

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 95-11405-MWV
Chapter 7

Douglas R. Kingsley,
Debtor

Adv. No. 99-1155-MWV

Jeffrey A. Schreiber, Trustee
Plaintiff

vs.

Daniel J. Montalto and David Shaskan
Defendants

MEMORANDUM OPINION

Before the Court is Defendant David Shaskan's Motion for Partial Summary Judgment seeking judgment in his favor with respect to Count III of the Trustee's complaint. This matter originally came before the Court for a hearing on July 11, 2000, together with a motion pertaining to discovery matters. All matters were continued until October 4, 2000 in order for the parties to continue discovery and resolve their dispute. At the October 4, 2000 hearing, the Trustee sought a further continuance on the grounds that he was still attempting to take the Defendant's deposition in California. The Court refused to continue the summary judgment motion any further and took the matter under submission, allowing the Trustee to file a supplemental memorandum in opposition to the motion for summary judgment within ten days and allowing the Defendant ten days to respond. No further pleadings have been filed with respect to the motion and the Court, therefore, will decide the matter on the pleadings and documents before it. For the reasons set out below, the Defendant's Motion for Partial Summary Judgment is granted.

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

This matter comes before the Court on a motion for summary judgment. Rule 7056 of the Federal Rules of Bankruptcy Procedure makes applicable Rule 56 of the Federal Rules of Civil Procedure: “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

Count III of the Trustee’s complaint seeks authority to sell the bankruptcy estate’s interest along with the interest of co-owners in a California corporation know as Dover-Foxcroft, Ltd. pursuant to 11 U.S.C. 363(h).

This section of the Bankruptcy Code provides:

Notwithstanding subsection (f) of the section, the trustee may sell both the estate’s interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if –

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate’s undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interest of co-owners outweighs the detriment, if any, to such co-owners, and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h).

The Defendant contends, and the Trustee does not dispute, that he is the owner fifty percent of the stock of Dover-Foxcroft, Ltd. The remaining stock is split evenly between the Debtor in this Chapter 7 case, Douglas R. Kingsley, and Daniel J. Montalto. Dover-Foxcroft, Ltd. operates a small retail shop selling picture frames and other collectibles. It is also undisputed that Dover-Foxcroft, Ltd., although continuing to operate, has been placed on “inactive” status by the California Secretary of State for failure to pay state income taxes pursuant to section 23301 of the California Revenue and Taxation Code.

The Defendant correctly argues that § 363(h) may only be invoked to sell a co-owner's interest where that interest is held as a tenancy in common, joint tenancy or tenancy by the entirety. 11 U.S.C. § 363(h). Where the ownership interest involves corporate stock, § 363(h) is inapplicable. See Normandin v. Normandin (In re Normandin), 106 B.R. 14, 16 (Bankr.D.Mass.1989). The Trustee, on the other hand, argues that the corporate form in this matter should be disregarded as Dover-Foxcroft, Ltd. operates as the Defendant's alter ego, and that if the corporate entity is set aside, the Defendant's interest may be sold pursuant to § 363(h).

California law recognizes the equitable doctrine of piercing the corporate veil, which will disregard the corporate entity and hold a stockholder responsible for the liabilities of the corporation where "there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and . . . if the acts are treated as those of the corporation alone, an inequitable result will follow." Mesler v. Bragg Management Co., 702 P.2d 601, 606 (Cal.1985). However, under California law "when a court disregards the corporate entity, it does not dissolve the corporation." Id. Therefore, even if the Trustee is able to pierce the corporate veil of Dover-Foxcroft, Ltd., the corporate form would not be transformed into a tenancy by the entireties, tenancy in common or joint tenancy to which § 363(h) would apply.

Moreover, the Court holds that the suspension of Dover Foxcroft, Ltd. for failure to pay its corporate taxes does not alter its status for purposes of application of § 363(h). Under California's Revenue and Taxation Code, a corporation that fails to pay its taxes may have its corporate powers, rights and privileges suspended. Cal. Rev. & Tax Code § 23301. Although a suspension for failure to pay taxes prohibits the corporation from entering into enforceable contracts or from defending itself against a state court action, the corporate entity is not dissolved but remains in existence and a viable entity with rights at some level. See In re Feature Homes, Inc., 116 B.R. 731, 733 (Bankr.E.D.Ca.1990)(section 23301 of the California Revenue and Taxation Code does not affect a corporation's right to file for protection under the Bankruptcy Code).

CONCLUSION

Because Dover-Foxcroft, Ltd.'s status as corporation remains despite the Trustee's attempt to pierce the corporate veil or its suspension pursuant to the California Revenue and Taxation Code, § 363(h) may not be

invoked in order to sell the estate's interest and the interest of the co-owners of the stock of the corporation.

Accordingly, the Defendant's Motion For Partial Summary Judgment is granted and judgment shall be entered in favor of the Defendant with respect to Count III. A separate order will be entered consistent with this opinion.

DATED this 16th day of November, 2000, at Manchester, New Hampshire.

Mark W. Vaughn
Bankruptcy Judge