2000 BNH 040 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 98-11293-MWV
Chapter 7

Kendall Real Estate, Inc.,
Debtor

Jeffrey Schreiber,
Plaintiff

v. Adv. No. 00-1040-JMD

William Ryan, Curry Realtors, Inc.
d/b/a Curry Realtors, Joseph F. Pallaria, and
Lois E. Pallaria,
Defendants

Randall L. Pratt, Esq.
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MEMORANDUM OPINION

I. INTRODUCTION

This matter came before the Court on a complaint filed by the Chapter 7 Trustee, Jeffrey Schreiber (the "Trustee), to recover real estate commissions due to the estate. A trial was held on September 11, 2000. Upon consideration of the evidence submitted at trial, the memoranda filed, the record of the case, and applicable law, the Court will allow the Trustee to recover a portion of the commission paid to William Ryan ("Ryan"), but not the commission paid to Curry Realtors, Inc. d/b/a Curry Realtors ("Curry").

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).[1]

II. FACTS

This adversary proceeding involves the interest of the estate in a real estate commission arising from the sale of a piece of property located at 1 Spring Haven Lane in Alton, New Hampshire (the "Property"). On January 31, 1997 Ryan & Toman, LLC ("Ryan & Toman") entered into a listing agreement for the Property with its owners, Defendants Joseph and Lois Pallaria ("Pallaria"). Defendant Curry obtained a purchaser for the property, John and Victoria Holland (the "Hollands"), and was expressly described in the Purchase and Sale Agreement between Pallaria and the Hollands (the "Purchase & Sale Agreement") as a "sub-agent" of Ryan & Toman. On June 4, 1997 Ryan & Toman sold its business to the Debtor, Kendall Real Estate, Inc., under the terms of an Asset Purchase Agreement of even date (the "Agreement").[2] In December of 1997, the Hollands and Pallaria notified Curry and Ryan that they could not complete the sale and wished to have the deposit refunded.[3] In early 1998, the Debtor ceased all operations and closed the former Ryan & Toman office.

On April 7, 1998, the Debtor filed its petition for bankruptcy. Shortly thereafter Ryan and Curry learned that Pallaria and the Hollands had entered into a new agreement for the Hollands' purchase of the Property at the same price as the prior agreement and that the sale was to occur within a matter of days. Further, Pallaria did not believe that they owed, and did not intend to pay, any commissions to Curry or

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[1] While the Defendants failed to admit or deny the fact that this was a core proceeding in their pleadings, their counsel stated on the record at the beginning of the trial that this matter was a core proceeding under 28 U.S.C. § 157(b).

[2] William Ryan, individually as a member of Ryan & Toman, and his wife, Mary Ann Ryan, individually as a member of Ryan & Toman and as the lessor of Ryan & Toman's office, executed the Agreement.

[3] The Hollands' deposit had been held by the Debtor since its purchase of Ryan & Toman on June 4, 1997. After some delay the deposit was returned by the Debtor.

Ryan. Consequently, on April 16, 1998, Ryan and Curry filed suit in Belknap County Superior Court to recover the commissions due from Pallaria. Ryan's and Curry's claim was based upon a provision in the original listing agreement that provide that a commission was due to the agent if a sale was consummated between the owners of the Property and a buyer introduced to the property by the agent within six months after termination of the Purchase & Sale Agreement. Ryan and Curry obtained an ex parte attachment against the Property. Shortly thereafter, the closing on the Property occurred and the disputed commissions were held in escrow. The suit was submitted to binding arbitration and Pallaria was ordered to pay, and has since paid, $15,525.00 in commissions to Ryan and Curry collectively. The Trustee claims that the commission awarded by the arbitrator is an asset of the estate that must be turned over to him pursuant to 11 U.S.C. § 549.

III. DISCUSSION

The Trustee has filed suit seeking recovery of the commissions from Curry, Ryan, and/or Pallaria. Defendants Curry and Ryan each claim that their commission is not property of the estate and that even if the commission is property of the estate, they are entitled to a setoff for expenses incurred in collecting the commission from Pallaria. Ryan further claims that he is entitled to a setoff for portions of the commission paid to the widow of the listing agent on the Property. Pallaria claims that they have already paid the commission due as directed by the arbitrator's award in the state court action. They did not attend or otherwise participate in the trial.

A. Ryan

The first question to be addressed is whether the right to the commission on the Property was sold to the Debtor as part of the Agreement. The Trustee argues that under paragraph 1 of the Agreement all of the assets of Ryan & Toman, including real estate listings for both properties under agreement and those not yet under agreement, were sold to the Debtor, unless the assets were "excluded assets" listed in paragraph 2

of the Agreement. The Trustee claims that since the rights to commissions on pending sales were not listed in paragraph 2, such rights were part of the assets sold to the Debtor. As such, the Trustee claims that the right to the commission on the Property is property of the estate, that the proceeds from the right to such commission is property of the estate, and that Ryan's claim to the commission is a prepetition unsecured claim against the estate under the terms of the Agreement.

Ryan claims that the commissions due on pending sales were not part of the assets sold to the Debtor and points to paragraph 4.2 of the Agreement in support thereof. Paragraph 4 of the Agreement sets forth the computation of the amount of the purchase price and the timing of its payment to Ryan & Toman.[4] Paragraph 4.2 provides that the purchase price includes,

> One hundred percent (100%) of the Company Dollar collected upon the sale of all pending sales identified in Exhibit B which close within one year of the date of Closing on this Agreement. Company Dollar is defined as gross commissions from real estate sales or rentals, less commissions, referral fees, overrides or any other payments to agents or managers and fees due Prudential Real Estate Affiliates, Inc. Said sum shall be paid to Seller following the closings in accordance with the usual practice of the buyer.

Plaintiff's Exhibit 1.[5] Ryan claims that paragraph 4.2 clearly indicates that the commissions due on pending sales, although not listed in paragraph 2, were not part of the assets that were sold to the Debtor.

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[4] Under the terms of the listing agreement for the Property and the Purchase & Sale Agreement, the commission was to be paid to Ryan & Toman and not to Ryan individually. Similarly, paragraph 4.2 of the Agreement provided for the portion of the purchase price determined by the sale of property "under agreement" was to be paid to Ryan & Toman and not Ryan individually. Ryan brought an action in state court for the commission due to Ryan & Toman under the listing agreement in his individual name and was awarded judgment individually. No evidence was presented at trial as to the extent of Ryan's ownership interest in Ryan & Toman. However, the Agreement recites that Ryan and his wife are all of the members of the seller. See Plaintiff's Exhibit 1. Both the Trustee and Ryan have treated Ryan's right to the commission as identical to the right of Ryan & Toman. Accordingly, the Court will treat Ryan, individually, as having the same right to the commission on the sale of the property as that which Ryan & Toman held under the terms of the Agreement.

[5] The Court notes that while the commission on the Property was not listed in Exhibit B as attached to the Agreement, both the Trustee and the Defendants presented testimony at trial that the Property was left off in error and should have been included in Exhibit B. The Trustee has not alleged that the inadvertent omission of the listing agreement for the Property from Exhibit B to the Agreement is an element of his claim. Therefore, the Court will not address this issue any further in this opinion.

Ryan argues that the contract is ambiguous and that the Trustee's interpretation is contrary to the intent of the parties. Whether a contract is clear or ambiguous is a question of law. See Dahar v. Raytheon Co. (In re Navigation Tech. Corp.), 880 F.2d 1491, 1495 (1st Cir. 1989); see also Hopkins v. Fleet Bank-NH, 724 A.2d 1287, 1289 (NH 1999). The language of a contract is considered ambiguous when it can be given more than one reasonable meaning. See Anderson v. Century Prods. Co., 943 F. Supp. 137, 152 (D.N.H. 1996); see also Dahar, 880 F.2d at 1491; Fed. Deposit Ins. Corp. v. O'Flahaven, 857 F. Supp. 154 (D.N.H. 1994); Hopkins, 724 A.2d at 1287. The test for ambiguity remains the same regardless of the fact that the contract contains an integration clause. See Hopkins, 724 A.2d at 1290. Under New Hampshire law, if the terms of a contract are ambiguous, extrinsic evidence is admissible to clarify the ambiguity. See Anderson, 943 F. Supp. at 152 (quoting Gamble v. Univ. Sys. of New Hampshire, 610 A.2d 357, 361 (1992)). In clarifying the ambiguity "the court must examine the contract as a whole, the circumstances surrounding execution, and the object intended by the agreement." Woodstock Soapstone Co., Inc v. Carleton, 585 A.2d 312, 315 (NH 1991).

At trial both, Ryan and Michael Cornelius ("Cornelius"), the former principal of the Debtor and a witness for the Trustee, testified that the commissions on pending sales belonged to Ryan. Cornelius testified that the reason the commissions belonged to Ryan was because there was nothing left to do except collect the commission at the closing for the listings that were "under agreement" on June 4, 1997 (as listed in Exhibit B to the Agreement). Ryan, therefore, claims that the commissions on pending sales were not sold to the Debtor as neither party intended for the commissions to belong to the Debtor. However, upon reviewing the contract as a whole, the Court finds that the provisions of the contract on payments of such commissions to Ryan are not ambiguous.

Paragraph 4.2 cannot be given more than one reasonable meaning. Paragraph 4.2 does not alter or amend either the scope of the "all asset" language contained in paragraph 1 or expand the exclusions from assets described in paragraph 2 of the Agreement. Paragraph 4.2 provides that all of the commissions from the sale of properties "under agreement" as of the date of closing shall be paid to Ryan subject to two

conditions being met. First, the closing of the pending sale must take place within one year of the sale of Ryan & Toman's assets to the Debtor. Second, the commissions on the pending sales must actually be collected. If the sales do not close within one year, or are not collected, then no payment is due to Ryan. For example, if the sale of Ryan & Toman's assets to the Debtor had occurred on April 4, 1997 rather than June 4, 1997, and all other facts surrounding that sale remained the same, a commission would have been due under the terms of the listing agreement, but the sale would have occurred more than a year after the Debtor's purchase of the assets of Ryan & Toman. In such an event, the Debtor could retain the commission because under the terms of paragraph 4.2 no payment to Ryan was required after one year. Therefore, the Agreement is not ambiguous and paragraph 4.2 does not exclude commissions collected by the Debtor from the sale of properties "under agreement" from the all assets language in paragraph 1 of the Agreement. Accordingly, the Court finds that the commissions on pending sales were part of the assets sold to the Debtor by Ryan & Toman.

Under 11 U.S.C. § 541(a) the bankruptcy estate is comprised of all legal and equitable interests in property held by the Debtor at the commencement of the case. Having already determined that the commissions due on pending sales were sold to the Debtor, the commissions were property of the estate under section 541. Therefore, the $7,762.50[6] commission collected by Ryan from Pallaria on the sale of the Property to the Hollands constitute proceeds of property of the estate, the contract right under the Pallaria listing agreement, and such proceeds must be turned over to the Trustee pursuant to 11 U.S.C. § 549.

B. Ryan's Right of Setoff[7]

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[6] As was noted above the state court suit for the commission was commenced jointly by Ryan and Curry. As Curry was entitled to one-half of the commission, Ryan will only be responsible for returning his one-half portion of the commission. Curry's liability for the portion of the commission paid to it is discussed in section III.C below.

[7] Unless otherwise indicated, all dollar amounts discussed in this section III.B reflect one-half of the total amount expended jointly by Ryan and Curry.

Ryan claims that even if the commissions are property of the estate, he is entitled to deduct his portion of the fee paid to the arbitrator ($187.50), his portion of the registry fee paid to record the discharge of the ex parte attachment ($8.67), and the attorney's fees expended in collecting the commission from Pallaria ($2,409.49), or an aggregate expense of collection in the amount of $2,605.66, plus an additional deduction for $2,243.00 in commissions paid to the widow of the original Ryan & Toman listing agent.[8] While neither 11 U.S.C. § 553 nor any other section of the Bankruptcy Code provides for setoff rights when the debts owed arose postpetition, case law has firmly established the rule that a debt and a claim that both arise postpetition may be setoff against each other so long as the debt and claim are valid and there is mutuality. See Mohawk Industr., Inc. v. United States (In re Mohawk Industr., Inc.), 82 B.R. 174, 178-79 (Bankr. D. Mass 1987); see also Palm Beach County Bd. of Pub. Instruction v. Alfar Dairy, Inc., 458 F.2d 1258, 1262 (5th Cir. 1972), cert. denied 409 U.S. 1048 (1972).

In the case at hand, Ryan acted in the good faith belief that the commission due on the Pallaria sale belonged to him. He incurred and paid the fees and expenses necessary to collect the commission due from Pallaria. While the Court has held such commission to be property of the estate, had the Trustee been aware of the Pallaria closing and had elected to pursue Pallaria, he too would have incurred expenses of collection that would have been paid by the bankruptcy estate. The Court also notes that at trial counsel for the Trustee agreed that Ryan was entitled to be compensated for the expenses of pursuing Pallaria to the extent the Trustee would have incurred such expenses. The Court, therefore, finds that Ryan has an administrative claim against the estate for his portion of the reasonable expenses associated with pursuing Pallaria in state court. At trial the only evidence presented as to the expenses incurred came from the testimony of Zannah Richards ("Richards"), a representative of Curry. Richards testified that Curry and Ryan collectively paid $5,810.00 in attorney's fees and $375.00 in arbitrator's fees in collecting the debt

[8] The Court notes that under the terms of paragraph 4.2 of the Agreement, the Debtor had the obligation to pay any such commissions due to third parties from the gross commissions it collected before remitting the net amount or the "Company Dollar" to Ryan.

from Pallaria. Since the Trustee's claim against Ryan for the proceeds of the contract right belonging to the estate and Ryan's claim for reimbursement of the expenses incurred by him in collecting those proceeds both arose postpetition, the Court holds that Ryan is entitled to a setoff for one-half of the total expenses incurred in collecting the commission, or $3,092.50, thereby reducing the amount he owes to the Trustee to $4,670.00.

As for the commission paid to the widow of the listing agent, the Court finds that there is no mutuality between the debts owed. While the estate may very well owe a commission to the listing agent under the provisions of paragraph 4.2 of the Agreement, the listing agent does not owe any money to the estate. In other words, Ryan can not offset a debt he owes to the estate with a postpetition payment of a prepetition debt the estate owes to a third party. Therefore, the Court finds that Ryan is not entitled to a setoff for the portion of the commission paid to the widow of the listing agent.

C. Curry

In addition to the commission paid to Ryan, the Trustee also claims that the portion of the commission paid to the co-broker, Curry, on the sale of the Property is also property of the estate. The Trustee argues that because Curry was listed as a "sub-agent" in the Purchase & Sale Agreement, the commission due Curry was to be paid first to the Debtor and then to Curry as the Debtor's sub-agent. Therefore, the Trustee claims Curry is also an unsecured creditor with regard to the commission due on the sale of the Property. Curry, however, argues that it was a co-broker with an independent claim against Pallaria and that the commission paid to Curry was never property of the estate.

At the trial Cornelius testified that it is standard practice to list co-brokers in purchase and sale agreements. Both Cornelius and Richards testified that it was standard practice to pay co-brokers at the closing by issuance of a separate check. As further evidence of the payment procedure, both witnesses testified that HUD documents used in the majority of residential closings specifically provide for separate disbursements to be made when there are co-brokers.

Based upon the testimony at trial, the Court finds that the commission paid to Curry is not property of the estate. The term "sub-agent" is not a word of art in real estate transactions or contracts. Curry was a co-broker under the terms of the multiple listing service agreement followed by Curry and Ryan & Toman at the time the listing agreement for the Pallaria property was signed. The testimony at trial established that Curry secured the Hollands as purchasers for the property and at all times acted as a co-broker. Notwithstanding the language in paragraph 4.2 of the Agreement, the commission due to Curry would never have been paid to the Debtor had the Debtor collected any commission from Pallaria at a closing. Curry had its own right, separate and apart from that of Ryan & Toman and/or the Debtor, to be paid its portion of the commission by Pallaria. When the Debtor purchased Ryan & Toman, the Debtor only purchased the rights of Ryan & Toman. Ryan & Toman had no right to the commission to be paid to Curry as a co-broker. Therefore, the commission owed to Curry never became property of the estate.

D. Pallaria

The Trustee has included Pallaria as defendants in this adversary proceeding on the grounds that they owed a commission for the sale of the Property to the Debtor and the Debtor has not been paid a commission. As noted earlier, Pallaria, resting on their argument that they have already paid the commission, have not participated in the trial. For the reasons set forth below, the Court holds that the claim against Pallaria for the commission due on the sale of the property is denied.

Pallaria had signed a listing agreement with Ryan & Toman for the sale of their property under which they agreed to pay a 3% commission should Ryan & Toman successfully sell the Property. As was discussed above in sections III.A and III.C, Pallaria owed a 1.5% commission to Ryan and a 1.5% commission to Curry. In compliance with an arbitrator's ruling, Pallaria paid the commission to Ryan and Curry.[9] Pallaria claims that they were not aware that Ryan & Toman's assets had been sold to the Debtor

[9] As was discussed in section III.C of this opinion, Curry had an independent right to its commission. Accordingly, the Trustee has no right to collect from Pallaria the portion of the commission paid to Curry.

or that the Debtor had filed bankruptcy, and no evidence was presented that Pallaria was informed of the sale or the bankruptcy proceedings. With no reason to believe that the commission was due to anyone but Ryan and pursuant to the directions of an arbitrator, Pallaria paid the commission due on the sale of the Property and thereby discharged their contractual obligation to pay a commission on the sale of the Property. Should the Trustee be successful in his claim, Pallaria would be forced to pay a commission on the sale of their Property twice, once to Ryan and once to the Trustee. Bankruptcy courts are courts of equity and a court of equity should not force the sellers of real estate to pay a commission for the sale of property twice. Therefore, the Trustee's claim against Pallaria for the commission due on the sale of the Property is denied.

IV. CONCLUSION

In summary, the Court holds that the portion of the commission collected by Ryan, $7,762.50, minus $3,092.50, in allowed setoffs, or a total of $4,670.00, is property of the estate and must be turned over to the Trustee. Further, the Court holds that the portion of the commission collected by Curry is not property of the estate and the Trustee's claim against Curry is denied. Finally, the Trustee's claim against Pallaria for payment of a commission from the sale of the Property is denied.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 13th day of October, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge