

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 03-13878-MWV
Chapter 7

Bob Desmond,
Debtor

Bob Desmond,
Plaintiff

v. Adv. No. 04-1107-MWV

ASR Acquisition Corp.,
Defendant

Robert Wolfe Associates, PC,
Plaintiff

v. Adv. No. 04-1112-MWV

Robert M. Desmond,
ASR Acquisition Corp.
and Alfred Ross,
Defendants

Edmond J. Ford, Esq.
FORD, WEAVER & MCDONALD, P.A.
Attorney for Robert Wolfe Associates, PC

Robert S. Wolfe, Esq.
Attorney for Robert Wolfe Associates, PC

William S. Gannon, Esq.
WILLIAM S. GANNON PLLC
Attorney for Debtor

William B. Pribis, Esq.
CLEVELAND, WATERS & BASS
Attorney for Defendants ASR Acquisition Corp.
and Alfred Ross

MEMORANDUM OPINION

Two motions are presently before the Court and both implicate the main bankruptcy case as well as two pending adversary proceedings. The first motion is the Chapter 7 Trustee's ("Trustee") motion to compromise with ASR Acquisition Corporation ("ASR") and thereby settle adversary 04-1107-MWV (the "ASR Adversary"). The second motion is the Trustee's motion filed in the main bankruptcy case to abandon the Debtor's property known as Strawberry Hill Farm and the personal property contents thereof. Objections were filed by creditor Stanley Jacobson, the Debtor, and Robert Wolfe Associates, P.C., the Plaintiff in adversary proceeding 04-1112-MWV (the "Wolfe Adversary"). As a testament to the interrelated nature of the proceedings, motions, replies, responses, statements, supplemental statements, and memoranda regarding the Trustee's motions to compromise and abandon Strawberry Hill Farm have been filed in the bankruptcy case and in the adversary proceedings. On April 20, 2006, the Court held a hearing on the matters and took both motions under advisement. On May 3, 2006, the trial in the Wolfe Adversary was scheduled to resume after being on hiatus since March 9, 2006. However, given the potential implications for the Wolfe Adversary if the Court were to grant the Trustee's motions to compromise and abandon Strawberry Hill Farm, the Court instead heard arguments regarding those implications, particularly, Wolfe's standing to proceed on its claims.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

The Debtor filed a voluntary Chapter 11 petition on November 13, 2003, and on August 26, 2005, the Court granted the United States Trustee's motion to convert to Chapter 7.¹ While the case was in Chapter 11, the Court allowed Wolfe to proceed on behalf of other creditors, as there was no creditors committee and it was not believed that the Debtor would look out for the creditors. However, upon conversion and appointment of a Chapter 7 trustee, all claims held by the estate belong to the trustee. See 11 U.S.C. § 323.

As representative of the estate, having stepped into the Debtor's shoes, the Trustee alone may assert the causes of action against ASR in the ASR Adversary. See In re Gaudette, 241 B.R. 491, 498 (Bankr. D.N.H. 1999). Correspondingly, if a "cause of action belongs solely to the creditors, the trustee has no standing to assert it." Id. In the Wolfe Adversary, Wolfe claims, among other claims, that the Debtor and ASR conspired and colluded in misrepresenting the debts owed ASR by Desmond. Following the reasoning of our Gaudette opinion, to the extent that Wolfe alleges claims that could not be brought by the Trustee, those claims survive in Wolfe. The settlement does not extinguish those claims because the Trustee does not have standing to assert those claims. See In re Gaudette, 241 B.R. at 498–501 (discussing trustee standing and the doctrine of *in pari delicto*). However, the settlement does release any and all claims against ASR that *the Debtor or the estate* could assert, as those claims belong to the Trustee upon conversion to Chapter 7. This release of claims and statement that such claims belong exclusively to the Trustee are found in Paragraph 13 of the proposed settlement agreement. Movants argue that Paragraph 13 is a disguised request for a declaratory judgment and should be brought by an adversary proceeding, pursuant to FED. R. BANKR. P. 7001. The Court disagrees. The language of Paragraph 13 merely restates the law that claims of the estate belong to the Trustee. See 11 U.S.C. § 323;

¹ The background of this bankruptcy case may be found in numerous prior opinions issued by this Court. That being the case, the Court will forego another recitation of the facts here.

FED. R. BANKR. P. 6009; In re Dawnwood Props./78, 209 F.3d 114, 116 (2nd Cir. 2000); see also In re Medomak Canning, 922 F.2d 895 (1st Cir. 1990).

The Trustee's proposed settlement is subject to the Court's approval. FED. R. BANKR. P. 9019(a). "When assessing a compromise, courts need not rule upon disputed facts and questions of law, but rather only canvass the issues. A mini trial on the merits is not required." In re Schmitt, 215 B.R. 417, 423 (B.A.P. 9th Cir. 1997) (citations omitted). The settlement between the Trustee and ASR includes the following: (1) ASR will pay the estate \$120,000; (2) the Trustee will abandon any interest in Strawberry Hill Farm in order for ASR to proceed with foreclosure or sale;² (3) ASR's proof of claim number 6 will be reduced from \$3,173,851.40 to \$2,400,000; (4) ASR will waive any deficiency in the event that the liquidation of Strawberry Hill Farm and the personal property thereof does not fully satisfy its \$2,400,000 claim; and (5) the Trustee will release any claims against ASR held by the Debtor.

In assessing the compromise, the following factors are among those to be taken into account by the Court in evaluating a proposed compromise: "(i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and, (iv) the paramount interest of the creditors and a proper defense to their reasonable views in the premise." Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995).

As for the probability of success, this Court has found, for purposes of ASR's motion for relief, that the value of Strawberry Hill Farm is \$1,500,000 and ASR is owed by the Debtor more than \$2,600,000. If he proceeds to trial, the Trustee states that "his best case scenario" would be reducing ASR's claim to \$1,300,000 (and perhaps even lower if he can prove that certain fees were improperly charged). In settling for \$120,000, the Trustee recognizes that his best case scenario would yield a few

² The Court previously granted ASR's motion for relief from the automatic stay in regard to the Strawberry Hill Farm property. ASR Acquisition Corp. v. Desmond (In re Desmond), 2006 BNH 008 (Bankr. D.N.H. Feb. 28, 2006).

hundred thousand dollars, without taking into account the costs of litigation. However, considering the Court's preliminary findings regarding the value of the property and the amount owed ASR, the Trustee realized that he might recover nothing at trial. In the spectrum of possible litigation outcomes, a \$120,000 settlement is rather close to the Trustee's best case scenario. This case, too, is complex and fact intensive. Finally, this settlement will bring substantial funds into the estate for the creditors, while also eliminating ASR's claim. Although the settlement agreement allows ASR a reduced claim of \$2,400,000, ASR waives any deficiency claim and therefore will only collect from the estate the Strawberry Hill Farm property and personal property thereof.

In sum, the Court is convinced that the Trustee has competently and fairly assessed the costs, merits, and possible outcomes of the ASR Adversary and has reached a settlement that is probably at the higher end of the range of potential outcomes if the matter proceeded to trial. The Court hereby grants the Trustee's motion to compromise and settle the ASR Adversary. Having found that the probable value of Strawberry Hill Farm is \$1,500,000, and the Trustee's best case scenario that he could reduce ASR's claim to approximately \$1,300,000, abandonment of the property is appropriate given the settlement's payment of \$120,000 plus no claim against the estate.

CONCLUSION

The Trustee's motion to compromise with ASR and motion to abandon Strawberry Hill Farm are granted. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 17th day of May, 2006, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge