

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11090-JMD
Chapter 11

Stephen Camann,
Debtor

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it an “Assented to Motion to Appoint Commissioner to Sell Non-Real Estate Assets of Manchester Realty Company” filed by Joan Camann, an objection thereto filed by Stephen Camann (the “Debtor”), and a reply thereto filed by Joan Camann. The Court conducted a hearing on the matter on December 12, 2000 and, after hearing the parties’ arguments, the Court took the matter under advisement.

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).

II. BACKGROUND

The Debtor and Joan separated in 1989 and began divorce proceedings in state court in 1990. On December 15, 1995, the Debtor and Joan executed a proposed final decree in order to resolve their divorce proceeding (the "Stipulation"). On December 22, 1995, Judge William Groff of the Hillsborough County Superior Court approved the recommendation of the marital master and entered a decree of divorce, approving the Stipulation and incorporating it into a final order (the "Final Decree"). The Stipulation details the method and means of distributing the parties' marital assets, including two corporations owned by the Debtor, namely, Camco, Inc. and Manchester Realty Company. Pursuant to the Stipulation, if certain "Designated Assets" were not sold by a particular date, Joan could move for the appointment of a commissioner to sell those assets.

The parties engaged in extensive negotiations regarding the disposition of the marital assets, particularly the assets of the Debtor's businesses, during the years following the parties' divorce but they encountered little success. On April 12, 2000, on the eve of a state court trial, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code. On April 27, 2000, within weeks of the Debtor's bankruptcy filing, Joan filed a motion seeking the transfer of real property owned by Manchester Realty Company to Joan. See Doc. No. 23. The Court denied the motion. See Doc. No. 85.

Since that time, both the Debtor and Joan have proposed plans of reorganization. A hearing on confirmation of the competing plans has been scheduled for January 8, 2001. Joan has now filed a motion seeking the appointment of a commissioner to sell and distribute to Joan \$400,000 or forty percent, whichever is greater, of the aggregate of cash in bank accounts of Manchester Realty Company and the value of a National Life of Vermont life insurance policy allegedly owned by Manchester Realty Company.

Joan argues that she is entitled to a percentage of the cash and cash value of the life insurance policy for several reasons. First, Joan argues that the cash and the life insurance are Designated Assets under the terms of the Divorce Decree, specifically reading paragraphs VII and IX.5 together. Second, Joan contends that because the cash and the life insurance are Designated Assets, she is entitled to move for the

appointment of a commissioner pursuant to paragraph IX.6 of the Divorce Decree. Third, Joan argues that the Debtor is deemed to have assented to the motion in accordance with paragraph IX.6 of the Divorce Decree.

The Debtor objects to Joan's motion on several grounds. First, the Debtor argues that the insurance policy is owned by the Debtor not Manchester Realty Company, that the policy was collaterally assigned to Citizen Bank's predecessor-in-interest on December 20, 1995, and that the insurance policy is not a "Designated Asset." Second, the Debtor contends that Joan needs to obtain relief from the automatic stay to pursue the possession and control of property of the estate. Third, the Debtor argues that the motion is premature because (i) the Debtor's property settlement obligation may be discharged pursuant to section 523(a)(15) of the Bankruptcy Code in the adversary proceeding that was commenced by Joan, and (ii) to the extent that the Divorce Decree will be reaffirmed pursuant to the Debtor's plan, the plan has not yet been confirmed. Fourth, the Debtor contends that the motion is procedurally defective because the equitable relief requested (i.e., the appointment of a commissioner and the compelled sale of assets) must be sought in an adversary proceeding. Lastly, the Debtor argues that the cash in Manchester Realty Company may be needed to remodel Camco's stores, which could cost as much as three million dollars.

In her reply to the Debtor's objection, Joan makes three points. First, she contends that the life insurance policy is owned by Manchester Realty Company as demonstrated by the Debtor's representations and conduct during the course of the parties' dealings. Second, she argues that cash generated by Manchester Realty Company's real property is a Designated Asset and thus capable of being distributed by a commissioner. Third, Joan contends that the automatic stay and other procedural processes proposed by the Debtor do not apply because the cash and life insurance are not owned by the Debtor and are not property of the estate.

III. DISCUSSION

This case presents a unique situation in the experience of the Court. Both the Debtor and Joan contend that sufficient value and cash flows exist to render all secured creditors oversecured by a comfortable margin and sufficient liquid resources exist in the estate to pay all non-insider unsecured creditors in full with interest. The only dispute remaining in this case involves who will control the disposition of the remaining assets in order to effectuate the provisions of the property settlement in the Final Decree, the Debtor or Joan. Both parties have filed competing plans of reorganization.

After failing in her attempt to have this Court order the transfer of a fifty percent interest in real property owned by Manchester Realty Company to her during the first month of the case, Joan participated in the trial of the only other major issue in this case, the determination of whether the Debtor had entered into a binding prepetition contract with Joan and their son, Gregory, to transfer some of the real property of Manchester Realty Company and some of the Dunkin' Donuts franchises to them. After several preliminary hearings and four days of trial, this Court determined that no enforceable contract existed because the parties did not have a meeting of the minds with respect to all material terms of the contract. See Memorandum Opinion dated June 6, 2000 (Doc. No. 132) (the "Contract Opinion").

In the Contract Opinion, this Court found:

Under the terms of the Stipulation the parties divided all of the marital property into the following categories:

1. Life Insurance on the Debtor (Section VII);
2. Primary Residences (Section IX.4);
3. Joan Camann Parcels of Land (Section IX.4);
4. Camco, Inc. (Section IX.5.a);
5. Manchester Realty Co. (Section IX.5.b);
6. Lake Winnepesaukee Property (Section IX.5.c);
7. Hooksett Land (Section IX.5.d);
8. Household Furniture and Furnishings (Section X);
9. Other Personal Property (Section XI); and
10. Personal Motor Vehicles (Section XII).

Under the Stipulation, the assets in categories 3, 4, 5, 6 and 7 are referred to as the "Designated Assets."

Contract Opinion at 3. Notwithstanding this Court’s previous finding that the life insurance policies are not “Designated Assets” under the terms of the Stipulation, Joan now contends that both the life insurance policies and the cash in Manchester Realty Company are Designated Assets.¹

Under the terms of section VII of the Stipulation, the Debtor was given what amounts to a right of first refusal to purchase the life insurance policies on his life owned by Manchester Realty Company and Camco, Inc. “for an amount equal to their cash surrender values.” Under the terms of section IX.5 of the Stipulation, the “Designated Assets” are defined as the assets mentioned in the subsections of section IX.5 that follow in the Stipulation. Although the provisions of the Stipulation may not be a model of clarity, section IX.5.b provides:

If, as of May 1, 1996, [the Debtor] and Joan ... have not entered into any other arrangement concerning Manchester Realty Co., its real estate will be immediately placed on the market. The corporation will be dissolved in the same calendar year as the closing of the first sale of the property. [The Debtor] will not enter into a binding agreement to sell any real property of Manchester Realty Co. without Joan’s Consent.

The parties do not dispute that they did not enter into “any other arrangement” regarding Manchester Realty Company prior to May 1, 1996. Based upon this Court’s findings and rulings in the Contract Opinion, the parties did not enter into “any other arrangement” regarding Manchester Realty Company between May 1, 1996 and the petition date. Absent agreement to “any other arrangement” the Stipulation clearly contemplated that the real estate assets of Manchester Realty Company would be sold and, in the calendar year that the first real estate asset was sold, the corporation would be dissolved. Under the terms of section IX.5 of the Stipulation, all net proceeds from the sale of Designated Assets, subject to reserves for the payment of certain joint liabilities, were to be “split 50:50 between [the Debtor] and Joan” and the Debtor was to “promptly” remit to Joan her fifty percent share. Accordingly, absent another agreement, the Stipulation provided that the non-real estate assets of Manchester Realty Company were not to be paid out from the corporation until its dissolution. The provisions of section VII which gave the Debtor a right of

¹ Joan has appealed this Court’s Order entered in accordance with the findings and rulings set forth in the Contract Opinion and, accordingly, said Order is not yet final.

first refusal to purchase the life insurance policies confirm this interpretation of the Stipulation because it requires the Debtor to pay the full amount of the cash value of such policies even though he would ultimately be entitled to one-half of their value. If the parties had intended to permit distributions from Manchester Realty Company prior to its dissolution, the Debtor would have been permitted to purchase any life insurance policies by paying Joan her fifty percent interest in such policy and assigning the policy to himself. However, that is not what the parties did in the Stipulation. When viewed in its entirety, it appears that the parties intended that the non-real estate assets of Manchester Realty Company remain in the corporation until its dissolution.

The foregoing analysis was the basis for this Court's finding in the Contract Opinion that the life insurance was not a Designated Asset under the terms of the Stipulation. Joan has not presented any argument or analysis which warrants a different finding for purposes of this motion. Since the non-real estate assets of Manchester Realty Company are not Designated Assets, Joan would have no right outside of bankruptcy to compel the sale and distribution of such assets by a commissioner under the provisions of the Stipulation. Since hearings on the parties' competing plans of reorganization are scheduled to begin early next month, this Court sees no reason to consider any interim distribution of assets to the parties at this time.

IV. ORDER

The Court hereby denies the “Assented to Motion to Appoint Commissioner to Sell Non-Real Estate Assets of Manchester Realty Company” filed by Joan Camann. 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 order consistent with this opinion.

DONE and ORDERED this 15th day of December, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge