UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1613
Summary Calendar

IN THE MATTER OF: PRESTONWOOD CROSSING INVESTORS, LTD., Debtor.

PRESTONWOOD CROSSING INVESTORS, LTD.

Appellant,

VERSUS

RESOLUTION TRUST CORPORATION,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(3:92-CV-1967-G)

(January 4, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges

PER CURIAM*:

Appellant Prestonwood Crossing Investors, Ltd. ("Prestonwood") challenges the bankruptcy court's order classifying a debt for $96,052.37 as a recourse debt. Finding no reversible error, we

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

affirm.

I

FACTS AND PROCEEDINGS

The facts underlying this case are undisputed. Prestonwood is a limited partnership that owned one apartment complex, the Prestonwood Crossing Apartments, in Dallas, Texas. In November 1984, Prestonwood executed a promissory note for $6,060,000 to First Savings and Loan Association of Fort Stockton ("the lender").[1] To secure payment of this note, Prestonwood executed a deed of trust. This deed of trust contained a security agreement and an assignment of rents and leases that granted the lender a lien on the apartments and the rental income derived from the operation of the apartments.

In May 1987, Prestonwood executed a reinstatement and modification of the note and the deed of trust, obligating Prestonwood to pay the lender the net operating income from the apartments as partial payment on the note. The deed of trust also contained an assignment of rents provision, which authorized Prestonwood to collect rents as trustee for the benefit of the

[1]Prestonwood and First Savings and Loan Association of Fort Stockton were the parties to the 1984 agreements. Prestonwood and Stockton Savings Association were the parties to the 1987 modifications. The RTC claims entitlement to the rights underlying these agreements as conservator for Southwest Federal Savings Association. Despite the ever changing name of the entity lending the funds, Prestonwood does not contest that the RTC validly acquired these rights. For the sake of clarity, we thus refer to all of these different entities simply as "the lender."

lender and to apply these rents to the payment of the note. Appellee Resolution Trust Corporation ("RTC") is the successor in interest to the lender.

The "Non Personal Liability" section in the note provides that Prestonwood shall be liable only to the extent of the security given. The note also contains, however, an exception to this limitation:

> It is provided further that this exculpatory provision shall not extend to [Prestonwood's] wrongful appropriation of any property serving as security for this Note or any rentals, security deposits, insurance proceeds, condemnation proceeds or any other sums of a similar nature to its own use if [the RTC] shall be entitled thereto or to any intentional act of [Prestonwood], the result of which is to deprive the [RTC] of any security for this loan . . . .

On February 1, 1990, Prestonwood defaulted on its obligations to the RTC under the note. Although unable to pay the full amount of the note installments, Prestonwood did pay the RTC--until December 1990--the net operating income from the apartments. During this period Prestonwood attempted to sell the apartments or to otherwise restructure its debts. Prestonwood was unsuccessful in these attempts and apparently embarked on a new course: In December 1990, and January and February 1991, Prestonwood collected rents but failed to remit them to the RTC. The rents collected for these three months totaled $96,052.37. The recourse classification of this sum is the focus of this appeal.

On February 4, 1991, Prestonwood filed its Chapter 11 bankruptcy petition. In schedules filed with the bankruptcy court, Prestonwood listed the RTC's claim on the unremitted rents as

"nonrecourse." The RTC did not file a "proof of claim" challenging this classification and instead, in February 1991, filed a "notice of perfection" of interest in rents, issues, and profits.[2] The RTC also made repeated demands on Prestonwood to turn over the unremitted rents.

In February 1992, the apartments were sold and all creditors except for the RTC were paid in full. The RTC filed a Motion for Payment of Rents with the bankruptcy court, to which Prestonwood responded. The bankruptcy court conducted an evidentiary hearing on these motions. During this evidentiary hearing, the RTC disclosed that the original note had been lost in 1987.

The bankruptcy court concluded that the RTC was not required to file a proof of claim to avoid being bound by Prestonwood's characterization of the unremitted rents as "nonrecourse," and that Prestonwood's refusal to remit rents constituted a wrongful appropriation, making those unremitted rents a recourse debt under the note and the deed of trust. The bankruptcy court further concluded that the RTC owed no indemnification for the loss of the original note. Consequently, the bankruptcy court entered an order granting the RTC a recourse claim in the amount of $96,052.37, and commanding Prestonwood to pay this amount to the RTC within 15 days.

Prestonwood appealed the bankruptcy court's order to the district court, which affirmed. The district court agreed with the bankruptcy court that the RTC's failure to file a proof of claim

[2]The bar date for filing claims was June 5, 1991.

did not bind the RTC. Next--instead of classifying Prestonwood's refusal to remit rents as a wrongful appropriation--the district court concluded that Prestonwood committed an intentional act that deprived the RTC of its security under the note and deed of trust. The district court thus also classified the RTC's claim on the unremitted rents as a recourse debt. Finally, the district court concluded that the bankruptcy court did not abuse its discretion in refusing to order indemnification for the lost note. Prestonwood timely appealed.

II

ANALYSIS

A. The Procedural Hurdle

Prestonwood attempts to erect a procedural bar to the reclassification of RTC's claim. According to Prestonwood, the RTC's failure to file a proof of claim within the allotted period precludes the RTC from challenging Prestonwood's characterization of the claim by the RTC for the unremitted rents as "nonrecourse."

Section 1111(a) of the Bankruptcy Code provides in pertinent part that "[a] proof of claim is deemed filed . . . for any claim or interest that appears in the schedules . . . except a claim or interest that is scheduled as disputed, contingent, or unliquidated."[3] The procedural rules provide that "[t]he schedule of liabilities . . . shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not

[3]11 U.S.C. §1111(a) (emphasis added).

be necessary for a creditor . . . to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule."[4] Subdivision (c)(2) likewise states that a creditor must file when his claim is unscheduled, or when the claim is scheduled as disputed, contingent, or unliquidated.[5]

Prestonwood does not contend that it failed to schedule the RTC's claim; neither does it contend that it scheduled the RTC's claim as "disputed, contingent, or unliquidated." Finally, Prestonwood does not contend that the amount scheduled, as such, was inaccurate.[6] Thus, Prestonwood is reduced to arguing that we should judicially legislate a duty-to-challenge-the-characterization-of-the-claim defense into the Bankruptcy Code.

We decline Prestonwood's invitation. The statutory language relevant to this contention is straightforward: a proof of claim is deemed filed except when that scheduled claim is listed as disputed, contingent, or unliquidated. Prestonwood offers no rationale that would satisfy the "exceptionally heavy" burden needed to ignore this clear statutory language.[7] In contrast, we

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[4]FED R. BANKR. P. 3003 (b)(1).

[5]FED. R. BANKR. P. 3003 (c)(2).

[6]Prestonwood does raise the novel argument that misscheduling a claim as "nonrecourse" may somehow be considered as misscheduling the "amount" of the claim. As one would suspect, Prestonwood offers no plausible support for its attempted reinvention of language.

[7]See, Union Bank v. Wolas, 116 L.Ed.2d 514, 521 (1991) (holding that a litigant bears an "exceptionally heavy" burden to persuade a court that Congress intended a rule contrary to the clear language of the Bankruptcy Code); Patterson v. Shumate, 119 L.Ed.2d 519, 528 (1992) (noting same).

think it sound to uphold the RTC's expectation that the Bankruptcy Code means what it says.[8]

B. The Merits

The note on the apartments provides that the "Non Personal Liability" limitation "shall not extend to [Prestonwood's] wrongful appropriation of any . . . rentals to its own use if [the RTC] shall be entitled thereto or to any intentional act of [Prestonwood], the result of which is to deprive the [RTC] of any security for this loan. . . ." The deed of trust for this note provides that the collateral for this note includes "all proceeds arising from or by virtue of the . . . lease. . . of the Land, the Improvements and the Personal Property."

Prestonwood collected the rents for the three months preceding the filing of its Chapter 11 petition and then refused to remit these rents to the RTC. We agree with the district court that this collection and refusal to remit plainly was an "intentional act" depriving the RTC of the security (the assigned rents) for its

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[8]Lewis Carroll does not apply to the Bankruptcy Code. Compare:

> 'Then you should say what you mean,' the March Hare went on. 'I do,' Alice hastily replied; 'at least--at least I mean what I say--that's the same thing, you know.' 'Not the same thing a bit!' said the Hatter. 'Why, you might just as well say that "I see what I eat" is the same thing as "I eat what I see!" '

LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND, ch. 7 (1865).

Because we conclude that the RTC did not need to file a proof of claim here, we decline to address whether 1) the RTC's "notice of perfection" constitutes an informal proof of claim, or 2) the RTC's failure to file was "excusable neglect."

loan.[9] Consequently, we conclude that the balance due on the unremitted rents is properly classified as a recourse claim against Prestonwood.

C. The Indemnification Claim

Relying on §3.804 of the Texas Business and Commerce Code, Prestonwood claims that the RTC owes it indemnification because the RTC lost the original note. Section 3.804 provides:

> The Owner of an instrument which is lost, whether by destruction, theft, or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.[10]

The commentary to this section provides that "[t]here may be cases in which so much time has elapsed, or there is so little possible doubt as to the destruction of the instrument and its ownership that there is no good reason to provide the security. The requirement is therefore not an absolute one, and the matter is left to the discretion of the court."[11]

The note at issue was lost in 1987. Nothing indicates that any other holder of the note exists, and no one other than the RTC asserted a claim on the note during Prestonwood's bankruptcy.

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[9]We note that the district court--which was sitting here as an appellate court--was not limited to the grounds espoused by the bankruptcy court to sustain the bankruptcy court's order. See, e.g., Jaffke v. Dunham, 352 U.S. 280, 281 (1957) (holding that an appellate court may sustain the judgment of a lower court on any ground that finds support in the record).

[10]TEX. BUS. & COM. CODE ANN. §3.804 (Vernon 1968).

[11]Id.

Because Prestonwood's exposure to another claim on this note is remote, we agree with the district court that the bankruptcy court did not abuse its discretion when it refused to order the RTC to provide indemnity.

III

CONCLUSION

Prestonwood refused to remit rents to the RTC--rents over which the RTC had a valid security interest--and then attempted to remove these rents from the RTC's grasp by filing for bankruptcy while characterizing these rents as "nonrecourse." The plain language of the Bankruptcy Code clearly indicates that this characterization does not bind the RTC. Substantively, Prestonwood's intentional refusal to remit the rents warrants classifying the obligation to remit them as a recourse obligation. Finally, the bankruptcy court did not abuse its discretion in refusing to order indemnification here.

For the foregoing reasons, the order of the bankruptcy court is

AFFIRMED