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~~For Plaintiff~~

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
Northern Division

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In re

LAVERNE B. STACEY and
BARBARA FAY STACEY

Bankruptcy Nos. B-78-00307
B-78-00308

Bankrupts

WAYNE R. BARKER and
ZELPHA H. BARKER

MEMORANDUM DECISION AND ORDER

Plaintiffs

vs

LAVERNE B. STACEY and
BARBARA FAY STACEY,
MARYLAND CASUALTY COMPANY,
and FIREMANS FUND INSURANCE
COMPANY

Defendants

George B. Handy for the plaintiffs. John L. McCoy for the defendants, LaVerne and Barbara Stacey. L. Rich Humpherys, for Firemans Fund Insurance Company. David G. Williams and Scott Daniels for Maryland Casualty Company.

On August 29, 1972, the Barkers, as sellers, entered into a Uniform Real Estate Contract with the Staceys, as buyers, for the sale of a parcel of property located at Washington Boulevard and 2600 North Street in North Ogden, Utah. The purchase price was \$96,000, with an agreed down-payment of \$27,840 and annual installments including interest of \$7,467. A warranty deed, the contract and a title policy were placed in escrow and the Staceys assumed possession of the property in September of 1972. The Staceys constructed a commercial building on a portion of the property and utilized part of the remaining area as a parking space for customers. The Staceys subsequently defaulted on their payments under the contract. As a result, on March 21, 1978, the Barkers filed suit in the District Court of Weber

County, Utah seeking termination of the contract and enforcement of their right to forfeiture claimed under paragraph 16A of the contract. On April 11, 1978, the Staceys filed a petition for arrangement under Chapter XI of the Bankruptcy Act, at which time, pursuant to Rule 11-44(a) Fed.R. Bankr.P., the state court proceeding was automatically stayed. In December of 1978, the Barkers filed a complaint with this Court to vacate the stay under Rule 11-44(d), Fed.R. Bankr.P. On June 14, 1979, the Staceys tendered payment of a sum they contended would bring the contract current. The tender was refused. Thereafter, on August 10, 1979, Firemans Fund Insurance Company and Maryland Casualty Company moved to intervene as defendants, which motion was granted by the Court on August 22, 1979.

As a result of trial held in September of 1979, the automatic stay imposed by Rule 11-44(a) prohibiting plaintiffs from enforcing their lien or claim of forfeiture against the property was maintained conditioned upon a prompt tender by the Staceys of all due and overdue payments under the contract. The Staceys dutifully tendered these payments until December, 1979 when the Court authorized a withdrawal of funds deposited with the Court.

In January, 1980, the Staceys filed a counterclaim seeking a determination denying the Barkers' right to a forfeiture and permission to sell the property to the highest bidder in open court. The Barkers moved to dismiss the counterclaim for lack of subject matter jurisdiction at preliminary pre-trial conference on April 8, 1980. Memoranda of the parties were filed and the motion was submitted to the Court for decision.

The question for determination is whether this Court, in a Chapter XI proceeding, has jurisdiction over real property subject to an executory Uniform Real Estate Contract where the vendor has filed a complaint in state court to

forfeit the vendee's interest less than one month before the vendee has filed a petition in bankruptcy.

The jurisdiction of the bankruptcy court in a Chapter XI case is set out in Section 311, former 11 U.S.C. §711:

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for purposes of this Chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

Under Section 70(a) of the Bankruptcy Act, former 11 U.S.C. §110(a), the trustee, or debtor-in-possession, succeeds to the debtor's interest in the following kinds of property wherever located:

(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him

. . . ;
(6) rights of action arising upon contracts . . .

In Utah, by the terms of Rule 64C, Utah Rules of Civil Procedure, the interest of a conditional vendee in a real estate contract is subject to attachment, levy, and execution. Furthermore, the Utah Supreme Court, in cases where an executory contract for the sale of real property is enforceable, applied the doctrine of equitable conversion, to convert the vendor's interest to personalty and vest the vendee with real property rights. In Allred v. Allred, 15 Utah 2d 396, 393 P.2d 791 (1964), the court held that a sale by vendors of real and personal property operated as an equitable conversion of their interest in the contract to personalty. Their written letter of instruction and delivery to the escrow created in them a joint tenancy in the proceeds of the sale. The subsequent death of one of the joint tenants left the survivor as the sole owner of the right to receive the payments. The court stated: "As a general rule an enforceable executory contract of sale has the effect of converting the interest of the vendor of real property to personalty." 393 P.2d at 792. In Jelco, Inc. v. Third Judicial District Court, 29 Utah 2d 472, 511 P.2d 739 (1973),

the court further addressed the property rights of a vendee in an executory contract for the sale of real property. In Jelco, Salt Lake City condemned the subject property and placed the appraised value of the land with the court. The trial court permitted the vendor to receive as just compensation the sum of the remaining payments due under the contract plus interest. The vendee's assignee appealed claiming that it had no opportunity to present evidence and alleging that the compensation was excessive. The court concluded that the assignee of the vendee was entitled to an opportunity to present evidence and remanded for further proceedings. The court discussed the rights of a vendee under an executory contract for the sale of land in these words:

In such an executory contract the vendee (Jelco) acquires all the incidents of ownership except legal title. He is therefore in equity properly regarded as the owner of the property. Thus, in the absence of an agreement to the contrary, where a condemnor takes land subject to an executory contract, it is the vendee who is normally entitled to any condemnation award for the land so taken.

511 P.2d at 741, (citations omitted). Thus, under Utah law, it can be seen that the Barkers, while still holding legal title to the land, have transferred to the Staceys, a significant equitable real property interest in the land over which the Court may exercise jurisdiction.

The Barkers argue, however, that where a state court action predates the filing of the bankruptcy petition, the jurisdiction of the state court attaches first and is not divested by the Bankruptcy Act. See 8A C.J.S., Bankruptcy, §261, at 366; 9 AM. JUR. 2d, Bankruptcy, §61, at 105. See also 8 Collier on Bankruptcy, ¶3.22, at 259 (14th ed. 1976). This reasoning is derived from Straton v. New, 283 U.S. 318 (1931), where the United States Supreme Court, in a Chapter VII liquidation case, held that the bankruptcy court could not divest the state court of jurisdiction where a

creditor's suit had begun in the state court five and one-half months prior to the filing of the petition of bankruptcy, and the state court had taken possession of the res, and appointed commissioners to sell certain real estate owned by the bankrupt, prior to the filing in bankruptcy. Several circuit courts have followed and reaffirmed the reasoning in Straton. See Schmitt v. Blackwelder, 379 F.2d 278 (2d Cir. 1967); Smith v. Hill, 371 F.2d 539 (9th Cir. 1963); Muffler v. Petticrew, 132 F.2d 479 (6th Cir. 1942); Johnson v. Burke Manor Bldg. Corp., 48 F.2d 1031 (7th Cir. 1931). In all of these cases, however, the prior state court proceedings had progressed to the point where a receiver had been appointed, which is not the case here.

The Barkers argue that due to the pending litigation, the court in Weber County had constructive possession of the property, and thus, the Straton reasoning applies. In In re Freed & Co., 534 F.2d 1235 (6th Cir. 1976), the United States Court of Appeals for the Sixth Circuit was presented a similar argument. More than one year prior to filing a bankruptcy petition, the creditors in that case had commenced foreclosure suit in state court on property on which the debtor operated an airport. A receiver was appointed. Upon filing of the petition in bankruptcy, the bankruptcy court held that even though under the state court proceeding, the debtors stood to lose any excess value of the property over the claim, the state court action had divested the debtor of any interest in the property (though he remained in possession) and therefore, vacation of the stay was proper. The district court reversed and the circuit court affirmed the district court. The Sixth Circuit found it unnecessary to explore the constructive possession of the property. Similarly, the argument before this Court is not compelling. No receiver has been appointed and, in any event, the Staceys have actual physical possession of the property and equitable title. In In re Premier Sales Company, Inc., 277 F.Supp. 802 (D. Utah 1967), Judge Christensen stated:

Possession of the res draws to the bankruptcy court jurisdiction of all questions respecting title or liens, and it may, on notice to claimants determine the conflicting claims to the property in the debtor's possession.

Id. at 806.

The Straton case, supra, is not controlling in this proceeding for a further reason: As the Sixth Circuit in Freed noted, Straton dealt with straight bankruptcy and did not address Section 314, former 11 U.S.C. §714, which empowers the bankruptcy court to enjoin or stay other suits to enforce liens upon the property of the debtor. The court there concluded that the bankruptcy court was free, pursuant to this section, to exercise its discretion and stay the state court proceedings where enjoining execution of the lien would protect the debtor's estate. The court stated:

Section 314 of the Bankruptcy Act grants injunctive power to the Bankruptcy Court in an ambiguous language, and without qualifying the power in terms of the status of the state court proceeding.

In re Freed & Co., 534 F.2d at 1239.

In Pasadena Investment Co v. Weaver, 376 F.2d 175 (9th Cir. 1967), the plaintiff filed for arrangement under Chapter XI to save a ranch which was under a term lease and sublease. The bankruptcy court found that the defendant beneficiary of plaintiff's trust deed had obtained his interest by fraud. The defendant claimed on appeal that the bankruptcy court had no jurisdiction because the plaintiff was not in possession of the ranch. The court held that the existence of the term lease and sublease did not deprive the bankruptcy court of summary jurisdiction to determine the validity of the note and trust deed. The court noted that generally, a plan of arrangement under Chapter XI affects only unsecured creditors to the debtor, but "liens are subject to the administration of the bankruptcy court, and that court has power to determine their validity, amount, and priority." Id. at 179. Rule 11-61 Fed.R. Bankr.P. embodies the same concept in these words:

(a) Adversary proceedings. Part VII of the Bankruptcy Rules governs any proceedings instituted by a party before a bankruptcy judge in a Chapter XI case to . . . (2) determine the validity, priority, or extent of a lien or other interest in property . . .


In this case, the Barkers, as vendors, had merely filed their complaint in the state court. No attachment, levy or execution on the property had been effected, neither had a receiver been appointed. Therefore, some twenty days later, when the Staceys, as vendees, filed for bankruptcy, and the state action was stayed, the property interest of the Staceys, as vendees, remained unchanged by the pending state court action. Therefore, this property interest became a part of the debtor's estate, and as such, falls squarely within the ambit of Section 311, former 11 U.S.C. §611, thereby giving this Court exclusive jurisdiction over the property. This Court also has power under Rule 11-61, Fed.R. Bankr.P., to define the relative rights of the parties in the property. An expeditious resolution of these rights is needed. The creditors of the Staceys have been stayed by the filing of the petition in bankruptcy from enforcing their claims. The success or failure of the Stacey's reorganization must be decided soon. It is, indeed, for the purpose of efficient resolution of disputes which bear upon reorganization that the Court is given its jurisdiction.

Inasmuch as the defendants remain in possession, hold equitable title to the property, and inasmuch as the state court action predates the bankruptcy filing by less than one month has not advanced beyond the initial pleadings and has not resulted in attachment, levy, execution or the appointment of a receiver, this Court can properly exercise summary jurisdiction over the property which is the subject of the parties' Uniform Real Estate Contract.

ORDER

Pursuant to this memorandum decision IT IS NOW ORDERED
that defendant's motion to dismiss be, and it is denied.

DATED this 17 day of July, 1980.



Ralph R. Mabey
United States Bankruptcy Judge

RRM/bl

CERTIFICATE OF MAILING

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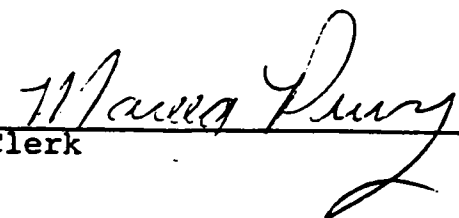
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DATED this 19th day of July, 1980.



Clerk