

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 11
	:	
WILLIAM K. HOLMES,	:	
	:	
Debtor	:	Case No. 02-52793 RFH
	:	
WILLIAM K. HOLMES and	:	
AIRTREK, LLC,	:	
	:	
Plaintiffs	:	
	:	
vs.	:	
	:	
GENERAL ELECTRIC CAPITAL	:	
CORPORATION,	:	
	:	
Defendant	:	Adversary Proceeding
	:	No. 03-5280

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

Plaintiffs: Mr. Joseph J. Burton, Jr.
Ms. Rosemary Armstrong
Two Ravinia Drive
Suite 1750
Atlanta, Georgia 30346

Defendant: Mr. John F. Isbell
Mr. Gregory S. Bianchi
Mr. Mark M. Maloney
191 Peachtree Street, N.E.
Atlanta, Georgia 30303-1763

MEMORANDUM OPINION

William K. Holmes and Airtrek, LLC, Plaintiffs, filed on July 25 2005, a motion for partial summary judgment. General Electric Capital Corporation, Defendant, filed on July 25, 2005, a motion for summary judgment. The Court, having considered the record and the arguments of counsel, now publishes this memorandum opinion on the two motions.

“[The] filing of cross-motions [for summary judgment] does not establish that there is no material fact in issue and that a trial is therefore unnecessary. The Court must still make an independent evaluation as to the merits of each party’s motion.”

Donovan v. District Lodge No. 100, International Assoc. Of Machinists and Aerospace Workers AFL-CIO, 666 F. 2d 883, 886 (5th Cir. Unit B, 1982).

“The court must rule on each party’s motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard. Both motions must be denied if the court finds that there is a genuine issue of material fact.” 10A C. Wright, A. Miller, & M. Kane, Federal Civil Practice and Procedure 3d § 2720, p. 335-36 (1998).

The following facts are not in dispute. William K. Holmes is the sole shareholder of Airtrek, LLC. Mr. Holmes controls Airtrek, LLC.

Between May 1997 and June 2000, Plaintiffs agreed to purchase or lease four airplanes. Defendant provided financing for the transactions. Plaintiffs and

Defendant disagree on the amount, if any, of the remaining balance owed on the transactions.

In May 1997, Mr. Holmes purchased a King Air 350 Beachcraft. Defendant financed the purchase. Mr. Holmes executed a promissory note and an aircraft security agreement in favor of Defendant.

In December 1998, Mr. Holmes executed a purchase agreement to purchase a Galaxy 1126 Aircraft S/N 016 from Galaxy Aerospace Company, LP. Defendant financed the purchase. The Galaxy was to be delivered in June 2000.

Mr. Holmes decided to lease another airplane while awaiting delivery of the Galaxy. In July 1999, Airtrek, LLC executed a lease with Defendant for an Astra SPX. The term of the lease was twelve months. Mr. Holmes executed a personal guarantee of the Astra lease. Mr. Holmes also entered into an agreement with Galaxy Aerospace Company to trade in the Astra when the Galaxy was delivered. Mr. Holmes was to receive a credit towards the purchase of the Galaxy. About six months later, Mr. Holmes decided to sell to a third party his right to purchase the Galaxy.

In June 2000, Airtrek, LLC executed a lease with Defendant for a Falcon 990. The term of the lease was twelve years. The lease provided that Airtrek, LLC could not sublease the Falcon without the prior written consent of Defendant. The Falcon was to be refurbished. The Astra lease was to expire in August 2000. Defendant agreed to extend the Astra lease until December 2000 so that Mr. Holmes could use

the Astra until the Falcon was delivered.

In the fall of 2000, Mr. Holmes had financial problems. In October 2000, Mr. Holmes advised Defendant that he could not meet his obligations on the King Air promissory note, the Astra lease, and the Falcon lease. Defendant sent notices of default to Mr. Holmes. Defendant's representatives had a number of discussions with Mr. Holmes concerning his obligations.

Mr. Holmes sold the King Air and was able to satisfy his obligations on the King Air promissory note. Mr. Holmes attempted to sell or sublease the Falcon. A third party expressed an interest in subleasing the Falcon for a term of two years. The remaining term on Airtrek, LLC's lease of the Falcon was 11 ½ years. Defendant would not give its written consent to the sublease.

Defendant sold the Falcon for \$23 million. Defendant sold the Astra for \$9 million. Defendant contends that there was a net deficiency of \$2,519,981.10.

Mr. Holmes filed a petition under Chapter 11 of the Bankruptcy Code on July 1, 2002. Defendant filed a proof of claim asserting a secured claim for \$2,227,488.62.

Plaintiffs filed this adversary proceeding on October 10, 2003. Plaintiffs assert claims for breach of contract, conversion, tortious interference with contract, fraud in the inducement, and for an accounting of funds. Defendant filed a response and asserted a counterclaim on May 10, 2004. Defendant contends that Plaintiffs breached the Astra lease and Mr. Holmes' personal guarantee of the lease. Plaintiffs

filed a response to the counterclaim on May 27, 2004.

In their motion for partial summary judgment, Plaintiffs contend that Defendant breached its contractual duty of good faith and fair dealing when Defendant refused to allow Plaintiffs to sublease the Falcon to a third party. Defendant contends that it had good business reasons for refusing to allow the sublease.

Good faith and fair dealing are basically factual inquiries. See Figter Limited v. Teachers Insurance and Annuity Assoc. of America, (In re Figter Limited), 118 F.3d 635, 638 (9th Cir.) cert. denied 522 U.S. 996, 118 S. Ct. 561, 139 L.Ed 2d 402 (1997); EZ Cash 1, LLC v. Brigance, (In re Brigance), 234 B.R. 401, 408 n.6 (W.D. Tenn. 1999); Scherer Construction, LLC v. Hedquist Construction Co., 18 P.3d 645, 654 (Wyo. 2001).

The Court is persuaded that there are genuine issues of material fact as to whether Defendant acted in good faith and whether Defendant dealt fairly with Plaintiffs.

Plaintiffs also seek partial summary judgment on Defendant's counter-claim for Plaintiffs alleged breach of the Astra lease and Mr. Holmes's personal guarantee. Plaintiffs contend that Defendant waived any right to a deficiency exceeding \$1 million and that Defendant suffered no loss upon the sale of the Falcon. The Court is persuaded that there are genuine issues of material fact concerning the agreements and the dealings between Plaintiffs and Defendant.

Defendant moves for summary judgment on all claims in Plaintiffs' complaint and on Defendant's counter-claim. The Court is persuaded that there are genuine issues of material fact concerning the agreements and the dealings between Plaintiffs and Defendant.

The Court is persuaded that Plaintiffs' motion for partial summary judgment and Defendant's motion for summary judgment should be denied.

An order in accordance with this memorandum opinion will be entered this date.

Dated this 14th day of October 2005.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court