

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

**DEAN LAWRENCE and
CARMELLA LAWRENCE,

Debtors.**

BK. NO. 91-23255

CHAPTER 13

DECISION AND ORDER

BACKGROUND

On November 20, 1991 the debtors, Dean Lawrence and Carmella Lawrence (the "Debtors"), filed a voluntary petition initiating a Chapter 13 case. On Schedule B and in Item #6 of their Statement of Affairs the Debtors listed as a joint asset a \$3,500 cash under-taking filed by them with the Monroe County Clerk to secure their appeal of a New York State Supreme Court ("Supreme Court") judgment entered against them in favor of a Polvino Construction Company, Inc. ("Polvino Construction"). On Schedule F the Debtors listed Polvino Construction as an unsecured creditor in the amount of \$14,749.

On March 18, 1992 Polvino Construction filed a Proof of Claim in the amount of \$14,739 plus interest based on a July 16, 1991 Judgment Upon Decision of the Appellate Division Fourth Judicial Department of the Supreme Court (the "Appellate Division"). The claim of Polvino Construction, filed as a secured claim, included a copy of a July 2, 1990 Order of the Appellate Division which required that the Debtors post a bond or cash in the amount of \$3,500 as a condition to their appealing an Order of Eviction granting Polvino Construction, as plaintiff-landlord, possession of certain leased premises. The Order provided that the bond or cash was to guarantee that if the validity of the Order of Eviction were upheld on appeal or upon final judgment, the Debtors would pay to Polvino Construction the sum of \$200 per month for the occupancy of the premises from the date of issuance of the Order of Eviction until the date the Debtors vacated the premises, together with the costs of the appeal. Pursuant to that Appellate Division Order, the defendants paid \$3,500 into the Monroe County Treasurer, as required by New York law. Pursuant

to Article 26 of the New York Civil Practice Law and Rules ("CPLR") such funds can only be paid out pursuant to a subsequent court order. Furthermore, Section 2601(c) of the CPLR provides: "Title to funds paid into Court. Title for the benefit of interested parties is vested in the County Treasurer to whom any security is transferred pursuant to this Article." The July 16, 1991 judgment in favor of Polvino Construction in the amount of \$14,739 included \$7,600 for post-eviction rent and \$700 for the costs of the appeal, amounts determined to be due by the Appellate Division in a March 8, 1991 Decision which affirmed the Order of Eviction.

By motion returnable November 20, 1991 Polvino Construction moved in the Supreme Court for an order which would direct the payment to Polvino Construction of the funds on hand with the Monroe County Treasurer. On the return date of the motion the Debtors filed their Chapter 13 petition thereby staying the motion. May 20, 1992 was set as the date for the hearing on confirmation of the Debtors' proposed plan. By motion dated May 12, 1992 and returnable on the confirmation date, Polvino Construction moved for an Order granting it relief from the automatic stay pursuant to 11 U.S.C. §362 so that it could prosecute its pending motion in Supreme Court for an order directing the payment of the funds on deposit with the Monroe County Treasurer.

On May 20, 1992 the modified plan of the Debtors was confirmed. The plan provides for the payment to the Chapter 13 Trustee of \$345.00 per month over a three-year term plus the payment to the Trustee of the funds on deposit with the Monroe County Treasurer. The Debtors contend in response to the Polvino Construction motion for relief from the stay that the funds on deposit with the Monroe County Treasurer are property of the estate within the meaning of 11 U.S.C. §541(a)(1) which should be paid over to the Trustee and distributed to all creditors, including Polvino Construction. Without the payment to the Trustee of the funds on deposit it is estimated that the Debtors' confirmed plan will pay unsecured creditors approximately 36% of their claims.

DISCUSSION

11 U.S.C. §541(a)(1) provides that upon the filing of a petition for bankruptcy an estate is created which is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. It is clear from the House and Senate Reports on Section 541 of the Bankruptcy Code that the intended scope is very broad. United States v. Whiting Pools, Inc., 462 U.S. 198, 204-205, 103 S.Ct. 2309, 2313-14 (1983). However, the courts are divided on the question of whether a supersedeas bond is property of the estate within the meaning of Section 541. In re Southmark Corp., 138 B.R. 820, 827 (Bankr. N.D.Tex. 1991). See In re Fleming-Roberts Corp., Ltd., 60 B.R. 353 (Bankr. S.D.Tex. 1986) (bond is property of estate); In re North American Marketing Corp., 24 B.R. 16 (Bankr. S.D.Fla. 1982) (not property of estate); Borman v. Raymark Industries, 946 F.2d 1031 (3d Cir. 1991) (is property of estate.) This Court agrees with those courts that hold that funds on deposit as a supersedeas bond, voluntarily made by a debtor as a condition to pursuing an appeal, are property of the debtor's estate under 11 U.S.C. §541 when the appeal process has not been completed and the final entitlement to the funds is not clear. Borman, 946 F.2d at 1034. However, to the extent that an interest in property is limited in the hands of the debtor, it is equally limited as property of the estate. In such cases the Debtors' interest and the interests of the estate in the funds on deposit as a supersedeas bond would be limited by the specific conditions of the Court order directing the deposit and the applicable law which provides for the holding of the funds and the conditions for their ultimate disposition.

In this case, since the appeal process was completed, a subsequent judgment was entered which establishes the right of Polvino Construction to the funds on deposit (the rent was unpaid and appeal costs were incurred in an amount greater than the funds on deposit) and the Debtors' schedules do not list the judgment as paid or indicate that it will otherwise be paid, the only order the Supreme Court could make on Polvino Construction's pending motion would be to direct that the funds be paid to Polvino Construction. Therefore, on the facts of this case the funds on deposit

