



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 3, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

KITCHENS BROTHERS MANUFACTURING
COMPANY,

CASE NO. 13-01710-NPO

DEBTOR.

CHAPTER 11

KITCHENS BROTHERS MANUFACTURING
COMPANY

PLAINTIFF

VS.

ADV. PROC. NO. 16-00020-NPO

EQUITY PARTNERS HG, LLC;
HERITAGE GLOBAL, INC.; HERITAGE
GLOBAL PARTNERS, INC.; ROBINSON
AUCTIONS; AND PHIL ROBINSON

DEFENDANTS

**MEMORANDUM OPINION AND ORDER ON
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

There came on for consideration Plaintiff's Motion for Partial Summary Judgment (the "Motion") (Adv. Dkt. 30)¹ filed by Kitchens Brothers Manufacturing Co. ("Kitchens Brothers"); Memorandum of Authorities Supporting Plaintiff's Motion for Partial Summary Judgment ("Kitchens Brothers Brief") (Adv. Dkt. 31) filed by Kitchens Brothers; Defendants' Response in

¹ Citations to the record are as follows: (1) citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ____)" ; and (2) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ____)".

Opposition to Motion for Partial Summary Judgment (the “Response”) (Adv. Dkt. 40) filed by Equity Partners HG, LLC (“Equity Partners”), Heritage Global Inc. (“Heritage”), Heritage Global Partners, Inc. (“HGP”) (collectively, the “Heritage Defendants”), Robinson Auctions, and Phil Robinson (collectively with the Heritage Defendants, the “Defendants”); Memorandum Supporting Defendants’ Response in Opposition to Motion for Partial Summary Judgment (the “Defendants Brief”) (Adv. Dkt. 41) filed by the Defendants; and Plaintiff’s Reply Memorandum Supporting Motion for Partial Summary Judgment (the “Reply Brief”) (Adv. Dkt. 46) filed by Kitchens Brothers in the Adversary.

Kitchens Brothers attached eleven (11) exhibits to the Motion, marked as Exhibits “1” through “11” (Adv. Dkt. 30-1 to 30-11), which will be referred to as “(KB Ex. ____)”. The Defendants presented six (6) exhibits, marked as Exhibits “A” through “F.” Of these six (6) exhibits, the Defendants attached Exhibits “A” through “C” (Adv. Dkt. 40-1 to 40-3) to the Response and submitted Exhibits “D” through “F” in paper form under seal (Adv. Dkt. 44) pursuant to the Agreed Protective Order Regarding the Production and Use of Private and Confidential Information (Adv. Dkt. 33). The Defendants’ exhibits will be referred to as “(Defs. Ex. ____)”, except for Exhibits “D” through “F,” which will be referred to as “(Defs. Sealed Ex. ____)”.

Jurisdiction

The Court finds that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Motion was proper under the circumstances.

Facts²

1. On May 30, 2013, Kitchens Brothers commenced the Bankruptcy Case by filing a voluntary petition for relief (the “Petition”) (Bankr. Dkt. 1) under chapter 11 of the Bankruptcy Code. The Bankruptcy Case is a liquidating case under chapter 11. (Bank. Dkt. 158 ¶ 4).

2. On August 13, 2013, Kitchens Brothers filed the Emergency Application to Employ Heritage Global, Inc. [and] Jacqueline L. Kittrell Appraisers, Inc. and for Expedited Hearing (the “Application to Employ”) (Bankr. Dkt. 78), asking the Court to approve its employment of Heritage, including its subsidiaries, Equity Partners and HGP,³ for the purposes of conducting a sale of its three (3) sawmills located in Utica, Mississippi, Hazelhurst, Mississippi, and Monroe, Louisiana.

3. Also on August 13, 2013, Kitchens Brothers and the Heritage Defendants entered into the Exclusive Marketing and Sale Agreement (the “Contract”) (KB Ex. 1), which granted the Heritage Defendants the exclusive right “to advertise, market, and sell [Kitchens Brothers’] Assets . . . via privately negotiated sale(s) of all or a substantial portion or portions of the Assets in bulk (the ‘Entirety Sale’) and, if necessary, a public auction sale (the ‘Auction’) of any remaining Assets on a piecemeal basis.” (*Id.* at 1). The term of the Heritage Defendants’ exclusive right to sell the assets began as of the date of the Court’s approval of the Contract and continued “for the greater of: (i) one hundred twenty (120) days or (ii) as long as any prospect identified during the 120 days is under a letter of intent for any transaction regarding the Assets.” (*Id.*).

² The following findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

³ In the Application to Employ, Kitchens Brothers identifies Equity Partners as “Equity Partners CRB LLC” and HGP as “Heritage Global Partners LLC.” (Bankr. Dkt. 78).

4. The Contract provided for the payment of expenses in the maximum amount of \$20,000 for the Entirety Sale and an additional \$30,000.00 for the Auction, to be advanced by the Heritage Defendants and reimbursed by Kitchens Brothers as a deduction from the net proceeds. (*Id.* at 3). The Contract also provided for payment of a fee to the Heritage Defendants in the form of a commission “with respect to all sales of Assets consummated during or as a result of the Entirety Sale” equal to seven percent (7%) of the first \$2 million of aggregate gross sale proceeds. (*Id.*).

5. The Contract disclosed that Heritage would perform its obligations through its subsidiaries, Equity Partners and HGP. (*Id.* at 1). Kenneth Mann (“Mann”) signed the Contract on behalf of the Heritage Defendants. (KB Ex. 1 at 7; KB Ex. 2 at 8-9).

6. On August 26, 2013, the Court granted the Application to Employ.⁴ (Bankr. Dkt. 85).

7. On November 15, 2013, Kitchens Lumber Company, LLC, owned by Robyn Birdsong (“Birdsong”), who is the daughter of one of the principals of Kitchens Brothers, purchased the sawmill in Utica, Mississippi (the “Utica Sawmill”), at a public auction for \$485,000.00. (Bankr. Dkt. 142). The Court approved the sale on December 17, 2013. (Bankr. Dkt. 170). The sale of the Utica Sawmill was the only “entirety sale” of Kitchens Brothers’ assets. (KB Ex. 2 at 38-39).

8. On November 20, 2013, HGP conducted a live auction sale of Kitchens Brothers’ remaining assets at a hotel in Jackson, Mississippi (the “Live Auction”). (Bankr. Dkt. 158 ¶ 6; KB Ex. 2 at 30, 68-69). Under the heading “Offering Procedure,” the Contract provided that “[d]uring the Auction phase, all Assets shall be sold to the highest bidder (subject only to the

⁴ The Court denied Kitchens Brothers’ request to retain the services of an appraiser for reasons not relevant to the present Motion. (Bankr. Dkt. 85).

purchaser's timely payment in full and removal of purchased Assets)." (KB Ex. 1 at 3). Also, the Contract prohibited Kitchens Brothers from withdrawing, selling, or otherwise disposing of any of the assets during the term of the agreement. (*Id.* at 1). Apparently, no minimum bid reserves were placed on any of the assets. (KB Ex. 2 at 45-46).

9. On November 21, 2013, Kitchens Brothers filed a Motion to Confirm Auction and Sale of Assets Free and Clear of Liens, Claims and Interests (the "Sale Motion") (Bankr. Dkt. 147) in the Bankruptcy Case. Attached to the Sale Motion was an Auction Summary (the "Auction Summary") (Bankr. Dkt. 147-1), consisting of forty-seven (47) pages. The first 43 pages of the Auction Summary listed the items sold at the Live Auction and included a description and the location of each such item, the name of the successful bidder, and the purchase amount. (*Id.* at 1-43). The total amount of sale proceeds, \$702,870.00, was reflected on the bottom of the last page of the list of sold items. (*Id.* at 43). The last four (4) pages of the Auction Summary identified the items that were not sold at the Live Auction. (*Id.* at 44-47). Mann testified at his deposition that he believed the Auction Summary constituted the "Settlement Report" required by the following provision of the Contract:

No later than 14 business days after the conclusion of the Sale, Heritage shall also issue Debtor a settlement report (the "Settlement Report") showing, generally, a record of sales of the Assets and the allocation of the funds generated by such sales. The Settlement Report shall be deemed to comply with Federal Rule of Bankruptcy Procedure 6004(f)(1).

(KB Ex. 2 at 25; KB Ex. 1 at 4).

10. HGP conducted a "sealed bid" auction of the unsold items listed in the last four (4) pages of the Auction Summary (the "Sealed Bid Auction"). (KB Ex. 4; Defs. Ex. C ¶ 4; Defs. Sealed Ex. D; KB Ex. 2 at 30). On November 22, 2013, HGP sent an email to participants in the Live Auction, instructing them to make their "best and final offer" on any of the items

“that went unsold at [the Live] [A]uction” in a “Sealed Bid Form” by November 26, 2013. (Defs. Sealed Ex. D). HGP attached to the email a one (1)-page list of the unsold items and the Sealed Bid Form. (*Id.*).

11. By the November 26, 2013, deadline, HGP received several completed Sealed Bid Forms. (Defs. Ex. C ¶ 5; Defs. Sealed Ex. E). According to the Defendants, successful bidders of the unsold items included Birdsong, Associated Rigging Services, Ben Jones Machinery, and Oasis Trading, and the Sealed Bid Auction netted an additional \$28,007.00 in sale proceeds. (Defs. Br. ¶ 17; Sklar Aff., Defs. Ex. C ¶ 6; Defs. Sealed Ex. F). The combined sale proceeds from the Live Auction and the Sealed Bid Auction totaled \$730,877.00.⁵

12. On December 4, 2013, the Court entered the Order (Bankr. Dkt. 158), granting the Sale Motion and confirming that the assets sold at the Live Auction “should be sold free and clear of liens, claims and interests with all liens, claims and interests attaching to the sale proceeds.” (*Id.* at 3).

13. On February 18, 2014, Kitchens Brothers filed the Motion to Disburse Sales Proceeds (the “Motion to Disburse”) (Bankr. Dkt. 210), which identified sale proceeds of \$1,131,607.00 after deducting the seven percent (7%) commission and \$50,000.000 in expenses due the Heritage Defendants under the Contract. (*Id.* at 2). In the Defendants Brief, the Defendants alleged that the net sale proceeds generally consisted of the following:

⁵ \$730,877.00 = \$702,870.00 + \$28,007.00.

\$485,000.00	Entirety Sale (Utica Sawmill)
-\$33,950.00	Seven percent (7%) Commission
\$730,877.00	Live Auction & Sealed Bid Auction
-\$50,000.00	Expenses
<hr/>	
\$1,131,927.00	Total Sale Proceeds ⁶

(Defs. Br. ¶19).

14. In early April, 2014, Birdsong contacted Mann and Bruce Costello with HGP, inquiring about the sale of certain items after the Live Auction and questioning, *inter alia*, the purchase price of a particular building. (KB Exs. 7-8, 10-11).

15. On April 21, 2014, the Court entered the Order (Bankr. Dkt. 238) granting the Motion to Disburse.

16. On November 12, 2014, Kitchens Brothers filed a lawsuit in the U.S. District Court for the Southern District of Mississippi, entitled *Kitchens Brothers Manufacturing Co. v. Equity Partners HG, LLC; Heritage Global, Inc.; Ken Mann; Matt LoCascio; Robinson Auctions; and Phil Robinson*, Civil Action No. 3:14-cv-880-HTW-LRA (the “District Court Action”). The defendants in the District Court Action filed a motion to dismiss for lack of jurisdiction or, alternatively, a motion for referral to this Court, which the U.S. District Court granted in part by referring the matter to this Court on March 25, 2016. (Adv. Dkt. 1).

17. On August 29, 2016, Kitchens Brothers filed the First Amended Complaint (Adv. Dkt. 28), alleging that: (1) Heritage failed to provide the Settlement Report required by the Contract (Compl. ¶ 53); (2) the “Defendants negligently failed to exercise reasonable care in selling Kitchens Brothers’ assets” (*Id.* ¶ 57); (3) the Heritage Defendants negligently failed to adequately train and supervise its employees in charge of the Live Auction (*Id.* ¶ 59); (4) the

⁶ In the Defendants Brief, the Defendants attributed the discrepancy of \$320.00 between the amount shown in the Motion to Disburse (\$1,131,607.00) and the amount they claim actually represents the total sale proceeds (\$1,131,927.00) to a possible theft of items and claimed they reimbursed the money to the buyer. (Defs. Br. ¶ 19 n.1).

“Defendants’ conduct was grossly negligent because it was performed in a grossly negligent, willful, reckless and/or wanton manner” (*Id.* ¶ 62); and (5) the Defendants breached the Contract by: (a) failing to stop the Live Auction as Kitchens Brothers requested; (*Id.* ¶ 63); (b) selling property of the estate after the Live Auction (*Id.* ¶ 64); and (c) not maximizing sale proceeds (*Id.* ¶ 65). Kitchens Brothers requested specific performance of the Contract as a remedy for Heritage’s alleged failure to provide the Settlement Report. (*Id.* ¶ 54). As to all other causes of action, Kitchens Brothers requested actual and punitive damages, and attorneys’ fees and costs in an amount in excess of \$75,000.00. (*Id.* at 10).

18. On October 18, 2016, Kitchens Brothers filed the Motion, seeking partial summary judgment against the Heritage Defendants on its breach of contract claims related to the Settlement Report and the sale of estate assets after the Live Auction. (Mot. ¶¶ 2-4). In the Motion, Kitchens Brothers asked the Court to order specific performance of the Contract and require Heritage to provide the Settlement Report “in order to allow Kitchens Brothers and the Court to compute Kitchens Brothers’ monetary damages for breach of contract.” (*Id.* ¶ 4). Kitchens Brothers did not seek summary judgment on any of its other claims or on the amount of its alleged monetary damages.

19. The parties continue to engage in discovery in the Adversary. (Defs. Br. at 9). The Court recently granted Kitchens Brothers’ request for an extension of the discovery deadline until March 13, 2017. (Adv. Dkt. 39).

Discussion

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure (“Rule 56”), as made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides in relevant part that “[t]he court shall grant summary judgment if the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “[S]ummary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense.” FED. R. CIV. P. 56(a) advisory committee notes to 2010 amendment. Partial summary judgment serves the purposes of narrowing, simplifying, and focusing the issues for trial. *Calpetco 1981 v. Marshall Expl., Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993).

Summary judgment is not disfavored, but rather is looked upon as an important process through which parties can obtain a “just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations & quotation omitted). Summary judgment is properly entered when the “depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials” 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. FED. R. CIV. P. 56(c)(1)(A); *see also Celotex*, 477 U.S. at 322.

The initial burden of proof is on the movant to specify the basis upon which summary judgment should be granted and identify portions of the record that demonstrate the absence of a genuine issue of material fact. FED. R. CIV. P. 56(c)(1); *see also Celotex*, 477 U.S. at 322. Once the initial burden is met, the burden of production shifts to the nonmovant who then must come forward with specific facts, supported by the evidence in the record, upon which a reasonable factfinder could find a genuine fact issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[C]onclusory allegations” or “unsubstantiated assertions” do not meet the nonmovant’s burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). Summary judgment should be granted, after adequate time for discovery,

against a nonmovant who “has failed to make a sufficient showing on an essential element of [the] case with respect to which [the party] has the burden of proof.” *Celotex*, 477 U.S. at 323.

B. Breach of Contract

To prevail on a breach of contract claim under Mississippi law,⁷ Kitchens Brothers must show by a preponderance of the evidence: (1) the existence of a valid and binding contract; and (2) that the Defendants have broken or breached the contract. *Bus. Comm., Inc. v. Banks*, 90 So. 3d 1221, 1224-25 (Miss. 2012). In Mississippi, damages are not an element of a breach of contract claim. *Id.* at 1225. A plaintiff, however, who seeks monetary damages for breach of a contract “must put into evidence, with as much accuracy as possible, proof of the damages being sought.” *Id.* (quotation omitted). Generally, specific performance is a remedy for a breach of contract that lies within the discretion of a court to award. *Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220, 225 (Miss. 2001).

The Defendants do not dispute that the Contract in question is a valid and binding agreement between the parties. Also, for purposes of the Motion, it is unnecessary under Mississippi law for Kitchens Brothers to produce summary judgment evidence establishing that it incurred damages as a result of the Heritage Defendants’ alleged breach of the Contract. The narrow issue before the Court is whether a genuine dispute exists that the Heritage Defendants breached the Contract either by failing to provide the Settlement Report or selling assets after the

⁷ There does not appear to be a dispute between the parties that Mississippi law applies. Kitchens Brothers cited Mississippi law in the Kitchens Brothers Brief (KB Br. at 8), to which the Defendants did not object. The Contract dictates that “[t]his Agreement shall be construed, interpreted and governed by the laws of the state in which the principal office of [Kitchens Brothers] is located.” (KB Ex. 1 at 6). The Petition identified Copiah County, Mississippi, as Kitchens Brothers’ “County of Residence or of the Principal Place of Business.” (Pet. at 1). Thus, without engaging in a full choice-of-law analysis, the Court finds that Mississippi law governs the resolution of the Motion.

Live Auction, and, if not, whether Kitchens Brothers is entitled to judgment as a matter of law based on the undisputed facts.

Under Mississippi law, courts use a three-tiered approach for construing and interpreting written instruments. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003). First, courts apply the “four corners” test, meaning that courts look to the actual language the parties used in expressing their agreement to determine their intent. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990). Second, if the parties’ intent cannot be determined from the “four corners” of the agreement, courts “apply the discretionary ‘canons’ of contract construction.” *Royer*, 857 So. 2d at 753 (citation omitted). Third, if the contract remains ambiguous as to the parties’ intent, courts may consider extrinsic or parol evidence, if necessary. *Id.* A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. *Songcharoen v. Plastic & Hand Surgery Assocs.*, 561 F. App’x 327, 333 (5th Cir. 2014) (applying Mississippi law). Only if the contract is unclear or ambiguous may courts go beyond the text to determine the true intent of the parties. *Pursue Energy*, 558 So. 2d at 352. “The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law.” *Epperson v. SOUTHBANK*, 93 So. 3d 10, 16-17 (Miss. 2012) (quotation omitted).

Kitchens Brothers attached as an exhibit to the Motion a transcript of the deposition testimony of Mann (KB Ex. 2) and argued extensively in the Kitchens Brothers Brief and the Reply Brief that Mann’s testimony bore on the interpretation of the Contract. (KB Br. at 2-3, 7-8; Reply Br. at 1-4). By asking the Court to look beyond the “four corners” of the Contract and consider extrinsic or parol evidence in determining the parties’ intent, Kitchens Brothers in effect alleged that the Contract was ambiguous. At the outset, the Court notes that Mississippi courts,

generally speaking, “take a dim view of the practice of resolving contract ambiguities via summary judgment.” *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985); *see also Epperson*, 93 So. 3d at 17.

1. Settlement Report

In the Motion, Kitchens Brothers’ criticism of the Auction Summary is twofold. According to Kitchens Brothers, the Auction Summary failed to report: (1) the “total collected or the total paid to the debtor” or (2) the items sold after the Live Auction. (KB Br. at 7). In support of its contention that the Auction Summary failed to comply with the Contract because it did not show the “total collected or the total paid to the debtor,” Kitchens Brothers relied solely on Mann’s deposition testimony. (*Id.* at 6-7). When shown a copy of the Auction Summary, Mann remarked that he was unsure whether the document handed him amounted to a complete settlement report because he did not see the “total collected [and] total paid to the debtor.” (KB Ex. 2 at 25).

The Defendants, in contrast, insisted that the Auction Summary was adequate and complied with both the Contract and Rule 6004(f)(1) of the Federal Rules of Bankruptcy Procedure (“Rule 6004(f)(1)”) because it identified the property sold, the name of the purchaser, and the price for each item. (Defs. Br. at 7-8). The Contract required that the Settlement Report include “a record of sales of the Assets and the allocation of the funds generated by such sales” (KB Ex. 1 at 4), but, according to the Defendants, did not require that it also show the “total collected” or “total paid to the debtor.” (Defs. Br. at 7-8). Similarly, Rule 6004(f)(1) required only “an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk.” (*Id.* at 8) (citing FED. R. BANKR. P. 6004(f)(1)).

After looking at the “four corners” of the Contract, the Court finds that the contractual language in question is not so ambiguous or unclear as to allow Kitchens Brothers to rely on Mann’s testimony to show what information the parties intended the Settlement Report to include. Kitchens Brothers did not point to any provision of the Contract that could be reasonably interpreted to require the Settlement Report to include the “total collected or the total paid to the debtor.” Even assuming for the sake of argument that the Contract was ambiguous as to whether the parties intended the Settlement Report to include this calculation, Mann’s deposition testimony would not have resolved the alleged ambiguity as a matter of law because he admitted that he was not an auctioneer and did not know what information should be included in a complete settlement report. (KB Ex. 2 at 25). In other words, his testimony was equivocal and not so one-sided as to preclude any other reasonable interpretation of the Contract. *Epperson*, 93 So. 3d at 17-18. Finally, the bottom of page 43 of the Auction Summary showed a total of \$702,870.00 under the column “Bid Amt,” so there is at least a factual dispute as to whether the total collected was actually provided, notwithstanding Mann’s testimony that he did not see it. (Bankr. Dkt. 147-1 at 43). Because the Court does not find that the contractual provision is ambiguous as a matter of law, the Court finds that Kitchens Brothers is not entitled to summary judgment on its claim that the Auction Summary failed to include the “total collected or the total paid to the debtor” in violation of the Contract. Even assuming some ambiguity in the Contract, the Court finds that there are factual disputes unresolved by Mann’s testimony and also apparent from the face of the Auction Summary as to whether the information was actually required and/or provided.

Kitchens Brothers next asserted that the Heritage Defendants breached the Contract because the Auction Summary failed to list the assets sold after the Live Auction. (KB Br. at 7).

Although the Defendants offered no explanation as to why the Heritage Defendants did not amend or supplement the Auction Summary after the Sealed Bid Auction, they asserted that the Auction Summary was correct when it was filed and that the Heritage Defendants later reported all of the sale proceeds to Kitchens Brothers and the Court in the Motion to Disburse. (Def's. Br. at 7-9).

The Court finds that Kitchens Brothers' second challenge to the Auction Summary appears to be inconsistent with its contention that the Contract did not cover sales of property of the estate after the Live Auction. Neither party mentioned this apparent inconsistency, but Kitchens Brothers' argument would require the Court to find that the Contract obligated the Heritage Defendants to report unauthorized sales. Either the Heritage Defendants had the authority to sell estate property after the Live Auction and failed to report these sales in breach of the Contract or the Heritage Defendants had no such authority, in which event there is a strong argument that they were under no contractual obligation to report them. Kitchens Brothers cannot have it both ways. The summary judgment evidence it offered in support of its claim that any auction sales that took place after the Live Auction were outside the scope of the Contract undermines its claim that the Auction Summary failed to comply with the Contract as a matter of law because it did not list those allegedly unauthorized sales.

In conclusion, on Kitchens Brothers' breach of contract claim that the Auction Summary failed to comply with the Contract either because it failed to include the "total collected or the total paid to the Debtor" or failed to report the sales that took place after the Live Auction, the Court finds that the Motion should be denied. Accordingly, the Court finds that Kitchens Brothers' request for specific performance of the Contract also should be denied.

2. Sales of Estate Property after the Live Auction

According to Kitchens Brothers, the Contract authorized the Heritage Defendants to sell property of the estate only: (1) in entirety sales of whole sawmills or (2) in piecemeal sales at a public auction. (KB Br. at 7). In support of its reading of the Contract, Kitchens Brothers again looked outside the “four corners” of the parties’ agreement and relied on the deposition testimony of Mann. When asked “[w]hat happened if items did not sell at either the entirety sale or the public auction sale,” Mann stated that “[t]hey remained property of the estate.” (KB Ex. 2 at 34-35). Kitchens Brothers contended that his answer constituted an admission that the Contract authorized only one (1) public auction of property of the estate. Thus, according to Kitchens Brothers, the Heritage Defendants breached the Contract as a matter of law by conducting the Sealed Bid Auction.

The Defendants, in contrast, maintained that “nothing in the Contract prohibited [them] from selling unsold assets after the [L]ive Auction.” (Defs. Br. at 2). Indeed, the Defendants alleged that the Heritage Defendants conducted the Sealed Bid Auction pursuant to their contractual obligation to “[p]erform related services necessary to maximize the proceeds to be realized for the Assets.” (KB Ex. 1 at 2; Defs. Br. at 8). Moreover, the Defendants pointed out that Birdsong herself was among the participants at the Sealed Bid Auction, although they did not explain the relevancy. (Defs. Br. at 2).

Even assuming that the Contract is ambiguous so as to justify consideration of parol evidence, the Court finds that Kitchens Brothers reads more into Mann’s testimony than is there. Mann did not testify that assets that were not sold at the Live Auction remained property of the estate that could not be sold in any other public auction during the term of the Contract. Mann’s testimony could also be reasonably interpreted to mean that assets that were not sold at the Live Auction remained property of the estate that could not be sold in any other public auction after

the Contract expired. This second interpretation is consistent with Mann's later testimony in which he described the Sealed Bid Auction as "a continuation of the auction process." (KB Ex. 2 at 84). More to the point, when asked if the Contract should have stated whether items would be sold after the public auction, Mann testified:

I think you're defining the auction as the live auction and I think that doesn't necessarily conclude the auction. I'm not going to speculate because I don't run the auction division as to what discussions the client and Kirk Dove and our corporate counsel had about what was considered part of the auction, but as a general rule the live auction isn't necessarily the entire auction. There are other phases to an auction.

(*Id.* at 93). Thus, the Court disagrees with Kitchens Brothers' bold assertion that Mann's testimony, when considered as a whole, constituted an admission by the Heritage Defendants that the Contract authorized only the Live Auction and no other.

Moreover, according to his own testimony, Mann was not the best witness to answer questions regarding the parties' intent as to the scope of the public auction phase of the Contract. In that regard, Mann described the Contract as an "A/B Contract" (KB Ex. 2 at 31), consisting of: (1) an entirety phase, where attempts are made to sell the assets as going concerns and (2) an auction phase, where attempts are made to sell the assets in piecemeal fashion. (*Id.* at 31-33). Mann stated that he was in charge of the entirety phase and his knowledge of the auction phase was limited. (*Id.* at 31, 46). Given the equivocal nature of his testimony, the Court does not find that Mann's statements cured the purported ambiguity in the Contract even if it were appropriate on summary judgment to hold that they did.

Apart from Mann's testimony, the presence of a genuine dispute is further demonstrated by Kitchens Brothers' own response to the Defendants' argument that the Sealed Bid Auction was conducted pursuant to language in the Contract requiring the Heritage Defendants to "[p]erform related services necessary to maximize the proceeds to be realized for the Assets."

(KB Ex. 1 at 2). According to Kitchens Brothers, that language is found under the section of the Contract titled “Services” and, thus, was not intended by the parties to define the scope of the public auction. (Reply Br. at 2). Therefore, even assuming the Contract is ambiguous regarding the scope of the auction phase of the Contract, the Court finds that a genuine dispute exists that prevents summary judgment on Kitchens Brothers’ breach of contract claim related to the sales that occurred after the Live Auction.

Conclusion

Kitchens Brothers did not ask the Court to resolve purely legal questions as to the interpretation of the Contract for which summary judgment might be proper, but to resolve factual disputes regarding the parties’ intent based on Mann’s deposition testimony. Because the Court does not find the ambiguities in the Contract urged by Kitchens Brothers and because courts generally may not resolve ambiguities in contract language as a matter of law, the Court concludes that the Motion should be denied. *Epperson*, 93 So. 3d at 17.

The Court also notes that “[e]ven if the standards of Rule 56 are met, a court has the discretion to deny a motion for summary judgment if it believes that ‘the better course would be to proceed to a full trial,’” so that the record might be more fully developed for the trier of fact. *Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (quoting *Anderson*, 477 U.S. at 255); *River Region Med. Corp. v. Wright*, Civil Action No. 3:13cv793-DPJ-FKB, slip op. at 4-6 (S.D. Miss. Aug. 5, 2014) (affirming interlocutory order denying summary judgment); *see also Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Expl. Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989).

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF OPINION##