UNITED STATES BANKRUPTCY COURT
WESTERN DIVISION OF TENNESSEE
WESTERN DIVISION

In re

LARRY PAUL CONWAY,

Debtor.

Case No. 02-23559-L
Chapter 11

OPINION

BEFORE THE COURT is the motion of Eliot Cohen, Executor of the Estate of Stanley M. Cohen, deceased, and Successor Trustee to Stanley M. Cohen ("Cohen"), for relief from the automatic stay. The motion raises a number of issues arising out of a quit claim deed that attempted to convey twelve unspecified acres within a larger tract of land from Jacmar Enterprises, Inc. ("Jacmar") to Larry Paul Conway ("Conway"). After hearing the testimony of witnesses and reviewing the record, including post-hearing briefs submitted by the parties, the Court concludes that the motion should be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

I. FACTUAL HISTORY

Jacmar purchased unimproved real property in two tracts known as the Lakewood Hills Subdivision (the "Lakewood Property") from Cohen on September 10, 1997, for a purchase price of $234,000. A portion of the purchase price was paid by a promissory note in the amount of $192,000 secured by a lien of a deed of trust on the property. The Debtor claims to be the owner of a 30% interest in Jacmar, valued at $3,500,000 at Schedule B filed in connection with his bankruptcy case, although his statement of financial affairs lists no businesses in which he is an officer, director, partner or managing executive, or of which he owns five percent or more of the voting securities. At the time of the purchase of real property by Jacmar, the Debtor signed the promissory note as

president. It is not clear, when, if ever, the Debtor ceased to be president of Jacmar. The promissory note called for monthly payments of interest at 8% per annum from November 10, 1997, to October 10, 1999; followed by monthly payments of interest at 9% per annum from November 10, 1999, to October 10, 2004; together with annual payments of principal in the amount of $10,000 on December 31 of each year beginning December 1998, with the note payable in full on October 10, 2004.

Jacmar defaulted in payments of interest and principal as early as 1997. On June 21, 2000, Jacmar filed a voluntary Chapter 11 case, which was dismissed on February 9, 2001, pursuant to a motion filed by the United States Trustee prior to a hearing on Cohen's motion for relief from the automatic stay. On June 26, 2001, Jacmar purported to convey to the Debtor "Twelve (12) Acres Ownership...in and to the following described real estate, to-wit: Property Address: Vacant Land, Memphis, Tennessee, Lakewood Drive, Lakewood Hills 1st Addition." The description went on to incorporate two exhibits, which contain the legal descriptions of the two parcels comprising the Lakewood Property. The deed was signed by Marilyn Conway, the Debtor's wife, as vice president of Jacmar, and recites actual consideration for the transfer of $10.00. The deed was not recorded until August 17, 2001.

On November 7, 2001, the Debtor filed his own Chapter 11 case under cause number 01-37379, which case was dismissed on January 29, 2002. Following the dismissal of the bankruptcy cases of Jacmar and Larry Conway, Cohen scheduled a foreclosure sale of the Lakewood Property for February 27, 2002. On February 26, 2002, Larry Conway filed the instant Chapter 11 case.

On April 23, 2002, Cohen filed his motion for relief from the automatic stay alleging that the Debtor has no legal or equitable interest in the Lakewood Property, and thus that the Lakewood Property is not property of the bankruptcy estate of Larry Conway. The court conducted a hearing on August 12, 2002, at which both the Debtor and Marilyn Conway admitted that no particular twelve acres has ever been identified to the quit claim deed, but that in the Debtor's opinion, the deed was intended to convey an undivided interest in the property and that the conveyance resulted from Jacmar's attempt to obtain release of a portion of the Lakewood Property from the deed of trust held by Cohen. At the close of the hearing, the Court asked the parties to brief three issues: (1) Is the conveyance of twelve unspecified acres within a larger specified tract sufficient under Tennessee law to convey an undivided interest in the larger tract of land? (2) Is a quit claim deed that contains an inadequate description of the land to be conveyed void or voidable under Tennessee law? (3) Is a quit claim deed that contains an inadequate description of the land to be conveyed sufficient to convey an equitable interest in property under Tennessee law?

II. ANALYSIS

It is clear that the Debtor is not a party to either the promissory note or the deed of trust held by Cohen, and thus that the Debtor has no personal liability for the obligation to Cohen. If the Debtor owes no debt to Cohen and if the Debtor owns no interest, legal or equitable, in the Lakewood Property, the automatic stay does not prevent Cohen from foreclosing his deed of trust, for in that event, the attempt to foreclose does not relate to a lien that secures a claim against the Debtor, and the Lakewood Property is neither property of the estate nor property of the Debtor. *See*

11 U.S.C. § 362(a)(3), (4), (5), and (6). Property of the estate consists of a debtor's legal and equitable interests in property as of the commencement of the bankruptcy case. *See* 11 U.S.C. § 541(a)(1). The filing of a bankruptcy case does not expand a debtor's interest in property, rather, "[t]he estate succeeds to property only to the extent of the right and title possessed by the prepetition debtor." *Emerson v. Maples (In re Mark Benskin & Co., Inc.)*, 161 B.R. 644, 653 (W.D. Tenn. 1993), citing *United States v. Whiting Pools*, 462 U.S. 198, 204, n.8, 103 S.Ct. 2309, 2313 n.8 (1983). Whether or not the prepetition debtor had an interest in property is determined pursuant to state law. *See Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918 (1979).

Under Tennessee law, instruments purporting to convey an interest in land must contain a description of the property. *See* TENN. CODE ANN. § 66-5-103. To be valid, a deed "must designate the land intended to be conveyed with reasonable certainty." *CC Holdings (Tennessee), Inc. v. Tennessee Gas Transport, Inc. (In re Tennessee Gas Transport, Inc.)*, 169 B.R. 643, 644-45 (Bankr. M.D. Tenn. 1994) quoting *Phoenix Mutual Life Insurance Co. v. Kingston Bank & Trust Co.,* 172 Tenn. 335, 112 S.W.2d 381, 382 (1938) (other citations omitted). To determine whether the description is sufficient, the court looks to "whether a surveyor with the deed before him and with or without the aid of extrinsic evidence can locate the land and establish the boundaries." *Tennessee Gas Transport*, 169 B.R. at 645 (citations omitted). In order to determine whether extrinsic evidence may be used, the following standard is used:

> Where an instrument is so drawn that, upon its face, it refers necessarily to some existing tract of land, and its terms can be applied to that tract only, parol evidence may be employed to show where the tract so mentioned is located. But where the

> description employed, is one that must necessarily apply with equal exactness to any one of an indefinite number of tracts, parol evidence is not admissible to show that the parties intended to designate a particular tract by the description.

Dobson v. Litton, 45 Tenn. 616 (1868) quoted in *West Tennessee Gas Transport,* 169 B.R. at 645.

In this case, the conveyance of twelve acres does not refer to any one existing tract of land, but could refer to any twelve-acre tract within the larger tracts comprising the Lakewood Property. Therefore, under the *Dobson* test, extrinsic evidence is not admissible to show that the parties intended to designate a particular tract of land. Based upon these facts, the deed would be void for failure to contain an adequate description of the property to be conveyed *unless* the effect of the deed is not to convey a *particular* tract but to convey an *undivided interest* in the whole tract.

The Debtor's testimony confirmed that no particular tract of land was intended to be conveyed, but rather that the quit claim deed was meant to convey an undivided interest in the real estate owned by Jacmar to himself. Mrs. Conway testified that she signed the conveyance from Jacmar to Mr. Conway because "Mr. Conway owns 30% of Jacmar and has a right to twelve acres." Mrs. Conway further testified that the twelve acres was based upon the note and deed of trust which calls for partial release of property from the deed of trust upon payment of a release fee of $2,400 per acre. Mrs. Conway appears to have conflated two separate requests made by Mr. Conway to Cohen on or about July 1, 2001: (1) for a partial release from the deed of trust, and (2) for permission to transfer a portion of the Lakewood Property from Jacmar to Mr. Conway. In the record is a letter from Mr. Allen C. Dunstan to Mr. Larry E. Parrish which references a "facsimile letter of July 1, 2001, regarding a request to release certain property from the lien of the Deed of Trust."

Trial Exhibit 8. The letter of July 1, 2001, is not a part of the record. Based upon the contents of Mr. Dunstan's letter, however, it appears that Mr. Dunstan represented Cohen and Mr. Parrish represented Jacmar and/or Mr. Conway. Mr. Dunstan's letter indicates that before the request for release of acreage can be considered, clarification is needed as to the application of payments made by Mr. Conway and a survey is needed indicating the acres sought to be released. Mr. Dunstan requests that Mr. Parrish have Mr. Conway forward to him a copy of a survey and request for the acreage so that he can discuss it with Mr. Cohen. The letter further indicates that Mr. Parrish had requested the Cohens' approval for a portion of the property to be quit claimed back to Mr. Conway. The letter requests information concerning the creditworthiness and development experience of the proposed transferee to enable the Cohens to consider this additional request. Unbeknownst to Mr. Dunstan, of course, Jacmar, by Mrs. Conway, had already executed the quit claim deed to Mr. Conway.

The Court must therefore determine whether an attempt to convey twelve unspecified acres within a larger tract of land is sufficient to convey an undivided interest in the whole. The rule in Tennessee, and indeed the general rule, is that "where a deed of a given quantity of land, parcel of a large tract, does not locate it by its description, the purchaser becomes a tenant in common *pro rata* in the whole parcel." *Maury v. Brown*, 85 Tenn. 358, 1 Pickle 358, 3 S.W. 175, 175 (1887) quoting 1 WASHBURN ON PROPERTY (4th Ed.) 654; *see also Seguin v. Maloney,* 198 Or. 272, 253 P.2d 252, 282 (1953) ("The more modern rule, and the one which we believe is the better and more equitable, is that where there is a conveyance of a stated acreage or other designated quantity of land

out of the larger tract, without particularly attempting to locate or describe the smaller tract, the conveyance operates as an undivided interest in the whole."); *Turner v. Hunt*, 131 Tex. 492, 496, 116 S.W.2d 688, 690 (1938) ("The general rule is that, when a deed conveys a certain number of acres out of a tract containing a greater number of acres, the grantee acquires under the deed and at the time of delivery an undivided interest in the whole tract measured by the proportion which the number of acres conveyed bears to the number of acres in the tract."); *Hodge v. Bennett*, 78 Miss. 868, 29 So. 766, 766 (1901) ("But if a grantor, intending to convey, not a specific tract of land particularly described, but to convey a certain quantity or number of acres of land out of a larger quantity or number of acres of land, makes a deed to such quantity or number of acres out of a larger quantity or number of acres of land, the grantee does take an undivided interest in the whole land as tenant in common with the grantor, and his interest is measured by the proportion which the number of acres conveyed to him bears to the whole number of acres in the tract; and this interest he may have set apart to him in severalty by proper partition proceedings."); *and see* W.W. Allen, Annotation, *Validity and effect of deed which purports to convey specified acreage or quantity of land out of a larger tract, with or without a right of selection expressed*, 117 A.L.R. 1072 (1938).

Cohen attempts to distinguish two cases relied upon by the Debtor, *Gratz v, Land River Imp. Co.*, 82 F. 381 (W.D. Wis. 1897) and *Hodge v. Bennett,* 78 Miss. 868, 29 So. 766, 766 (1901), on the basis that the conveyance in both cases was expressed to be an "undivided" interest. Cohen is correct, but it does not appear that this precise language was necessary to the outcome of either case. Rather, as stated above, the general rule requires only that the deed convey a definite number of

acres or other definite quantity of land within a larger tract and that no intent to convey a particular tract of land known to the parties appears. This rule is subordinate to the still more general rule that "a deed should be held to pass some interest if such effect may be given to it consistently with the law and the terms of the instrument." Allen, 117 A.L.R. at 1072.

Likewise, Cohen's attempt to distinguish the Tennessee case *Brown v. Maury* is unconvincing. Cohen argues that *Brown* requires the conveyance of an aliquot part of a larger tract in order to give rise to an undivided interest in the whole, meaning that the larger tract must be exactly divisible by the smaller. This is clearly not the case. In *Brown* the smaller tract consisted of 200 acres and the larger of 900; nine hundred is not exactly divisible by 200. Rather, in *Brown*, the court referenced WASHBURN ON PROPERTY for the announcement of two similar rules, one concerning the conveyance of an aliquot part of land and the other, the one relied upon by the court, the general rule quoted above: "[W]here a deed of a given quantity of land, parcel of a large tract, does not locate it by its description, the purchaser becomes a tenant in common *pro rata* in the whole parcel." *Brown*, 3 S.W. at 176. The subsequent case cited by Cohen, *Brier Hill Collieries v. Pile*, distinguished *Brown* not on the basis of any requirement that an aliquot part be conveyed, but upon a presence of substantially different facts. The actual ruling in *Brown* was that where a mortgagor agreed "to mortgage 200 acres of her land lying west of the Hillsborough turnpike,"(her land actually consisting of 900 acres), the mortgagee was vested with an undivided two-ninths interest in the 900 acre tract, and upon sale for satisfaction of the balance due, the purchaser would become

a tenant in common with the mortgagor to the extent of an undivided two-ninths of the 900 acres. *Brown*, 3 S.W. at 175.

There is nothing in the quit claim deed given by Jacmar to indicate an intention by the grantor to convey a specified parcel of land. Indeed the language chosen, "Twelve (12) Acres Ownership," is consistent with Mr. Conway's testimony that the intent was to convey an undivided interest. Therefore, applying the general rule, the quit claim deed conveyed to the Debtor an undivided interest in the property of Jacmar in the proportion that 12 acres bears to the total acreage in the property, which is variously reported to be 87.52 acres or 79 acres. Attached to the quit claim deed are the legal descriptions for the two parcels that make up the Lakewood property. The description of Parcel 1 indicates that it consists of 77.52 acres. The description of Parcel 2 contains no specification of acreage, so that the Court cannot determine the fractional ownership held by the bankruptcy estate. The Debtor testified that he believed the quit claim deed conveyed to him a 25% interest in 79 acres, but 25% of 79 acres is 19.75 acres. The Court nevertheless concludes that the bankruptcy estate has an undivided interest in the Lakewood Property in the percentage that 12 acres bears to the total acreage of the larger tracts, whatever that is. The Court need not consider the remaining issues it requested to be briefed by the parties as this conclusion is dispositive of the question of the Debtor's Lakewood Property. The Court expresses no opinion about whether the conveyance is subject to being set aside as a conveyance in fraud of creditors of Jacmar.

At the hearing to consider its motion, Cohen relied almost exclusively on the argument that the automatic stay did not prevent foreclosure of his deed of trust because the property was not

property of this Debtor's bankruptcy estate. This argument fails. In his motion, Cohen also argued that the Debtor had no equity in the property and that it was not necessary for an effective reorganization. *See* 11 U.S.C. § 362(d)(2). The Court will briefly consider this argument. Upon a motion for relief from the automatic stay, the creditor bears the burden of demonstrating lack of equity, and the Debtor bears the burden of proof on all other issues.. 11 U.S.C. § 362(g)(1).

The original purchase price for the property was $250,000. Neither side presented competent proof of the present value of the property. As the property consists of unimproved land, the Court has no reason to believe that the value of the property has declined. The Court finds for purposes of this hearing only that the value of the entire Lakewood Property is not less than $250,000. Mr. Stuart Cohen testified that the current principal balance due under the note given by Jacmar is $160,069.59. In addition to this amount, Mr. Cohen testified that there was a pre-petition arrearage in payments in the amount of $18,053.56 and a post-petition arrearage in the amount of $5,077.92. The arrearages undoubtedly consist of both principal and interest, but no attempt was made by Mr. Cohen to segregate the interest from principal. Even if the total amount of the arrearages was added to the principal balance, however, the total outstanding indebtedness appears to be significantly below $250,000. Cohen also introduced proof of three additional liens against the property securing an indebtedness owed to Helm Enterprises, Inc., but provided no proof concerning the amount, if any, of the outstanding indebtedness owed to Helm. Although the Debtor is not indebted to Cohen, the Debtor's interest in the Lakewood Property is encumbered by any liens prior to the conveyance to him. Cohen failed to show that the total indebtedness secured by these liens exceeds the value

of the property, thus Cohen failed to demonstrate that the Debtor has no equity in the property. As a result, the Court need not consider whether the property is necessary to an effective reorganization of the Debtor, but merely notes that the Debtor insists that it is.

For the foregoing reasons, the motion for relief from the automatic stay should be denied. The Court will prepare a separate order consistent with this opinion.

BY THE COURT,

_____
JENNIE D. LATTA
United States Bankruptcy Judge
Dated: _____

cc: Larry Paul Conway
Wanda Abioto
Alan Harkavy
United States Trustee