ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U. S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
JAN 17 2002
TAWANA C. MARSHALL, CLERK
By _____
Deputy

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| IN RE: | § | |
| | § | |
| HAMPSTEAD PROPERTIES, LTD., | § | CASE NO. 99-35922-SAF-11 |
| DEBTOR. | § | |
| | § | |
| SHAWN K. BROWN, CHAPTER 11 | § | |
| TRUSTEE, | § | |
| PLAINTIFF, | § | |
| | § | |
| VS. | § | ADV. NO. 01-3533 |
| | § | |
| LARRY TYLER, CAPITAL APPRECIA- | § | |
| TION, INC., MYRIKA TYLER FAMILY | § | |
| TRUST, AND ADVANCED FINANCIAL | § | |
| SERVICES, INC., | § | |
| DEFENDANTS. | § | |

**MEMORANDUM OPINION AND ORDER**

The defendants, Larry Tyler, Capital Appreciation, Inc., Myrika Tyler Family Trust, and Advanced Financial Services, Inc., move the court for summary judgment. The plaintiff, Shawn K. Brown, the Chapter 7 trustee of the bankruptcy estate of Hampstead Properties, Ltd., opposes the motion. The court conducted a hearing on the motion on December 28, 2001.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court

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show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

In count one of the complaint, Brown seeks a declaratory judgment that Tyler is liable as if a general partner for the debts of Hampstead, pursuant to the Texas Revised Limited Partnership Act, Tex. Rev. Civ. Stat. Ann. art. 6132a-1, §3.03 (Vernon 2001). In count two, Brown seeks recovery from Tyler for an alleged defalcation while acting in a fiduciary capacity. The

defendants seek a summary judgment dismissing those counts, contending that the trustee lacks standing to prosecute the claims.

Tyler contends that counts one and two assert claims that belong to individual creditors. Consequently, the trustee lacks standing to prosecute those claims. As presented on summary judgment, the court must consider §3.03 of the Texas Revised Limited Partnership Act and the Fifth Circuit's decision in In re Schimmelpenninck, 183 F.3d 347 (5th Cir. 1999). In this case, Tyler was a limited partner in Hampstead Properties, Ltd. Section 3.03 provides that a limited partner may be liable for the obligations of a limited partnership if "the limited partner participates in the control of the business . . .[in which event] the limited partner is liable only to persons who transact business with the limited partnership reasonably believing, based on the limited partnership's conduct, that the limited partner is a general partner." Art. 6132a-1 §3.03. Thus, a cause of action under the statute belongs to persons who transact business with the partnership, while reasonably believing that the limited partner is a general partner.

That does not mean, however, that the trustee of the bankruptcy estate of the partnership lacks standing to prosecute the claims. A trustee may prosecute claims of individual creditors asserting a generalized injury to the debtor's estate,

which ultimately affects all creditors. Schimmelpenninck, 183 F.3d at 359-60. Prosecution of such claims by the trustee ensures that the bankruptcy estate will not be wholly or partially consumed for the benefit of one or even a small number of creditors. With the trustee prosecuting such claims for the advantage of all creditors, the trustee prevents multi-jurisdictional rushes to judgment and saves judicial resources, while furthering the equitable principles of bankruptcy. Id. Thus, even if a claim belongs to individual creditors, the trustee is the proper party to assert the claim, for the benefit of all creditors, provided the claim advances a generalized grievance. 183 F.3d at 360.

The trustee has presented summary judgment evidence suggesting that all creditors of the debtor, except one, invested in the debtor. With the exception of one creditor, all are similarly situated and have suffered similar losses. Consequently, if the trustee can establish at trial that one or more of the creditors did business with the debtor reasonably believing that Tyler acted as the general partner, then all of the creditors, except one, would hold a generalized grievance. Thus, as in Schimmelpenninck, recovery should be amalgamated for the benefit of all creditors, not just the ones who would bring claims against Tyler in state court. 183 F.3d at 359-60. Indeed, one creditor has already brought a claim in state court.

The equitable principles of the Bankruptcy Code, as explained in Schimmelpenninck, cannot countenance a single creditor obtaining an advantage over other creditors who have suffered a similar loss. The trustee, therefore, has standing to prosecute the claims.

In addition, since the commencement of the adversary proceeding, the court has converted the underlying Hampstead bankruptcy case to a case under Chapter 7 of the Bankruptcy Code. Brown, therefore, serves as a Chapter 7 trustee. In Chapter 7, if there is a deficiency of property of the bankruptcy estate to pay all of the partnership's debts, then the trustee would have a claim against the general partner to the extent that applicable non-bankruptcy law makes the general partner personally liable for the deficiency. 11 U.S.C. §723(a). Brown intends to seek leave of court to amend the complaint to apply §723(a) to his counts against Tyler for liability as a general partner.

To succeed, Brown would have to establish at trial that Tyler had participated in the control of Hampstead's business and that a creditor had reasonably believed that Tyler had acted as a general partner. If Brown can establish those elements, then Brown contends that applicable non-bankruptcy law would make Tyler liable as a general partner to the creditor. Furthermore, under the Supremacy Clause, §723(a) would allow the trustee to proceed against him for the benefit of the bankruptcy estate.

That is, consistent with the rationale of Schimmelpenninck, the claim of the individual creditor has been transformed into a generalized grievance for the bankruptcy estate. The trustee is the person to prosecute the claim and to test the theory of liability at trial. If the trustee fails to establish control and the reasonable belief of a creditor or creditors that Tyler had acted as a general partner, then the court need not determine the reach of §723(a). However, if the trustee can establish those elements, then §3.03 of the Texas Revised Limited Partnership Act may establish liability and thereby make §723(a) applicable. Tyler does not contend that the trustee lacks summary judgment evidence necessitating a trial on the underlying factual dispute.

In count three, Brown seeks to avoid, as fraudulent conveyances, transfers of property to Capital Appreciation, Inc. One transfer involves property on Randol Mill Road in Arlington, Texas, while the other involves property on May Street in Fort Worth. The defendants contend that the summary judgment evidence establishes that the transfers were for reasonably equivalent value and that the trustee lacks evidence that Hampstead was either insolvent or became insolvent as a result of the transfers.

There is, however, a genuine issue of material fact regarding whether the transfers had been made for reasonably

equivalent value. For the May Street property, the debtor paid Capital Appreciation $725,000 on October 2, 1995, with a deed apparently executed on October 4, 1995. The defendants have presented an appraisal of the property by the Grayson Company reporting a value of $725,000 on May 17, 1996. The defendants have not presented an appraisal of the property as of either October 2, 1995, or October 4, 1995. But, the trustee has presented summary judgment evidence suggesting that Capital Appreciation acquired the property with a closing on October 2, 1995, for $575,000. The trustee also has summary judgment evidence that he began marketing the property for a sale in February 2000, but eventually sold the property in September 2001 for $275,000.

For the Randol Mill property, the debtor paid Capital Appreciation $225,000 in 1996. The defendants have presented an appraisal of the property by Hanes, Jorgenson & Burgdorf reporting a value of $225,000 as of July 2, 1997. The appraisal is dated January 28, 2000, following a January 24, 2000, inspection of the property. The trustee sold the property for $147,000 in 2000.

This summary judgment evidence establishes a genuine issue of material fact regarding the value of the property on the date of transfer. The defendants contend that the trustee must present expert evidence of value. But, the trustee need not do

so to defeat a summary judgment motion. The defendants as movants have not presented summary judgment evidence of the value of the property on the date of transfer. Therefore, the trustee need only counter the movants' evidence to show that genuine issues of material fact exist. The court must draw inferences in favor of the party opposing the motion. By doing so, the trustee's evidence of a related party sale of the May Street property at the time and of subsequent sales of the properties create a genuine issue of material fact when contrasted with the movants' expert value of the property as of dates other than the dates of transfer.

The defendants contend that Brown cannot establish either that Hampstead was insolvent at the date of the transfers or that the transfers made Hampstead insolvent. The trustee bears the burden of proving insolvency. Where the burden at trial rests on the non-movant for summary judgment, "the movant must merely demonstrate an absence of evidentiary support in the [summary judgment] record for the non-movant's case." Mississippi River Basin Alliance v. Westphal, 230 F.3d 170, 174 (5th Cir. 2000). Since the defendants have moved for summary judgment on the insolvency issue, they need only establish that the trustee cannot prove that element. See GasMark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp., 158 F.3d 312, 315, 318 (5th Cir. 1998). The defendants argue that in response to their motion,

the trustee must produce summary judgment evidence to support an insolvency finding. However, the trustee has not moved for summary judgment. Therefore, although the trustee has the burden of proof at trial, the defendants must demonstrate from the summary judgment evidence that there is no genuine issue of material fact for trial. The defendants have failed to do so. They just state in their motion that, since the trustee has no evidence, they should prevail. The defendants have the burden on their motion to show the lack of summary judgment evidence on insolvency. If they had come forward with evidence that Hampstead was solvent, then the trustee would have had to respond with summary judgment evidence that demonstrated a genuine issue of material fact. The defendants cannot turn their motion for summary judgment into a requirement that Brown establish his case. They cannot say, in effect, we have no summary judgment evidence that Hampstead was solvent, but nevertheless we compel you, trustee, to show your evidence that Hampstead was insolvent. The defendants may only force Brown to demonstrate genuine fact issues by presenting their summary judgment evidence, while contending that the trustee has no summary judgment evidence to raise a trial issue. The defendants have not done so. But, nevertheless, Brown has presented an income statement and balance sheet from the debtor's records, dated April 9, 1996, to support insolvency. The trustee asserts that the partners were in fact

noteholders that should have been reflected as liabilities on the balance sheet. Brown contends that due to these obligations, in addition to the inflated value of the real estate, Hampstead was either insolvent or became insolvent. Accordingly, the court finds the issue must go to trial.

In the final count, the trustee seeks an accounting from the defendants. The defendants have presented summary judgment evidence suggesting that no monies are due to Hampstead. The defendants further contend that even if all of the disputed items are found in the trustee's favor, they still have a positive balance. But, the accounting appears to be aggregated among the defendants, yet each remains a separate legal entity. The trustee questions the calculation of interest on obligations and the separation among the defendants. The trustee asserts that, according to the schedules filed in the case, Tyler still owes Hampstead money. The trustee also notes that although Tyler testified that he intended to pay interest to Hampstead, he is uncertain as to whether he did. On this record, the court cannot accept the aggregated summary judgment evidence as dispositive of the trustee's request for an accounting.

Based on the foregoing,

**IT IS ORDERED** that the motion for summary judgement is **DENIED.**

Signed this 16th day of January, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge