UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
BRITISH AMERICAN HOMES, LLC,	)	Case No. 6:07-bk-5628-KSJ
	)	Chapter 7
Debtor.	)	
	)	
LEIGH RICHARD MEININGER, Trustee,	)	
	)	
Plaintiff,	)	Adversary No. 6:08-ap-00098
vs.	)	
	)	
CLASSIC REAL ESTATE VENTURES, INC.	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Chapter 7 trustee, Leigh Meininger, brought this adversary proceeding to "claw back" commissions of approximately $3.1 million paid to the debtor's real estate broker, Classic Real Estate Ventures, Inc. In short, the trustee contends that Classic is not entitled to keep its commissions because the debtor failed to construct, let alone close on, any of the 230 units in the Elliot's Landing development sold by Classic. After considering the evidence, the Court rejects the trustee's arguments and concludes that Classic is entitled to keep all of the commissions it received from the debtor.

Hudson Gabay formed the debtor, British American Homes, LLC, in September 2004. British American Homes' only endeavor was Elliott's Landing. The project was located near the tourist attractions in Central Florida, was intended to consist of villas and town homes, and was contemplated for sale to overseas investors, primarily residents of the United Kingdom would buy units for their own use and as an investment for short term vacation rentals.

Needing a broker to locate buyers, Mr. Gabay met Kevin Wardle, a real estate broker and manager for Classic, to discuss whether Classic, who specialized in sales of short term rental units to U.K. residents, was interested in acting as the sole broker for the project. On September 21, 2004, the debtor and Classic entered a real estate broker agreement that set forth the terms on which Classic would be paid commissions on sales of Elliot's Landing lots.[1]

The broker agreement provided that Classic would receive a commission of 12 percent of the sale price of a unit, with 6 percent to be paid shortly after Classic's delivery to the debtor of a signed purchase agreement and the purchaser's deposit. Classic would receive the other 6 percent after closing. As Mr. Wardle testified, the reason for the 6 percent "advance" commission was to pay for Classic's marketing and advertising costs both in the U.K. and in this country, which were substantial.[2] Accordingly, Classic included an invoice for its 6 percent advance commission each time it sent a signed purchase agreement and deposit to the debtor.[3] The parties thus intended that Classic would receive half of its total commission up front to compensate Classic for its marketing costs, with the remaining half to be paid only upon closing of a sale.

At the time the parties entered into the broker agreement, the debtor did not own the real estate for the project and had only basic conceptual drawings. The debtor began purchasing real estate in March 2005, and purchased the last piece of real property for Elliot's Landing on October 17, 2005.[4] Mr. Wardle testified he did not know whether the debtor owned all of the real estate for the project at the time Classic began selling lots for Elliot's Landing, but "everyone" always knew that the debtor would not start construction until late 2006, after the debtor finished construction drawings and obtained the necessary zoning and building permits. He further testified that the

[1] Plaintiff's Ex. 15.
[2] Mr. Wardle also testified that advertising costs in the U.K. are three times more costly than in the U.S.
[3] See Plaintiff's Ex. 1 at Ex. C.
[4] Plaintiff's Ex. 14.

purchasers were aware that actual construction would not begin for at least a year from signing a purchase agreement. No evidence contradicts this testimony.

Classic began selling units in Elliot's Landing in April 2005, and between April and August 2005, the debtor paid Classic $3,157,074[5] on the sale of over 230 units. Although not provided in the broker agreement, the parties agreed that the debtor would pay Classic for the advance commissions within five days of the debtor's receipt of an invoice. Although the debtor initially timely paid Classic its advance commissions, by September 2005, the debtor was past due on many payments due to Classic. Mr. Wardle threatened legal action; Classic stopped selling lots on behalf of the debtor at some point in September 2005. Gabay formally fired Classic in October 2005.

In January 2006, Classic filed a lawsuit[6] against the debtor in the Circuit Court of the Ninth Judicial Circuit in Osceola County, Florida, to recover unpaid advances from the debtor in the amount of $639,624. After some litigation, the parties reached a settlement agreement that provided Classic was entitled to a judgment of $500,000 entered in its favor against the debtor in the event the debtor timely failed to pay a lesser amount. The debtor indeed failed to pay Classic, and, on November 2, 2006, Classic received a final judgment in its favor in the amount of $500,000.[7]

At no time did the debtor ever begin construction on Elliot's Landing; nor was the land for the project ever properly zoned for short term vacation housing.[8] Mr. Gabay simply never built the project, even though he received approximately $12-$15 million in purchaser deposits. Significant questions exist as to how Mr. Gabay used these monies and the veracity of his intentions.

[5] The parties have stipulated to this amount.
[6] Case no. CI-06-CI-000153. See Plaintiff's Ex. 1. for a copy of the complaint.
[7] Plaintiff's Ex. 5.
[8] The land was zoned for agricultural use, according to the trustee.

Beginning in March 2006, purchasers began demanding that the debtor refund their respective deposits, which the debtor never did. A group of purchasers eventually filed a class action suit against the debtor and Mr. Gabay in the Circuit Court of Miami Dade County, Florida.[9] Then, on November 8, 2007, certain purchasers filed an involuntary bankruptcy petition before this Court forcing the debtor into bankruptcy.

Many purchasers have timely filed proofs of claims for the return of their deposits. The total amount of claims against the debtor's estate is approximately $10 million, while the estate currently holds funds in the amount of $436,822.97. Without question, Mr. Gabay and the debtor's actions have significantly harmed these individual investors. The investors have suffered a huge loss. The primary issue in this adversary proceeding, however, is whether, and to what extent, Classic is responsible for this loss.

The trustee filed this adversary proceeding to recoup the $3.1 million in advances the debtor paid to Classic, arguing, under various fraudulent transfer and unjust enrichment theories, that Classic is not entitled to the advances because the sales of the units never closed. Specifically, the trustee raises the following legal theories:

> Count I—Turnover/Monetary Damages under §§ 541 and 542 of the Bankruptcy Code
>
> Count II—Unjust Enrichment
>
> Count III/ IV—Fraudulent Transfer under § 548(a)(1)(B) and Request for Judgment
>
> Count V/VI —Fraudulent Transfer under Fla. Stat. 726 and Request for Judgment
>
> Count VII/ VIII—Fraudulent/Negligent Misrepresentations under § 544 and Fla. Stat. § 726 and Request for Judgment
>
> Count IX—Fraudulent Transfer under Fla. Stat. § 726 (re the judgment lien)

The Court will address each Count in turn.

[9] Case No. 06-22198-CA-5

In Count I, the trustee seeks the turnover of property of the estate, arguing that Classic is not entitled to keep the advances because they were not "earned" under the broker agreement insofar as the sales never closed. This is a matter of contract interpretation. The broker agreement between the debtor and Classic reads, in pertinent part, that the debtor shall pay Classic:

> a sales commission of 12 percent on each unit sold by Classic…said 12 percent commission shall be paid upon full completion and closure of each sale agreement and full price has been paid…British American Homes LLC., [sic] agrees to pay an advance to Classic…equal to, but not in access [sic] of, 50 percent of said above mentioned 12 percent sales commission upon or only after 20 percent down payment on any given unit has been received and said 20 percent down payment has by enforcement and in accordance with sales agreement generated by British American Homes LLC., entered into [sic] time period whereby said 20 percent is not refundable.[10]

Under the plain language of the agreement, Classic was entitled to a 6 percent advance upon delivering to the debtor a signed purchase agreement and the purchaser's 20 percent down payment. The evidence established and the Court finds that the 6 percent advance was to compensate Classic for its expensive advertising and marketing costs incurred in finding U.K. citizens willing to sign the sales contract and to make a 20 percent down payment on a unit they knew would not be built for at least one year. Classic was very successful in its efforts, locating over 230 interested buyers. For example, Classic paid the cost of flying buyers from Britain to Florida to spend several days in the area visiting the local attractions and seeing the future site of Elliott's Landing. Classic incurred substantial costs in obtaining its many buyers.

The question, then, is whether Classic is entitled to keep the commissions it received when the debtor failed to actually build the promised units. Nothing in the agreement required Classic to return the advances or entitled the debtor to request the monies back. This makes sense when the purpose for the advances was to pay Classic's marketing and advertising costs. As Mr. Wardle testified, Classic was not just acting as the debtor's real estate broker; it was also incurring

[10] Plaintiff's Ex. 15.

significant marketing and advertising costs. Because closing on the units was not anticipated for more than a year from the time of sales, Classic needed the advance commissions to continue marketing the project.

Moreover, in the absence of a written agreement otherwise, and under Florida law, a real estate broker earns a commission when, at a minimum, "he produces a purchaser who is ready, willing and able to purchase under terms fixed by the seller."[11] Closing is not a requirement under Florida law for a broker to be entitled to compensation. Classic earned its advances upon delivery to the debtor of a signed purchase agreement and down-payment. The contingency under the broker agreement was that Classic may or may not receive the remaining 6 percent commission depending on whether the sale closed or not. Classic earned its advances paid by the debtor and is not required to turnover any funds to the trustee. The Court rejects the trustee's argument in Count I.

Under Count II, the trustee argues that Classic was unjustly enriched by keeping the advance commissions, again contending they were not earned. To state a claim for unjust enrichment under Florida law, a plaintiff must show (1) that the plaintiff conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.[12] Although the trustee has met the first three of these elements, he has failed to show why it would be inequitable for Classic to retain the advance commissions.

Classic incurred significant costs in locating its buyers. The broker agreement between the parties expressly allowed Classic to receive the 6 percent advance commissions. Although it is very unfortunate that Mr. Gabay, in effect, swindled the purchasers Classic brought into this mess by

[11] *Banks Real Estate Corporation v. Gordon*, 353 So.2d 859,860 (Fla. 3d DCA 1978).
[12] *Nova Info. Sys., Inc. v. Greenwich Ins. Co.*, 365 F.3d 996, 1006-07 (11th Cir. 2004).

misappropriating the deposit monies, nothing in the evidence indicates that Classic was involved in any misconduct or fraud. Rather, the trustee argues that, but for Classic's efforts, Mr. Gabay would never have located the buyers to swindle, and, as a result, Classic should return the advance commissions.

The Court rejects the trustee's argument, finding that Classic and the purchasers were *both* swindled by Mr. Gabay. Classic was not a partner in the fraud, but rather a victim itself. The trustee provided no evidence that Mr. Wardle or anyone else at Classic was aware of, or complicit in, Mr. Gabay's misdeeds. To the contrary, Classic sued the debtor in state court and received a judgment for the advance commissions still owed. The state court judgment establishes that the debtor owes Classic over $500,000 and that Classic, like the buyers, is an unpaid creditor of the debtor. Classic earned and is entitled to the advance commissions it received, as well as those still due from the debtor. The Court finds no inequity in allowing Classic to retain the monies, designed primarily to reimburse it for its advertising and marketing costs, and rejects the trustee's argument on Count II.

The trustee's constructive fraudulent transfer claims under Counts III and V,[13] brought under § 548(a)(1)(B)(i) of the Bankruptcy Code and Fla. Stat. § 726.105(b), likewise fail. In order to succeed, the trustee must show that the debtor received less than reasonably equivalent value for the transfer (the payment of the commissions to Classic) while the debtor was insolvent or that the debtor became insolvent as a result of the transfer.[14] Under both the Bankruptcy Code and the Florida Statutes, "value" is given for a transfer or obligation if, in exchange for the transfer, property is transferred or an antecedent debt is secured or satisfied.[15]

[13] Related Counts IV and VI seek entry of a money judgment on these two counts.
[14] The transfers of funds to Classic were clearly within the two-year clawback period established under § 548(a), and the four year statute of limitations established under Fla. Stat. § 726.110(2).
[15] 11 U.S.C. § 548(d)(2)(A); Fla. Stat. § 726.104(1).

As discussed above, Classic spent significant time and money to procure approximately 230 signed purchase agreements and to gather over $12 million in down payments for the debtor. It advertised and marketed Elliot's Landing in the U.K. and paid for potential purchasers to inspect the proposed site location in Orlando.[16] The debtor's payment of the 6 percent advance commissions to Classic satisfied its debt to Classic under the terms of the broker agreement. Classic provided more than reasonably equivalent value in exchange for the $3.1 million it received.

The fact that the debtor's principal absconded with purchasers' deposits and failed to build Eliott's Landing is irrelevant to whether Classic provided reasonably equivalent value to the debtor. Classic and the debtor entered into a valid real estate brokerage contract, and Classic, believing the debtor was a legitimate real estate developer, performed all of its duties under that contract. If anything, Classic may have performed *too* well, as, remarkably, it was able to sell nearly 230 units in Elliott's Landing without showing purchasers much more than conceptual drawings for the proposed development. The Court cannot find that Classic received something for nothing. The debtor was obligated to pay Classic for the advance commissions upon receipt of the signed purchase agreements and the purchasers' down payments. No evidence supports the trustee's position that the payments received by Classic were constructively fraudulent transfers under either § 548(a)(1)(B)(i) or Fla. Stat. § 726.105(b).

Under Count VII,[17] the trustee ambiguously asserts an action for "fraudulent/negligent misrepresentation" under Fla. Stat. § 726 *et seq*., arguing that Classic fraudulently or negligently misrepresented the contents of the purchase agreements to the purchasers and should forfeit the advance commissions it received. Florida Statute § 726 provides a cause of action to recover transfers when the debtor made the transfer with actual or constructive intent to defraud other

[16] Although Classic received $3.1 million in advance commissions, Classic's net profit was only between $300,000-$350,000 because of the considerable expenses involved in selling real estate to purchasers living in the U.K.
[17] Related Count VIII seeks entry of a money judgment.

creditors. The statute says nothing about fraudulent/negligent misrepresentation on the part of a creditor who is the *recipient* of a transfer. And nor should it, since such misconduct is completely irrelevant to the issue of whether the *debtor* defrauded other creditors by transferring property or funds to an individual creditor. The Court thus finds the trustee's Count VII fails to state a fraudulent transfer cause of action under Florida Statute § 726.

The trustee's final fraudulent transfer claim, under Count IX, references Classic's lien placed on the real property purchased for Elliot's Landing, which Classic obtained after recording its state court final judgment in the Florida public records. The trustee seeks to avoid the lien for the same reasons outlined above—namely, because the debtor allegedly received less than reasonably equivalent value from Classic in connection with the final judgment. For the reasons outlined above, this argument again has no merit.

In addition, in a related adversary proceeding,[18] this Court recently held that Classic's judgment lien on the real property, to the extent it is secured, is subordinate to the trustee's rights in the property and without value. Thus, the Court already has held that the trustee's interest in the proceeds obtained from the sale of the real property is superior to that of Classic's. No further action is needed on Count IX.

In conclusion, the Court holds that the trustee has failed to establish any basis under any pled count to require Classic to return the advance commissions. Classic is entitled to a judgment in

[18] Adversary Proceeding No. 6:09-ap-00920-KSJ.

its favor and against the trustee as to Counts I – IX. A separate final judgment consistent with these Findings of Fact and Conclusions of Law shall be entered.

DONE AND ORDERED in Orlando, Florida, September 2, 2010.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN
United States Bankruptcy Judge

Copies provided to:

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