

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 11
BALSTERS/VILLA ROSE, L.P.,)
) No. Bk 90-50870
Debtor)

MEMORANDUM

The Federal Deposit Insurance Corporation seeks a declaration that the 11 U.S.C. §362 automatic stay does not apply to real property which is used by Balsters/Villa Rose Limited Partnership but titled in the names of Harold, Melvin and Kenneth Balsters. The FDIC brought a state court foreclosure action naming the Balsters as defendants in their individual capacities. When the debtor partnership filed the petition that instituted this bankruptcy proceeding, the state court halted the foreclosure action pending the resolution of the bankruptcy case. In response to the December 21, 1990 order issued by this Court requesting additional evidence, the parties have stipulated to some facts and an evidentiary hearing has been held.

It is undisputed that, in December 1983, Audubon Federal Savings and Loan Association¹ entered into an agreement to loan \$6.2 million to Harold, Melvin and Kenneth Balsters to develop a health care facility. The loan was made to the Balsters in their individual capacities.

¹Although Audubon was the original lender, the FDIC is now before the Court as the receiver for Audubon.

Audubon secured the loan with a mortgage on the property to be developed. Each of the three Balsters also executed personal guarantees for the debt.

Sometime in 1984, the Balsters created Balsters/Villa Rose Limited Partnership in order to obtain additional capital for the project. The Balsters became general partners; the only limited partner was another limited partnership known as VR Congregate Care. The land on which the project was built was never formally conveyed to the partnership; the Balsters retained title to the property in their individual names as tenants in common. The project was built on that land with capital supplied overwhelmingly from the Audubon loan proceeds. The partnership occupied the property and operated the health care facility. It also paid the mortgage payments, taxes and insurance for the property. The property was disclosed as an asset and the mortgage debt was disclosed as a liability on the partnership income tax returns.

The FDIC contends that the automatic stay does not apply to the mortgaged property because it is not property of the partnership. It relies on the fact that the title has been held all along in the names of the individuals. The Balsters counter that property need not be titled in the partnership name to be partnership property.

The Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay of "any act to create, perfect, or enforce

any lien against property of the estate." 11 U.S.C. §362(a)(4). Property of the estate includes "equitable" as well as "legal" interests. 11 U.S.C. §541(a)(1). Matter of Kaiser, 791 F.2d 73, 74 (7th Cir. 1986), cert denied, 479 U.S. 1011, 107 S.Ct. 655, 93 L.Ed. 2d 710 (1986); In re Palm Gardens Nursing Home, 46 B.R. 685 (Bankr. E.D. N.Y. 1985). There is no dispute that the Balsters were the legal owners of the property. Therefore, the property is subject to the automatic stay only if the debtor partnership owned an equitable interest in it.

Under Illinois law, record title is not determinative of whether a partnership has an interest in property. See In re K & L Ltd., 741 F.2d 1023 (7th Cir. 1984). The controlling factor is the intention of the parties. That intention can be shown by express agreement or by the parties' acts. Blakeslee v. Blakeslee, 265 Ill. 48 (1914). Where an express agreement does not exist, relevant indications of the parties' intentions are payments of taxes and insurance by the partnership and how the property was reflected on the accounting books of the partnership. H. Reuschlein & W. Gregory, The Law of Agency and Partnership, §212 (2d ed. 1990). See also In re Palm Gardens Nursing Home, 46 B.R. 685; In re Helmwood Apts., 2 B.C.D. 1151 (Bankr. N.D. Ga. 1976).

The facts in this case provide a clear indication of the intention of the parties. The partnership occupied the mortgaged property and

operated the health care facility. It paid the mortgage payments, insurance and property taxes. Additionally, the partnership reflected the property as an asset and the mortgage debt as a liability of the partnership on the partnership tax return. The Court is convinced that the partners of Balsters/Villa Rose intended that the mortgaged property be partnership property.

The interest acquired by the partnership in this manner is an equitable interest. See In re Palm Gardens Nursing Home, 46 B.R. at 689 (Bankr. E.D. N.Y. 1985); In re Helmwood Apts., 2 B.C.D. at 1154. Because the partnership owns an equitable interest in the mortgaged property, the property is part of the estate under §541(a) of the Code and therefore subject to the automatic stay under §362(a)(4).

The FDIC contends that Audubon was not informed of the formation of the partnership, nor were they aware of any facts that would put them on notice of the transfer of any interest to the partnership. It argues that, because any interest in the property transferred to the partnership was necessarily a violation of a due-on-sale clause contained in the loan agreement,² the automatic stay should not apply to the mortgaged property.

2.The² due-on-sale clause was not automatically invoked. Section 5.12 of the loan agreement contained a prohibition of transfer of the "Project" without "prior written consent of the majority in principal amount of the Bondholders" (Audubon). Transfer would constitute an "Event of Default" under Section 7.12 which would allow the mortgagee to accelerate the debt payments under Section 7.2 and foreclose.

