IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

(19)

In re	
FASHION BOWLING LANES, formerly doing business as OLYMPUS LANES, INC.	Bankruptcy No. B-76-837
Bankrupt	
LINDSEY H. KESLER, Trustee	
Plaintiff	
vs	MEMORANDUM DECISION AND ORDER
ROLAND B. WILKINS, STANLEY ROBLES, EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY, W. STERLING EVANS, County Clerk of Salt Lake County, R. EARL DILLMAN, and P. J. COLEMAN	
Defendants	

Herschel J. Saperstein, Watkiss & Campbell, Salt Lake City, for plaintiff. Brant H. Wall, Salt Lake City, for the defendants Wilkins and Robles. Heard June 22, 1979.

This action was brought by the trustee to determine his right to a fund now being held by W. Sterling Evans, County Clerk of Salt Lake County. The fund, which originated as a reserve account created by a deed of trust was paid over to the County Clerk by Equitable Life and Casualty Company (herein after Equitable) and Bettilyon Mortgage Company (hereinafter Bettilyon) in defense to a state court suit brought to recover the sum by the defendants Wilkins and Robles. As Bettilyon and Equitable claim no interest in the fund, this Court is now called upon to adjudicate the validity and extent of the competing claims of the trustee and the defendants Wilkins and Robles to the fund. The claims of these parties are based upon the following facts.

FACTS

On October 28, 1961, the bankrupt executed a deed of trust in favor of Bettilyon as security for a promissory note in the amount of $125,000. The Bettilyon deed of trust was recorded on October 29, 1961, entry number 2418305, in the office of the County Recorder, Salt Lake County, State of Utah. Under the Bettilyon deed of trust, the bankrupt agreed to deposit into a reserve account, on a monthly pro-rated basis, sufficient funds to provide for the payment of taxes, assessments, and hazard insurance premiums. On November 3, 1971, Equitable obtained an assignment of Bettilyon's beneficial interest in the deed of trust. Bettilyon retained the responsibility of maintaining and disbursing the reserve account. The funds with which the Court is now concerned are those left in the reserve account when the Bettilyon deed of trust was paid in full on or before February 2, 1977.

On August 23, 1972, the bankrupt executed a deed of trust in favor of The Lockhart Company (hereinafter Lockhart) as security for a promissory note in the amount of $29,000. The Lockhart deed of trust was recorded on September 7, 1972, entry number 2482788, in the office of the County Recorder, Salt Lake County, Utah. It provided that Lockhart had the right to make payments to Bettilyon on the Bettilyon deed of trust to prevent default. It further provided that Lockhart had the right to treat any such payments as additional advances to be secured by Lockhart's lien on the real property.

Until December 4, 1974, the bankrupt made all payments on the Bettilyon deed of trust including various payments into the reserve account. Between December 4, 1974 and March 2, 1976, several payments on the Bettilyon deed of trust were made by Lockhart, including a total of $6,421.21 which was paid into the Bettilyon reserve account for taxes and insurance. The payments made by Lockhart were all necessary to avoid default on the Bettilyon deed of trust.

In addition to these advances, Lockhart paid late charges in the amounts of $52 and $139.48 which had been assessed against the bankrupt. Lockhart treated each payment and each late charge as an additional advance under its deed of trust, thereby increasing its lien on the real property.

Between December 4, 1974 and March 2, 1976, Bettilyon continued to manage the reserve account and make payments from the reserve account for taxes, assessments, and insurance premiums. These disbursements included a payment for 1976 property taxes in the amount of $3,541.84 and a payment for fire insurance covering the period of December 6, 1975 to December 6, 1978 in the amount of $4,184.

By reason of the bankrupt's default on its deed of trust, Lockhart obtained a judgment and decree of foreclosure on January 30, 1976. In addition to being the foreclosing beneficiary, Lockhart was also the purchaser at its March 2, 1976 foreclosure sale. A sheriff's deed was executed in favor of Lockhart on November 9, 1976 and recorded on November 10, 1976. By the order of sale dated March 2, 1976, Lockhart, as a foreclosing beneficiary under the deed of trust, received, in addition to the original loan amount of $29,000, the amount of all advances made to Bettilyon in the form of payments or charges assessed against the bankrupt plus interest and costs of the foreclosure sale. The total price received by Lockhart as beneficiary from Lockhart as purchaser, was $71,741.43.

The bankrupt remained in possession of the property until the filing of a Chapter XI petition on September 3, 1976. Thereafter, the trustee in bankruptcy turned over possession of the property to defendants Wilkins and Robles, who had previously purchased the property from Lockhart and who had received a special warranty deed dated January 21, 1977. As part of that transaction, Lockhart had also executed an undated assignment of all its right, title and interest,

if any, in and to the subject reserve account to the defendants Wilkins and Robles.

Following a series of negotiations, this Court, by order of November 12, 1976, authorized the trustee to sell to the defendants Wilkins and Robles whatever right, title and interest the estate held in the

> real property previously owned by the bankrupt, together with all personal property of said estate in which it may have an interest, including, but not limited to, bowling lanes, bowling shoes, bowling balls, kitchen equipment, cash registers, lockers, lounge equipment and the like.

The purchase price was $15,100.

Subsequent to the Court-ordered sale, the defendants Wilkins and Robles tendered payment in full on the Bettilyon Deed of Trust and demanded that Bettilyon turn over the balance of the reserve account. Bettilyon refused. On February 2, 1977, the defendants Wilkins and Robles filed suit against Equitable and Bettilyon in the District Court of the Third Judicial District, Salt Lake County, State of Utah, to recover the balance of the reserve account. By way of answer and affirmative defense, Bettilyon and Equitable obtained an order from the state court under which they turned over the balance of the reserve account, $15,085.57, to the defendant W. Sterling Evans, County Clerk of Salt Lake County. On February 15, 1977, the trustee commenced this action to obtain an Order directing W. Sterling Evans to pay over the $15,085.57 to the estate of the bankrupt.

The trustee claims the fund as an asset of the bankrupt which passed to the trustee when the bankruptcy was filed. Wilkins and Robles initially assert title to the fund by virtue of the assignment given them by Lockhart of its interest in the fund. If, however, all or part of the fund did in fact pass to the trustee at the filing of bankruptcy, Wilkins and Robles claim that the trustee's interest was subsequently sold to them in the November 12, 1976 order and sale.

ISSUES

Out of these facts arise the following issues:

1. Does this Court have jurisdiction to determine the matters complained of by the trustee?

2. What right or interest, if any, did Lockhart have to the reserve account which passed to the defendants Wilkins and Robles pursuant to Lockhart's assignment?

3. If title to the account passed to the trustee on the filing of the petition in bankruptcy, did the defendants Wilkins and Robles succeed to the trustee's interest in the reserve account by reason of the order and sale of November 12, 1976?

4. If, under the terms of the November 12, 1976 order, the defendants Wilkins and Robles succeeded to the interest of the trustee, does this Court have jurisdiction and sufficient justification to modify that order?

5. Is the trustee estopped from claiming an interest in the reserve account by reason of his failure timely to assert the claim?

JURISDICTION

Under section 23 of the Bankruptcy Act, 11 U.S.C. §46 (1976), this Court has jurisdiction over controversies arising in the course of the bankruptcy proceeding between claimants and the trustee regarding property claimed to be part of the estate of the bankrupt. See 2 Collier on Bankruptcy, ¶23.04, at 453 (14th ed. 1976). This action is a controversy over funds previously held in the Bettilyon reserve account into which the bankrupt made all deposits prior to December 4, 1974. If, under the governing state law, the bankrupt received a property interest in the reserve account funds when it made those deposits, the interest would have passed to the estate upon the filing of the Chapter XI proceeding on September 3, 1976. Thus, the Court must examine Utah law to determine if the bankrupt had a property interest in the funds which would establish a basis for this Court's jurisdiction under Section 23, 11 U.S.C. §46 (1976).

Under relevant Utah law, funds held in a reserve account created in connection with a real estate loan are recognized as the property of the depositor. Madsen v. Prudential Federal Savings & Loan Association, 558 P.2d 1337 (Utah 1977). UTAH CODE ANN. §7-17-1 et seq. (1979). Under certain circumstances, the lender holding the reserve account must even pay interest on the funds held. UTAH CODE ANN. §7-17-3 (1979). Thus, under state law, the bankrupt had some recognized property interest in the reserve account which would have passed to the estate upon the filing of the Chapter XI petition. This Court, then, has jurisdiction under section 23 of the Bankruptcy Act, 11 U.S.C. §46 (1976), over this controversy since it concerns the extent of the estate's interest in the funds previously held in the reserve account.

The defendants, Wilkins and Robles, claim that the Court's November 12, 1976 order removed the matters involved in this case from the jurisdiction of the bankruptcy court. They argue that the only proper procedure to clarify the meaning of the order is an appeal.

Whatever effect the order may have had, it did not limit the Court's jurisdiction over the matters with which the order was concerned. As noted by Judge Learned Hand in In re Pottasch Brothers Company, Inc., 79 F.2d 613, 616 (2nd Cir. 1935):

> [If] a referee is a court at all, there is no warrant for saying because an appeal lies from his orders, that he has not the ancient and elementary power to reconsider those orders, nor the faintest reason why he should not do so.

This Court has continuing jurisdiction to hear the matters involved in this action and to modify the November 12, 1976 order if necessary. See 2A Collier on Bankruptcy, ¶38.09[3], at 1439 (14th ed. 1976).

THE LOCKHART COMPANY'S INTEREST

Under governing state law, the reserve account creates personal property rights which are treated differently from

the right in the real property that is encumbered by the deed of trust creating the reserve account. See Madsen v. Prudential Federal Savings & Loan Association, supra. See also UTAH CODE ANN. §§7-17-1 et seq. (1979). Therefore, when Lockhart purchased the real property at the foreclosure sale, whatever interest the bankrupt had in the reserve account did not automatically pass to Lockhart as part of the real property. Furthermore, the bankrupt's interest in the reserve account did not invest in the trustee a right such that the trustee could demand immediate payment from Bettilyon. See In re Simon, 167 F. Supp 214 (C.D.N.Y. 1958). The bankrupt's funds in the reserve account must remain in the reserve account until the account no longer serves the purpose of protecting Bettilyon or its assignee. See F. Tinnio, Rights in Escrow Funds for Taxes and Insurance, 50 A.L.R. 3d 697 (1973).

Under the Lockhart deed of trust, Lockhart had the right to make payments on the Bettilyon deed of trust and to treat those payments as additional advances secured by its lien on the real property. Paragraphs 6 and 7 of the Lockhart deed of trust, Defendant's Exhibit #3. Lockhart chose to make a series of such payments in the form of late charges, principal and interest, and payments into the reserve account. These advance payments to Bettilyon were treated as if a direct loan had been made by Lockhart to the bankrupt, who then paid the funds into the reserve account, for all advances increased the principal amount being secured by the deed of trust. All Lockhart deposits made into the reserve account through this advance payment system then, were deposits made for the bankrupt in exchange for a perfected lien on the bankrupt's real property.

Lockhart continued to honor this advance payment system up to the date of the foreclosure sale, March 2, 1976. Lockhart, at the foreclosure sale, received not only the amount of the original loan, $29,900 plus interest, but also the amount of all advances made under the advance payment

system plus interest, together with costs of the sale. As previously stated, the total price that Lockhart received was $71,741.43.

The result of this Lockhart system of additional advances was that all deposits into the reserve account prior to the date of foreclosure were for the benefit of the bankrupt. Either they were made by the bankrupt or were made in exchange for a perfected lien on the bankrupt's real property. Therefore, the bankrupt, and thus his estate, is entitled to an amount of the reserve fund equal to the amount in the reserve account on March 2, 1976, less any taxes and insurance charges properly accountable to the bankrupt. Payments made after March 2, 1976 on the Bettilyon Deed of Trust were made by Lockhart as the purchaser at the foreclosure sale and not as additional advances to or for the benefit of the bankrupt. On March 2, 1976, the reserve account had $12,388.66 on deposit which is then the starting figure for calculating the estate's portion of the reserve account.

TAXES

Under the general rules of responsibility for real property taxes, a party is responsible for the taxes during the period in which that party enjoys title to and possession of the property. See Crofts v. Johnson, 6 Utah 2d 350, 313 P.2d 808 (1957). See also D. Taylor, Primary Escrow Text 23 (1st ed. 1965). Thus, the bankrupt is responsible for the taxes on the real property until title and possession passed to Lockhart. Under the governing state law of foreclosure sales, the title and possession pass to the purchaser only after the redemption period has run. See Local Realty v. Lindquist, 96 Utah 297, 85 P.2d 770 (1938). Thus, the bankrupt is responsible for the taxes until November 10, 1976, the date on which the redemption period expired and the sheriff's deed was recorded.

Since taxes for all years prior to 1976 were paid from the reserve account prior to March 2, 1976, the 1976 taxes,

amounting to $3,541.84, are the only taxes which must be pro-rated. The bankrupt is responsible for the 1976 taxes from January 1, 1976 to November 10, 1976. Therefore, the estate is responsible for 314/365 of the taxes for 1976, or $3,046.94. See Bettilyon Loan Ledger, Plaintiff's Exhibit #3 (amount of the 1976 taxes). This amount must be subtracted from the $12,388.66 credit in favor of the bankruptcy estate entitling the estate to a credit of $9,341.72.

INSURANCE

Since the risk of loss remains on the party who enjoys title to and possession of real property, See Fireman's Insurance Co. v. Brown, 529 P.2d 419 (Utah 1974), the cost of insurance against loss should be allocated on the same basis as the taxes. Therefore, the bankrupt is responsible for insurance premiums until November 10, 1976, when title passed to Lockhart.

On December 6, 1975, a payment in the amount of $4,184 was made from the reserve account to cover insurance on the property from December 6, 1975 to December 6, 1978. See Bettilyon Loan Ledger, Plaintiff's Exhibit #3 (amount of the insurance premium). This payment was made from funds in the reserve account belonging to the bankrupt. The bankrupt enjoyed the benefit of this insurance protection only from December 6, 1975 until November 10, 1976. The bankrupt estate is therefore entitled to a credit for the prepayment of insurance protection covering the period from November 10, 1976 until December 6, 1978. This credit is 24.8/36 of the $4,184,000 premium or $2,882.31. This credit must be added to the amount of the reserve account earmarked as belonging to the bankrupt estate. Thus, the bankrupt estate had a $12,224.03 credit in the reserve account when this Court entered its November 12, 1976 order.

THE EFFECT OF THE NOVEMBER 12, 1976 ORDER

As of November 10, 1976, the day that Lockhart became the owner of the real property in question, the bankrupt

estate had a personal property interest in the reserve account in the amount of $12,224.03. On November 12, 1976, this Court authorized a sale of some or all of the personal property of the estate of the bankrupt. The issue now presented is whether the estate's interest in the reserve account passed to the defendants Wilkins and Robles by reason of the November 12, 1976 order and sale.

Initially, the Court must determine what evidence is available to interpret its November 12, 1976 order. May parol evidence be admitted to determine the intent of the parties to the sale? Since the sale involved the sale of personal property, UTAH CODE ANN. §70-2-202 (1965), the Uniform Commercial Code's parol evidence rule applies.

The defendants Wilkins and Robles rely principally upon the November 12, 1976 order and the Trustee's bill of sale as complete statements of the agreement between the parties. These documents provide that the trustee is selling

> [a]ll personal property of the estate, or in which it may have an interest, including but not limited to, bowling lanes, bowling balls, bowling shoes, bowling equipment, cash registers, lockers, lounge equipment and the like and the business heretofore conducted by the bankrupt and now by said trustee under order of this Court, including whatever good will and going concern value the same may have.

Taken alone, this language could be construed to intend the conveyance of every type of personal property including the estate's interest in the reserve account with Bettilyon.

At trial, the trustee offered two documents to explain the bill of sale and the order. Those documents are Plaintiff's Exhibit #2, a letter dated November 3, 1976, and Plaintiff's Exhibit #12, the Notice of Hearing on the Sale involved.

UTAH CODE ANN. §70A-2-202 (1965), provides that a memorandum such as the order and bill of sale may be "explained or supplemented by course of dealing." UTAH CODE ANN. §70A-1-205(1) defines course of dealing as

> a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expression and other conduct.

Both the letter from the defendants and the Notice of Hearing are evidence of the course of dealing between the parties within the definition of section 70A-1-205. They therefore are admissible to explain or supplement the Bill of Sale and Order.

The letter contains a discussion of the sale of "personal property on the premises," the premises being used to refer to the bowling alley. The Notice of Hearing invites bids on the sale of personal property and describes the personal property as the following:

> The personal property consists of bowling lanes, bowling balls, bowling shoes, kitchen equipment, cash registers, lockers, lounge equipment and the like.

The letter is signed by the buyers, the defendants Wilkins and Robles, and the Notice of Hearing was posted under the authority of the Court by the trustee, the seller. This documentary evidence, therefore, supports a finding that both parties to the transaction intended only the sale of personal property at the bowling alley and did not intend a transfer of the estate's interest in the reserve account. No documentary evidence was introduced to the contrary.

The testimony of Mr. Ray Twelves, the successor trustee, and Lindsay H. Kesler, the original trustee, support the documentary evidence presented by the trustee. Both men testified that the disposition of the reserve account never entered their discussions with prospective purchasers of the personal property. In fact, they testified that they neither knew nor even thought about the possibility of a reserve account upon which the estate might have some claim at the time. While the defendant, Mr. Roland B. Wilkins, did testify that he had discussed the reserve account with Mr. Kesler, his testimony was unclear and based upon apparently

inaccurate recollection. Mr. Wilkins' recollection of the date of the discussion with Mr. Kesler was approximately one month before Mr. Kesler was appointed trustee in this case. All of this testimony given at trial concerned the course of dealing between the seller, (the trustee) and the buyers (the defendants, Wilkins and Robles), and as such, was within the exception of UTAH CODE ANN. §70A-2-202 (1965). It may therefore be considered to explain and supplement the bill of sale and order.

A comparison of the sales price and the amount of the reserve account reinforces a finding of no intent to sell the reserve account interest. The total sales price was $15,100. This would mean, after subtracting the $12,224.01, held in the reserve account, that the bowling lanes, bowling balls, bowling shoes, bowling equipment, cash registers, lockers, lounge equipment, and good will of the on-going business operation was sold by the trustee for only $2,875.99. It is inconceivable that the trustee would have accepted or that the Court would have approved such a price.

Finally, the plain language of the order and notice supports a finding that the reserve account was not among the personal property sold. The order, in enumerating generally the personal property sold, listed "bowling lanes, bowling balls, bowling shoes, bowling equipment, cash registers, lockers, lounge equipment and the like." The notice, which can be used to explain the order, specifically defined the personal property sold as consisting of "bowling lanes, bowling balls, bowling shoes, kitchen equipment, cash registers, lockers, lounge equipment, and the like." By application of the principle of ejusdem generis, a rule of construction which limits the meaning of general words following an enumeration of specific items to the same general kind of class, the reserve account, which is a completely different sort of personal property from that listed and is unconnected to the property listed, would not be included in the property sold.

In light of the documentary evidence, the testimony of Mr. Twelves and Mr. Kesler, and the amount of the sales price, this Court holds that the estate's interest in the reserve account at Bettilyon was not sold to the defendants, Wilkins and Robles, as part of the November 12, 1976 order and Trustee's Bill of Sale.

As alternative grounds for its holding, this Court exercises its inherent power to clarify its own order. See 2A Collier on Bankruptcy, ¶38.09[3], at 1439 (14th ed. 1976). This Court would not and did not enter an order whereby the trustee received $15,100 for $12,224.01 in cash held in the reserve account, the good will of an on-going business, and the personal property located at the bowling alley consisting of bowling lanes, bowling balls, bowling shoes, and the like.

This Court hereby clarifies the November 12, 1976 order limiting it to include only the personal property located at the bowling alley and not the estate's interest in the reserve account.

ESTOPPEL

In an amendment to the pleading contained in the pre-trial order dated July 28, 1977, the defendants Wilkins and Robles raised the argument that the trustee is estopped from claiming an interest in the reserve account by reason of his failure to assert timely the claim. The trustee, notwithstanding some delay, did act timely after receiving notice of the reserve account. By letter dated December 30, 1976, and received on January 4, 1977, the trustee was first advised of the existence of the reserve account. The trustee filed his complaint in this action on February 2, 1977. There is thus insufficient basis for the defendants' claim of estoppel.

SUMMARY

Based upon the foregoing analysis and the Lockhart assignment to the defendants Wilkins and Robles, this Court finds the following:

Total being held: $15,085.57

A.	Funds belonging to the Estate of the Bankrupt:	
1.	March 2, 1976 balance of reserve account, due by reason of Lockhart's being paid for all advances.	$12,388.66
2.	Taxes debit for 1976 taxes to November 10, 1976, assessed against the bankrupt for possession of property.	$ 3,046,94
3.	Insurance credit for insurance protection from November 10, 1975 to December 6, 1978, the benefit of which Wilkins and Robles enjoyed.	$ 2,882.31
	Total of Funds Due Estate	$12,224.03
B.	Funds belonging to Wilkins and Robles by reason of the Lockhart assignment of funds.	$ 2,861.54

ORDER

In accordance with this memorandum decision, IT IS NOW ORDERED that the defendant W. Sterling Evans, County Clerk of Salt Lake County disburse the funds which are the subject of the action in the following manner: $12,224.03 to the present trustee, and $2,861.54 to the defendants, Roland B. Wilkins and Stanley Robles.

DATED this 10 day of July, 1980.

Ralph R. Mabey
United States Bankruptcy Judge

RRM/bl