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**UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA**

In Re)
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JOE LOUIS CALDWELL,)
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)
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Debtor.)
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)
JOE LOUIS CALDWELL,)
)
)
Plaintiff,)
)
v.)
)
BETTER CHOICE INVESTMENTS,)
LLC, et al.,)
)
)
Defendant.)
)
)

Chapter 13 Proceedings
Case No. BR-05-12076-PHX-CGC
Adversary No. 05-00740

**UNDER ADVISEMENT DECISION
RE: TRIAL ON ADVERSARY
PROCEEDING, STAY RELIEF
MOTION, AND OBJECTION TO
CLAIMED EXEMPTION**

On April 26, 2006, the parties appeared before the Court for trial on three related matters:
1. Debtor’s adversary complaint (05-740); 2. Defendant Tristan K Moreland’s (“Moreland”) Motion for Relief from the Automatic Stay; and 3. Moreland’s Objection to Claimed Exemption. Resolution of these three matters hinges on the validity of two, simultaneously executed Purchase and Sale Agreements, Residential Lease Agreements, and Options to Purchase Real Property entered into between Debtor and Defendant Taken Care of Investments, LLC, (“TCOI”) in November, 2004. If the transactions are upheld as valid, Defendant Moreland’s objection to Debtor’s claimed homestead exemption will be sustained and the stay relief motion will be rendered moot. If the Court finds the transactions to be fraudulent or avoidable as pled in Debtor’s adversary complaint, then the Court must address Moreland’s stay relief motion and objection to exemption.

For the most part, the facts are undisputed. Debtor Joe Louis Caldwell owned two properties at 14 and 15 East Pebble Beach Drive, Tempe, Arizona (hereinafter referred to as Units

1 14 and 15 respectively). Debtor lived in Unit 15 and a family member lived in Unit 14. At the
2 time of the transaction at issue, around November 11, 2004, Unit 14 was encumbered by a deed
3 of trust in favor of Citifinancial Mortgage Company, Inc. and Unit 15 was encumbered by deeds
4 of trust in favor of Countrywide Home Loan, Conseco/Greentree, and Household Realty
5 Corporation.

6 On March 29, 2004, Debtor filed a voluntary Chapter 13 case (04-5266-GBN) to stay the
7 trustees' sales of the two Units. Both Countrywide and Citifinancial sought stay relief to foreclose
8 on their respective security interests. Both motions were granted. Trustees' sales were scheduled
9 for September 20, 2004, on Unit 14 and November 26, 2004, on Unit 15 (after several
10 continuances). Prior to these scheduled sale dates, Debtor's case was dismissed by the Court, on
11 November 9, 2004, for Debtor's failure to comply with the Trustee's Recommendations. Debtor
12 did not challenge the dismissal, however, as he himself wanted to dismiss the case.

13 The reason Debtor did not object to dismissal was because he wanted to enter into an
14 agreement with TCOI whereby TCOI would assist Debtor in paying the arrearages on the two
15 properties and stopping the scheduled trustees' sales. Soon after the case was dismissed, on
16 November 11, 2004, Debtor entered into two nearly identical Purchase and Sale Agreements with
17 TCOI, whereby Debtor agreed to quit claim Units 14 and 15 to TCOI in exchange for TCOI
18 either paying off all existing liens on the properties or bringing current all arrears, and remaining
19 current on all future mortgage payments.¹ In addition, Debtor would remain in possession of the
20

21 ¹The parties acknowledge a discrepancy in the Purchase Agreements as to whether TCOI agreed
22 to payoff all existing liens or simply bring the accounts current and remain current. Paragraph 2 of
23 the Purchase and Sale Agreements provide that the purchase price included "[p]ayoffs of existing
24 deeds of trust and/or judgments encumbering the property to be paid to the respective lienholders
25 &/or judgment holders." On page 2, however, the Purchase and Sale Agreements stated that "[t]he
26 property is being purchased subject to all liens & encumbrances listed in 2(a) - 2(d) on page 1 on
27 this contract." While the Court believes the language of the documents indicates the loans should
28 have been paid off, the failure to do so has no meaningful effect on the transaction or on Debtor's
rights under the various agreements. As was testified to by Defendants at the hearing, whether the
existing mortgages were paid in full or simply brought current, Debtor still had the option to
repurchase the property for the amount agreed upon at the time of, and as set forth in, the executed
Agreements. Whether Defendants paid the mortgages off, refinanced the properties, or simply
brought the loans current was a matter that only impacted Defendants' economic situation.

1 properties as a tenant and pay rent of \$3,500 a month to TCOI for the two Units. For a period
2 of one year, Debtor would have the option to repurchase the property at the price fixed in the
3 Option to Purchase Real Property. At the time of the transaction, the parties agreed to the
4 following encumbrances and repurchase prices:

5 Unit 14:

6 Encumbrances of \$167,500

7 Repurchase price of \$205,000

8 Unit 15:

9 Encumbrances of \$184,463

10 Repurchase price of \$192,800

11 Several days after the transaction was completed, TCOI assigned all of its rights and
12 responsibilities under the above described agreements and quit claimed its interest in the properties
13 to Moreland and his company Better Choice Investments, LLC (“BCI”). Moreland paid TCOI
14 \$4,000 in consideration of such conveyance and assignment. Debtor learned of this conveyance
15 in February, 2005, when he attempted to “refinance” the property in order to repurchase the two
16 Units.

17 In March, 2005, Countrywide recorded a notice of trustee’s sale on Unit 15 with a July 5,
18 2005, sale date. The trustee’s sale was set because there was some apparent confusion over the
19 payment of Countrywide’s loan by Moreland and BCI, as TCOI’s successor. According to
20 Defendant Moreland’s testimony, the payments to Countrywide were made by automatic payments
21 from its Wells Fargo account. For some unknown reason, Countrywide returned a number of
22 payments to Wells Fargo. Due to the timing of the returned payments, it took several months for
23 Moreland and BCI to discover and, by that time, Countrywide was listing the account as in
24 default. Once the problem was discovered, the account was brought current and the trustee’s sale
25 cancelled. Debtor does not dispute these facts.

26 As set forth by agreement of the parties, there are five issues currently before the Court:

27 Issue 1. Were the transfers of the property on November 11, 2004,
28 for reasonably equivalent value?

- 1 Issue 2. Were the Purchase and Sale Agreements executory contracts
2 as opposed to executed contracts because TCOI and/or
 Moreland failed to pay off the encumbrances?
- 3 Issue 3. Did TCOI commit fraud and violate the implied covenant of
4 good faith and fair dealing when it recorded the Debtor Caldwell
 to TCOI deeds?
- 5 Issue 4. Is Debtor entitled to a homestead exemption in the properties?
- 6 Issue 5. Is BCI/Moreland entitled to relief form the automatic stay?

7 The Court addresses each in order.

8 **Issue 1**

9 Reasonably equivalent value is determined by looking at the totality of the circumstances,
10 such as the fair market value of the item or service received compared to the price paid, the arms-
11 length nature of the transaction, and the good faith of the transferee. *See Barber v. Golden Seed*
12 *Co., Inc.*, 129 F.3d 382 (7th Cir. 1997). There is no dispute here that the deal struck between
13 Debtor and TCOI was an arms' length transaction. Debtor also admits receiving benefits from
14 TCOI in exchange for quit claiming the property to TCOI. Such consideration included being
15 relieved of any and all obligation to pay the arrearages owing on the two properties, which the
16 undisputed evidence at the hearing established to be in the neighborhood of \$68,000. Debtor was
17 also relieved from any continuing obligation on the underlying mortgages, which remained in the
18 neighborhood of \$350,000. In addition, the pending foreclosure sales were stopped, allowing him
19 to dismiss his bankruptcy. In addition, he admitted that there was value to him and his family in
20 being allowed to remain in the properties under two Residential Lease Agreements and in having
21 the option to repurchase the two properties for a period of one year. As Debtor himself stated at
22 the hearing, this gave him breathing room for a year to get his finances together, repurchase the
23 property and be on his way.

24 On Defendant's side, there was compelling evidence presented that it spent approximately
25 \$68,000 to reinstate the mortgages on the two Units. In addition, while there is some dispute as
26 to whether TCOI was to payoff all of the underlying mortgages or simply bring the loans current
27 (and keep them current), the result for Debtor was the same – He was relieved by way of
28 agreement with TCOI of all responsibility for these debts. Additional evidence presented at the

1 hearing, and not disputed by Debtor, supports Defendant's contention that it made monthly
2 mortgage payments to the various lien holders of approximately \$22,000 over the course of the
3 year. This was in addition to the \$68,000 it spent to bring the accounts current and an additional
4 \$17,000 paid to reinstate the loans in April and July of 2005.

5 The fact that Debtor paid \$3,500 a month to rent the properties back from TCOI, which
6 exceeded what he owed the lien holders in monthly mortgage payments by about \$330.00, does
7 not render the consideration illusory. The value was the release of the nearly \$350,000 in liens
8 against him, the release of approximately \$68,000 in arrears owed by him and the stopping of the
9 already-scheduled foreclosure sales by the lien holders. He was then given a year, as he described
10 at the hearing, to collect himself and get himself back on his feet. His failure to remain current
11 on his monthly rental payments and successfully repurchase the property at the end of the year
12 does not unravel the reasonably equivalent value he received at the time of the transaction.

13 **Issue 2**

14 The Court also agrees with Defendants that these contracts were not executory. An
15 executory contract is one in which obligations remain owing on both sides: "A contract under
16 which the obligation of both the bankrupt and the other party to the contract are so far
17 unperformed that the failure of either to complete the performance would constitute a material
18 breach excusing the performance of the other." Countryman, Executory Contract in Bankruptcy:
19 Part I, 57 Minn. L. Rev. 439, 460 (1973).

20 The Agreements here were substantially performed. Debtor quit claimed the property to
21 Defendant and Defendant, in turn, cured the arrears and made the monthly payments on the
22 underlying mortgages. While there was a time during which payments from Defendant to
23 Countrywide were for some unexplained reason being returned and not properly credited to the
24 loan, the evidence establishes that Defendant regularly and timely made all payments and was
25 unaware that the payments were being returned. Once Defendants learned of the problem in
26 Debtor's bankruptcy, it reinstated the loan by paying the \$8,000 in arrears.

27 Debtor's option to purchase at the end of the year and the Residential Lease Agreement
28 does not render the Purchase and Sale Agreements executory either. There is no evidence in the

1 record that this was not a simple, outright sale of the property in exchange for a lease back
2 provision and an option to purchase.

3 **Issue 3**

4 Regarding Debtor's claim that TCOI committed fraud and violated the implied covenant
5 of good faith and fair dealing in recording the quit claim deed, the Court similarly finds for
6 Defendants. Debtor presented no evidence in this case that TCOI, or its assignees, engaged in any
7 fraudulent behavior. The record establishes that there was no prior relationship between Debtor
8 and TCOI when this deal was struck. Debtor conferred with counsel before making the deal to
9 make sure he would be able to repurchase the property at the end of one year. He was advised
10 that he could do so as long as he remained current on his monthly rental payments. Such option
11 was preserved upon transfer of the property from TCOI to Moreland and BCI. Moreland and BCI
12 indicated to Debtor that they would honor that option.

13 The subsequent transfer of the property and lease agreement to Defendant Moreland also
14 did not violate any agreement the parties had. The testimony was that the transfer from TCOI to
15 Moreland and his company BCI was an arms' length transaction for consideration. There was no
16 language in the various documents or oral representations made by TCOI to Debtor that it could
17 not or would not transfer the properties to another entity. As mentioned above, the fact that the
18 properties were transferred to Moreland and BCI did not change the deal to which Debtor had
19 agreed. Defendant Moreland through BCI in fact responded to Debtor's inquiry as to the
20 repurchase of the properties in May, 2005, stating that the repurchase prices for the two Units
21 were \$205,500 and \$198,800 – the prices Debtor had agreed to with TCOI upon signing the
22 Purchase and Sale Agreements. Debtor's misunderstanding of this fact seems to arise from his
23 attempt repurchase the properties by way of "refinancing" the properties. Debtor could not
24 obviously refinance properties to which he was not the current owner. What Debtor should have
25 been seeking was financing to repurchase the properties.


26 Debtor's claim that TCOI improperly recorded the deed of trust on the properties is also
27 simply not supported by any evidence. Debtor admitted in his joint pretrial statement, and again
28 at the hearing, that no such oral or written representation was ever made by TCOI or anyone else.

1 He also admitted that he never asking TCOI to hold off recording the quit claim deeds for a period
2 of one year. His contention was simply that he believed this was inferred from the terms of the
3 deal – that nothing would happen for one year. No such inference, however, can be made from
4 the documents. Debtor entered into Purchase and Sale Agreements – by definition Defendant was
5 buying and Debtor was selling the properties. The recording of the quit claim deeds is a logical
6 conclusion of such a transaction, especially in light of no language to the contrary. Debtor also
7 does not deny signing the quit claim deeds and makes no argument that he did not freely and
8 willingly enter into these transactions. The Residential Lease Agreements similarly do not contain
9 any language stating that as long as Debtor remains current on his lease obligations, no further
10 action will be taken with respect to recording to deeds of trust. There further is no obligation
11 under the law or otherwise for TCOI to inform Debtor that it would not be recording the quit
12 claim deeds.

13 In conclusion, the Court is sympathetic to Debtor’s predicament. However, that alone is
14 not sufficient grounds upon which to unravel an arms’ length, above-board agreement. There
15 must be clear and convincing evidence of fraud and it simply does not exist in this case. For these
16 reasons, the Court grants judgment in favor of Defendants and Debtor’s adversary proceeding is
17 dismissed with prejudice. As a result of such ruling, Debtor cannot claim a homestead exemption
18 in either of these properties. He does not own these properties. For the same reason, stay relief
19 is not necessary for Defendants to pursue their state law remedies with respect to the properties.
20 Counsel for Defendants is to lodge a form of order consistent with this decision for the Court’s
21 signature.

22 So ordered.

23
24 DATED: June 12, 2006

25 
26 CHARLES G. CHASE II
27 United States Bankruptcy Judge
28

1 **COPY** of the foregoing served by the BNC to:

2 Vincent R. Mayr
3 Law Offices of Vincent R. Mayr, Ltd.
4 1534 W. McDowell Rd.
5 Phoenix, Arizona 85007
6 Attorney for Debtor

7 Nick Rayes
8 Law Office of Nick Rayes, PC
9 4410 N. Arcadia Lane
10 Phoenix, Arizona 85018
11 Attorney for Moreland and Better Choice Investments, LLC

12 Alan L. Tipton
13 Kelley Tipton & Whelan, PC
14 2058 S. Dobson Rd., suite 9
15 Mesa, Arizona 85202
16 Attorneys for Defendant Taken Care of Investment, LLC

17 Edward J. Maney
18 P.O. Box 14034
19 Phoenix, Arizona 85064-0434
20 Chapter 13 Trustee
21 Office of U.S. Trustee
22 230 N. First Avenue, Suite 204
23 Phoenix, Arizona 85003
24
25
26
27
28