UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MICHIGAN MILLING CO-OP, LTD., dba DAILY GRIND FLOUR MILL, Debtor. _____/	Case No. DL 03-01273 Hon. Scott W. Dales Chapter 7
SYCAMORE CREEK LAND DEVELOPMENT CO. LLC, MARKUS HELD, and L. LYNN BALL, Plaintiffs, v. ORGANIC BEAN AND GRAIN, INC., MARK VOLLMAR, and MICHAEL W. PUERNER, Chapter 7 Trustee, Defendants. _____/	Adversary Proceeding No. 06-80562

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION AND JURISDICTIONAL STATEMENT

On April 24, 2008, in Lansing, Michigan, I conducted a trial on the Complaint of Plaintiffs Sycamore Creek Land Development Co. LLC ("Sycamore Creek"), Markus Held ("Held"), and L. Lynn Ball ("Ball") (collectively the "Plaintiffs") against Organic Bean and Grain, Inc. (the "Buyer"), Mark Vollmar ("Vollmar"), and Michael W. Puerner, Chapter 7 Trustee of the estate of Michigan

Milling Co-Op, Ltd. (the "Trustee," and with the Buyer and Vollmar, collectively referred to as the "Defendants"). Michigan Milling Co-Op, Ltd. (the "Debtor") is not a party to this proceeding.

The court has jurisdiction under 28 U.S.C. §§ 1334(b) and 959. This matter is a core proceeding as described in 28 U.S.C. § 157(b)(2)(A), (N), and (O).

II. ISSUE FOR DECISION

The issue before me is whether a certain furnace and related electrical box formerly located at real estate belonging to Sycamore Creek qualified as either personal property or fixtures when the Trustee sold the Debtor's *personal property* to the Buyer pursuant to 11 U.S.C. § 363(b).

The following constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52. In reaching my determinations, I have considered the pleadings filed by the parties, the demeanor and credibility of witnesses, and the exhibits properly admitted into evidence.

III. MATERIAL FACTS

Sun Ray Milling Corporation ("Sun Ray") owned real property located at 4205 W. Columbia Rd., Mason, Michigan (the "Property"). The Debtor was interested in moving its operations to the Property and as a result, Sun Ray and the Debtor decided to form a third entity – Sycamore Creek -- and convey the

Property to it. In turn, Sun Ray and the Debtor each leased from Sycamore Creek one half of the buildings and land for their respective businesses.

The Debtor used the premises to mill grain and beans and other raw materials. Because milling generates flammable airborne dust, the Debtor required a specially adapted non-explosive furnace to heat the milling site area. The Debtor purchased just such a furnace (the "Furnace") and installed it as one of several leasehold improvements related to Sycamore Creek's building (the "Building"). Although no party introduced a written lease between Sycamore Creek and the Debtor, according to Ball's uncontroverted testimony, the Debtor was obligated to purchase the Furnace under the lease, even though the Furnace was considered a leasehold improvement. This is a common commercial practice.

The Furnace was a non-explosive, electrical heating unit suspended from the ceiling and attached to the Property by at least three bolts and other fasteners, as Plaintiffs' Exhibit 3 depicts. The Furnace was connected to a special electrical box (the "Breaker Box") by wires fed through a conduit pipe also shown in Plaintiffs' Exhibit 3. The Breaker Box is comparable to electrical circuit breaker boxes found in most residences. According to Ball, who is a builder by trade and was involved in procuring the Furnace from an electrician, the Furnace was expected to last approximately 25 years.

Sometime after the Debtor purchased the Furnace, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The Trustee later obtained court approval to sell the Debtor's equipment and machinery. In the

weeks leading up to the sale, Vollmar visited the Building with the Trustee's attorney and others to inspect the proposed sale items. On one such visit, Vollmar inquired of Held whether the Furnace was included among the Debtor's machinery and equipment to be sold through the bankruptcy court. Held advised Vollmar that the Furnace and Breaker Box were Sycamore Creek's property, as they were part of the real estate, and therefore neither item would be included in the sale. Not satisfied with this response, and evidently eager to procure the Furnace and Breaker Box for the Buyer, Vollmar telephoned or wrote to the Trustee or his attorney to ask whether the Furnace and Breaker Box would be included in the sale.

The task of responding to Vollmar's inquiry fell to Emily Matthews ("Matthews"), a junior associate, and another attorney, Scott Chernich. Although Matthews did not specifically recall inspecting the Furnace and Breaker Box, she did remember performing legal research on whether the Furnace and Breaker Box were personal property, or part of the real estate. She concluded that both items were personal property and, in a letter to Vollmar (Plaintiffs' Ex. 6), advised that the "electrical box and heater are not fixtures, and will be sold as part of the equipment sale."

In making the decision to purchase the Debtor's machinery and equipment from the Trustee, the Buyer and its agents relied on this letter, and did not speak further to Held or Ball about the Furnace and Breaker Box. The Honorable James D. Gregg entered an order (the "Sale Order") approving the sale of the

Debtor's "equipment and machinery" to the Buyer pursuant to 11 U.S.C. § 363 on July 25, 2003.

No party offered as evidence any listing of property included in the bankruptcy sale, nor did any witness recall such a listing. From the relatively modest price of $17,500.00 that the Debtor's machinery and equipment fetched at the auction, I assume that making a detailed inventory did not strike the Trustee as worthwhile. Evidently, the Trustee, the Plaintiffs, and prospective purchasers proceeded informally at the time of the pre-sale inspection by orally identifying items, such as specific racks, that would be excluded from the sale.

After the sale, the Buyer removed the Furnace and Breaker Box from the Building. At that time, the Furnace was two years old. Because Plaintiffs were attempting to sell the real estate to a third-party who had inspected the Building before the Buyer removed the Furnace and Breaker Box, Plaintiffs felt compelled to obtain replacements for these items. As Plaintiffs' Exhibits 4 and 5 established, Sycamore Creek replaced the items for $3,950.00.

IV. GOVERNING LAW

My decision depends primarily upon Michigan real estate law governing fixtures, which Judge Gregg summarized in In re Cliff's Ridge Skiing Corp.,123 B.R. 753 (Bankr. W.D. Mich. 1991). In Michigan, whether personal property becomes a fixture and thereby part of realty is determined by a three-part test: (1) is the property annexed or attached to the realty, (2) is the attached property adapted or applied to the use of the realty, and (3) is it intended that the property

will be permanently attached to the realty? Cliff's Ridge, 123 B.R. at 759; John G. Cameron, Jr., Michigan Real Property Law Principles and Commentary § 4.3 (3rd ed. 2005) (It is well established in Michigan that in the absence of an agreement between the parties, this threefold test should be applied). From the testimony and exhibits, I conclude that the Furnace and Breaker Box were bolted to the Building, and therefore physically "annexed or attached" to the realty. The Debtor needed to heat the space for its employees' comfort, but needed a particular type of heating unit adapted to the use of the facility because the milling process generated flammable, airborne dust. Therefore, I find that the Furnace and Breaker Box were adapted and applied to the use of the real estate as a milling facility.

Moreover, Ball testified that the Furnace was supposed to last 25 years, a substantial period of time, tending to show its permanent nature. Common sense and experience also persuade me that, as a general matter, furnaces and circuit breakers are so closely related to real estate that they are commonly regarded as permanent. I conclude that Sycamore Creek and the Debtor (and the natural persons related to these entities, including Held and Ball), intended that the Furnace and Breaker Box be permanently attached to the real estate. These items were fixtures within the meaning of Michigan property law, and therefore part of the real estate.

Because the Furnace and the Breaker Box were fixtures, they were not included within the property of the Debtor's bankruptcy estate, and not included

in the sale from the Trustee to the Buyer. They belonged to Sycamore Creek when the Buyer removed them from the Building.

The only remaining issue is whether the Defendants can avoid liability under 11 U.S.C. § 363(m). I conclude they cannot. The Buyer does not qualify as a good faith purchaser because the testimony clearly established that it had notice of Sycamore Creek's claim that the Furnace and Breaker Box were fixtures, and therefore not within the "equipment and machinery" to be sold. The letter from the Trustee's counsel does not undercut a finding of notice of the claim; it confirms it. Indeed, having taken no steps to seek agreement from Sycamore Creek or clarification from the court after receiving the letter but before the sale, the Buyer assumed the risk of relying on the letter.

As confirmed in the Sale Order, the Trustee disclaimed warranties of "any kind," a broad disclaimer embracing title warranties. See Sale Order at p. 2. Further, the Trustee did not have the authority to decide whether the Furnace and Breaker Box were included within the property of the Debtor's estate. Only the court had that authority. See 28 U.S.C. § 1334(e) (court has exclusive jurisdiction over property of the estate). Nor did the Trustee have authority to sell property other than "property of the estate." See 11 U.S.C. § 363(b). Because the Furnace and Breaker Box were fixtures and therefore part of the real estate, and because the Debtor owned no real estate, it follows that the Trustee lacked authority to sell the Furnace and Breaker Box to the Buyer.

I discount Vollmar's reliance on the Trustee's letter because he knew the Plaintiffs viewed the matter quite differently, yet he communicated no further with

them about the dispute. Perhaps if he had shared the letter with them, or if Trustee's counsel had copied them on the letter, I might be more inclined to find the equities favored the Defendants. Even then, as noted above, the Sale Order prescribed that the Trustee sell the machinery and equipment "with no warranties of any kind made by the Trustee." See Sale Order at p. 2.

For their part, the Plaintiffs did not have the benefit of any specific property listing giving them notice that the Trustee intended to sell the Furnace and Breaker Box. They told Vollmar of their position before the auction, and heard nothing further from him to dispute it. The first time they knew the Furnace and Breaker Box were at issue was after the Buyer had removed them from the Building. I cannot fault Held and Ball for trusting Vollmar, though in retrospect their reliance seems to have been misplaced. Therefore, I find that Vollmar recklessly seized on the letter as a pretense for purchasing property that he knew the Plaintiffs continued to claim and the ownership of which they would continue to dispute. This is sharp practice – not the conduct of one who purchases at a bankruptcy sale in "good faith" within the meaning of 11 U.S.C. § 363(m).

As for the measure of damages, because the Furnace and Breaker Box qualify as fixtures, the rule governing damage to real estate, not personalty, applies, and directs me to order replacement value. Strzelecki v. Blaser's Lakeside Industries of Rice Lake, Inc., 133 Mich. App. 191, 348 N.W.2d 311 (1984). Consequently, Sycamore Creek suffered $3,950.00 in damages. (Plaintiffs' Ex. 4 & 5).

V. DISPOSITION

The judgment based on this opinion will run in favor of Sycamore Creek only, because the parties stipulated that it is the entity that owned the real property at the relevant time. Although the other Plaintiffs may have had ownership interests in Sycamore Creek, corporate law teaches that they did not have an interest in the property of Sycamore Creek itself. Sycamore Creek suffered a direct injury to the Property; Held and Ball did not.

Furthermore, I am satisfied that the judgment should be entered against the Buyer and Vollmar because Vollmar personally and directly participated in conduct amounting to waste against Sycamore Creek's Property for the Buyer's benefit. An Individual who acts for the benefit of an artificial entity cannot avoid responsibility for his own tort just because he committed the tort in the service of another. The law of agency is clear on this point. Joy Management Co. v. City of Detroit, 183 Mich. App. 334, 340, 455 N.W.2d 55 (1990); see also Attorney General v. Ankersen, 148 Mich. App. 524, 557, 385 N.W.2d 658 (1986); Trail Clinic, P.C. v. Bloch, 114 Mich. App. 700, 709, 319 N.W.2d 638 (1982); Warren Tool Co. v. Stephenson, 11 Mich. App. 274, 300-01, 161 N.W.2d 133 (1968).

Finally, there was no evidence that the Trustee participated in removing the Furnace and Breaker Box, and the Plaintiffs did not file a claim against the bankruptcy estate. Therefore, Plaintiffs shall not recover against the Trustee.

For these reasons, judgment shall enter in favor of Sycamore Creek against the Buyer and Vollmar in the amount of $3,950.00.

Dated: April 30, 2008
at Grand Rapids, Michigan

_____
Scott W. Dales
United States Bankruptcy Judge