

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED

DEC-21-1984

In re:

Case Number:

KEY PARTNERS

LF11-84-00889

CLERK
U.S. BANKRUPTCY COURT

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDERS (1) DISMISSING MOTIONS FOR CONTEMPT
(2) DISMISSING MOTIONS FOR ABANDONMENT
(3) ADJOURNING MOTION FOR RELIEF FROM STAY

Various motions and an adversary proceeding having been filed as set forth below; and hearings having been held from time to time; and Debtor Key Partners being represented by Donald J. Harman, Ltd; and Dale A. Wernecke being represented by Bosshard & Associates; and briefs having been submitted; the Court, being fully advised in the premises, FINDS THAT:

1. Key Partners (Key) was the vendee under an unrecorded land contract with Buchner Place Partners (Buchner); Buchner, in turn, was the vendee of the same real property under a land contract with Dale A. and Patricia A. Wernecke.
2. The subject of the land contract, the Buchner Place Apartments (Apartments) was managed by Key's agent, Hawaiian Midwest Management, Inc. (HMM), until early May 1984.
3. On June 21, 1983, the Werneckes commenced a strict foreclosure action against Buchner, but did not name Key or HMM.
4. On August 9, 1983, a judgment of foreclosure was entered and Dale Wernecke was appointed receiver of the Apartments.

5. On December 28, 1983, Buchner filed for relief under Chapter 11 of the Bankruptcy Code. In re Buchner Place Partners, LF11-83-02116.

6. Although the record does not reveal the procedure by which Buchner, Key and the Werneckes operated the Apartments in the fall and early winter, after Buchner filed for relief all Apartments income collected by HMM was deposited into Dale Wernecke's receivership account.

7. In late April, 1984, Key obtained a state court order restraining Dale Wernecke from involvement in the Apartments and May rents were apparently transferred to Key's account with the State Bank of La Crosse (Bank).

8. On April 30, 1984, this Court abstained in the Buchner matter and left the determination of Dale Wernecke's receivership rights to state courts.

9. On April 30, 1984, the Werneckes' law firm served Reginald A. Gassen and Thomas Markos (Gassen & Markos)¹ "d/b/a Hawaiian Midwest Management, Inc.", a "Notice Terminating Tenancy Under Wisconsin Statutes 704.19". The subject of this Notice was certain office space within the Apartments complex which was originally leased by Key to HMM.

10. On May 3, 1984, the Order restraining Dale Wernecke was dissolved.

11. On the same day, this Court signed an Order in the Buchner matter directing Dale Wernecke, as receiver, to continue

¹ Gassen & Markos are the sole general partners of both Buchner and Key.

in possession, custody and control of Buchner's interest in the Apartments.

12. On May 3, 1984, the Werneckes obtained a temporary order restraining Gassen & Markos, Buchner, Key and HMM from interfering with the Werneckes' management of the Apartments (including Dale Wernecke's actions as receiver). In addition, the Bank was ordered to freeze Key's account.

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

14. On May 8, 1984, the state court converted the May 3 temporary restraining order to a preliminary injunction--except as to Key: "the temporary restraining order with respect to Key Partners continues, this Court taking no further action with respect thereto." Although Key's general partners and attorney appeared at the preliminary injunction hearing in other capacities, no appearance was made by Key.

15. On the same day, this Court issued an Order in the Buchner matter determining that Buchner retained no interest in the Apartments.

16. At some time between May 2 and May 9, 1984, Dale Wernecke obtained actual possession of the lessor interest to the Apartments from HMM.

17. On May 23, 1984, Dale Wernecke, in his individual capacity, filed a motion in this bankruptcy proceeding to have the Apartments declared not a part of the estate or, in the alternative, for abandonment of Key's interest in the Apartments.

18. On May 24, 1984, Key filed a motion in this proceeding

to find Dale Wernecke and the Bank in contempt for "maintaining possession of property of the debtor" in violation of the automatic stay, 11 U.S.C. sec. 362.

19. In late May, 1984, Dale Wernecke commenced an unlawful detainer action against Gassen & Markos d/b/a HMM. See Paragraph 9 supra.

20. In June, 1984, the state court denied Buchner's motion, made in the original foreclosure action, to extend the redemption period or to reopen the final judgment. Buchner's motion was based upon the failure of the Werneckes to name Key as a defendant.

21. On June 28, 1984, a writ of restitution was issued in the unlawful detainer action.

22. On July 5, 1984, Key filed a motion in this proceeding to find Dale A. Wernecke in contempt for maintaining the unlawful detainer action and obtaining a writ of restitution in violation of the automatic stay, 11 U.S.C. sec. 362.

23. On July 12, 1984, this Court issued an Order denying Dale Wernecke's May 23 motion to have the Apartments declared not a part of the estate. This Court's ruling was, in essence, based upon Key's possessory interest in the Apartments. Cf. Paragraphs 2 & 3 supra.

24. On July 30, 1984, Dale Wernecke, in his individual capacity, filed a motion in this proceeding for abandonment of Key's interest in the Apartments.

25. On September 13, 1984, Key commenced an adversary proceeding against the Werneckes seeking a turnover and

accounting under 11 U.S.C. sec. 543 (turnover by a custodian).²

26. On November 30, 1984, the District Court affirmed this Court's July 12 Decision.

27. On December 7, 1984, Dale Wernecke, in his individual capacity, filed a request in this proceeding for relief from the automatic stay.

28. The parties have informed this Court that the extent of Key's interest in the Apartments will be determined in a state court proceeding which is currently on appeal to the Wisconsin Court of Appeals.

Discussion

29. In the absence of a countervailing order from this Court, the Bank's continued compliance with the state court order is not a violation of the automatic stay, compare 11 U.S.C. sec. 362 (automatic stay) with 11 U.S.C. sec. 542 (general turnover statute), nor is it contemptuous, cf. In re Continental Marine Corp., 35 B.R. 990 (Bankr.E.D.Mo. 1984) (violation of 11 U.S.C. sec. 363 (use of cash collateral) not enforced by contempt).

30. By the same token, Dale Wernecke did not violate the automatic stay or act contemptuously when he maintained possession of Key property. Compare 11 U.S.C. sec. 362 (automatic stay) with 11 U.S.C. sec. 543 (turnover by custodian). Cf. Continental Marine, paragraph 29 supra.

² Although Key's Complaint refers to the Bank, the Bank is not a named defendant and no relief is requested under 11 U.S.C. sec. 542 (general turnover statute). Cf. 11 U.S.C. sec. 101(10) (custodian defined).

31. More troublesome is Wernecke's May 8 prosecution of the preliminary injunction matter. See 11 U.S.C. sec. 362(a)(1) (prohibits continuation of judicial proceeding against debtor).

32. While the record reflects that Wernecke took no action against Key per se, HMM, Key's agent, and the Bank, which held property of the Key bankruptcy estate, were enjoined.

33. Assuming, without deciding, that continuing judicial proceedings against HMM, as Key's agent, and Key's bank was a violation of the automatic stay, this is not a proper case for the exercise of this Court's power to punish for contempt:

- (A) The application of the automatic stay in this situation was by no means clear, see Paragraph 14 supra (the state court, attempting in good faith to apply 11 U.S.C. sec. 362, believed HMM and the Key bank account were not protected), cf. United States (I.R.S.) v. Norton, 717 F.2d 767, 774, 10 B.C.D. 1337, 1343 (3rd Cir. 1983) (ambiguity in the law should be resolved in favor of the party charged with contempt);
- (B) There is no evidence that Key, HMM or the Bank argued to Wernecke or the state court that the automatic stay protection extended to HMM and the Key bank account;
- (C) Prior to this Court's July 12, 1984, Order, it was not judicially established that HMM represented Key's interest in the Apartments.

See generally, In re Marcott, 30 B.R. 633, (Bankr.W.D.Wis. 1983) (court may consider equities of the case in determining the appropriateness of contempt sanctions).

34. Wernecke's subsequent acts, as lessor, to remove HMM, as lessee--i.e., not as Key's agent, from certain office space within the Apartments complex did not violate the automatic stay. See Pitts v. Unarco Ind., Inc., 698 F.2d 313, 10 B.C.D. 131 (7th Cir. 1983) (automatic stay operates only in favor of the debtor).

35. Abandonment. Congress intended that abandonment be used where there is no question of fact or law and the estate's retention of the asset would be unconscionable. In re Pepper Ridge Blueberry Farms, 33 B.R. 696, 698 (Bankr.W.D.Mich 1983). As the Werneckes appear to acknowledge by their subsequent relief from stay request, this is not an appropriate matter for abandonment proceedings.

36. Relief from Stay & Turnover. A crucial issue in both the relief from stay matter and the turnover adversary proceeding is the nature and extent of Kay's interest in the Apartments. This issue is currently before the Wisconsin Court of Appeals and this Court believes that it should abstain to permit the state courts to rule on the state law question. 28 U.S.C. sec. 1334(c)(1).

CONCLUSIONS OF LAW

1. The motions for contempt should be dismissed.
2. The motions for abandonment should be dismissed.
3. The request for relief from stay should be adjourned until Wisconsin state courts determine Key's interest in the Apartments.

4. The turnover adversary proceeding should be adjourned until Wisconsin state courts determine Key's interest in the Apartments.³

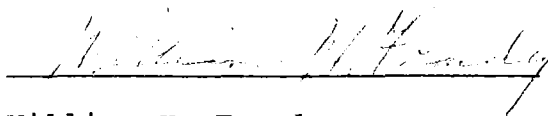
ORDERS

IT IS ORDERED THAT the Motions for Contempt filed in this proceeding by Debtor Key Partners on May 24, 1984, and July 5, 1984, be, and the same hereby are, DISMISSED, without costs;

IT IS FURTHER ORDERED THAT the Motions for Abandonment filed in this proceeding by Dale A. Wernecke on May 23, 1984, and July 30, 1984, be, and the same hereby are, DISMISSED, without costs;

IT IS FURTHER ORDERED THAT the Request for Relief from Automatic Stay filed in this proceeding by Dale A. Wernecke on December 7, 1984, be, and the same hereby is, ADJOURNED until such time as the state courts of Wisconsin determine the nature and extent of Debtor Key Partner's interest in the Buchner Place Apartments, without costs.

Dated: December 21, 1984.



William H. Frawley

U. S. Bankruptcy Judge

³ An Order in accordance with this Conclusion is issued this day in Key Partners v. Wernecke, Adv. No. 84-0224-11 (Bankr.W.D.Wis.).

cc: Attorney Donald J. Harman
Attorney James J. McNeilly (Bosshard & Associates) *ca*

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

DEC 21 1984

CLEK
U.S. BANKRUPTCY COURT

In re:

Case Number:

KEY PARTNERS

LF11-84-00889

Debtor.

KEY PARTNERS,

Plaintiff,

Adversary Number:

v.

84-0224-11

DALE A. WERNECKE and
PATRICIA F. WERNECKE,

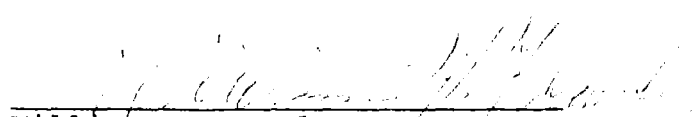
Defendant.

ORDER ADJOURNING PROCEEDINGS

IT IS ORDERED THAT, based upon the Findings of Fact and Conclusions of Law issued this day in the above captioned bankruptcy proceeding, the above captioned adversary proceeding be, and the same hereby is, ADJOURNED until such time as the state courts of Wisconsin determine the nature and extent of Debtor Key Partners' interest in the Buchner Place Apartments, without costs.

Dated: December 21, 1984.

BY THE COURT:


William H. Frawley
U. S. Bankruptcy Court

cc: Attorney Donald J. Harman
Attorney James W. McNeilly, Jr. (Bosshard & Associates)

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