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03/11/2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	
SUPREME BEEF PROCESSORS, INC.	§	Case No. 00-61810
	§	
Debtor	§	Chapter 7

STEPHEN J. ZAYLER, Trustee of the Chapter 7 Bankruptcy Estate of Supreme Beef Processors, Inc.	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 02-6255
	§	
TOPS ORGANIC, L.L.C. and GENE HAMON	§	
	§	
Defendants	§	

MEMORANDUM OF DECISION[1] RESOLVING COMPETING MOTIONS FOR SUMMARY JUDGMENT

Now before the Court for consideration is the "Defendant Gene Hamon's Notice of Motion and Motion For Summary Judgment" filed by Gene Hamon ("Hamon"), one of the Defendants in this adversary proceeding, as well as the "Plaintiff's Response to Defendant Gene Hamon's Motion For Summary Judgment and Plaintiff's Motion For Summary Judgment" filed by Stephen J. Zayler ("Plaintiff" or "Trustee"), Chapter 7 Trustee of the Bankruptcy Estate of Supreme Beef Processors, Inc. ("Debtor"). In

[1] This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

addition to seeking a competing summary judgment against Defendant Hamon, the Trustee also seeks the entry of a summary judgment against Defendant TOPS Organic, L.L.C. ("TOPS"). Both Defendants filed responses to the Trustee's Motion. Based upon the Court's consideration of the pleadings and the proper summary judgment evidence submitted by the parties, the Court concludes that Defendant Hamon's Motion for Summary Judgment should be granted and, to the extent that the Trustee's Motion for Summary Judgment seeks a competing judgment against Hamon, such motion must be denied. However, the Trustee's Motion for Summary Judgment against Defendant TOPS shall be granted.[2]

Factual and Procedural Background

On September 25, 2000, the Debtor, Supreme Beef Processors, Inc., filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code ("Code"). On May 9, 2001, the bankruptcy proceeding was converted from a case under Chapter 11 to a case under Chapter 7, and Mr. Zayler was thereafter appointed to serve as the Trustee of the Chapter 7 bankruptcy estate. In his trustee capacity, the Trustee sought to fulfill his statutory directive to sell the assets of the Debtor's estate, including approximately 1,008 acres of real property, together with 17 buildings affixed thereto, located near Palestine, Anderson County, Texas (the "Property").

The Trustee notified interested parties that the Property would be sold, and in

[2] This Court has jurisdiction to consider the complaint pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final judgment in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (N) and (O).

response to such notice, Defendant Hamon submitted a written offer to purchase the property for $600,000.00. As the highest offer received by the Estate, Hamon's bid was subsequently incorporated into an Improved Property Commercial Contract.[3]

In accordance with the provisions of the Code, the Trustee filed his "Application by Trustee for Authority to Sell Real Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. §363(f) and Request for Hearing," seeking to sell the Property to Hamon. Several objections were filed to the Trustee's sales motion, and a hearing on the motion was held before this Court on June 5, 2002. At the hearing, an auction between the interested parties was proposed and the Court recessed the scheduled hearing to allow the Trustee to conduct an auction of the Property. The highest bid was submitted by Defendant TOPS in the amount of $1,775,000.00, with Defendant Hamon making the second highest bid of $1,750,000.00. The Court then recalled the hearing on the Trustee's sales motion, and the Trustee announced to the Court that he had accepted the high bid of $1,775,000.00 from Defendant TOPS, with the reservation to accept the second highest bid of Hamon in the event that TOPS did not complete the transaction. The Court subsequently issued an order on June 13, 2002, authorizing the Trustee to sell the Property. This order reiterated the terms announced by the Trustee in open court and stated that "[i]n the event that the above-named purchaser [(*i.e.*, TOPS)] does not tender to the Trustee within three (3) business days the purchase price in cash, the Trustee is

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[3] *See* Plaintiff's Ex. 3; Hamon's Ex. 1.

authorized to accept the next highest bid of Gene Hamon for $1,750,000.00."[4]

TOPS failed to consummate the transaction by tendering the purchase price of $1,775,000 for the Property, and has continued to fail to pay the purchase price to the Estate. Consequently, the Trustee on June 24, 2002, mailed a letter and sent a facsimile transmission to both TOPS and Hamon informing the parties that TOPS had failed to close the sale, and that the Trustee was therefore under the "duty and obligation to extend to the next highest bidder, Mr. Gene Hamon and Cold & Dry Storage, the opportunity to purchase this property at its purchase price, offered on June 5, 2002, in the amount of $1,750,000.00, as the next highest bid pursuant to the Court's order dated June 13, 2002." Prior to this June 24, 2002, letter, the Trustee had received no communication from Hamon.

However, on June 26, 2002, Hamon, through his attorney, sent a letter to the Trustee refusing to pay the $1,750,000.00, but offering to purchase the Property for the $600,000.00 amount offered in the original Improved Property Commercial Contract. Thereafter, on July 17, 2002, the Trustee entered into a letter agreement with TOPS in the hope that TOPS would be able to obtain the funding necessary to close its obligation to purchase the Property.[5] After TOPS again failed to pay the purchase price, the Trustee filed the present adversary proceeding against the Defendants, Hamon and TOPS,

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[4] "Order on Trustee's Motion to Sell Real Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. §363(f)" entered on June 13, 2002 (emphasis added).

[5] *See* Ex. 10 to Plaintiff's Motion for Summary Judgment.

seeking, *inter alia,* specific performance or damages against at least one of the named Defendants.

Discussion

Standard for Summary Judgment.

The parties bring their respective motions for summary judgment in this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056. That rule incorporates Federal Rule of Civil Procedure 56 which provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). "The inquiry to be performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, identifying those portions of the

"pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. "If a moving party fails to carry its initial burden of production, the non-moving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion." *Hunter v. Caliber System, Inc.*, 220 F.3d 702, 726 (6th Cir. 2000) (*citing Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102-03 (9th Cir. 2000)). As more particularly described by Judge William Wayne Justice in *Marshall Independent School Dist. v. U.S. Gypsum Co.*, 790 F. Supp. 1291 (E.D. Tex. 1992):

> Even where the non-moving party has the burden of persuasion on an issue, the summary judgment movant still has the initial burden of showing the absence of a genuine issue of material fact. It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove its case. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider either any evidence submitted by the non-moving party or whether the moving party has met its ultimate burden of persuasion that summary judgment should be granted in its favor.

Id. at 1299-1300.

The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial is on the moving

party, "that party must support its motion with credible evidence--using any of the materials specified in Rule 56(c)--that would entitle it to a directed verdict if not controverted at trial." *Celotex*, 477 U.S. at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 843 (6th Cir. 1997); *Thom v. State Farm Lloyds*, 10 F.Supp.2d 693, 698 (S. D. Tex. 1997). On the other hand, if the burden of persuasion at trial must be borne by the non-moving party, the party moving for summary judgment may satisfy the burden of production under Rule 56 by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. See 10A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §2727 at pp. 471-472 (1998); *see also Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 329-30 (3d Cir. 1995); *Cannon v. Cherry Hill Toyota, Inc.*, 161 F. Supp.2d 362, 366 (D.N.J. 2001).

Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, but rather must demonstrate in specific responsive pleadings the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson,* 477 U.S. at 248-49, 106 S.Ct. at 2510 (*citing* FED. R. CIV. P. 56(e)). The substantive law will identify which facts are material. *Id.* If, however, the non-movant fails to set forth specific facts that present a

triable issue, its claims should not survive summary judgment. *Giles v. General Elec. Co.,* 245 F.3d 474, 494 (5th Cir. 2001). As the Supreme Court has stated,

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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 that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552.

On the other hand, "in the absence of the necessary minimal showing by the plaintiff that the defendant may be liable under the claims alleged, the defendant should not be required to undergo the considerable expense of preparing for and participating in a trial." *Robinson v. Cutchin*, 140 F.Supp.2d 488, 491 (D. Md. 2001) (*citing Catrett*, 477 U.S. at 323-24, 106 S.Ct. at 2548 and *Anderson*, 477 U.S. at 256-57, 106 S.Ct. at 2505).

To determine whether summary judgment is appropriate, the record presented is reviewed in the light most favorable to the non-moving party. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, if the evidence demonstrating the need for trial "is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-250, 106 S.Ct. at 2511. Thus, a non-movant must show more

than a “mere disagreement” between the parties, *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1413 (5th Cir. 1993), or that there is merely “some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. However, “[t]he issue of material fact which must be present in order to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Anderson*, 477 U.S. at 248-249, 106 S.Ct. at 2510. Accordingly, the process has been described by the Supreme Court as one which mandates the entry of summary judgment where the evidence is such that it would require a directed verdict for the moving party. “In essence, . . . the inquiry [is] . . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id*. at 251-52, 106 S.Ct. at 2512. *See also In re Hudsar Inc.*, 199 B.R. 266, 272 (Bankr. D.N.J. 1996) [“The evidence which the non-moving party produces to show the existence of a genuine issue must be of sufficient quantum and quality to allow a rational and fair-minded fact finder to return a verdict in favor of the non-movant, bearing in mind the applicable standard of proof that would apply at a trial on the merits.”] (citing *Anderson,* 477 U.S. at 249-51, 106 S.Ct. at 2511).

Trustee v. Defendant Hamon

In his summary judgment motion, Defendant Hamon argues that he has no valid contract with the Trustee because his $1,750,000 bid at the June 5, 2002, hearing was not accepted by the Trustee; rather, the Trustee accepted the higher bid of TOPS in the amount of $1,775,000. Hence, Hamon claims that his offer was rejected by the Trustee, and therefore cannot be made the basis of liability to the Trustee for the damages specified in the Trustee's complaint. Hamon further argues that, even if his June 5, 2002, offer was not rejected, the Trustee is still estopped from accepting this offer because the Trustee, after receiving the June 26, 2002, letter stating that Hamon was withdrawing his $1.75 million bid, continued to negotiate with TOPS by extending TOPS's deadline for performance to July 31, 2002, and by agreeing to accept $75,000.00 in earnest money from TOPS. Finally, Hamon argues that the contract fails for lack of consideration, and that the statute of frauds prevents enforcement of the contract.

The Trustee, on the other hand, contends that Hamon's offer was never rejected. The Trustee asserts that he formed a valid contract with Hamon, subject to the condition precedent that TOPS actually failed to perform under its higher bid. Furthermore, the Trustee claims that there was sufficient consideration for the contract, that the estoppel argument cannot apply because of Hamon's unclean hands and the fact that Hamon did not change his position, and, finally, that there is no statute of frauds problem.

The Court obviously must utilize Texas law to resolve these issues of substantive contract law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct.

2211, 2219, 135 L.Ed.2d 659 (1996) ["Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."] (*citing Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). To form a binding contract under Texas law, each of the following elements must be satisfied:

> (1) an offer,
> (2) an acceptance in strict compliance with the terms of the offer,
> (3) a meeting of the minds,
> (4) each party's consent to the terms, and
> (5) execution and delivery of the contract with the intent that it be mutual and binding.

Komet v. Graves, 40 S.W.3d 596, 600 (Tex. App. — San Antonio 2001, no pet. h.) (*quoting Buxani v. Nussbaum,* 940 S.W.2d 350, 352 (Tex. App. — San Antonio 1997, no pet.)).

In consideration of such authorities, the Court concludes that no valid contract existed between the Trustee and Hamon. As mentioned above, no contract can result from an offer or proposal until the offer is accepted by the other party "in strict accordance with its terms." *See id.*; *Williford Energy Co. v. Submergible Cable Services, Inc.*, 895 S.W.2d 379, 384 (Tex. App. — Amarillo 1994, no writ) ["A binding contract must have an offer and an acceptance and the offer must be accepted in strict compliance with its terms."]; *see generally* 14 TEX. JUR. 3D *Contracts* §69 (2003). In the context of an auction, "[t]he bid at auction constitutes an offer to buy, while the fall of the hammer

or any other customary means constitutes acceptance and the contract is then made."[6] 7 AM. JUR. 2D *Auctions and Auctioneers* §34 (2002). Hence, Hamon's bid at the June 5, 2002, auction clearly constituted an offer by him to purchase the Property for $1,750,000.

However, the undisputed facts as presented to the Court in the parties' competing motions establish that the Trustee clearly rejected Hamon's bid at the auction by accepting the $1,775,000 bid of Defendant TOPS. In fact, the Trustee admits that he accepted the $1.775 million bid from TOPS,[7] although he contends that he reserved the right to accept Hamon's bid at a subsequent time in the event that the TOPS failed to complete the transaction.[8] Hamon, however, did not make an offer to purchase the Property *if TOPS failed to consummate the transaction*. Rather, Hamon made an offer to purchase the Property on the terms stated in his bid.

Accordingly, the Trustee's purported "reservation" to accept Hamon's bid did not constitute an acceptance *in strict compliance with* the terms of the offer. Therefore, there was no contract formed between the Trustee and Hamon. This conclusion is further buttressed by the rule that "a conditional acceptance of an offer usually will constitute a rejection and terminate the offeree's right to thereafter accept the original offer." 14 TEX. JUR. 3D *Contracts* §§ 66, 69 (2003); *see also W. T. Rawleigh Co. v. Izard*, 113 S.W.2d

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[6] The terms of this contract were, of course, subject to the granting of authority to the Trustee to sell the property pursuant to 11 U.S.C. §363(f).

[7] *See* Plaintiff's Response to Defendant Gene Hamon's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment, p.5, ¶4(f).

[8] The Trustee made an oral statement to the Court that he was reserving the right to accept Hamon's second highest bid if the high bidder failed to complete the transaction.

620, 622 (Tex. Civ. App. — Eastland 1938, no writ) ["If an offer is rejected . . . by an acceptance conditionally or not identical with the terms of the offer, or by a counter proposal, the party making the original offer is relieved from liability on that offer, and the party who has rejected the offer cannot afterward, at his own option, convert the same offer into an agreement by subsequent acceptance. For that purpose he must have the renewed consent of the person who made the offer."].

Likewise, the language contained in the Court's June 13, 2002, order approving the Trustee's sales motion does not bind Hamon to his $1,750,000 offer. Rather, it merely grants authority to the Trustee to accept Hamon's offer without the necessity of a further hearing. Such authority, however, could never be translated into a binding contract under applicable contract principles in the absence of Hamon's subsequent consent to be bound by the "back-up bid" designated in the order. Once the Trustee had rejected Hamon's bid by accepting the higher TOPS bid, the Trustee's alternative action of returning to the lesser Hamon bid simply constituted a new offer — a new offer which never was accompanied by the other four factors necessary to constitute a valid contract under Texas law. Consequently, because of the absence of all but one of the essential elements required for the formation of a binding contract under Texas law, no valid contract exists between the Trustee and Hamon for the purchase of the Property for $1,750,000.00.

Accordingly, Hamon's Motion for Summary Judgment against the Trustee should be granted, and, to the extent that the Trustee's Motion seeks a competing summary

judgment ruling against Defendant Hamon, that motion must be denied.[9]

Trustee v. Defendant TOPS

In his Motion for Summary Judgment, the Trustee also seeks a judgment against Defendant TOPS for breach of contract damages in the amount of $1,775,000.00, reasonable and necessary attorneys fees in the amount of $710,000.00, and pre- and post-judgment interest.[10] While TOPS admits that the Trustee accepted its $1,775,000.00 bid at the June 5, 2002, auction and subsequent hearing,[11] thereby forming a valid contract, it argues that this contract was not enforceable against it because it failed to satisfy the statute of frauds.

The statute of frauds provides that "a contract for the sale of real property (or a

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[9] Because no valid contract existed between the Trustee and Hamon, it is unnecessary to discuss the alternative grounds raised by Hamon's Motion for Summary Judgment.

[10] The Trustee also argues that his acceptance of Defendant TOPS' high bid at the June 5, 2002, auction and the subsequent reading into the record of the agreement by the Trustee resulted in a "settlement" under Tex. R. Civ. P. 11, which can be enforced based upon the oral agreement. Because the statute of frauds was satisfied, there is no need to entertain the Trustee's "settlement" argument.

[11] *See* Response of Defendant TOPS Organic, L.L.C., to Plaintiff's Motion for Summary Judgment, ¶4 [stating that "[g]enerally, Defendant does not contest the undisputed facts set forth in Paragraph 4 of Plaintiff's Motion for Summary Judgment"]. Plaintiff's Motion for Summary Judgment, ¶4(j) - (l) states as follows:

> Because of the failure of both TOPS Organic, LLC, and Gene Hamon to comply with their *contracts to purchase the Property*, Trustee continued to try and encourage both to close the transaction and live up to their obligations. In that regard, on July 17, 2002, Trustee entered into a letter agreement with TOPS, LLC, in hopes that it would be able to obtain funding to close its obligation to purchase the Property. . . . Neither TOPS Organic, LLC nor Gene Hamon have paid the amounts they owe nor have they completed their obligation to purchase the Property and both are in *breach of their contracts*. As a result of the failure of TOPS Organic, LLC and Gene Hamon to comply with the *terms of their contracts* to purchase the Property, it was necessary for Trustee to employ counsel to represent him in enforcing those contracts.

(emphasis added).

lease of real property for a term longer than one year) is not enforceable unless the agreement is in writing and signed by the person or his agent against whom enforcement of the contract is sought." *Fandey v. Lee*, 880 S.W.2d 164, 170 (Tex. App. — El Paso 1994, writ denied); *see also* 26 TEX. BUS. & COM. CODE ANN. §26.01 (Vernon 2002). It has long been held under Texas law that "sales at auction are within the statute of frauds." *Brock v. Jones*, 8 Tex. 78 (1852); *see generally*, 7 TEX. JUR. 3D *Auctions and Auctioneers* §7 (2003). In discussing the requirement that a contract for the sale of land must be in writing, the Supreme Court of Texas has recognized that:

> It is well settled that before a court will decree the specific performance of a contract for the sale of land, or entertain a suit for damages for the breach thereof, the written agreement or memorandum required by the statute must contain the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence to show the intention of the parties; and no part of the instrument is more essential than that which identifies the subject matter of the agreement.

Wilson v. Fisher, 144 Tex. 53, 56, 188 S.W.2d 150, 152 (1945).

In addition, the court in *Key v. Pierce*, 8 S.W.3d 704 (Tex. App. — Ft. Worth 1999, pet. denied), provides the following guidance:

> Whether a contract comes within the statute of frauds is a question of law. The statute of frauds requires the written agreement or memorandum to contain all of the essential elements of the agreement so that the contract can be ascertained from the writings without resort to oral testimony. It does not require that the contract itself be in writing. Rather, the written instrument merely furnishes written evidence of a contract and its essential

terms. A valid memorandum of the contract may consist of numerous communiques signed by the party to be charged and addressed to his agent or the other party to the contract, or even to a third party not connected with the transaction.

Id. at 708.

The writing does not have to be in existence at the time of the agreement in order to enforce the agreement, but it does have to be in existence prior to suit being filed. *See Black v. Hanz*, 146 S.W. 309, 312 (Tex. Civ. App. — Austin 1912, no writ); and *see generally* 41 TEX. JUR. 3D *Frauds, Statute of*, §98 (2003).

The Trustee argues that the July 17, 2002, letter from TOPS to the Trustee[12] which was signed by Oliver Tyson, Vice President of TOPS, evidences the agreement in sufficient manner to avoid operation of the statute of frauds. TOPS, on the other hand, claims that this letter is insufficient in and of itself to constitute a contract to purchase the property because the letter "fails to furnish within itself or by reference to some other existing writing the means or data by which the particular land to be conveyed may be identified with reasonable certainty."[13] The letter states, in pertinent part, as follows:

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[12] *See* Plaintiff's Ex. 10.

[13] *See* Response of Defendant TOPS Organic, L.L.C., to Plaintiff's Motion for Summary Judgment, ¶9. Defendant TOPS also argues that the July 17, 2002, letter "was rendered moot and meaningless by the failure of Defendant to tender any earnest money to Trustee as represented by the letter." TOPS' argument, however, is meritless because the statute of frauds "does not require that the contract itself be in writing." *Key*, 8 S.W.3d at 708. As recognized in *Key*, the statute of frauds merely "requires the written agreement or memorandum to contain all of the essential elements of the agreement so that the contract can be ascertained from the writings without resort to oral testimony. It does not require that the contract itself be in writing. *Rather, the written instrument merely furnishes written evidence of a contract and its essential terms.* A valid memorandum of the contract may consist of numerous communiques signed by the party to be charged and addressed to his agent or the other party to

> This letter agreement is made by and between TOPS Organic LLC ("TOPS") and Stephen J. Zayler ("Trustee"), as Trustee for the benefit of Supreme Beef Processors, Inc., Debtor in the above-referenced bankruptcy proceeding, with respect to the sale by Trustee to TOPS of the Supreme Beef Processors, Inc., processing plant facility and real property in Palestine, Texas, as described and authorized in the Order on Trustee's Motion to Sell Real Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. §363(f) signed June 13, 2002.[14]

TOPS is correct that the only description of the property to be sold contained within the four corners of this letter identifies the property as "the Supreme Beef Processors, Inc., processing plant facility and real property in Palestine, Texas." However, the letter also references the Court's June 13, 2002, Order granting the Trustee's sales motion, wherein a more complete description of the property is provided.[15] In Texas, "[t]he law is well

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the contract, or even to a third party not connected with the transaction." *Id.* (emphasis added). Therefore, TOPS' failure to pay the $75,000 earnest money called for in the July 17, 2002, letter, is completely irrelevant to the issue of whether the letter contains "all of the essential elements of the agreement" necessary to satisfy the statute of frauds.

[14] *See* Plaintiff's Ex. 10.

[15] Such order describes the Property in the following manner:
1,008 acres, more or less, with 17 buildings comprising the beef processing facility, located in Palestine, Anderson County, Texas, more particularly described as follows:

> 1,008 acres, more or less, Mickum Main Survey, A-0040, Reson Crist Survey, A-0161, and the Patrick O'Rourk Survey, A-0666, Anderson County, Texas, along with all improvements situated thereon.
> It is the intention of the Seller to convey all interest in any and all real and personal property, furniture, fixtures and equipment in the name of Supreme Beef Processors, Inc., located in Anderson County, Texas, as shown by deeds to Supreme Beef Processors, Inc., of record in the offices of the County Clerk of Anderson County, reference to which is made for a more complete description.

settled . . . that in so far as the description of the property is concerned the writing must furnish within itself, *or by reference to some other existing writing*, the means or data by which the particular land to be conveyed may be identified with reasonable certainty." *Lewis v. Midgett*, 448 S.W.2d 548, 551 (Tex. Civ. App. — Tyler 1969, no writ) (*citing Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1945)) (emphasis added); *see also Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995) ["The written memorandum, however, need not be contained in one document."]. As detailed in *Street v. Johnson*, 96 S.W.2d 427 (Tex. Civ. App. — Amarillo 1936, no writ):

> A memorandum which states a sale of land, identifying it by an adequate description, and which specifies the price and is dated and signed by the seller, is sufficient to support a suit for specific performance against him. Nor need the writing contain all of the stipulations upon which the parties may have agreed. The object of the statute was to abrogate parol titles and this is sufficiently accomplished by a promise to convey the land . . . without requiring the other terms of the agreement to be stated. When the memorandum contains within itself, all the particulars of a concluded contract, it need only be signed by the party against whom it is sought to be enforced. The written evidence that is required by the statute need not be comprised in a single document, the requirement may be satisfied by two or more scripts in combination--for instance, letters passing between the parties or telegrams. A letter or telegram sufficient as to contents and signature to constitute a memorandum satisfying the statute of frauds, or a part of such memorandum if more than one writing is involved, is adequate for this purpose, even though it is not intended for, addressed, delivered, or known to the other contracting party.

Id. at 429.

Consequently, because the letter contains an express reference to the sale by the Trustee to Defendant TOPS; identifies the property to be sold by referring to the Court's June 13, 2002, order; specifies that the purchase price is to be $1,775,000; and is signed and dated by Defendant TOPS, the July 17, 2002, letter from TOPS to the Trustee satisfies the requirements of the statute of frauds.[16]

Although the July 17, 2002, letter satisfied the statute of frauds, the Court is compelled to note that the Trustee in this case could have avoided any potential statute of frauds problem had he, upon the conclusion of the auction, complied with the generally-accepted practice of executing a memorandum of sale setting forth the material terms of the agreement. It has long been the rule in Texas that a purchaser at an auction who announces his bid to the auctioneer gives the auctioneer authority as his agent to sign the contract of sale for him as the highest bidder, and the auctioneer satisfies the statute of

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[16] Moreover, authority exists for the proposition that the statute of frauds is not applicable to bankruptcy sales conducted by a chapter 7 trustee under court authority. *See, e.g., Stearns v. Woolard (In re Laughinghouse)*, 51 B.R. 869, 875 (Bankr. E.D.N.C. 1985) ["At an early date, the rule was laid down that a judicial sale under an order of a court of equity was not within the statute of frauds, and that no note or memorandum in writing was necessary; this rule has been followed in most of the later cases and is now supported by the decided preponderance of authority. Equity sales are neither within the letter of the statute nor embraced by its policy. In regard to such sales, its provisions are not obligatory on the court, nor is there any reason why they should be applied upon any principle of analogy. Such sales are conducted under the decrees or orders of the court, which prescribe the terms, and are always guarded by its superintendence, and therefore, cannot be considered within the mischief intended to be provided against. The bidder subjects himself to the jurisdiction of the court, and, in effect, by making his bid, becomes a party to the proceeding in which the sale is made, and may be compelled to complete his purchase by the process of the court."]; *see also The Monte Allegre*, 22 U.S. 616, 623, 6 L.Ed. 174, 9 Wheat. 616 (1824) ["It is on a similar principle that all judicial sales are out of the operation of the statute of frauds; and this is by no means because the judicial sale is at *auction*, for auction sales are within the statute, unless they are also in pursuance of judicial authority; but it is because there is a peculiar respect due to judicial sales. The danger which the statute intended to guard against, cannot be supposed of such sales."]. Because the statute of frauds was otherwise satisfied in this instance, the Court does not reach this issue.

frauds by making some entry of memorandum in writing of the name of the purchaser and the terms of the sale. *See Brock v. Jones*, 8 Tex. 78, 79-80 (1852); *Maddox v. Cosper*, 25 S.W.3d 767, 772 (Tex. App. — Waco 2000, no pet. h.) [finding that an auctioneer has the authority to sign the high bidder's name to a memorandum of sale following the conclusion of an auction, but the memorandum must be sufficient to satisfy the statute of frauds in order to avoid the operation of this statute]; *Cherryhurst Properties v. Larry Latham Auctioneer's, Inc.*, No. 01-96-01458-CV, 1998 WL 653453, *3 (Tex. App. — Houston. [1st Dist.] Sept. 27, 1998, no pet. h.) ["The auctioneer temporarily becomes an agent of the buyer as well as the seller after the hammer falls concluding a sale. The purpose of this brief agency relationship between the auctioneer and the buyer is to allow the auctioneer time to record the transaction in a sufficient manner to remove it from the effect of the statute of frauds."]; *see generally* 7 TEX. JUR. 3D *Auctions and Auctioneers* §2 (2003) and 41 TEX. JUR. 3D *Frauds, Statute of* §112 (2003). However, authority exists for the proposition that, when dealing with the written memorandum required by the statutes of frauds, one party to the contract may not act as the agent of the other in signing the written memorandum. *See Walker v. Keeling*, 160 S.W.2d 310, 311 (Tex. Civ. App. — Amarillo 1942, no writ); and *see generally* 7 TEX. JUR. 3D *Frauds, Statute of* §112 (2003). Consequently, because the Trustee in this case, in fulfillment of his duty to collect and liquidate the debtor's estate, conducted the auction and was also the selling party, the Trustee could avoid any potential problem by requiring the high bidder to sign

the memorandum of sale immediately upon the conclusion of the auction,[17] rather than by utilizing the apparent authority authorized under *Brock* and *Maddox* to sign on behalf of the highest bidder.[18]

Hence, because the contract between the Trustee and TOPS satisfied the statute of frauds, and because no other genuine issue of material fact exists, the Trustee's Motion for Summary Judgment against TOPS must be granted on the issue of the liability of TOPS for breach of contract. However, as to the Trustee's request for damages equal to the full amount of the contract price, or $1,775,000.00,[19] a material fact issue does exist. As stated by the Texas Supreme Court, "[t]he measure of damages for breach of contract of sale of land by the purchaser is the difference between the contract price and the salable value. This value may be fixed by a fair resale, after notice to the party to be bound by the price as the value, within a reasonable time after the breach." *Kempner v. Heidenheimer*, 65 Tex. 587, 1885 WL 7312, *4 (Tex. 1886). A more complete description of the proper measure of damages is provided in *Kollmeyer v. Stewart*, No. 05-00-01787-CV, 2001 WL 1570322 (Tex. App. — Dallas 2001, no pet. h.):

Generally, the measure of actual damages in a breach of contract case is the

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[17] Again, the memorandum of sale must include sufficient information to satisfy the statute of frauds.

[18] In fact, were it not for the subsequent negotiations between Trustee and TOPS and the Defendant's accompanying letter, the Trustee's failure to execute any type of memorandum upon the conclusion of the auction would have likely rendered the contract unenforceable due to the statute of frauds.

[19] The Trustee also seeks pre- and post-judgment interest, and attorney's fees in the amount of $710,000.00.

> loss of the benefit of the bargain, which would put the plaintiff in the same economic position he would have been in had the contract actually been performed. *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.,* 798 S.W.2d 274, 278 (Tex. 1990); *Peco Constr. Co. v. Guajardo,* 919 S.W.2d 736, 739 (Tex. App. — San Antonio 1996, writ denied). When a real estate contract is breached by the purchaser, the measure of damages is the difference between the price the seller was to receive and the market value of the land at the date of the breach, plus interest from the date of the breach. *Runnells v. Pruitt,* 204 S.W. 1017, 1020 (Tex. Civ. App. — Dallas 1918, no writ). Market value is defined as the price property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying, with both parties having reasonable knowledge of relevant facts. *Exxon Corp. v. Middleton,* 613 S.W.2d 240, 246 (Tex. 1981); *Fisher v. Yates,* 953 S.W.2d 370, 379 (Tex. App. — Texarkana 1997), *pet. denied,* 988 S.W.2d 730 (Tex. 1998) (per curiam). Market value may be calculated by using "a fair resale, after notice to the party to be bound . . . within a reasonable time after the breach." *Kempner v. Heidenheimer,* 65 Tex. 587, 591 (1886); *see Roselawn Cemetery, Inc. v. Martin,* 415 S.W.2d 442, 445 (Tex. Civ. App. — San Antonio 1967, no writ) [evidence of sale to third party constituting breach was "some evidence" as to market value of property at time of breach]; *Nelson v. Jenkins,* 214 S.W.2d 140, 144 (Tex. Civ. App. — El Paso 1948, writ ref'd) [evidence of price sellers received after they breached contract with plaintiff and sold property to another supported jury's award of benefit of the bargain damages].

See id. at *3.

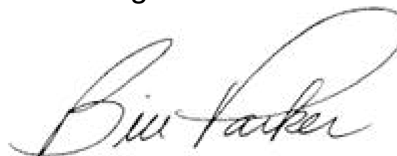
As these authorities indicate, it would be improper for the Court to award the full

contract price of $1,775,000.00 to the Trustee without making some deduction for the fair market value of the property. Accordingly, because the Trustee failed to introduce any evidence of the fair market value of the Property, summary judgment cannot be properly awarded as to the Trustee's damages claims. Similarly, summary judgment for the Trustee is also precluded as to his request for $710,000 in attorney's fees because the Trustee failed to provide the Court with any evidence to support the "reasonable and necessary" character of such fees.

Accordingly, the Court concludes that Defendant Hamon's Motion for Summary Judgment against the Trustee should be granted, and, to the extent that the Trustee's Motion seeks a competing summary judgment ruling against Defendant Hamon, the Trustee's motion for summary judgment against Hamon must be denied. However, as to the Trustee's Motion for Summary Judgment against Defendant TOPS, the Court concludes that this motion should be granted as to the liability of Defendant TOPS for breach of contract, but that summary judgment is precluded as to any of the Trustee's damage or attorney's fee claims.

Accordingly, this matter will proceed to trial on Wednesday, April 28, 2004 at 10:00 a.m. in Tyler wherein the Court will consider the Trustee's damage and attorney's fee claims against TOPS. Appropriate orders shall be entered which are consistent with this opinion.

Signed on 3/11/2004



BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE