UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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April 11, 1988

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Re: James and Dorothy Anderson
Chapter 12 386-00044

Gentlemen:

This matter was heard January 7, 1988, in Pierre, South Dakota. John Keller represented the Debtors. Brent Wilbur represented Norwest Trust Company, and perhaps Barbara Palmer. Mr. Wilbur's representation of Mrs. Palmer was disputed at the hearing. Under an Order entered February 26, 1988, Mr. Keller, on his application, has been replaced as Debtors' counsel by Thomas Tobin, of Aberdeen, South Dakota.

The Andersons originally filed under chapter 11 of the Bankruptcy Code on May 28, 1986. On August 3, 1987 a hearing was held on the Andersons' Notion to Convert to a chapter 12 bankruptcy. There was heard simultaneously a motion by Nr. Wilbur on behalf of Barbara Palmer and NorWest Bank, to require the Debtors to accept or reject an executory contract. The motion referred to a contract for deed in which the Debtors were purchasing land from the company[1] are the co-trustees of the trust.

The motion for acceptance or rejection alleged the Andersons were behind in their contract payments. At this hearing Mr. Wilbur recited the following agreement.

> . . .[t]he debtors have indicated and will stipulate that they will accept the contract and will bring the contract current within ninety days of the date for todays hearing unless other accommodations are reached between they and the beneficiaries and the trustees in this matter. The debtors apparently feel that they could, that they may be able to obtain some concessions and therefore, we have given them ninety days to at least discuss it. If further stipulations aren't reached ninety days from today, they would, the debtors would either make a payment or the Norwest Bank through the Palmer Estate would be entitled to relief from the automatic stay, it payment has not been made at that time.

Mr. Keller indicated his approval of this agreement on the record.

On August 27, 1987, Judge Ecker of this District, who sat at the hearing held earlier that month, entered his Order indicating acceptance of the contract for deed. The Order required the Debtors to bring the contract up to date by November 3, 1987- In the event the Debtors tailed to do so, or defaulted on any future payment required under the contract, the vendors were entitled to relief from stay without further notice, hearing, or order of this Court prior to foreclosure or other remedial action. The Order also required that the Debtors' plan provide for acceptance of the contract. On November 16, 1987, Mr. Wilbur tiled an Affidavit stating the Debtors were in default under the Order at August 27, 1987 and contract for deed. (See Local Bankruptcy Rule 307.) That same day my Order granting the vendor relief from the automatic *stay* was entered. Two days later Mr. Keller tiled his Motion to Reconsider the "Order of August 27, 1987, and any further Order entered at the request of counsel for Norwest Trust and the Palmer

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[1] Exhibit 5 entered in this hearing indicates the Bank's true name is Norwest Capital Management and Trust Company.

Estate..." Mr. Wilbur filed an objection on behalf of Norwest Trust.

The Motion to Reconsider is founded upon an alleged modification as contemplated on the record at the August 3, 1987 hearing. The Debtors allege they reached a modification of the contract for deed with Barbara Palmer prior to the November 3 deadline, under which they were not in default. James Anderson, the only witness called at the reconsideration hearing, testified as to the terms of the modification. He testified that in late August of 1987 Mrs. Anderson and he met with Barbara Palmer, her daughter and son-in-law at the trustee's home in Faulkton, south Dakota.[2] He testified that he and Mrs. Palmer agreed that under the Debtors' plan, real estate taxes and interest under the contract would be made current as of November 15, 1987, and that starting in 1983 the principal payments would be resumed.[3] He also testified that the modification was placed in the Debtors' chapter 12 plan. According to the proposed plan, the last principal payment was made in November, 1984 and the last interest payment was made in November, 1985. The Debtors were to bring unpaid interest current as of the effective date of the plan. The unpaid principal was to be extended eleven years beyond the original contract term, with annual payments resuming in 1988. The plan remains unconfirmed.

Holdings of the Court

The Court first holds that the only Order which it may reconsider is that entered November 16, 1987 granting the relief from stay. Under Federal Rule of Civil Procedure 59(b), made applicable to this contested matter by Bankruptcy Rule 9023, a motion for new trial must be served not later than ten days after entry of the judgment. The word "judgment" used in the Rule means any appealable order.

Bankruptcy Rule 9001. The August 27, 1987 order is not vulnerable to Mr. Keller's motion because the ten-day service period had expired. See In Re Design Classics, Inc., 788 F.2d 1384, 1386 (8th Cir. 1986); wright & Miller, Federal Practice & Procedure, Section 2812 (1973).

As Mr. Keller stated at the reconsideration hearing, it is the November 16, 1987 order Granting Relief from Stay which actually injures the Debtors. Mr. Keller's motion was timely served as to

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[2] Throughout this opinion the term "trustee(s)" refers to Barbara Palmer and Norwest Trust.

[3] Subsequent to the January 7, 1988 he&ring Mr. Wilbur submitted Affidavits of Mrs. Palmer and her daughter, LaVonne Frank, which dispute modification of the contract. The Court does not consider the Affidavits admissible evidence, and they are given no evidentiary value.

this Order, placing it within Rule 9023's grasp, and the motion to reconsider is granted as to this Order. Based on the following analysis, however, the Court declines to vacate the Order.

It is undisputed that Norwest Trust did not agree with the Debtors to modify the terms of the contract for deed. This is admitted in Mr. Keller's brief. As is also admitted in Mr. Keller's brief, the "declaration of trust, so far as the record shows, makes no mention of a single trustee acting alone." This raises the following issue. Where there are two trustees, does one trustee acting alone hold power to enter into contracts binding upon the trust, where it has not been shown that the trust instrument so provides?

Title 55 of the South Dakota Code regulates trusts within that state's jurisdiction. See also, SDCL ch. 43-10. There was very little evidence offered as to the nature of the Charles Palmer Trust. The Court knows little more than that the trust was created by the Will of Charles Palmer (Ex. 2), that the trust property consists of the contract for deed (Ex.3), and who the co-trustees are. In examining the types of trusts contemplated by the South Dakota Code, it appears the present trust is either a trust created for the benefit of a third person (SDCL ch. 55-3), or a trust governed by South Dakota's enactment of the Uniform Trusts Act (SDCL ch. 55-4). See SDCL 55-4-34. SDCL 55-3-1 defines the type of trust governed by the former chapter. The statute was enacted over one hundred years ago and is not an example of clear legislative expression- However, it appears the present trust fits within that definition. See, SDCL 55-1-3,- 12.

Regarding trusts created for third-party beneficiaries, SDCL 53-3-8 provides: "Where there are several co-trustees all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides." Under this statute any modification which may have been reached with Barbara Palmer alone is unenforceable against the trust. The only provision in South Dakota's Uniform Trusts Act dealing with the power of co-trustees is SDCL 55-4-3. This statute provides: "Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees.' Obviously, this statute does not answer the question at hand. This Court therefore must consult the general law of trusts. The South Dakota Supreme Court has not ruled on the joint or several authority of dual trustees. Accordingly, this Court must determine how the Supreme Court of South Dakota would decide the issue if it were presented to that Court. As noted in a leading treatise in the field, the "cases are unanimous" that the trust property is not controlled by an act of a single co-trustee such as is in question in this case. C. Bogart, The Law of Trusts and Trustees, Section 554 (Rev. 2nd ed. 1980) - This Court concludes that this would be the result reached by the South Dakota Supreme Court.

The Court holds that Barbara Palmer acting alone would not have held authority to modify the terms of the contract for deed held by the Charles Palmer Trust. This result is dictated under

SDCL 53-3-8, or to the extent that statute does not apply, under general law, because South Dakota's enactment of the Uniform Trust Act does not speak to the issue of dual trustees. The Court does not hold regarding any other issue taken under advisement, nor may this opinion be construed as finding that an agreement was reached between Barbara Palmer and the Debtors.

This matter is a core proceeding under 28 U.S.C. 157. See also, In Re Southern Industrial Banking Corp., 809 F.2d 329 (6th Cir. 1987); In Re Daniels-Head Associates, 819 F.2d 914 (9th Cir. 1987). Counsel for Norwest Trust shall prepare an appropriate Order, and Findings of Fact and Conclusions of Law. See Bankruptcy Rule 9021.

Very truly yours,

Irvin N. Hoyt
Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk