

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

IN RE: LAMBERT OIL COMPANY, INC. )  
)  
) CHAPTER 7  
)  
) CASE NO. 03-01183-WSA  
)

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WILLIAM E. CALLAHAN, JR., TRUSTEE )  
)  
Plaintiff )

v. )

Adversary Proceeding No. )

MOUNTAIN EMPIRE OIL COMPANY, INC. )  
QUALITY PROPERTIES, L.P., and )  
S & T INVESTMENT COMPANY, LLC )  
Defendants )

04-07135 )

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MEMORANDUM DECISION

The matter before the Court is the Plaintiff's Second Motion For Leave To Amend Complaint filed on March 10, 2006, which the Defendants oppose. This adversary proceeding was commenced by a complaint filed on November 30, 2004. The relief sought in that complaint was to recover from one or more of the Defendants the value of their use and occupancy of two convenience stores owned by the Debtor which one or more of them had operated for more than two years prior to the closing of the Plaintiff's sale of such stores. In their responsive pleadings, the Defendants, which are commonly owned, took the position that any rights the Trustee had for such pre-sale rents were conveyed in the Trustee's deeds of conveyance because such claims were part of the bundle of ownership rights conveyed with the fee simple title to the properties and were not expressly excepted or excluded therefrom. On

August 18, 2005 the Plaintiff filed his first Motion to Amend his complaint and such Motion was granted by this Court's order entered September 13, 2005. The Trustee, to try and protect the bankruptcy estate from the legal position asserted by the Defendants in the event such position were determined by this Court to have any merit, then added a count to his complaint seeking reformation of the deeds of conveyance to express the alleged mutual intent of the parties that any claims for pre-sale rents were excepted from the conveyances. The Defendants filed their responsive pleadings to the amended complaint. On October 20, 2005 this Court entered a scheduling order which provided that all discovery was to be completed by February 17, 2006 and that any motions be filed by March 10, 2006. On that day the Trustee filed his Second Motion For Leave To Amend Complaint and the Defendants filed their Motion For Summary Judgment to the Amended Complaint.

The Motion For Summary Judgment was noticed for a hearing on March 22, 2006. The Plaintiff did not at that time notice the Motion To Amend for hearing. Both parties filed briefs supporting their respective positions regarding the summary judgment motion and the Court took the same under advisement. By its Memorandum Decision dated May 8, 2006 and Order entered the same date this Court denied the Motion For Summary Judgment and directed the Plaintiff to notice his Motion To Amend Complaint for a hearing if he still wished to proceed with it. He did so and the Court heard the arguments of counsel thereon in a telephone conference call held on June 29 at which time the Court took the matter under advisement and promised a written decision on same.

The Motion now before the Court seeks to add a new count under 11 U.S.C. § § 549 and 550 to the effect any purported transfer of any estate claims for pre-sale rents was not authorized by the Court and therefore would be avoidable by the Trustee as an unauthorized

post-filing transfer of property of the estate. In their Response to this Motion the Defendants assert in paragraph # 10 as follows:

Section 549 is not applicable to this case. Either the Trustee's right to be paid for pre-June 29, 2004 occupancy and possession, if any, was transferred pursuant to the authority of the Order (Docket #185) authorizing the sale of the property of the estate, in which case §549 would not apply, or the Order did not authorize the transfer of such right, in which case the Trustee would still retain possession of the right to collect rent.

In its Memorandum Decision upon the Defendants' Motion For Summary Judgment this Court determined and ruled that the deeds executed and delivered by the Trustee conveyed only the right permitting the grantees to recover only non-accrued rents due the Trustee and that such non-accrued rents, if any, could not exceed rent due for the month in which such conveyances occurred, and if the initial rent paid for the use and occupancy of the premises was payable in advance at the beginning of a particular lease month, there were no non-accrued rents transferred by such deeds.

#### CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. Proceedings to recover property of the bankruptcy estate are "core" bankruptcy proceedings pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O).

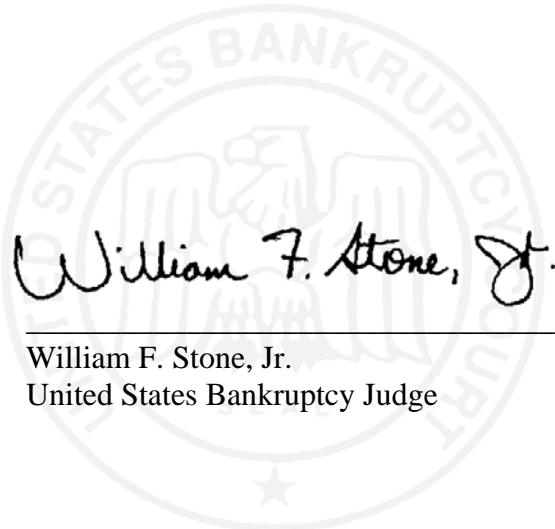
Federal Rule of Bankruptcy Procedure 7015 provides that leave to amend pleadings "shall be freely given when justice so requires." The trial court is entrusted with "sound discretion" in deciding whether or not such a motion should be granted. *See Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). The count which the Trustee seeks to add to his complaint would add a theory of recovery which could have been asserted in the first amended complaint and in the Court's view is not one which facts later revealed in discovery made applicable. The

Defendants' position that pre-sale rents were conveyed incident to the deeds of conveyance of title to the underlying properties has not changed, although the exact nature of counsel's legal arguments may not have been entirely clear to the Trustee at the beginning. Nevertheless, no persuasive rationale has been offered to the Court as to why this particular theory of recovery was not discernible by the Trustee when he sought and obtained the right to file his first amended complaint. This Court concludes upon the rationale stated below that the "ends of justice" do not require that the Second Motion For Leave To Amend Complaint be granted.

The Court agrees with counsel for the Defendants that by its express terms section 549 does not apply to transfers authorized by the Court. The sale and conveyance of the properties in question were certainly approved by this Court. If the conveyance of fee simple title to such properties did include the right to collect non-accrued rents, such right properly passed to the grantees, subject to the Trustee's asserted claim in Count Two of the Amended Complaint. The Defendants have expressly acknowledged in their Response to the Trustee's Motion that if the Court's approval of the transactions in question did not include the right to collect and retain pre-sale rents, "the Trustee would still retain possession of the right to collect rent." Accordingly, the Court concludes that the Defendants would be estopped to argue that the Trustee's proper cause of action, if any, is one under sections 549 and 550 of the Code. Therefore, no amendment of the amended complaint is necessary to protect the Trustee's right to collect pre-sale rent if the Court's approval of the sale transaction did not extend to the transfer of any separate and distinct claims for such rent.

By separate order the Court will deny the Plaintiff's Second Motion For Leave To Amend Complaint and will set this proceeding for trial.

This 30th day of June, 2006.

The seal of the United States Bankruptcy Court is visible in the background. It is a circular emblem with the words "UNITED STATES BANKRUPTCY COURT" around the perimeter. In the center, there is an eagle with its wings spread, perched on a shield. Below the eagle is a five-pointed star.

*William F. Stone, Jr.*

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William F. Stone, Jr.  
United States Bankruptcy Judge