

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF PUERTO RICO**

In re:

Olympic Mills Corporation, d/b/a Olympic Group,  
Debtor

Bk. No. 01-13021 (GAC)  
Chapter 11

Coachman Incorporated,  
Debtor

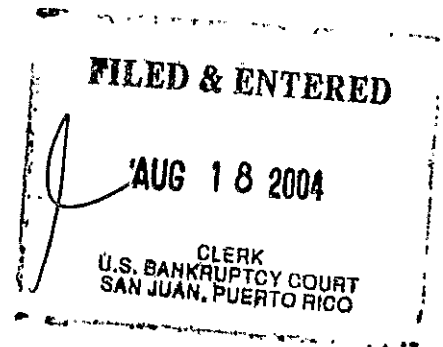
Bk. No. 01-13028 (GAC)  
Chapter 11

DCC Operating, Inc.,  
Plaintiff

v.

Luis Rivera Siaca and the Conjugal Society  
constituted with his wife Eney Ortiz-Rivera,  
Defendants

Adv. No. 03-0090 (GAC)



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and  
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**MEMORANDUM OPINION**

The Court has before it DCC Operating, Inc.'s ("Plaintiff") motion for summary judgment seeking an award of damages against Defendant Luis Rivera Siaca ("Rivera") arising from Rivera's

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breach of the Subordination and Standby Agreement. The Plaintiff also filed a memorandum in support of its motion. Rivera filed a cross motion for summary judgment requesting that the case be dismissed with prejudice. The Court held a hearing on the motion on January 21, 2004, and took this matter under advisement. For the reasons set out below, the Plaintiff's motion for summary judgment is granted, however, the Court has made its own determination as to the amount of damages to be awarded.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§1334(b) and 157(a). This is a core proceeding which the Court may hear and enter appropriate judgment in accordance with 28 U.S.C. § 157(b).

#### **FACTUAL AND PROCEDURAL BACKGROUND**

The facts are not disputed. The Plaintiff is the general partner of Development Capital Ventures ("DCV"), a limited partnership organized under Delaware law. Rivera is the chairman and chief executive officer of Coachman, Inc. ("Coachman") and its affiliates, including Olympic Mills Corporation. Coachman is a Delaware corporation doing business in Puerto Rico, and Rivera is a Puerto Rico resident. This case involves a \$2.5 million bridge loan, which was made by DCV to Coachman in contemplation of the creation of a subsidiary of Coachman.

As a condition precedent to the extension of the \$2.5 million loan, DCV entered into a Subordination and Standby Agreement with Rivera and Coachman on February 24, 2000. The Agreement required Rivera to defer collection of all payments of principal on the loans which he made to Coachman and its affiliates until DCV was first paid in full. In connection with the Agreement, Coachman delivered a Convertible Subordinated Demand Note ("Note") to DCV, and DCV agreed to lend \$2.0 million to Coachman subject to the terms and conditions of the subordination agreement. The amount of the loan was subsequently increased to \$2.5 million upon the amendment to the Note on November 21, 2000. The loan fell into default on February 24, 2001.

Since January 5, 2000, Rivera made a series of loans to Coachman and its affiliates, and Rivera was repaid at least \$5,663,175.74 from Coachman and its affiliates in violation of the subordination agreement. On November 7, 2001, the Plaintiff filed a complaint in the U.S. District Court for the District of Puerto Rico alleging several claims against Rivera. Shortly thereafter, Coachman and Olympic Mills Corporation, each, filed a bankruptcy petition under Chapter 11 in this Court on November 26, 2001.

The main issue of the proceeding in the district court was which of Coachman's debts to Rivera were to be subordinated pursuant to the subordination agreement. Rivera argued that the subordination agreement only applied to the money he lent to Coachman prior to the execution of the agreement.

On December 16, 2002, the district court granted a partial summary judgment in favor of the Plaintiff holding that Rivera's loans made to Coachman after execution of the subordination agreement are also subordinated and that the repayments that Rivera received from Coachman were in violation of the agreement. See DCC Operating, Inc. v. Luis Rivera Siaca, et al., Civil No. 01-2524 (HL) Doc. 56. The district court further ordered that "The Court leaves the issue of the precise amount of liability to the parties to be resolved either at the pretrial and settlement conference or by stipulation. If the parties are unable to resolve this remaining issue without the Court's intervention, the Court will proceed to address DCC's request on this matter." Id. pp. 6-7. On May 1, 2003, the district court referred this case to this Court pursuant to 28 U.S.C. § 157(a).

On November 4, 2003, the Plaintiff filed a motion for summary judgment seeking the determination of the precise amount of liability based upon the district court's judgment.

#### DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment should be granted only when "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 a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under applicable law.” Nercida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulge all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.2d 576, 581 (1st Cir. 1994).

The sole remaining issue before the Court is the precise amount of damages to be awarded to the Plaintiff. In his cross motion for summary judgment, Rivera argues that the partial summary judgment entered by the district court should be vacated and set aside. This Court does not agree. Having carefully reviewed the district court’s opinion, this Court agrees with the district court’s analysis and conclusion. The Court does not see any reason to compel a different result. Thus, this Court will not set aside the district court’s order granting partial summary judgment. Accordingly, Rivera’s cross motion for summary judgment is denied.

The Note and the subordination agreement provide that their terms and conditions should be governed and construed pursuant to the laws of the State of Delaware. In construing its opinion, the Court will rely on the laws and jurisprudence of Delaware. In determining the appropriate measure of damages, the Delaware Supreme Court recognized the basic proposition that “default damages rules, like other contract rules, should generally reflect the contract term that most parties would have bargained for at the time of the agreement.” Duncan v. TheraTx, Inc. 775 A.2d 1019, 1021 (Del. 2001). Under Delaware law, the standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*. Id. 775 A.2d at 1022. “This principle of expectation damages is measured by the

amount of money that would put the promisee in the same position as if the promisor had performed the contract.” Id. In other words, expectation damages require the breaching promisor to compensate the promisee for the promisee’s reasonable expectation of the value of the breached contract, and, hence, what the promisee lost. See Comrie v. Enterasys Networks, Inc., 837 A.2d 1 (Del. Ch. 2003).

The language of the Note and the annexed subordination agreement demonstrate what the parties had bargained for when they entered into the agreement. Article 5 of the Note specifically states that the execution of an irrevocable subordination and standby agreement is a condition precedent to any funding by DCV to the Note. Thus, it is clear that DCV lent Coachman \$2.5 million in reliance on the terms of the subordination agreement. Therefore, there is no question that DCV is entitled to be compensated its actual loss caused by Rivera’s violation of the agreement pursuant to what it has bargained for, which would be the terms and conditions of the Note and the subordination agreement. See Genencor Intern., Inc. v. Novo Nordisk A/S., 766 A.2d 8, 11 (Del. 2000) (“It is a basic principle of contract law that remedy for a breach should seek to give the nonbreaching party the benefit of its bargain by putting that party in the position it would have been but for the breach.”)

The damages to be awarded are calculated as follows. As for the principal amount, the Plaintiff states the outstanding balance of the principal is \$2,442,674.67. See Pl.’s Ex. 16. Rivera did not dispute the amount of the loan made by DCV to Coachman. DCV lent Coachman \$1,000,000, \$600,000, \$450,000 and \$500,000 from February 25, 2000, to November 21, 2000. Coachman repaid \$100,000 on March 3, 2000, \$54,742 on June 14, 2000, and \$86,500 on December 26, 2000. On December 26, 2000, DCV added accrued interest in the amount of \$79,174.67 to the principal amount. However, no provisions in the Note provide for the increase of the principal amount by adding accrued interest. Thus, this should not be allowed. Accordingly, the principal to be awarded as damage should be in the amount of \$2,363,500 (\$2,442,674.67 - \$79,174.67).

Applying the annual interest rate of twelve per cent (12%) provided under the note to the principal,<sup>1</sup> the interest amount would be as follows: \$930,034.67 from February 25, 2000, through December 25, 2003, plus \$230,003.84, which is a per diem of \$777.04 multiplied by the 296 days between December 25, 2003 and August 18, 2004, the date of this judgment. Thus, the total amount of interest to be awarded would be \$1,160,038.51.

The Plaintiff requests interest at the rate of twelve percent (12%) per annum on any uncollected judgment amount until paid. Delaware law states that "...judgments entered after May 13, 1980, shall bear interest at the rate in the contract sued upon." 6 Del. C. § 2301(a). The Court notes that many unpublished Delaware cases allow post judgment interest at the contract rate in accordance with the provisions of 6 Del. C. § 2301(a). The Plaintiff's request for post-judgment interest is allowed.

The Plaintiff also requests an award of attorneys' fees and costs. Under Delaware law, the general rule regarding payment of attorneys' fees is that "apart from statute or contract, a litigant must pay his counsel fees." See Mauer v. International Re-Insurance Corp., 95 A.2d 827, 830 (Del. 1953); Safeway Stores, Inc. v. Chamberlain Protective Serv. Inc., 451 A.2d 66 (Del. Ch. 1982). Delaware courts give great weight to contract clauses creating the right to payment of attorneys' fees in subsequent litigation. See Bickford v. Smithson, 2003 WL 22931394 (not reported in A.2d) (Del. Com. Pl. 2003). The contracting parties have the opportunity to negotiate for provisions within the contract that would require one party to pay the attorneys' fees of the other if they do not abide by the terms of the contract. Knight v. Grinnage, 1997 WL 633299 (not reported in A.2d) (Del. Ch. 1997).

The "Senior Debt" defined under the subordination agreement includes "enforcement expenses (including legal fees and disbursements) ... and other reimbursement or indemnity obligations created or

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<sup>1</sup> Article 2 of the note states that "[i]nterest shall accrue at the rate of twelve percent (12%) per annum on the principal of this Note outstanding from and after the date of this Note, and shall be due and payable on the 1<sup>st</sup> of each month, beginning April 1, 2000." Pl.'s Ex. 2.

evidenced by the Note." It seems that the "enforcement" here means enforcement of the obligation under the Note against Coachman, not enforcement of the subordination obligation against Rivera. Thus, the Court finds that the attorneys's fees and costs incurred in enforcing the subordination agreement are not included in the definition of "Senior Debt." Moreover, there is no provision under the Note stating that in the event a dispute arises under the Note or subordination agreement resulting in any litigation, whichever party is unsuccessful shall be liable for the other party's court costs and attorneys' fees.

On the other hand, considering the substantial amount of time and money that the Plaintiff's counsel has spent on this case, it is only fair to allow at least part of the attorneys' fees and costs. Therefore, as the Plaintiff has requested, the Court will defer rulings on the separate issue of attorneys' fees and costs until such time as the full amount of the attorneys' fees and costs can be ascertained.

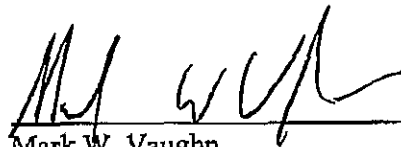
#### CONCLUSION

For the reasons stated above, the Plaintiff's motion for summary judgment is granted, and Rivera's cross motion for summary judgment is denied. The Court awards damages to the Plaintiff in the amount of \$2,363,500 in principal, \$1,160,038.51 in interest through the date of judgment, and 12% per annum post judgment interest on any uncollected amount until paid. The issue of the attorneys' fees and costs are deferred until such time as the full amount can be ascertained.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DONE and ORDERED this 18th day of August, 2004, at Manchester, New Hampshire.

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VST



Mark W. Vaughn  
Chief Bankruptcy Judge for the District of  
New Hampshire, sitting by designation