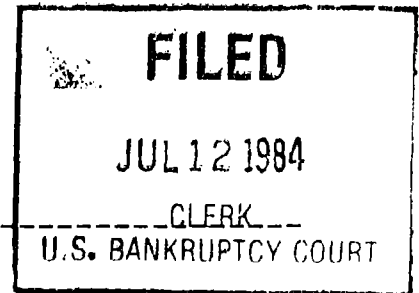


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

KEY PARTNERS,

LF11-84-00889

Debtor.

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

Dale A. Wernecke, by Attorney John H. Schwab, Jr., of Bosshard, Sundet & Associates, having filed a Motion to Have Property Declared Not to Be Part of Estate or For Abandonment; and hearings having been held; and the Movant appearing in person and by counsel; and the Debtor appearing by general partners Reginald A. Gassen and Thomas G. Markos and by its attorneys, Donald J. Harman of Donald J. Harman, Ltd., and Margaret Dee McGarity of Chernov & Croen, S.C.; the Court, having considered the arguments and briefs of counsel and all filings and proceedings herein, and having been fully advised in the premises, FINDS THAT:

1. The Debtor was the vendee under an unrecorded land contract with Buchner Place Partners.
2. Buchner Place Partners was, in turn, the vendee of the same real property under a land contract with the Movant, Dale A. Wernecke, and his wife.

3. In Dale A. Wernecke and Patricia F. Wernecke v. Buchner Place, a limited partnership, Reginald A. Gassen, Thomas Markos and La Crosse County, 83-CV-475 (La Crosse County, Wisconsin, Circuit Court Jan. 5, 1984), a Judgment of Foreclosure of the real property was made absolute, title to said property was vested in the Werneckes and "all the interests of Defendants, and any persons claiming under or through them [were] forever barred and foreclosed."¹

4. As Reginald A. Gassen and Thomas G. Markos are the sole general partners of both the Key and the Buchner Place partnerships (there are no mutual limited partners), Key had knowledge of the Buchner Place foreclosure proceedings. In addition, Mr. Wernecke admitted having knowledge of the Key/Buchner Place land contract.

5. Hawaiian Midwest Management Company, acting as Key's agent, had possession of the real property on August 9, 1983 (the day the state foreclosure action was commenced).

¹In a recent proceeding, Wernecke v. Buchner Place, 83-CV-475 (La Crosse County, Wisconsin, Circuit Court June 21, 1984), Buchner Place's motion to extend the redemption period or, in the alternative, to reopen the final judgment was denied. Said motion was based upon the failure of the Werneckes to name Key as a defendant in the Wernecke v. Buchner Place foreclosure action.

6. On May 4, 1984, Key Partners filed for relief under Chapter 11 of the Bankruptcy Code.²

Discussion

7. All legal and equitable interests of a debtor become property of a bankruptcy estate. 11 U.S.C. sec. 541(a)(1).

8. The Movant argues that Key is a successor in interest to Buchner Place with actual notice of the foreclosure proceedings. Accordingly, Key is bound by the January 5, 1984, Order in Wernecke v. Buchner Place, paragraph 3 supra, and now has no interest in the property. Cf. Hoppmann v. Ried, 86 Wis.2d 531, 273 N.W.2d 298 (Sup. 1979). In the alternative, Movant argues that Key never had an interest in the property-at-bar (only contractual rights vis-a-vis Buchner Place), see, 27 Am.Jur.2d Equitable Conversion sec. 15 (1966) (when conversion is dependent on an event--in this case, transfer of title from the Werneckes to Buchner Place--conversion will not take place until that event occurs), and that joinder of Key in the foreclosure action was not necessary.

9. Key has joined issue regarding its status as a successor in interest. See Kimberly-Clark Co. v. Patten Paper Co., 153 Wis. 69, 85-86, 140 N.W. 1066, 1072 (Sup. 1913). In addition, Key argues it is not bound by the Wernecke v. Buchner Place fore-

²The Buchner Place partnership had previously filed for relief and, in In re Buchner Place Partners, LF11-83-02116 (Bankr.W.D. Wis. May 8, 1984), appeal pending 84-C-418-C (W.D.Wis.), this Court found that the real property was not a part of the Buchner Place bankruptcy estate.

closure judgment because it was not made a party to that proceeding. See Perszyk v. Milwaukee E.R. & L. Co., 215 Wis. 233, 239-240, 254 N.W. 753, 755-756 (Sup. 1934).

10. Because this Court finds that Key's land contract interest in the property was not affected by the Werneck v. Buchner Place action (see discussion below), it is not necessary to determine whether Key was the successor in interest to Buchner Place or whether equitable conversion occurred.

11. Possession may not be, as the adage would have it, nine-tenths of the law, but it is certainly an interest in property. See 63A Am.Jur.2d Property sec. 30, et seq. (1984). The point is too basic to require further commentary.

12. The case upon which Movant relies, Hoppmann, paragraph 7 supra, involved a landowner, a tenant with a right of first refusal and prospective purchasers. The tenant (with the knowledge of the purchasers) prevailed in an action against the landowner for specific performance of the right of first refusal. The purchasers' subsequent motion to intervene was denied. In affirming the trial court, the Wisconsin Supreme Court noted that the purchasers had notice of the tenant's suit and gambled that the landowner would prevail. Having "lost their gamble[, they] need not be given a second chance to participate in the lawsuit." Id., 86 Wis.2d at 536, 273 N.W.2d at 301 (emphasis added).

13. The case upon which Key relies, Perszyk, paragraph 8 supra, involved a claimant in possession, adverse claimants and a prospective purchaser from the claimant in possession. After the

purchaser entered into possession the adverse claimants commenced a quiet title action against the claimant in possession. The adverse claimants prevailed. In a subsequent action by the purchaser against the adverse claimants the Wisconsin Supreme Court ruled that the purchaser (who had notice of the prior quiet title action) was not bound by the prior action because, inter alia, "it had openly entered into possession of the land [and] was not joined as a party. . ." Id., 215 Wis. at 240, 254 N.W. at 755.

14. Even assuming that case which determines the right of a party to participate in a lawsuit is relevant to the issues at bar, Hoppmann is inapposite: The purchasers in Hoppmann did not have possession of the litigated property.

15. The Perszyk Court repeated the following language with approval:

Actual possession of the vendee under an unrecorded contract for the sale of land is sufficient to put all persons upon inquiry as to his right,. . .

If one. . . prosecutes a suit directly affecting the title, without inquiry of the person in possession as to his right, it is regarded as. . . an act of bad faith, the punishment of which is to hold such person in equity by implication to a knowledge of such facts as he would have ascertained if he had inquired.

Id., 215 Wis. at 240, 254 N.W. at 756 (citation omitted).

Cf. In re Fitzpatrick, 29 B.R. 701, 704-705 (Bankr.W.D.Wis. 1983) (possession by tenant results in constructive notice of landlord's interest).

15. Thus, the onus is on the plaintiff in a Wisconsin real property dispute to name parties with recorded interests and the party in possession--whether or not those parties have actual notice of the proceedings. In this case the Werneckes had the duty to name Key or its agent.

CONCLUSION OF LAW

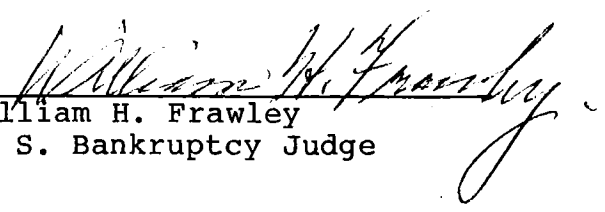
At the time of the foreclosure action Key had, at least, a possessory interest in the property which was based upon its land contract with Buchner Place. As Key was not named in the Wernecke v. Buchner Place action, it retains its land contract interest in said property.

ORDER

IT IS ORDERED THAT the Motion of Dale A. Wernecke to have property declared not a part of the above captioned estate be, and the same hereby is, DENIED, without costs.

Dated: July 12, 1984.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge