IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE:	§	
	§	
DCRI L.P. NO. 2, INC.,	§	CASE NO. 03-31053-SAF-11
DEBTOR(S).	§	
	§	
DCRI L.P. NO. 2 and J. MICHAEL MOORE,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 03-3205
	§	
BANK ONE TEXAS, N.A.,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding removed from state court, Bank One Texas, N.A., the defendant, moves for summary judgment. The plaintiffs, DCRI L.P. No. 2, Inc., and J. Michael Moore, also move for summary judgment. At a status conference on April 1, 2003, the parties agreed to submit the summary judgment motions on the pleadings. On May 1, 2003, the plaintiffs withdrew their motion for summary judgment. Pursuant to a series of orders, the pleadings were completed and the court took the bank's motion under advisement on May 22, 2003.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence, which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

DCRI L.P. No. 2 executed a promissory note to the bank, dated July 10, 1998, in the principal amount of $825,000. Moore executed a commercial guaranty, which guaranteed payment of amounts due under the note. As security for the note, DCRI L.P. No. 2 pledged a number of shares of stock of Diversified

Corporate Resources, Inc.

DCRI L.P. No. 2 defaulted on the note. Moore did not pay on the guaranty. The bank filed a lawsuit styled Bank One, Texas N.A. v. DCRI L.P. No. 2, Inc. and J. Michael Moore in state court. DCRI and Moore agreed to the entry of a judgment for $780,000 plus post judgment interest at 10% per annum. The state court entered that judgment on May 10, 2001.

In an attempt to satisfy the judgment, the bank sold shares of the stock pledged by Moore and DCRI L.P. No. 2. The sale proceeds partially reduced the outstanding amount of the judgment.

The parties then executed a forbearance agreement, dated September 7, 2001, where, for consideration, the bank agreed to forbear from the further exercise of its rights to collect the judgment, including the sale of the stock, until October 7, 2001. DCRI L.P. No. 2 and Moore released the bank from any claims concerning the liquidation of the stock.

DCRI L.P. No. 2 and Moore did not pay the judgment. Instead, they initiated this lawsuit on February 28, 2002. The plaintiffs allege that the exercise of dominion and control by the bank over the pledged stock extinguished the judgment. The plaintiffs allege that the stock value exceeds the amount of the judgment, and they seek damages.

In its motion for summary judgment, the bank contends that

it sold the stock in a commercially reasonable manner but did not realize sufficient value to pay the judgment. In addition, the bank argues that in the forbearance agreement the plaintiffs waived any claims against the bank. The plaintiffs respond that the stock had a value sufficient to pay the judgment and that they entered the forbearance agreement under duress.

The summary judgment evidence establishes that there is no genuine issue of material fact that the judgment has not been satisfied and that the plaintiffs waived any claims against the bank regarding the manner of selling the DCRI stock.

Under Texas law, the bank had to sell the stock in a commercially reasonable manner. F.D.I.C. v. Blanton, 918 F.2d 524, 527 (5th Cir. 1990). "A disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." Tex. Bus. & Com. Code Ann. § 9.627 (Vernon Supp. 2001). "Texas law establishes that the sale of collateral on a recognized market is commercially reasonable." Blanton at 530. A recognized market assures a fair price through neutral market forces. Id.

In his affidavit, Hal E. Fudge, the Bank One vice president in charge of the DCRI loan, averred that the shares of Diversified Corporate Resources, Inc., stock are publicly traded on the American Stock Exchange. The bank retained the securities firm of RBC Dain Rauscher, Inc., to sell the stock on the American Stock Exchange. As the shares of Diversified Corporate Resources are typically very thinly traded, the bank instructed Dain Rauscher to sell the stock as promptly as possible based on its professional judgment, at market prices, and in a manner that would not disrupt the stock. Fudge further avers that Dain Rauscher periodically sold the shares of stock at their market price. The sales did not yield sufficient proceeds to satisfy the judgment.

In his response, Moore states that he is the president of DCRI L.P. No. 2 and the chief executive officer and chairman of the board of directors of Diversified Corporate Resources, Inc. Moore agrees that the stock is very thinly traded. He avers that the bank sold the stock "in too short a period of time" to maintain market value. He avers that the weekly volume of DCRI's stock in the public market was usually less than 10,000 shares a week, but the bank sold 243,000 shares "over a short period of time." He avers that the bank should have only sold a few hundred shares a day. He further states, however, that as of the date of the judgment, May 10, 2001, the market value of the DCRI

stock was $3.24 per share, which would have resulted in sufficient value to pay the judgment.

Moore's affidavit is inherently inconsistent and contradictory. On the one hand, he avers that the 243,000 shares of DCRI stock had a market value on May 10, 2001, of $787,320, but, on the other hand, he avers that only a few hundred of the 243,000 shares could have been sold that day and still maintain the price per share. Moore cannot have it both ways. Both sides agree that the stock was thinly traded. So the stock had to be sold over time to obtain the best price. Obviously, then, the stock could not have been sold on May 10, 2001, to pay the judgment. On May 10, 2001, the market value of the 243,000 shares had to be considerably less than $787,320. There is no genuine issue of material fact that had all the pledged shares been sold on May 10, 2001, the price per share would have been significantly diluted and would have been insufficient to pay the judgment.

Moore does not provide any underlying facts to support his conclusion that the bank sold the stock in "too short" a period of time. Moore does not aver what he means by "too short." Moore does not provide factual averments for how he would have sold the stock. The stock was publicly traded on a recognized market. The bank retained a securities firm to sell the stock on that market. The securities firm understood that the stock was

thinly traded. The bank directed the securities firm to use its professional judgment to sell the stock at market prices in a manner that would not disrupt the market for the stock. The securities firm periodically sold the stock at the then current market price on the public market. Moore's averments do not put these facts at issue.

The sale of stock on a recognized public market at the current prices and in a manner recognizing that the stock was thinly traded meets the commercially reasonable standard.

In the forbearance agreement, DCRI L.P. No. 2 and Moore released the bank "from any and all claims . . .related to . . . all actions and inactions taken in connection with collection of the Judgment, including sales of Diversified Corporate Resources, Inc. (AMEX-HIR) or other common stock . . .and any claims that sales of common stock delivered by Defendants to Bank One were improper . . ." The forbearance agreement itself recognizes that the parties, for consideration, exchanged the bank's forbearance on the sale of the stock for the release. As Moore states in his affidavit, he did not want the bank to sell the stock. As Fudge establishes in his affidavit, neither DCRI L.P. No. 2, Inc., nor Moore paid the judgment prior to the forbearance agreement The forbearance agreement enabled Moore and DCRI L.P. No. 2 to attempt to pay the judgment without further sales of the stock. In return, the bank obtained the release. The undisputed facts

belie Moore's allegation that the bank forced him to execute the forbearance agreement. The bank could have continued to sell the stock. The bank held a valid, binding, final and enforceable state court judgment. The bank held collateral to sell to apply against the judgment. Moore wanted the collateral preserved. The forbearance agreement gave him an opportunity to pay the judgment without further sale of the stock.

There is no genuine issue of material fact that the forbearance agreement is a binding contract among the parties. In the agreement, the plaintiffs specifically release any claims they have against the bank regarding the sale of the stock. They also disclaim any reliance on any representation made by the bank. See Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179 (Tex. 1997) (explaining how parties' clear and specific intent regarding disclaimer, negates reliance element necessary from fraudulent inducement claim).

Based on the foregoing,

IT IS ORDERED that the motion of Bank One, N.A., for summary judgment is **GRANTED**. Counsel for Bank One shall submit a proposed judgment.

Signed this 10th day of June, 2003.

Steven A. Felsenthal
United States Bankruptcy Judge