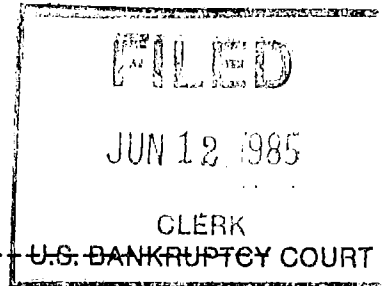


UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

TRI-STATE HOMES, INC.

WF11-82-00488

Debtor.

TRI-STATE HOMES, INC.,

Plaintiff,

Adversary Number:

v.

82-0149

DONALD MEARS and ELNA MEARS,

Defendants and  
Third Party Plaintiffs,

v.

EDWARD ALVEY and MARGARET ALVEY,

Third Party Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND  
ORDER GRANTING SUMMARY JUDGMENT

Defendants Donald and Elna Mears, by Attorney John E. Danner, having filed a motion for summary judgment; and Tri-State Homes, Inc., being represented by Attorney Robert E. Hackett, Jr.; and Edward and Margaret Alvey being represented by Attorney Dennis M. Burgy; and briefs having been filed; the Court, being fully advised in the premises, FINDS THAT:

1. Complaint. On June 15, 1982, Tri-State Homes (TSH) filed a Complaint to void a 1978 transaction involving its

purchase of its stock from Elna and Donald Mears. (The Mearses have filed a Third-Party Complaint against Margaret and Edward Alvey, the sole remaining stockholders of TSH.)

2. In its Complaint, TSH alleges that the transaction is voidable as a violation of Wis.Stats.sec. 180.385 and as a violation of TSH by-laws.

3. The Complaint does not allege that an unsecured creditor of TSH could avoid the repurchase.

4. Standing. On March 24, 1982, when TSH filed for relief under Chapter 11 of the Bankruptcy Code, no TSH creditor claimed obligations which became due at or before the time of the stock redemption agreement or within one year thereafter (open account obligations are treated as satisfied on a first in-first out basis).

5. However, the present record does suggest that TSH could show that some unsecured creditors of the Chapter 11 estate could trace their claims to obligations which became due in late 1979 or early 1980.

6. Transaction. On February 10, 1978, TSH agreed to buy the Mearses' TSH stock for a total of \$475,000 (\$135,000 down and two payments of \$170,000 (plus 8% interest) in February, 1979, and February, 1980). The agreement was consummated on March 8, 1978.

7. As of December 31, 1976, TSH retained earnings totalled \$335,759; as of December 31, 1977, TSH retained earnings totalled \$361,562.

8. TSH alleges, and the Mearses do not appear to dispute, that the book value of the Mearses stock was \$200,800.

9. At the time of the agreement the Alveys and the Mearses were the only TSH stockholders and the only TSH directors; in addition, Donald Mears was TSH President, Edward Alvey was TSH Vice-President; Margaret Alvey was TSH Treasurer and Elna Mears was TSH Secretary. TSH had no outstanding preferred stock at the time of the transaction.

10. At the time of the transaction TSH by-laws provided that "[a]ny action taken or authorized by the shareholders or by the Board of Directors . . . by affirmative vote of not less than the number of shares or the number of directors required to amend the Bylaws . . . shall be given the same effect as though the Bylaws had been temporarily amended . . . to permit [such action]."

11. Both the Mearses and the Alveys signed documents entitled "Consent of Shareholders" and "Consent of Board of Directors" which authorized the stock redemption transaction.

12. Solvency. The Mearses received payments from TSH as follows: \$135,000 on February 3, 1978, \$196,455 on February 1, 1979; \$13,600 on January 31, 1980; \$30,000 on November 17, 1980; \$19,716.17 on February 2, 1981; and \$500 on August 6, 17, 21 & 28 and September 4 & 11, 1981 (each \$500 payment was accompanied by an additional \$3,000 payment by Mercer Lumber Company on TSH's behalf<sup>1</sup>, an additional \$3,000 Mercer payment was made on October 2, 1981).

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<sup>1</sup> The record does not reveal the nature of the relationship between Mercer, TSH and the Mearses.

13. The annual average aging for TSH accounts payable was 27 in 1977, 19 in 1978; 48 in 1979 and 87 in 1980. (In 1978, TSH taxable income exceeded \$95,000 and an additional \$55,000 was contributed to the corporate profit sharing program. The TSH accountant described 1978 as TSH's most profitable year.)

14. On April 1, 1980, TSH informed Creditor Merrill Gravel and Construction Company that "our cash flow is zero, and until we get back into full production, this payment was have to 'sit on the back burner' for a little longer." This obligation was outstanding at the time TSH filed for relief.

15. Estoppel. On June 15, 1982, the above captioned adversary proceeding was commenced.

16. On April 20, 1983, the Mearses filed proof of claim forms alleging that the TSH Chapter 11 estate owed them \$65,911.62 each on account of the stock redemption transaction.

17. On July 20, 1984, TSH filed a proposed plan of reorganization. Under the provisions of the proposed plan, unsecured claims were to be satisfied by the issuance of certain preferred stock.

18. On November 27, 1984, this Court confirmed the proposed plan and, on December 26, 1984, TSH issued preferred stock to the Mearses on account of their unsecured claims.

#### Discussion

19. "[T]he rights, remedies and powers afforded the trustee through [11 U.S.C. sec.] 544 are necessary and important items in the trustee's efforts to secure all the debtor's property for an equal distribution according to the terms of the Code."

4 L. King, Collier on Bankruptcy para. 544.01 (15th ed. 1985) (emphasis added; footnote deleted).

20. TSH has informed the Court that, were it to succeed in the above-captioned adversary proceeding, a motion to reconsider the Mearses' claims would be forthcoming. However, there is no indication that any TSH recovery would, in turn, increase the distribution to creditors of the Chapter 11 estate.

21. It appears to the Court that, at least since the confirmation of the plan of reorganization, TSH has prosecuted this adversary proceeding on behalf of its common stockholders, the Alveys, and not on behalf of Chapter 11 creditors. Cf. 11 U.S.C. sec. 1141(b) (confirmation of plan vests property of estate in the debtor).

22. Even assuming that section 544 authorized TSH to stand in the shoes of shareholders, it would be estopped in this proceeding by the Alveys' consent to the redemption transaction for a period of over four years.

23. Even assuming that TSH could litigate the merits of its state law claim, it is clear to this Court that the stock redemption agreement was valid under Wis.Stats. sec. 180.385 and TSH by-laws. In short, the facts of this case demonstrate nothing more than a bona fide transaction entered into by a company which subsequently experienced financial hardship during an economic downturn.

CONCLUSIONS OF LAW

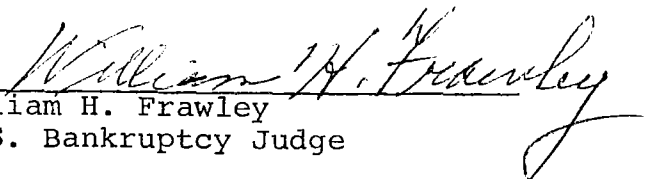
1. The Motion for Summary Judgment should be granted.
2. This is an appropriate case for the allowance of costs under Fed.R.Bank.P. 7054.

ORDER

IT IS ORDERED THAT the Motion for Summary Judgment be, and the same hereby is, GRANTED, with costs.

Dated: June 12, 1985.

BY THE COURT:

  
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William H. Frawley  
U. S. Bankruptcy Judge

cc: Attorney John E. Danner  
Attorney Robert E. Hackett, Jr.  
Attorney Dennis M. Burgy