UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

IN RE:

KGG, LLC, **Case No. 04-74550-11**

Debtor

BURNT CHIMNEY PROPERTIES, INC.,

Plaintiff

v. **Adversary Proceeding No. 05-07005**

KGG, LLC,

Defendant

DECISION AND ORDER

At Roanoke in said District this 28th day of March, 2005:

Facts

On February 24, 2004, Burnt Chimney Properties, Inc. (herein Burnt Chimney) and KGG, LLC (herein KGG) entered into a contract of sale for real estate whereby KGG agreed to sell Burnt Chimney property known as "Crazy Horse Marina and Campground" (herein the Property) for $3,600,000.00.[1] The contract provided for sale of real estate, fixtures, personal property, and assignment of leases. It scheduled a settlement date for May 24, 2004.[2] On March

[1] *See*, , AP docket entry 1, Exhibit A, Plaintiff's Motion to Remove to Bankruptcy Court dated January 10, 2005.

[2] *Id*, Exhibit B, Purchase Agreement, dated February 24, 2004.

19, 2004, the parties entered into another agreement whereby KGG acknowledged that Burnt Chimney met all its contractual obligations, in return for a $40,000.00 interest free loan to it from Burnt Chimney.[3] KGG failed to deliver the deed as required in the contract by May 24, 2004.[4]

On July 21, 2004, Burnt Chimneys filed a bill of complaint in Franklin County Circuit Court for specific performance (herein the Litigation). It was granted an injunction prohibiting KGG from selling the Property.[5] KGG formally terminated the contract in a letter dated July 30, 2004,[6] alleging that a *lis pendens* filed April 28, 2004, prohibited it from rendering good title.[7] KGG then filed a petition under Chapter 11 of the Bankruptcy Code on November 9, 2004.[8] The Chapter 11 estate has approximately $3.7 million worth of creditors' claims,[9] and the Property is the only asset of substantial value.

Discussion

Burnt Chimney seeks removal of the Litigation to this court pursuant to 28 U.S.C. section 1452 and Federal Rule of Bankruptcy Procedure 9027.[10] KGG opposes the removal action. KGG's position at a February 15, 2005 hearing in Roanoke is that Burnt Chimney filed

---

[3] *Id*, Exhibit C, Acknowledgment Agreement, dated March 19, 2004.

[4] *Id*, Exhibit D, Plaintiff's Bill of Complaint in Franklin County Circuit Court dated July 21, 2004.

[5] *Id*, Exhibit D.

[6] *Id*, Exhibit E, Transcript of hearing dated December 10, 2004, pages 5, 11.

[7] *Id*, Exhibit E, at 11, 34.

[8] *Id*, Exhibit A.

[9] *Id*, Exhibit E, page 15.

[10] *Id*, Exhibit A.

its application for removal on January 10, 2005, with the clerk of the bankruptcy court rather than with the clerk of the district court, that pursuant to Federal Bankruptcy Rule of Procedure 9027(a)(1) the removal needed to be filed with the clerk of the district court first, and that the 90-day time frame mandated by Rule 9027(a)(2) expired thereby barring removal.

KGG argues that the plain language of Rule 9027(a)(1) states that "notice of removal shall be filed with the *clerk for the district and division . . .*" and that, under Rule 9027(a)(2), the claim or cause of action must be filed 90 days after the order for relief has been granted. According to KGG's argument, Burnt Chimney's filing in the bankruptcy court instead of the district court, makes its application for removal procedurally defective and void. Moreover, since the 90-day window closed, KGG asserts that Burnt Chimneys is now forever unable to get the Litigation removed to this court.

In addition to a plain language argument, KGG relies on Sharp Electronics Corp., v. Deutsche Financial Servs. Corp., 222 B.R. 259, 261 (Bankr. D. Md. 1998) for the propositions that "removal must now be made to the district court in the first instance, rather than to the bankruptcy court" and that the addition of section 1452 "turned removal to the bankruptcy court into a two-step process, namely, removal to the district court and then reference to the bankruptcy court."[11] However, Sharp Electronics Corp. is distinguishable because it involves the issue of "whether a party to a civil action between *non-debtors in the United States District Court* has the right to remove the action to a bankruptcy court with nonexclusive jurisdiction." Sharp Elec. Corp. v. Deustche Fin. Serv. Corp., 222 B.R. 259, 260 (Bankr. D. Md. 1998). Because Sharp involves two non-debtors and because it involves removal of a case from the

[11] *See*, Exhibit A, Motion to Dismiss Application for Removal Filed by Burnt Chimneys Properties, Inc., page 2.

district court to the bankruptcy court, rather than from a state court to the bankruptcy court, it provides no assistance in deciding this case. Furthermore, Sharp is cited by Collier's for the proposition that "a proceeding may not be removed from the federal district court to a bankruptcy court in the same district," not that a party may not file a notice of removal with the bankruptcy clerk. 1-3 Collier on Bankruptcy ¶ 3.07 (Matthew Bender 15th ed. rev. 2004). Finally, Sharp has not been cited by another published opinion in this circuit and is not authoritative here.

Conversely, a majority of courts support Burnt Chimney's position that the notice of removal may be filed with the bankruptcy clerk rather than the district court clerk.[12] Also, Collier's states that "since Rule 9001(3) defines clerk as *the bankruptcy clerk*, and the bankruptcy court is a unit of the district court, so the notice of removal is filed with the bankruptcy clerk rather than the district court clerk." 10 Collier on Bankruptcy ¶ 9027.03 (Matthew Bender 15th ed. rev. 2004).

The rationale supporting this interpretation of Rule 9027 is threefold. First because Rule 9001(3) says "clerk means bankruptcy clerk, if one has been appointed, otherwise district clerk," Rule 9027(a)(1) is referring to the "bankruptcy clerk" when it mentions "clerk for the district and division." In re Boyer, 108 B.R. 19, 24 (Bankr. N.D.N.Y. 1988). Collier's comment on Rule 9001(3) states that the clerk referred to in numerous other rules is bankruptcy clerk, as long as one has been appointed. 10 Collier on Bankruptcy at ¶ 9001.03. Thus, it is logical to read Rule 9027 to mean clerk of the bankruptcy court.

---

[12] In re Gianakas, 56 Bankr. 747 (D.N.D. Ill. 1985), In re Adams, 133 B.R. 191, 193-194 (Bankr. W.D. Mich. 1991), In re Boyer, 108 B.R. 19, 24 (Bankr. N.D.N.Y. 1988), Hendersonville Condominium Homes, Inc. v. Contractors Performance Corp., 84 B.R. 510 (M.D. Tenn. 1988), In re Plowman, 218 B.R. 607, Footnote 4 (N.D. Ala. 1998) (Citing numerous authority).

Second, because 28 U.S.C. § 151 calls the bankruptcy court "a unit of this district court known as the bankruptcy court for this district," the clerk for the bankruptcy court constitutes the "clerk for the district and division" referred to in Rule 9027(a)(1). Hendersonville Condominium Homes, Inc. v. Contractors Performance Corp., 84 B.R. 510, 511 (M.D. Tenn. 1988). In other words, "as a unit of the District Court, the Bankruptcy Court is encompassed within the broader reference to the District Court when defining the proper forum for filing a removal petition." In re Adams, 133 B.R. 191, 193-194 (Bankr. W.D. Mich. 1991) (citing In re Gianakas, 56 Bankr. 747 (D.N.D. Ill. 1985)).

Third, 28 U.S.C. § 157(a) provides a general order of referral under which each district court may provide that any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be *referred* to the bankruptcy judges for the district. Id. at 193-194. As a result, notices of removal have been automatically referred to the bankruptcy courts.[13]

Altogether, the majority of courts, supported by Collier's, hold that notice for removal may be filed with the bankruptcy court, rather than the clerk of the district court. Even if Rule 9027(a) required the filing to be with the district court, "procedural aspects are simpler than the substantive basis for removal, and *literal compliance with the rule is not demanded.*" 10 Collier's on Bankruptcy at ¶ 9027.02, and Covington v. Indemnity Ins. Co. of North America, 251 F.2d 930, 932-33 (5th Cir. 1958) (holding it "basic law" that "removal proceedings are in the nature of process . . . and that mere modal or procedural defects are not jurisdictional and are

[13] The Western District of Virginia automatically refers all bankruptcy matters to the bankruptcy court. W.D. Va. Civ. O.B. 90, p. 29 (amended December 6, 1994).

completely without effect upon the removal, if the case is in its nature removable"). Based upon these authorities, this court holds that the Litigation was properly removed by Burnt Chimney.

Conclusion

Burnt Chimney's notice and motion for removal, dated January 10, 2005, was submitted properly to the Clerk of the Bankruptcy Court for the Western District of Virginia, and is in compliance with Federal Rule of Bankruptcy Procedure 9027(a)(1) and (2). The removed Litigation will be heard by this court. Accordingly, it is

ORDERED:

That the bill of complaint filed by Burnt Chimney Properties, Inc. against KGG, LLC, on July 21, 2004, in the Circuit Court of Franklin County for specific performance has been properly removed pursuant to Federal Rule of Bankruptcy Procedure 9027 for determination by this court.

Copies of this decision and order are to be mailed to Howard J. Beck, Jr., Esquire, P. O. Box 21584, Roanoke, Virginia, 24018, counsel for Burnt Chimney Properties, Inc.; to A. Carter Magee, P. O. Box 404, Roanoke, Virginia, 24003, counsel for KGG, LLC; to Office of the U. S. Trustee, First Campbell Square Building, 210 First Street, Suite 505, Roanoke, Virginia, 24011; and to George A. McLean, Esquire, P. O. Box 1264, Roanoke, Virginia, 24006, Trustee.

Ross W. Krumm

Ross W. Krumm
U. S. Bankruptcy Judge