

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	
)	
RICHARD L. CLISSOLD INVESTMENT)	Bankruptcy Case No. 88C-01035
CO.,)	
)	
Debtor.)	
)	
)	
)	
RICHARD L. CLISSOLD INVESTMENT)	Adversary Proceeding No. 90PC-0323
CO., a Utah limited partnership,)	
)	
Plaintiff,)	
)	
vs.)	
)	
VALLEY BANK & TRUST COMPANY,)	
)	
Defendant.)	MEMORANDUM OPINION

The matters presently before the court are the cross motions of the plaintiff-debtor, Richard L. Clissold Investment, Company (debtor), and the defendant, Valley Bank and Trust Company (Valley), seeking summary judgment of the above-captioned adversary proceeding. A hearing was held on April 15, 1991. David E. Leta, Esq.

appeared on behalf of the debtor. John T. Anderson, Esq. appeared on behalf of Valley. Counsel presented argument after which the court took the matter under advisement. The court has carefully considered and reviewed the arguments of counsel and memoranda submitted by the parties and has made an independent review of the pertinent authorities. Now being fully advised, the court renders the following decision granting the debtor's motion in part and granting Valley's motion in part.

FACTS

On or about May 30, 1986, the debtor executed a promissory note in favor of Valley in the amount of \$960,000.00 (first note). That note was secured by property which has been referred to by the parties as the Pine Park Property, the San Diego Condo, and the Snyderville Ranch.

On or about December 30, 1986, the debtor executed a second promissory note in favor of Valley in the amount of \$647,992.30 (second note). That note was secured by property which has been referred to by the parties as the Office Building and the Edison Street Warehouse.

The debtor filed a petition under Chapter 11 of the Bankruptcy Code on February 23, 1988. Subsequent to the filing of the debtor's petition, Valley sought relief from the automatic stay to foreclose the debtor's interest in the collateral securing its notes. Settling that motion, the debtor agreed to provide Valley with additional

collateral for the second note by creating a junior lien in its favor on the Pine Park Property.

On October 10, 1988, the debtor, Valley, and Zions First National Bank,¹ an alleged first priority lienholder on some of the properties that secured Valley's liens, entered into a stipulation for the use of cash collateral and consent to advance credit to the debtor (Stipulation) which was approved by the court on November 13, 1988. According to the Stipulation, Zions and Valley both agreed to advance \$20,000.00 to the debtor so that it could make certain repairs to the properties in question so as to "enhance [their] value ... marketability and return to the Debtor and the estate." (Stipulation at 2.) As an "additional condition for advancing" the debtor funds, the Stipulation provided that:

[T]he Debtor may have up to and including September 1, 1989 to sell and/or refinance the [Pine Park] Property except as hereinafter provided. Should the same not be done by that time the stay shall be lifted to the extent the same is still in effect and/or a plan must provide that after said date the underlying secured creditors may proceed to foreclose their interest on the [Pine Park] Property and Other Collateral² according to state law. Provided, however, that the Pine Park Property be sold first at any foreclosure sale, then the office building, then the San Diego Condo, then the Edison

¹Zions is not a party in this action.

²"Other Collateral" is defined in the Stipulation as the heretofore mentioned properties excluding the Pine Park Property. (Stipulation at 2.)

Street Warehouse, then the Snyderville 3.5 Acres,^[3] and then the Snyderville Ranch. The Pine Park Property and the office building may be noticed for sale together; however, the Pine Park Property shall be sold first and if it does not generate sufficient amounts to pay off Zions and Valley [sic] obligations, the sale of the office building shall be postponed at least 72 hours and a full accounting shall be given to the Debtor by Zions and Valley of the Pine Park sale before the office building may be sold. Should the office building not sell for enough to pay off the obligation to Valley then the San Diego Condo, Edison Street Warehouse, Snyderville 3.5 Acres and Snyderville Ranch may be noticed for sale according to state law, with a minimum of two weeks between the sale of the San Diego Condo and the Edison Street Warehouse, and seven days minimum time between the other remaining sales, with the San Diego Condo being the first to be sold. There shall be a full accounting given by Valley to the Debtor prior to and after each sale and reasonably before the next scheduled sale. After Valley and Zions are paid in full, there need not be any further sales of the property.

(Stipulation at 2-4.)

The Stipulation was incorporated into the debtor's Chapter 11 plan of reorganization; (see Plan of Reorganization at 8-9, Docket # 77); which was confirmed by the court by an order which was executed on February 5, 1989. (Order, Docket # 92.)

On September 5, 1989, the debtor proposed to transfer the Pine Park Property and the Office Building to Valley in lieu of foreclosure, with the fair market value of both

³The parties have referred to the "Snyderville Ranch." The court is unsure to this reference of the "Snyderville 3.5 Acres." Since the parties have apparently abandoned issues regarding this property, the court will disregard it.

properties being applied to the notes. (Complaint ¶ 17; Answer ¶ 6.) Valley refused the debtor's offer by a letter dated September 7, 1989, stating that it would be "governed in accordance with the Stipulation ... and the requirements of Utah Code Ann. § 57-1-32." (Complaint ¶ 28; Answer ¶ 7.)

Pursuant to the Stipulation, a trustee's sale of the Pine Park Property was held on October 3, 1989. Valley purchased that property by credit bid, subject to certain priority interests. (Complaint ¶ 19; Answer ¶ 8.) On October 5, 1989, Valley rendered an accounting of the trustee's sale of the Pine Park Property in which it asserted that a deficiency of \$355,363.61 remained on the first note. (Complaint ¶ 20; Answer ¶ 9.) The accounting did not indicate whether any amount of the proceeds from that sale had been applied to the second note.

On October 6, 1989, Valley conducted a trustee's sale of the Office Building and it purchased that property by credit bid, subject to priority tax liens. (Complaint ¶ 25; Answer ¶ 14.) Despite the debtor's contention that application of the fair market value of the Pine Park Property and the Office Building to the notes rendered them satisfied, Valley refused to release its liens against the San Diego Condo, the Synderville Ranch, and the Edison Street Warehouse. (Complaint ¶¶ 30 & 41; Answer ¶¶ 17 & 23; Admissions ¶¶ 19, 23, & 26.)

Thereafter, the San Diego Condo was sold in a private sale for \$355,929.11. Valley asserted an interest in the proceeds based on its alleged deficiency claim from

the first note. (Complaint ¶ 31; Answer ¶ 18.) Because Valley refused to release its lien on the San Diego Condo, the debtor was required to pay the proceeds of the sale under protest to Valley. (Complaint ¶¶ 31 & 33; Answer ¶¶ 18 & 19.) Similarly, the debtor was required to pay \$95,000.00 under protest to Valley from the proceeds of a private sale of the Edison Street Warehouse. (Complaint ¶ 41; Answer ¶ 23.)

On May 10, 1990, the debtor filed the present adversary complaint seeking to recover the \$355,929.11 retained by Valley from the sale of the San Diego Condo and the \$95,000.00 retained by Valley from the sale of the Edison Street Warehouse. The debtor argues that if Valley had applied the value it contends was the fair market value of the Pine Park Property and the Office Building to the notes, its claim would have been fully satisfied and, therefore, Valley would not have had grounds to demand the proceeds from the sales of the San Diego Condo and the Edison Street Warehouse. The debtor maintains that Valley's refusal to apply the fair market value of the properties in question to the notes resulted in its breach of the Stipulation (First Cause of Action), conversion of San Diego Condo and Edison Street Warehouse sales proceeds (Second Cause of Action), and unjust enrichment (Third Cause of Action). While the parties concede that a determination of the fair market value of the properties is a question of fact, they have asked the court to decide, as a matter of law, whether Valley was obligated to apply the fair market value of the Pine Park Property and the Office Building to the notes.

In addition to recovery of the San Diego Condo and Edison Street Warehouse sales proceeds, the debtor's Fourth Cause of Action seeks double damages pursuant to Utah Code Ann. § 57-1-33, prejudgment interest at the legal rate, costs, and attorney's fees. It maintains that, as a matter of law, Valley has improperly maintained liens against the San Diego Condo, the Edison Street Warehouse, and the Snyderville Ranch.⁴

Finally, in its Fifth Cause of Action, the debtor seeks a declaratory judgment that Valley has waived its right to seek a deficiency judgment under Utah Code Ann. § 57-1-32 because it did not initiate deficiency proceedings within three months of the trustee's sales of the respective properties. The parties have both submitted this issue to be decided as a matter of law.

Valley has asserted a counterclaim against the debtor asserting that if the court requires that it pay any portion of the monies requested by the debtor, that it be allowed three months from the date of this court's order to pursue a deficiency judgment pursuant to § 57-1-32. It argues that because the fair market value of the properties in question will be decided by this court at a future date, it has not been able to determine whether it has a deficiency. Notwithstanding § 57-1-32, Valley argues

⁴Fed. R. Civ. P. 8(d) provides that a party's failure to deny an averment in its answer constitutes an admission. Although Valley failed to deny ¶ 36 of the debtor's complaint, the court finds that Valley's answer, read as a whole, is a sufficient denial of the debtor's allegation that there is not a deficiency under the first note and that Valley was in violation of Utah Code Ann. § 57-1-33 because it failed to release its lien against the Snyderville Ranch.

that if the court determines that the fair market value of the properties does not satisfy its debt in full, it is entitled to a declaratory judgment allowing it to assert an unsecured claim for that amount against the debtor's estate.

A trial of this proceeding was initially scheduled to commence on January 29, 1991. In December, 1990, however, the court approved a stipulation which vacated the trial date so that a resolution of the legal issues could first be obtained. The debtor has demanded a trial by jury.

DISCUSSION

The first issue before the court is one that was not raised by the parties. Specifically, the court questions its jurisdiction over this proceeding in light of the jury demand that was made by the debtor. In Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990), the Tenth Circuit ruled that the bankruptcy court lacks the power to conduct jury trials. Accordingly, it would appear as if the court lacks jurisdiction over this proceeding. The court notes, however, that the debtor has waived its right to such a trial. This conclusion is based on the Tenth Circuit's holding in Stainer v. Latimer (In re Latimer), 918 F.2d 136, 137 (10th Cir. 1990), in which the court held that "parties seeking a jury trial must combine their request for a jury trial with a request for transfer to the district court." According to Latimer, failure to so request will be deemed as a waiver of the jury demand. See also Bankr. D. Ut.

511(a) (effective June 1, 1991). In this case, the debtor asserted its jury demand in its complaint. Its failure to move to withdraw the reference when it filed its complaint therefore constituted a waiver of its request for a jury trial.

Turning to the issues presented by the parties, the court has determined that Valley is obligated to apply the fair market value of the Pine Park Property and the Office Building to the notes. The arguments of the parties indicate that this issue is factual inasmuch as there is a question as to whether the Stipulation required the parties to apply fair market value. While factual issues are not proper for summary judgment, the court has determined that because Valley has admitted that it was obligated to apply fair market value; (Valley's Admissions to Debtor's Request for Admissions ¶ 14); "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law " Bankruptcy Rule 7056(c). The fair market value of the properties at the time that they were sold is a question of fact that will be determined at trial.

Next, the court concludes that the issue of damages pursuant to Utah Code § 57-1-33 is not ripe for summary judgment. First, without knowing the fair market value of the properties in question, it is impossible to tell which liens, if any, Valley was obligated to release. Second, in Hector, Inc. v. United Sav. & Loan Assoc., 741 P.2d 542, 545 (Utah 1987) (quoting Shibata v. Bear River State Bank, 205 P.2d 251, 254 (Utah 1949)), the Utah Supreme Court stated that § 57-1-33 is "not meant to penalize

one who honestly, though mistakenly, refuses to release or declare a mortgage of record because he believes that there has been no full satisfaction." Relying on Hector, Valley has argued that its failure to release its lien against the Snyderville Ranch was based on an honest mistake. (See Answer ¶ 17.) This is a factual issue which must be resolved at trial.

The last matter presented to the court is whether Valley has waived its right to assert a deficiency because it did not initiate a cause of action under Utah Code Ann. § 57-1-32 within three months of the trustee's sales of the respective properties. In addressing this issue, the court finds that the Utah Supreme Court's recent opinion in Phillips v. Utah State Credit Union, 159 Utah Adv. Rep. 18 (1991), is dispositive. In Phillips the court held that:

[W]here a creditor takes more than one item of security upon an obligation secured by a trust deed, the creditor is not precluded from making use of that additional security merely because the creditor has not sought a deficiency judgment within three months of a nonjudicial sale of one of the items covered by the trust deed property, nor is the creditor required to seek a deficiency judgment under section 57-1-32 in order to maintain its right to the additional security, so long as the security is applied toward the debt on the original loan.

Id. at 20.

Similar to the facts in Phillips, Valley had several pieces of property securing the debtor's two notes. The first note was secured by the Pine Park Property, the San

Diego Condo and the Snyderville Ranch. The undisputed facts presented to the court indicate that the Snyderville Ranch property has not been sold. Accordingly, because there is additional collateral securing the first note, Valley is not precluded from filing a deficiency action pursuant to § 57-1-32.

The second note was secured by the Pine Park Property, the Office Building, and the Edison Street Warehouse. According to the undisputed facts, the Pine Park Property was sold first, followed by the Office Building, and then the Edison Street Warehouse. Valley was therefore required to commence an action⁵ under § 57-1-32 within three months of the sale of the Edison Street Warehouse. The debtor's complaint does not assert when the sale of that property took place. Thus, the court cannot rule on this issue. Assuming that its action is time barred, the court dismisses that portion of Valley's counterclaim which seeks a declaratory judgment allowing it three months from the date of this court's ruling on the issue of the fair market value of the properties to file an action under § 57-1-32. The language of that statute is clear that the action must be commenced within three months of the sale of the property in question. The court will not read additional time periods into the statute. Valley was not precluded from filing an action under § 57-1-32 so as to secure its rights under that

⁵Because of the automatic stay in bankruptcy, a notice under 11 U.S.C. § 546(b) or amended proof of claim may suffice to satisfy § 57-1-32. See Standard Sav. & Loan v. Kirkbride, 161 Utah Adv. Rep. 26, 27 (1991). However, because Valley has not alleged that any of those actions were taken, the court will not rule on this issue.

statute even though it was unsure as to whether there was a delinquency under the second note.

Finally, Valley asserts that it is entitled to a declaratory judgment allowing it an unsecured claim against the estate for any deficiency that the court may determine exists after its decision concerning the fair market value of the properties in question. The court finds that this issue is one governed by the debtor's confirmed plan of reorganization which makes clear that Valley was to foreclose on the properties according to state law. Under state law, Valley had the option of pursuing a nonjudicial sale, in which case its right to a deficiency is limited by § 57-1-32, or a judicial sale, in which case it would automatically have a right to pursue a deficiency judgment. See Utah Code Ann. § 57-1-23. Having chosen a nonjudicial sale, Valley's right to a deficiency judgment is governed by § 57-1-32. Since the confirmed plan states that Valley is to foreclose according to state law, it is precluded from seeking a deficiency judgment other than pursuant to that section.

DATED this 7 day of August, 1991.

BY THE COURT:



GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT