UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

THOMAS W. CULBERT
d/b/a EXECUTIVE ENTERPRISES

BK 90-11602 K

Debtor

DECISION AND ORDER ALLOWING CLAIM

This matter came to be heard upon the Chapter 13 Debtor's objection to a $35,000 Proof of Claim (Claim #9) for breach of a land contract under which the Claimants, Mr. and Mrs. Larry Evert, were the contract buyers. Before the filing of the Debtor's chapter 13 petition, the subject land had been lost to foreclosure because (it is asserted) of the failure of the Debtor-Seller to make regular payments to the mortgagee of the property while he was receiving payments from the Claimants.

The Debtor objects to the amount claimed by the Everts. He agrees that they are entitled to a claim for the $3,000 downpayment they made upon the land, for $1,224.25 in monthly payments applied to the $35,000 principal amount of the contract, and to either (1) the $5,000 difference between the estimated market value of the property ($40,000) and the $35,000 purchase price under the land contract, or (2) the $6,673.00 in materials purchased by the Claimants to improve the property. The Claimants, however, have sought both the increase in market value and the cost of repairs or improvements, and they additionally seek $2,820 as the reasonable costs of labor performed by them in improving the property, as well as taxes, insurance, and other carrying costs of

maintaining the property in reliance upon the land contract up to the time they were dispossessed as a result of the foreclosure.

The Court conducted an evidentiary hearing. In addition to the above facts, it was determined that there was a period of time during which the Claimant's had rented-out the property and earned rental income, apparently in excess of carrying costs, in the amount of $1,279.50.

The parties have briefed the issues presented in this matter. In the Debtor's brief it is submitted that the claim should be allowed as follows: $3,000 downpayment, $1,244 in payments upon principal, and $5,000 increase in market value, less $1,279.50 in rental income above carrying costs received by the Claimants from renting out the subject property. This would total $7,964.50. The Debtor cites the case of *Battle v. Calavitta*, 132 Misc. 48, for the general proposition that where the purchaser of land under a contract has been in possession, and where he is permitted to collect the amount paid on the purchase price, the vendor is entitled to credit against this sum in the amount of rentals of the property in excess of carrying charges. The Debtor also appears to concur with the Claimants that pursuant to the case of *Walton v. Berry*, 120 N.Y. 79, if the Court were to find the Debtor's conduct in this transaction to have been tainted by fraud, certain additional damages could be awarded, namely, the $1,673 difference between the costs of materials used by the Claimants to improve the property and the $5,000 by which the value of the property was in fact improved. (The Debtor does not concede fraud, but leaves that

determination to the Court.)

The Court has some difficulty understanding the Claimants' brief, but it appears to argue firstly that the Debtor has failed to overcome the prima facie validity of the filed $35,000 claim and that consequently the claim should be allowed in that amount. This first argument I reject: the evidence introduced at hearing raises significant question as to the Claimants' entitlement to the full $35,000 claim which they asserted.

The brief alternatively appears to argue that the Claimants are entitled to (1) the $3,000 downpayment; (2) $2,833.95 which represents the difference between $8,226.90 paid to the Debtor and paid in taxes and insurance upon the property, on the one hand, and $5,392.95 representing the fair value of the Claimants' use and occupancy of the premises and net profits from their having rented to others, on the other hand; (3) the $5,000 increase in value of the property over the contract price; and (4) at least the $6,673 in materials used to improve the value of the property, if not that plus the additional $2,820 fair value of labor attributed by the Claimants in making the improvements.

The disputed elements of damages appear to be grounded, comparing the briefs, in the Claimants' vigorous assertion of fraud or bad faith on the part of the Debtor, and the Claimants cite a number of cases which they insist support their position that when a land contract transaction is tainted by the breaching seller's fraud, then the buyer may recover all monies expended in reliance on the contract. Assuming, for the sake of argument that these

cases do support the Claimants' position, I am not persuaded by the Claimants' allegations of fraud.

They argue that a close examination of the land contract entered into by the parties herein reveals a pattern of deception by the Debtor-Seller. Principally they cite a July 17, 1987 sale contract which they state does not disclose the existence of a prior mortgage on the property and which calls for delivery of a warranty deed at closing, free and clear of liens and encumbrances. No such document was introduced in evidence. I do have in evidence a nine page land contract executed by the Debtor and by Lawrence Evert on the 29th of September, 1987, approximately two months after the date of the document referred to in the Claimants' brief. This September 29, 1987 land contract is attached to the Claimants' Proof of Claim and it quite expressly does disclose the existence of the prior mortgage. In fact, the ninth paragraph of that contract obligates the Seller to provide to the Buyer written proof of the payments made on the first mortgage whenever the Buyer requests it (so long as the Buyer has not defaulted in the Buyers' payments). Indeed the provision further obligates the Buyer to make payments on the mortgage if the Seller has not made them, and to take a credit against the land contract purchase price for any payments so made. Not only can it not be said, as of September 29, 1987, that the Debtor had failed to disclose the existence of the mortgage, but it can also be said that the loss of this real estate to foreclosure could have been prevented had the Claimants exercised their rights and fulfilled their obligations under that

provision of the signed land contract.

The Court further notes that that contract (like the July 17, 1987 document discussed in the brief) provides for clear title to be delivered at closing, but it expressly states at subparagraph C of the third paragraph that clear title will be delivered after all payments provided for by the land contract have been made, an event that was not to occur until October 1 of the year 2003, at which time (it may be presumed) the first mortgage would have been retired. (Passage of title at the end of the stream of payments is, of course, the essence of any "land contract". Thus, even as to the July 17, 1987 contract that is not in evidence, a promise therein to provide clear title "at closing" is simply a promise to provide clear title at the time that all payments have been properly and completely made, so long as the document was understood to be a "land contract".)

It is argued in the Debtor's brief, and the Court agrees, that the Claimants have not proven fraud on the Debtor's part, as opposed to mere "bad luck," with regard to this transaction and the loss of the property.

Consequently the Court need not address the question of whether the cases cited by the Claimants support their computation of damages. Simple contract damages apply. I do not, however, believe that the Court is precluded from awarding the Claimants a claim for the $6,673.00 cost of materials used in improving the premises, rather than the $5,000 increase in property value derived from a mere market value "estimate."

Claim #9 is allowed as an unsecured claim in the amount of $9,617.75, representing the downpayment, the principal payments, the cost of improvements, less rents received in excess of carrying costs.

IT IS SO ORDERED.

Dated: Buffalo, New York
December 24, 1991

s/
U.S.B.J.