, that Frazier has the right to elect a remedy in accordance with the terms of the parties' agreements. See GTR Rental, LLC v. DalCanton, 547 F. Supp. 2d 510, 515 (D.S.C. 2008) ("The doctrine of election of remedies involves a choice between different forms of redress afforded by law for the same injury . . . .") (citing Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995)); cf. Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990) (a creditor "has the option of ignoring the security and suing on the note"). The Court also finds support for this conclusion from Frazier's reliance on a secured party's right to elect a remedy under the Uniform Commercial Code ("UCC").[7] Upon default, a secured party may enforce a claim by any available judicial procedure. § 36-9-601(a)(1); see also McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 54, 644 S.E.2d 43, 49 (2007) (recognizing a secured party has "a number of means available for protecting its interest in collateral"). Additionally, a secured party has any rights arising from the agreement of the parties. § 36-9-601(d).

Pursuant to the parties' agreements, Frazier's reacquisition of the membership share is not automatic, and thus, Frazier has no present equity interest in the LLC. While the agreements allow Frazier to demand reissuance of the membership share, the agreements do not provide the same relief to Debtor. Frazier has chosen not to exercise its right to reacquisition of the membership share, but instead, has pursued a claim for monetary damages arising from the

[7] South Carolina has adopted the relevant portion of the UCC that addresses a secured party's right to election of remedies. S.C. Code Ann. § 36-9-601 (2003).

Settlement and Modification Agreements.

IV. Conclusion

Based upon the foregoing, it appears no genuine issues of material fact exist, and the Motion for Summary Judgment should be granted. It is therefore,

ORDERED that Frazier's Motion for Summary Judgment is granted, the Objection to Claim filed by Debtor is overruled, and Frazier's claim in the amount of $2,112,000.00 is allowed.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
May 4, 2009