UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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June 2, 1999

John S. Lovald, Esq.
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Subject: ***Lovald v. Arch (In re Myril J. Arch II)***
Adversary No. 98-3020
Chapter 7; Bankr. No. 98-30026

Dear Counsel:

The matter before the Court is Defendant Myril J. Arch's Motion for Summary Judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendant's motion should be denied.

Summary of facts. In May 1993, Defendant opened the Cattleman's Steakhouse and Bar in Flandreau. His son, Debtor Myril J. Arch II, helped him open the business and served as its manager. According to Debtor, from the time the business opened, Debtor or his subsequently formed corporation, Myril Arch II, Inc., paid the real estate taxes on the property, kept it insured, and maintained the premises. Debtor also claims that at some point, Debtor or Myril Arch II, Inc. acquired and held the liquor license.

On November 26, 1994, Defendant and Debtor signed a "Real Estate Installment Contract." Debtor's signature was notarized; Defendant's was not. Under the terms of that document, Debtor was to pay Defendant $117,500.00 for the business, by making a down payment of $10,000.00 and paying the balance of $107,500.00, with interest at 6.75% per annum from June 1, 1994, in five annual

26

installments, beginning June 1, 1995.[1] Defendant kept the signed document, and Debtor did not receive a copy.[2] According to Debtor, Defendant did not receive any share of the profits from the business after this date.

On June 5, 1996, Defendant signed the document again, this time in the presence of a notary public. Debtor recalls receiving a copy shortly thereafter. The document was then recorded in the office of the Moody County Register of Deeds on June 17, 1996. According to Debtor, the decision to record the document may have been precipitated by Defendant's pending divorce.

In his 1996 tax return, Defendant represented to the Internal Revenue Service that he sold the business on June 5, 1996. In his 1996 tax return, Debtor similarly represented to the Internal Revenue Service that he purchased the business on June 5, 1996.

On June 2, 1997, Debtor sold the business for $220,000.00. From the proceeds, Debtor paid Defendant $126,000.00. According to Debtor, Defendant accepted this sum in satisfaction of any and all amounts owing under the agreement to sell the business. Prior to this, Debtor had made no payments of principal or interest under the agreement to purchase the business.

On March 2, 1998, Debtor filed a petition for relief under Chapter 7. Plaintiff John S. Lovald was appointed as the Chapter 7 Trustee for Debtor's bankruptcy estate. On December 8, 1998, Plaintiff commenced an adversary proceeding against Defendant, seeking a determination that Debtor's transfer of $126,000.00 to Defendant was avoidable as a fraudulent transfer within the meaning of 11 U.S.C. § 548. On December 21, 1998, Defendant answered the complaint, admitting only that Plaintiff is the duly qualified and acting trustee herein, that the Court has jurisdiction over this matter, that this matter is a core proceeding, and that Debtor filed bankruptcy as alleged in the complaint. The only discovery undertaken to date has been Debtor's deposition, which was taken on December 18, 1998, pursuant to his attorney's notice.

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[1] The receipt and sufficiency of the down payment was specifically acknowledged in the document. The annual payments were to be made according to an amortization schedule that was referred to in, but not attached to, the copies of the "Real Estate Installment Contract" on file herein.

[2] The parties did not raise or brief, and the Court does not address, the possible impact of S.D.C.L. § 53-7-8 on the question of the effective date of the "Real Estate Installment Contract."

On February 3, 1999, Defendant filed a motion for summary judgment, a supporting memorandum, and his affidavit. On March 8, 1999, Plaintiff filed a brief in opposition to Defendant's motion and a supporting affidavit. On March 17, 1999, Defendant filed a reply brief. The matter was taken under advisement.

Discussion. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Circ. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997 (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273, (8th Cir. 1988). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995).

On its face, the "Real Estate Installment Contract" signed by Defendant and Debtor on November 26, 1994 appears to be a valid and binding agreement for the sale of the Cattleman's Steakhouse and Bar. *See* S.D.C.L. §§ 53-1-2 and 53-8-2.

> The statute of frauds requires that contracts for the sale of land must not only be in writing and signed by the party who is to be charged, but the writing must contain all the material terms and conditions of the oral agreement between the parties. . . To satisfy the statute of frauds, a memorandum for the sale of land must describe the land, the price, and the contracting parties; it need not detail the form or delivery of deed, the time and place of payment, or any other matters. . . The status of frauds requires only that the writing evidence the substance of the contract. . . There is no fatal ambiguity if the contract terms are sufficiently certain to make the acts required of each party clearly ascertainable.

Amdahl v. Lowe, 471 N.W.2d 770, 774 (S.D. 1991) (cites omitted). And if, as they both now assert, Defendant and Debtor entered into a binding contract for the sale of the business on November 26, 1994, Debtor clearly owed Defendant more than the $126,000.00 he paid him from the proceeds of the sale to the Reinhards.[3]

However, as Plaintiff correctly points out, the fact that in their 1996 tax returns, both Defendant and Debtor indicated that the sale did not take place until June 5, 1996 raises a legitimate question as to whether they in fact intended a sale prior to that date. Defendant's failure to provide Debtor a copy of the signed document and Debtor's failure to make any of the payments called for by it cast further doubt on their contractual intent.

The Court does not agree with Defendant that these inconsistencies are irrelevant. For there to be an enforceable contract, there must be mutuality of consent. *See* S.D.C.L. § 53-1-2(2); *Coffee Cup Fuel Stops & Convenience Stores, Inc. v. Donnelly*, ___ N.W.2d ___, ___, 1999 WL 301338, *3 (S.D. 1999) (citations omitted). Absent the mutual assent of the parties to an agreement, there can be no contract. *See id.*

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[3]

Contract amount		$117,500.00
Down Payment	-	10,000.00
Interest (6.75%) 6/1/94 - 6/1/95	+	7,256.25
Interest (6.75%) 6/1/95 - 6/1/96	+	7,256.25
Interest (6.75%) 6/1/96 - 6/1/97	+	7,256.25
BALANCE ON 6/1/97	=	$129,268.75

The actions of the parties to an agreement may evidence the requisite mutual assent. *See Federal Land Bank of Omaha v. Houck*, 4 N.W.2d 213, 219 (S.D. 1942) ("It is elementary that conduct may be as effective as words in manifesting mutual assent to a contract). *See also Donnelly*, 1999 WL 301338, *3 ("[The] existence [of mutuality of consent] is determined by considering the parties' words and actions."). Conversely, their actions may demonstrate that mutual assent was lacking.

If Defendant and Debtor did not intend to effectuate a sale of the business on November 26, 1994 — for whatever reason — they did not do so. *See, e.g., Mitzel v. Hauck*, 105 N.W.2d 378, 380 (S.D. 1960) (citations omitted) ("Offers made in jest . . . or under great mental excitement or anger which are not really intended by the offeror and so known to the offeree have been held not to be the basis of legal liability."). *See also Wallace v. Rogier*, 395 N.E.2d 297, 300 (Ind. Ct. App. 1979) (citations omitted) ("When two parties enter into a sham contract, as between themselves, there is no contract and the document is thus unenforceable."); *County of San Diego v. Viloria*, 80 Cal. Rptr. 869, 872 (Cal. Ct. App. 1969) (citation omitted) ("Where parties to a writing purporting to be a contract do not intend it to be a contract, no contract exists."); *Hamilton v. Boyce*, 48 N.W.2d 172, 174 (Minn. 1951) (citation omitted) ("No contract is formed by the signing of an instrument when the offeree is aware that the offerer [*sic*] does not intend to be bound by the wording in the instrument.")

As suggested in *Wallace*, *Viloria*, and *Hamilton*, it makes no difference if the agreement has been reduced to writing. A contract "'is the result of a mutual assent of two parties to certain terms, and, if it be clear that there is no consensus, *what may have been written or said becomes immaterial.*'" *Geraets v. Halter*, 588 N.W.2d 231, 234 (S.D. 1999) (quoting *Watters v. Lincoln*, 29 S.D. 98, 100, 135 N.W. 712, 713 (1912)). Put another way, "not every [written] agreement . . . results in a binding, legally enforceable contract. *Neither party may intend the writing to be a contract* . . ." *Mitzel*, 105 N.W.2d at 380 (citation omitted). *See also Cooke v. Belzer*, 413 N.W.2d 623, 627 (Minn. 1987) (citations omitted) ("A written agreement, though complete in all its terms, does not become a binding contract until the parties express an intention that it be so."); *Pogreba v. O'Brien*, 27 N.W.2d 145, 146 (Minn. 1947) (citation omitted) ("[A] written agreement, even though complete and settled in all its terms, does not become binding until the parties express an intention that it be so."). *See also W.C. Larock, D.C., P.C. v. Enabnit*, 812 S.W.2d 670, 671 (Tex. App. 1991) (citing *Hamilton*).

Thus, if Defendant and Debtor did not intend to be bound by the "Real Estate Installment Contract" until June 5, 1996, there was no contract on November 26, 1994, notwithstanding the express language of the document. *See Geraets*, 588 N.W.2d at 234; *Mitzel*, 105 N.W.2d at 380.

Plaintiff has advanced specific facts to create a genuine issue of material fact for trial. Defendant's motion for summary judgment will be denied.

Counsel for Plaintiff shall prepare an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: adversary file (docket original in adversary; serve copies on counsel for each party and U.S. Trustee)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUN 02 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

JUN 02 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By M. Kay Lewis

Case: 98-03020 Form id: 122 Ntc Date: 06/02/1999 Off: 3 Page : 1
Total notices mailed: 3

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