

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
 )  
PRIME REALTY, INC., ) CASE NO. BK02-80785  
 )  
Debtor(s). ) CH. 11

MEMORANDUM

Hearing was held in Omaha, Nebraska, on February 6, 2003, on the debtor's motion under 11 U.S.C. § 542 for turnover of property of the estate and for sanctions for intentional violation of 11 U.S.C. § 362 (Fil. #432) and objection by Paul Fesler, Richard Everett, Byron Deden, and RCS & Sons, Inc. (Fil. #443). Marion Pruss and Robert Craig appeared for the debtor, and Mike Whaley appeared for the objecting parties. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(E).

The debtor has filed a "Motion Under 11 U.S.C. § 542 for Turnover of Property of the Estate, and for Sanctions for Intentional Violations of 11 U.S.C. § 362." The debtor asserts that it is a 50 percent owner of an entity known as Prime Realty Development, Inc. ("Development"), the other 50 percent of which is owned by an entity which the parties agree may be referred to as "Schropp." In addition, the debtor asserts that Development is a general partner with a 46.66 percent interest in a Nebraska general partnership identified as Spring Valley II, Phase II. On the other hand, evidence at the hearing suggests that Development is a member of a joint venture called "LDA." Either way, the other alleged general partners or joint venturers are Richard Everett with a 15 percent interest, Paul Fesler with a 15 percent interest, and Byron Deden with a 23.33 percent interest.

Development, perhaps as an agent for the partnership or joint venture, is a holder of a promissory note in the original face amount of \$702,250. The maker of the note is the City of Omaha. The note is referred to as the "TIF Note." From February 14, 1992, through the summer of 2001, the City of Omaha made payments under the TIF Note to Development as directed by a particular ordinance and as directed by the promissory note itself. During those years, Development, upon receipt of the

payments from the City of Omaha, distributed the payment to the entity and individuals with an ownership interest in the partnership or joint venture, as their interest appeared.

However, at some point in time, some or all of a payment from the City of Omaha was diverted by Development to Prime Realty, Inc., the debtor, and used by the debtor in its own operations. From and after the date such diversion was discovered, the City of Omaha was directed to make its payment to Mr. Fesler. Mr. Fesler then distributed the proceeds to the entities and individuals involved in the partnership, but in order to offset the amount of funds diverted to Prime Realty, Inc., Mr. Fesler distributed the debtor's portion of the City of Omaha's payments to the other interested parties. Such distribution was agreed to by Mr. McCart, then president of the debtor, who was, in addition, the individual who had actually received the funds from the City of Omaha on behalf of Development.

This Chapter 11 case was filed on March 15, 2002. Thereafter, Mr. Fesler received at least one payment from the City of Omaha. He distributed that payment as he had done prior to the bankruptcy being filed. In other words, the portion that traditionally had been distributed to Prime Realty, Inc., the debtor, was instead distributed to the other entities and other individuals. The approximate amount of the debtor's allocation which was distributed to the other parties is \$45,000.

The debtor claims that the \$45,000 that was its proportionate share of Development's share of the City of Omaha's payment was property of the bankruptcy estate and that the payment of that amount by Mr. Fesler to the other parties and their acceptance of such payment is a violation of the automatic stay at 11 U.S.C. § 362(a). The debtor, therefore, requests turnover of the \$45,000 and sanctions for violation of the automatic stay.

It cannot be determined from reading the promissory note involved and the joint venture agreement supplied by Mr. Fesler, which apparently has something to do with the arrangements between the parties concerning their business operations, what rights the debtor has to the monies being paid by the City of Omaha pursuant to the promissory note. Therefore, it cannot be determined that any portion of the payments from the City of Omaha is actually property of the bankruptcy estate. Such determination cannot be made because there is absolutely no

evidence of the contractual rights of the parties to receive a distribution of the payments from the City of Omaha. The promissory note requires payment by the City of Omaha to Development. The promissory note is silent with regard to how Development shall distribute the funds. The joint venture agreement, assuming it has something to do with this business transaction, is silent with regard to distribution of revenues received by the joint venture. If, instead of the joint venture being the investment vehicle, the alleged partnership is the investment vehicle, there is no partnership agreement in evidence and no testimony concerning the partnership distribution procedure.

What is clear, and apparently undisputed, is that Prime Realty, Inc., the debtor, owns a 50 percent interest in Development. From that undisputed fact, one can determine that the 50 percent interest in Development owned by Prime Realty, Inc., the debtor, is property of the bankruptcy estate. However, because Development itself is a legal entity, separate from the debtor, its assets, including payments from the City of Omaha, are not assets of the debtor and, when held by Development, are not property of the bankruptcy estate of this debtor.

It may be that as a result of the practices of the parties with regard to the distribution of the City of Omaha payments, the individual officers and directors of Prime Realty, Inc., the debtor, had an expectation that there would be an immediate distribution of Development's assets represented by the City of Omaha payments, but such expectation does not rise to the level of "property of the estate" of this debtor. The fact that the debtor's proportionate share of the City of Omaha payment received post-petition was distributed to other parties without notice or consent by the debtor may give the debtor a claim for conversion against Development and/or the parties that received the distribution, but without any evidence that the debtor had a contractual right to a distribution of its proportionate share, it cannot be said that such distribution was a violation of the automatic stay.

A claim of conversion can only be brought by an adversary proceeding, pursuant to Federal Rule of Bankruptcy Procedure 7001(1). Such an adversary proceeding will allow the parties, procedurally, to present all of the contractual arrangements between them, and allow the court to make a determination whether assets of Development have been converted. If such a

determination is eventually made, then the debtor's damages resulting from the conversion of property of an entity in which the debtor has an interest may be determined.

The motion, which requests turnover of property of the estate and for sanctions for violation of the automatic stay, is denied.

Separate order will be entered.

DATED: February 21, 2003

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*Robert Craig  
\*Marion Pruss  
Mike Whaley  
William Biggs  
United States Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

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IT IS ORDERED: For the reasons stated in the Memorandum filed contemporaneously herewith, the debtor's motion, which requests turnover of property of the estate and for sanctions for violation of the automatic stay, is denied.

DATED: February 21, 2003

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

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