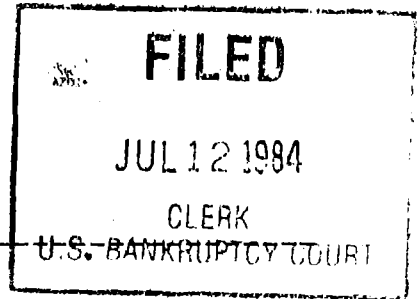


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

PHOENIX PARTNERS,

LF11-84-00493

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER GRANTING MOTION TO HAVE PROPERTY
DECLARED NOT TO BE PART OF ESTATE¹

Patricia F. Wernecke, by John H. Schwab, Jr., of Bosshard, Sundet & Associates, having filed, inter alia, a Motion to Have Property Declared Not to be Part of Estate; and hearings having been held; and the Movant appearing by counsel; and the Debtor appearing by Attorney Donald J. Harman of Donald J. Harman, Ltd., and by Attorney Margaret Dee McGarity of Chernov & Croen, S.C.; the Court, having considered the arguments and briefs of counsel and the complete record and file herein, and being fully advised in the premises, FINDS THAT:

1. On July 27, 1978, Dale A. Wernecke (as vendor) entered into an installment land contract with Debtor Midwest Partners (as vendee) to sell certain property in Maricopa County, Arizona.

2. Dale A. Wernecke, by deed, subsequently conveyed his

¹An identical Decision and Order is entered this day in In re Midwest Partners, LF11-84-00492.

interest in the property to his wife, Movant Patricia F. Wernecke. Midwest, by unrecorded installment land contract, subsequently conveyed its interest in the property to Debtor Phoenix Partners.²

3. At some time prior to July of 1983, Midwest fell into "default by failing to pay monies due under" its contracts. See Ariz. Rev. Stats. sec. 33-742(A).

4. On July 7, 1983, after waiting a period of time in excess of that provided by Ariz. Rev. Stats. sec. 33-742(D), the Movant recorded a Notice of Election to Forfeit with the Maricopa County Recorder and served copies of said Notice on all parties with a recorded interest. See Ariz. Rev. Stats. sec. 33-742(A) & 743(A)-(D).

5. Said Notice of Election provided, in pertinent part:

If the monies due under the contract are not received by five o'clock p.m. on the 29th day of July, 1983, being at least twenty days after the serving of this notice, at the offices of Michael M. Grant, Shimmel, Will, Bishop & Gruender, P.C., 111 West Monroe, 15th Floor, Phoenix, Arizona 85003, the interest of the purchaser and all persons who have an interest in or a lien encumbrance on the property, the priority of which is subordinate to that of the seller, shall be forfeited.

See Ariz. Rev. Stats. sec. 33-743(B).

6. The monies due under the contract were not received by the Movant by 5 p.m. on July 29, 1983, or at any time thereafter.

²Both Midwest and Phoenix are limited partnerships; Reginald A. Gassen and Thomas G. Markos are the sole general partners of both entities.

7. On December 29, 1983, the Movant filed an action in Maricopa County Superior Court to quiet title to the property in the seller and to declare that the interests of, inter alia, Midwest and all persons having an interest in the property which is subordinate to the Movant (e.g., Phoenix) had been forfeited. See Ariz. Rev. Stats. sec. 33-744. Midwest had 30 days after February 21, 1984, to file an Answer in said action.

8. On March 16, 1984, the above captioned Debtor filed for relief under Chapter 11 of the Bankruptcy Code.³

Discussion

9. Under 11 U.S.C. sec. 541(a)(1), the bankruptcy estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case" (emphasis added).

10. If a debtor's property interest terminates before bankruptcy proceedings are initiated,⁴ said interest generally⁵ can not be revived as part of the bankruptcy estate. In re Rapids Partners, 84-C-306-S (W.D.Wis. June 11, 1984)(litigation involved Wisconsin land contracts between Werneckes and a

³On April 30, 1984, this Court determined that the Debtor resided and maintained a principal place of business within the Western District of Wisconsin and that, accordingly, venue was proper, see 28 U.S.C. sec. 1472.

⁴As to interests which terminate after bankruptcy proceedings are initiated, see, for example, In re Oak Farms, Inc., 37 B.R. 178 (Bankr.D.Minn.1984)(11 U.S.C. secs. 105 & 108), In re Booth, 19 B.R. 53, 58 n.9 (Bankr.D.Utah 1982)(11 U.S.C. secs. 108, 365 & 1123).

⁵Avoidable pre-petition transfers are an exception to this rule. See 11 U.S.C. sec. 541(a)(3).

debtor-partnership operated by the general partners of Midwest and Phoenix). Cf. In re Moody & Jermoo's Inc., 734 F.2d 1200, ____ (7th Cir.1984) (Debtor can not revive contract validly terminated prior to petition).

11. Accordingly, the "issue to be addressed by this Court is whether Wernecke. . . has completed a forfeiture of the property under Arizona law sufficient to divest Midwest and Phoenix of any interest in the property." Brief of Debtor in Possession 2 (filed June 12, 1984).

12. Title 33, Chapter 6, article 3, Arizona Revised Statutes, "Forfeiture and Reinstatement of Purchaser's Interest Under Contract for Conveyance of Real Property", Ariz. Rev. Stats. secs. 33-741, et seq., provides a systematic statutory procedure for land contract forfeiture:

- (a) First, there is a post-default waiting period which varies according to the percentage of the purchase price which has been paid by the vendee. Ariz. Rev. Stats. secs. 33-742(A) & (D). Default is equated with "failing to pay monies due under the contract". Ariz. Rev. Stats. sec. 33-742(A); cf. Ariz. Rev. Stats. sec. 33-748(A).
- (b) Second, the vendor may then issue a Notice of Election to Forfeit--which must be recorded and served on all parties with a recorded interest. Ariz. Rev. Stats. secs. 33-742 & 743.
- (c) Third, there is a post-notice waiting period of not less than twenty days. Ariz. Rev. Stats. sec. 33-743.

(d) Finally, the vendor may "complete the forfeiture of the purchaser's interest" by judicial process, Ariz. Rev. Stats. sec. 33-744, or by notice (i.e., recording an affidavit), Ariz. Rev. Stats. sec 33-745. Ariz. Rev. Stats. sec. 33-742(A).

13. Here, the Movant had fulfilled the first three requirements prior to the Debtor's bankruptcy petition, but not the fourth. Did the Debtor retain an interest in the property?

14.. After a vendee's land contract interest is terminated, the vendee--and the subsequent bankruptcy estate--has no legal or equitable interest in a proceeding to quiet title in the vendor. See In re Rapids Partners, paragraph 10 supra; cf. First Fin. Sav. and Loan Ass'n. v. Winkler, 29 B.R. 771, 773-774 (N.D.Ill. 1983) (automatic stay litigation involving Illinois mortgage). On the other hand, if a vendee's interest is terminated by such a proceeding, there is "property of the estate" until such a proceeding is held. Cf. In re Lynch, 12 B.R. 533 (Bankr. W.D.Wis. 1981) (automatic stay litigation involving Wisconsin mortgage), In re Sapphire Investments, 19 B.R. 492, 495 (Bankr.D.Ariz. 1982) (automatic stay litigation involving Arizona mortgage).

15. Prior to 1981, when Arizona's land contract forfeiture law underwent a comprehensive codification, Arizona Laws 1981, ch. 243, it was established that "'[a]t the conclusion of the time specified in the notice of intention to declare a forfeiture the purchaser's interest in the contract is terminated.'" Trevillian v. Lee, 111 Ariz. 229, 231, 527 P.2d 100, 102 (Sup.

1974) (citation omitted) (notice required by contract rather than by the statute then in effect).

16. Thus, under former law, the Motion sub judice would be granted. Cf. In re Simpson, 7 B.R. 41, 44 (Bankr.D.Ariz. 1980) ("The recording of this affidavit after the filing of the Petition in Bankruptcy does not violate the automatic stay as it was done by the defendant after the forfeiture was completed⁶ prior to the filing of the Petition in Bankruptcy").

17. An evaluation of the current provisions of Ariz. Rev. Stats. secs. 33-741, et seq., mandates the same result:

- (a) Sec. 33-743(E)--which, in pertinent part, is substantially similar to former sec. 33-742(A)--provides that a vendee may avoid forfeiture "at any time prior to expiration of the period provided for" in the notice of election to forfeit (emphasis added).
- (b) The statutorily prescribed Notice of Election To Forfeit provides, in pertinent part: "If the monies due under the contract are not received by [a date certain]. . . the interest of the purchaser. . . shall be forfeited." Sec. 33-743(B)(emphasis added).

⁶(By this Court) "Completed" is used here to mean the termination of the vendee's interest. In the post-Simpson version of Ariz. Rev. Stats. secs. 33-741, et seq., "complete" is used to mean the termination of the statutory process. See generally paragraph 17 infra.

(c) The vendee is entitled to a Notice of Reinstatement if the vendee "timely complies with the terms of the notice of election to forfeit. . ." Sec. 33-743(F) (emphasis added).

(d) Neither of the "completion of forfeiture" sections provide procedures for reinstatement of the contract. See secs. 33-744 & 745.

In short, the vendee has no right to cure after the date set in the Notice of Election--regardless of whether forfeiture is "completed".

18. The only relevant statutory provision which would suggest the opposite result is Ariz. Rev. Stats. subsec. 33-745(B) (e.g., "Recordation of an affidavit of completion of forfeiture terminates without right of redemption all right, title and interest of the purchaser. . ."). Even assuming sec. 33-745 (completion of forfeiture by notice) is relevant to the case at bar, but see paragraph 7 supra, subsection 33-745(B) is neutralized by subsection 33-745(C) which prescribes that the Affidavit of Completion of Forfeiture provide, in part, "that the terms of the notice of election to forfeit were not complied with prior to expiration of the period provided for in the notice" (emphasis added).

CONCLUSIONS OF LAW

1. The interest of the Debtor in the property sub judice terminated at five o'clock p.m. on the 29th day of July, 1983.

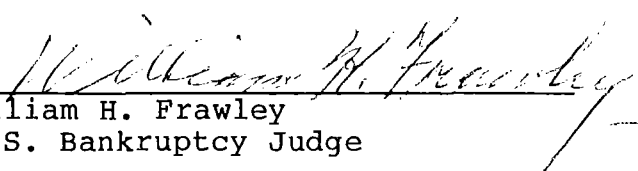
2. The above captioned bankruptcy estate does not include said property.

ORDER

IT IS ORDERED THAT the Motion of Patricia F. Wernecke to have property declared not to be part of the estate of the above captioned proceeding be, and the same hereby is, GRANTED, without costs.

Dated: July 12, 1984

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge