In the United States Bankruptcy Court

for the Northern District of Iowa

- Appealed 3/27/95;
- Appeal Withdrawn & Dismissed 6/27/95

RICKY L. BOOHER — Bankruptcy No. 94-10520KC
Chapter 13 — Debtor.

ORDER RE MOTION TO SHOW CAUSE and APPLICATION FOR ADMINISTRATIVE EXPENSES

The matters before the Court are Chapter 13 Trustee's Motion to Show Cause and the Application for Administrative Expenses filed by Chuck McEowen and Byers & Happel - Iowa Realty (the "Realtors"). Hearings were held on January 5, 1995 on these matters. Further hearing was held on January 23, 1995 pursuant to this Court's Order to Show Cause filed January 17, 1995. The Realtors filed a further Application for Orders in response to the Court's Order to Show Cause. The Court now rules on all of the above matters. Present at the hearings were: Attorney Joe Peiffer representing Debtor Ricky L. Booher; Carol F. Dunbar as the Chapter 13 Trustee; Attorney Dennis Currell representing the Realtors; Attorney John Schmillen on behalf of the U.S. Trustee; Attorney Charles Nadler representing Anrea Hess; Attorney Joe Schmall representing Farmers State Bank. This is a core proceeding pursuant to 28 U.S.C. sec. 157(b)(B, E, N).

STATEMENT OF THE CASE

Ricky L. Booher ("Debtor") filed his Chapter 13 petition on March 31, 1994. Previously, Debtor and Chuck McEowen entered into an exclusive real estate listing agreement dated June 23, 1993. McEowen is a Byers & Happel - Iowa Realty representative. The termination provision of the listing agreement provides as follows:

> This contract shall terminate at 11:59 P.M. on the 31 day of Dec. 1993 except that if the property shall be sold, rented, or exchanged within 365 days after the termination of this listing or any extension hereof to any party to whom I, you or any other licensed real estate broker, or any other person has presented it while it is listed, I will pay you the commission specified above.

On October 3, 1993, Grace Colgan made a written offer to buy Debtor's real property. McEowen had previously showed the property to Ms. Colgan. Debtor accepted the offer and both Debtor and Ms. Colgan signed a purchase agreement on October 5, 1993. However, the closing of the sale was not completed until June 1994, nearly two months after Debtor filed for Bankruptcy. In the meantime, Ms. Colgan took possession of the house on or about December 6, 1993 under a rental agreement.

On April 15, 1994, Debtor filed a motion to sell the real property free and clear of liens. After notice and hearing, this Court ordered, among other things, (1) that Ricky L. Booher was authorized to sell the house free and clear of any liens; and, (2) that "no payments [were] to be made to Realtors from the sale proceeds at this time." This Order was filed on May 24, 1994. On November 15, 1994, the Court entered a subsequent order to determine the distribution of the sale proceeds to lien creditors. The Court determined that one-half of the proceeds should be paid to Andrea Hess and the other one-half would be distributed to the various lien creditors, essentially paying child support judgments and a portion of a debt to Farmers State Bank. The Court further directed the Trustee to collect the sale proceeds which had been retained by the Realtors.

Subsequently, the Trustee filed a Motion to Show Cause why the Realtors should not be held in contempt of court for failure to comply with the Court's Orders requiring them to turn over to the Trustee all receipts from the sale of the house. On December 8, 1994, the Realtors filed their Application for Administrative Expenses pursuant to 11 U.S.C. § 506(c) in the amount of $5,460.00. At the initial hearing on these matters, the Court ordered the Realtors to turn over the entire remaining proceeds from the sale of the real estate, or $6,000. The Realtors then turned over the amount of $540.00 to the Trustee. After the Court set a subsequent hearing for contempt, the Realtors finally turned over the remaining balance of the proceeds, or $5,460.00.

CONCLUSIONS OF LAW

A valid and binding listing agreement existed between Debtor and the Realtors at the time Debtor filed his petition for bankruptcy. The Listing Agreement specifically stated that December 31, 1993 was the expiration date for the agreement. Debtor and Colgan signed the purchase agreement on October 5, 1993. Colgan also entered into a rental agreement in December 1993. The closing of the sale did not take place until after Debtor filed for bankruptcy relief. However, the sale was encompassed by the listing agreement as Debtor and Colgan signed both a purchase agreement and a rental agreement prior to the 31st day of December, 1993.

Under Iowa law, a real estate broker earns its commission under an exclusive listing agreement in any of three ways.

> First, by effecting a binding contract of sale under authority given to the agent to make such a contract for the principal; second, by producing a purchaser to whom a sale is in fact made; third, by producing a purchaser ready, willing and able to buy on terms specified in the agency agreement.

Gatton v. Stephen, 239 N.W.2d 159, 161 (Iowa 1976).

In Monticello State Bank v. Eldon L. Gravel, No. L-89-01068D, Adv. No. L-90-0077D, slip op. at 6 (Bankr. N.D. Iowa Aug. 23, 1990), this Court applied the principle that a real estate broker earns its commission "if the Realtor performs valuable services which assist in the sale of the property." Furthermore, Judge Melloy cited the following efforts of the Realtor which constitute valuable services: (1) devoting time and effort in selling the property; (2) advertising the real estate; (3) establishing the market price of the property; and (4) aiding the owner throughout the sale process. Id. slip op. at 7, citing In re Estate of Bruenne, 350 N.W.2d 209, 215 (Iowa Ct. App. 1984).

The record here does not specifically show what services McEowen performed. However, McEowen clearly devoted time and effort in selling Debtor's property, he showed and advertised the Debtor's property at least to Grace Colgan, and it was through his efforts that Colgan tendered an offer to buy

Debtor's property. McEowen orchestrated the execution of the purchase agreement on October 5, 1993 between Debtor and Colgan. Under these circumstances, the Court concludes that McEowen earned a commission by finding a buyer ready, willing, and able to purchase the property, and performing services which assisted in the sale of Debtor's property.

It is also obvious from the record that all of McEowen's activities occurred before Debtor filed his Chapter 13 petition on March 31, 1994. Because of this, the Listing Agreement does not constitute an executory contract for which Debtor would be liable under § 365(b). An executory contract under § 365 ordinarily includes contracts on which performance remains due to some extent on both sides. See In re Newcomb, 744 F.2d 621, 624 (8th Cir. 1984). In determining whether the Listing Agreement is an executory contract, the Court applies a two-step analysis. First, the Court must determine, under Iowa law, "whether and to what extent the obligations of the parties remain unperformed." In re Bockes Bros. Farms, Inc., No. 93-60881KW, slip op. at 2 (Bankr. N.D. Iowa Apr. 4, 1994). Second, the Court must resolve whether or not the failure of either party to complete performance would constitute a material breach excusing performance of the other. Id., citing In re Hill, No. C 86-0115, slip op. at 3 (N.D. Iowa Jan. 14, 1987).

In deciding this issue, one Court held that a listing agreement between a real estate broker and debtor was not an executory contract. In re Jones, 98 B.R. 399, 401 (Bankr. C.D. Ill. 1988). The facts of that case reveal that a real estate agency entered into a listing agreement with the debtor. Thereafter, the broker procured a buyer though final sale of the property did not occur until after debtor filed for Bankruptcy. Id. The Jones court held that the real estate agency earned its commission prior to the Bankruptcy filing. Id. The court stated that the agency "had performed sufficiently on its obligation so as to have an action for breach against the debtors prior to the Bankruptcy." Id.; see also Hilgendorf v. Hague, 293 N.W.2d 272, 276 (Iowa 1980) (seller revoked listing agreement but was held responsible to pay broker a commission, since broker found buyer ready, willing and able); In re Bob Hamilton Real Estate Inc., 138 B.R. 301, 302 (Bankr. M.D. Fla. 1992) (holding plaintiff-broker earned his commission at the time he located a purchaser ready, willing, and able). The court ultimately held that because the broker had performed sufficiently prior to bankruptcy, the contract was not an executory contract at the time the seller filed for bankruptcy. Jones, 98 B.R. at 401.

In this case, McEowen likewise sufficiently completed his obligations prior to the date Debtor filed for Bankruptcy. Therefore, the Listing Agreement does not constitute an executory contract for which Debtor would be liable under § 365(b).

Iowa law recognizes a cause of action in favor of realtors to enforce listing agreements and receive a commission on completion of the sale. See Ducommun v. Johnson, 110 N.W.2d 271, 273 (Iowa 1961). As was the case in Jones, this gives the Realtors a prepetition, unsecured, contract claim. Id.; see also In re Godwin Bevers Co., 575 F.2d 805, 807-08 (10th Cir. 1978) (holding that where broker had performed its obligations and only payment remained, the broker's claim was payable as a general, unsecured obligation); In re J. M. Fields, Inc., 22 B.R. 861, 866 (Bankr. S.D.N.Y. 1982) (notwithstanding the fact that commission was payable after bankruptcy filing and broker earned commission prior to bankruptcy, the claim is a general unsecured claim).

The Realtors argue that they are entitled to payment from the proceeds of the sale as an administrative expense. Section 506(c) provides:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

An administrative claimant invoking § 506(c) has standing to seek payment in light of United States v. Boatmen's First Nat'l Bank, 5 F.3d 1157, 1159 (8th Cir. 1993). This Court has previously considered a request for payment of attorney fees pursuant to § 506(c) in this case. In re Booher, No. 94-10520KC (Bankr. N.D. Iowa Feb. 6, 1995) ("Booher I"). The Court concluded that § 506(c) requires a claimant to prove that (1) the claimant is entitled to payment, (2) secured creditors quantifiably and directly benefited from the services provided, and (3) absent the costs of those services the "property would yield less to the secured creditor" than it would yield otherwise. Id. slip op. at 2. The claimant must also prove that the expenses were reasonable and necessary. Id. at 3. The Court has sound discretion in determining what charges may reasonably be imposed on the secured creditor. Id. at 2.

The Eighth Circuit Court of Appeals held that § 506(c) allows a debtor or trustee to an offset only when the expenses incurred are "reasonable and necessary in preserving the property, to the extent the secured party benefits thereby." Brookfield Prod. Credit Ass'n v. Borron, 738 F.2d 951, 952 (8th Cir. 1984). The Brookfield court stated that the trustee or debtor-in-possession "must expend the funds primarily to benefit the creditor, who must in fact directly benefit from the expenditure." Id. "Expenses undertaken for the benefit of the debtor, although indirectly benefiting the creditor, are not recoverable." Id.

The facts of this case do not satisfy the test applied by this Court in Booher I, or the standards set out in the Brookfield case. The Realtors have proven that they are entitled to a commission under the Listing Agreement. However, nothing in the record reflects that they are entitled to compensation from the proceeds of the sale. The facts of the case do not support a conclusion that the secured creditors directly benefited from the services McEowen rendered to Debtor prepetition.

Debtor was the only beneficiary of the services McEowen rendered. Debtor signed the listing agreement on June 25, 1993 and the purchase agreement on October 5, 1993, many months prior to filing for bankruptcy. The contract sellers of the property instituted forfeiture proceedings against Debtor on March 3, 1994. The lien creditors, who under § 506(c) must be the direct and primary beneficiaries, were then in risk of loosing the property securing their claim. The forfeiture proceedings against the house were stayed when Debtor filed his bankruptcy petition. The services McEowen rendered, which all took place prior to December 1993, did not prevent the forfeiture proceedings. These facts indicate that the services McEowen performed under the listing agreement did not directly or quantifiably benefit the secured creditors.

The Realtors must also prove that had McEowen not performed his services the property would have yielded less to the secured creditors than it did as a result of his services. It is impossible to speculate what price this property would or would not have sold for if McEowen had not performed under the listing agreement. The record simply does not indicate that the property was in risk of losing monetary value, thereby affecting the interest of the creditors. The Court concludes that the Realtors have failed to prove that they are entitled to payment under § 506(c).

There are significant differences between this claim and the § 506(c) claim filed by the Peiffer Law Office in the case at bar. As noted above, in Booher I, the Court granted Attorney Joseph Peiffer's application for approval and payment of attorney fees pursuant to § 506(c). Booher I, slip op. at 3. After Debtor filed for bankruptcy, Peiffer filed a motion for approval of the sale of debtor's property. After the Court granted the motion, Peiffer worked to clear title in order to complete the sale. Id. at 1. This Court determined that the services of Attorney Peiffer were necessary and reasonable, and that without his services secured creditors who were entitled to the proceeds would have received nothing from the property. Id. at 3.

When McEowen performed his obligations under the Listing Agreement, there were no forfeiture proceedings pending against the property, and the Bankruptcy petition had not yet been filed. Therefore, McEowen was not employed for the benefit of the creditors or the bankruptcy estate. McEowen did not perform any services once the Bankruptcy proceedings began. Thus, the services McEowen performed did not directly benefit the creditors as required by Booher I and Brookfield.

For the reasons stated above, this Court must deny the motion for payment of administrative expenses filed by the Realtors. They are instead unsecured, prepetition claimants having no right to payment from proceeds of the sale. The Realtors have not filed a proof of claim in this proceeding. If they desire to file a proof of claim, they must do so within 30 days from the date of this order pursuant to Rule 3002(c)(3).

The final issue is the Rule to Show Cause. The Trustee filed a Motion to Show Cause and the Court set a hearing on its own motion to show cause based on the Realtors' failure to turn over the remaining $6,000 in sale proceeds. The Realtors have now paid the Trustee the entire $6,000. However, the fact that a party has responded to a motion to show cause by performing as requested is irrelevant to a finding of contempt. In re Dennig, 98 B.R. 935, 940 (Bankr. N.D. Ind. 1989) (finding debtor in contempt even though he complied with turnover order at the time of the hearing).

This Court may utilize both civil and criminal contempt powers in response to a party's violation of a court order. In re Ragar, 3 F.3d 1174, 1180 (8th Cir. 1993). The moving party has the burden of proving civil contempt by clear and convincing evidence. Hazen v. Reagen, 16 F.3d 921, 925 (8th Cir. 1994); In re Mayex II Corp., ___ B.R. ___, 1995 WL 61095, at *6 (Bankr. W.D. Mo. Feb. 13, 1995) (applying Hazen standard in bankruptcy proceedings). The movant must establish that an order of the Court was in effect, the defendant knew of the order and the defendant failed to comply with the order. Maytex, at *6. "Before a party can be held in contempt for violating a court order, the party must have actual knowledge of the order and the order must be sufficiently specific to be enforceable." Hazen, 16 F.3d at 924. The primary purpose of a sanction for civil contempt is to compensate the moving party for losses sustained by the defendant's disobedience of a court order or to coerce the defendant into complying with the court order. In re Babbidge, 175 B.R. 708, 721 (Bankr. W.D. Mo. 1994).

The Court concludes that in these circumstances the Realtors' conduct falls just short of contempt. Misunderstandings and miscommunication between the Realtors and their attorneys appear to be the cause of their failure to immediately turn over the $6,000 from the sale proceeds. The record fails to support a finding that the Realtors had knowledge of the Court's orders sufficient to put them on notice of the proscribed conduct. Furthermore, considering the purposes of civil contempt sanctions, the facts that the Realtors have now complied in turning over the $6,000 and that the Realtors' claim will be treated as a prepetition, unsecured claim lead the Court to conclude that sanctions for contempt are not warranted.

WHEREFORE, Trustee's Motion to Show Cause is DENIED.

FURTHER, the Application for Administrative Expenses filed by Chuck McEowen and Byers & Happel - Iowa Realty is DENIED.

FURTHER, the Realtors' claim for commission under the Listing Agreement with Debtor shall be treated as an unsecured claim.

FURTHER, the Realtors shall have 30 days from the date of this ruling within which to file a Proof of Claim.

SO ORDERED this 15th day of March, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge