



UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

GENERAL COMMUNICATIONS CO., INC.,

DEBTOR

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CASE NO. BK80-2734

MEMORANDUM OPINION RE MOTION  
FOR SUMMARY JUDGMENT BY TRUSTEE

This matter, concerning the interpretation of a contract between the trustee and a purchaser of assets of the debtor, was heard on motion for summary judgment on June 6, 1986. Donald Swanson of Schmid, Ford, Mooney & Frederick, Omaha, Nebraska, appeared on behalf of the trustee. Van Schroeder, Bellevue, Nebraska, appeared on behalf of the purchaser of assets, Touch Communications Company of Nebraska.

Facts

This debtor in a Chapter 11 case apparently filed for protection under Chapter 11 of the Bankruptcy Code in 1980. At some point during the progress of the case, a trustee was appointed. The trustee took possession of the assets and in 1982 entered into an agreement to sell most, if not all, of the assets to Touch Communications Company of Nebraska. The assets included certain personal property and an interest in real property that the debtor was purchasing under a land contract.

The parties have submitted documentary evidence of the sale and purchase agreement between the trustee and the buyer of the assets and certain correspondence between a bank trust officer representing the original sellers of the land under the land contract and the asset purchaser under the agreement between the trustee and the asset purchaser.

The agreement between the trustee and the asset purchaser (Touch) provides that the trustee sell to Touch seven different types of property denominated A through G. These types of property are all listed in Paragraph 2 of the agreement which was admitted into evidence as plaintiff's Exhibit 1. The agreement contained a separate paragraph that provides the purchase price for all of the assets. It includes a down payment and a balance to be paid in installments over an 84-month period.

In a separate paragraph the trustee specifically assigns the trustee's right, title and interest in the land contract to the purchaser. The land contract had already been identified in the paragraph concerning assets as asset A.

In a separate paragraph the purchaser granted the trustee a security interest in certain personal property and a "collateral assignment of all right, title and interest in and to that certain land contract" which was identified as asset A. In the same paragraph, which contained the security for the sale, the agreement provided that if Touch failed to comply with terms of the agreement or with terms of the land contract, after appropriate notice, the trustee had the right to accelerate the total balance due. In addition, the default paragraph provided that if Touch failed to make payments under the land contract the trustee could cure that default and add any payments plus interest to the balance which was due and payable in installments.

The purchase price for the assets sold by the trustee to Touch was \$60,000. The original purchase price listed on the land contract was \$10,950 with a down payment of \$500 and the balance of \$10,450 plus interest at the rate of 9% payable at the rate of \$100 per month. That contract was entered into in 1974. Therefore, it appears to the Court that the land contract balance was relatively small in 1982 when the trustee's interest was transferred to the buyer.

Touch made the land contract payments directly to the contract sellers or their representative. In late 1982 Touch paid off the land contract balance and a bank that acted as representative of the sellers delivered to Touch a warranty deed to the real estate which had been subject to the land contract. The warranty deed shows as grantee General Communications Company, Inc., and not Touch.

In 1985 Touch discontinued making payments to the trustee under the installment payment requirement of the agreement. The trustee then filed a motion for termination of the contract alleging default and requesting the Court order Touch to account for all property subject to the contract and ordering Touch to vacate the real premises which had been the subject of the land contract. The Court ordered that the contract be terminated and that an accounting be provided to the trustee. However, Touch argued that it was the legal owner of the land since it completed the land contract payments and received from the sellers a deed of conveyance of the property. Touch admitted that the deed listed the grantee as General Communications Company, Inc., but argued that it was the real owner and could obtain correct record title by bringing a quiet title action in State Court.

Issue

Under the terms of the 1982 agreement between the trustee and Touch, was Touch required to make all payments under the installment payment provisions before it received title to any of the personal or real property sold pursuant to the agreement?

Decision

The agreement between the trustee and Touch sold specific property for a specific price. Title to the property did not transfer free and clear of the trustee's interest until and unless all of the installment payments under the agreement were made. Touch did not make all of the payments, the contract has been terminated and the interest of Touch in the land terminates. Summary judgment is granted to the trustee.

Discussion

The interest of the trustee in the land included the right to make payments on the land contract and included the equity or the difference between the market value of the land and the remaining land contract balance. The trustee sold his interest in the equity as part of the purchase price for all of the assets. He then assigned the right to continue to make payments on the land contract. To protect his interest in the equity and land contract rights, he took a collateral assignment of the land contract. It does not appear to the Court that the agreement between the trustee and Touch is in recordable form and, therefore, does not act as an assignment of record title. Instead it is in the form of a simple agreement between the parties which, if fulfilled, would require the trustee to deliver appropriate title documentation such as a bill of sale for personal property and a deed for real property.

The agreement specifically provides at Paragraph 8 that if the purchaser defaults either on the installment payments or the land contract payments, the trustee has the right to accelerate the total balance. Had the trustee intended to simply sell his interest in the land contract to the purchaser and grant purchaser clear title upon payment of the land contract balance, he could easily have done so by a separate agreement. Instead, by the agreement Touch grants a security interest in the personal property and in the land contract rights to the trustee, both of which secure the total balance of the installment payments.

There is no evidence that the trustee had knowledge of or agreed with the position of the representative of the seller that Touch, upon making complete payment under the land contract, was the owner of the real estate.


It appears to the Court that the intent of the parties was to sell all of the assets of the debtor which were specifically listed in the agreement. The sale price was for all of the assets taken together. The trustee retained an interest in all of the assets except accounts to secure the payment of the balance of the sale price. Instead of the trustee increasing the sale price and continuing to make the land contract payments, the parties apparently decided it was easier for Touch to make the land contract payments, without relieving the trustee of ultimate responsibility on the contract, and for Touch to make separate payments on the installment balance with regard to the total purchase price.

The interest of the purchaser, Touch Communications Company of Nebraska, in the real estate is terminated and Touch is ordered and directed to vacate the real estate premises identified in the contract and deliver possession of all property now held by Touch Communications Company of Nebraska, both real and personal, to Richard D. Myers, Trustee.

Separate journal entry to follow.

DATED: June 13, 1980.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies to:

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