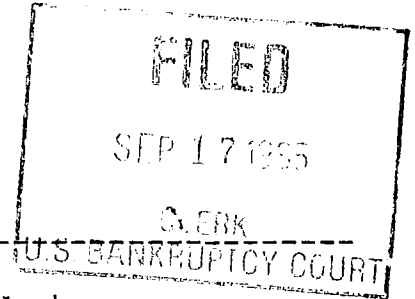


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

KEY PARTNERS,

LF11-84-00889

Debtor.

KEY PARTNERS,

Plaintiff,

Adversary Number:

v.

DALE A. WERNECKE,

85-0123-11

Defendant.

OPINION AND ORDER DETERMINING PROPERTY TO BE PROPERTY OF ESTATE

Plaintiff Key Partners has filed this adversary proceeding seeking a turnover of certain property pursuant to 11 U.S.C. § 542(a). The plaintiff also requests a court order directing defendant, Dale A. Wernecke, to pay reasonable rent for use of the property.

A pretrial conference in this matter was held on June 26, 1985. At that hearing plaintiff was represented by Attorney Donald J. Harman and defendant by Attorney James W. McNeilly. Both parties have subsequently filed briefs.

This action arises from a land contract sale of two apartment buildings by defendant to Buchner Place Partners. Included in that sale was personal property associated with the apartment

buildings including beds, stoves, refrigerators and furniture. That personal property is the subject of this proceeding. With defendant's permission, Buchner Place Partners subsequently sold both the real estate and personal property to plaintiff on land contract. Defendant initiated a foreclosure action against Buchner Place Partners in June, 1983, when it defaulted in its payments. On July 21, 1983, the parties in the foreclosure action entered into a stipulation which provided that Dale Wernecke would be appointed receiver over the property subject to the foreclosure action. A foreclosure judgment was entered on August 9, 1983, and made absolute on January 5, 1984.

The parties are in agreement that defendant acquired possession of the personal property during the foreclosure action. It is unclear, and apparently a matter of dispute, how this possession actually came about. Defendant Dale A. Wernecke maintains that in the foreclosure action he was appointed receiver over both the real and personal property. He likewise asserts that the foreclosure judgment entailed both the real and personal property. Therefore, defendant argues that Key has lost any interest in the personal property it seeks.

A review of the pleadings, foreclosure judgment and the order making that judgment absolute leads to the conclusion that the foreclosure action in no way addressed title or right to possession of the personal property contained in the apartment buildings. The order making the judgment of foreclosure absolute specifically states:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure of the real estate which is the subject of this action is hereby made absolute.

Defendant Wernecke was appointed receiver over, and obtained a foreclosure judgment of the real property, not the personal property. His foreclosure action provided him with no title or right to possess the personal property.

Defendant's second contention is that his land contract with Buchner Place Partners provided him with a security interest in the personal property. He claims that while he did not perfect this security interest by filing, he did perfect it by possession.

The portion of the land contract which allegedly creates a security interest in the personal property is contained in paragraph 27. The relevant section of that paragraph states:

Sellers hereby agree and elect as their sole and exclusive remedy an action for strict foreclosure of all and any interest of the Buyer, whether legal or equitable, in the property hereinafter described in Exhibit "A" in the event of Buyer's default in payments or failure to perform any of its obligations under this Agreement.

Exhibit A, in turn, describes both the real estate and personal property.

The Wisconsin version of the Uniform Commercial Code defines a security agreement as an agreement which creates or provides for a security interest. Wis. Stat. § 409.105(1). Thus, the issue is whether the language in paragraph 27 constitutes an agreement to create a security interest in the personal property.

A leading case on the issue of whether a security interest may be created by something other than a formal security agreement is American Card Co. v. H.M.H.Co., 97 R.I. 59, 196 A.2d 150 (1963). The court in American Card held that:

The financing statement which the claimants filed clearly fails to qualify also as a security agreement because nowhere in the form is there any evidence of an agreement by the debtor to grant claimants a security interest.

Id. at 152. Wisconsin has followed the American Card case and others which have held that an enforceable security interest exists only where there is language granting such an interest. Barth Brothers v. Billings, 68 Wis.2d 80, 88, 227 N.W.2d 673, 678 (1975). The security interests asserted in Barth were based on signed notes with the notations that they were secured by filed financing statements describing the collateral which were also signed. Citing the cases discussed above the court held that no perfected security interest in the collateral described in the financing statement existed because no security agreement was signed granting a security interest in the collateral. Id.

Based on the Wisconsin law, as set forth in Barth, supra, the court concludes that the language of paragraph 27 of the land contract does not create a security interest in the personal property. That paragraph simply limits seller's remedy to strict foreclosure in the case of default. To interpret that section as evidencing an intent by the buyer to grant a security interest in the personal property would require assumptions which are

clearly not justified. The parties may very well have intended a security interest only in the real estate. Considering that defendant's amended foreclosure complaint only refers to the real estate and that defendant entered into a stipulation allowing a judgment of strict foreclosure affecting only the real estate, this was quite likely the case. The land contract contains no reference to a security interest in the personal property. Under these circumstances one could not even claim that a security interest in the personal property arose by implication.

Since the court has determined that the land contract between defendant and Buchner Place Partners did not grant a security interest in the personal property to defendant, there is no legal basis for his possession of that property. With the filing of plaintiff's reorganization petition this personal property became property of the estate. Therefore, the court shall enter an order determining the personal property to be that of the estate, free and clear of any lien of the defendant, and that a further hearing be held as to the rental value.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

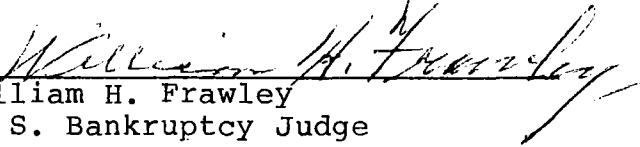
IT IS ORDERED:

1) That the personal property described in this proceeding be and the same is property of the bankrupt estate, free and clear of any lien of the defendant.

2) That the question of the rental be set for further evidentiary hearing forthwith.

Dated: September 17, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Donald J. Harman
Attorney James W. McNeilly