

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-12913-JMD  
Chapter 13

In re E. Dean Morley,  
Debtor

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**MEMORANDUM OPINION**

**I. BACKGROUND**

On April 18, 2003, the Court issued a memorandum opinion and an order wherein the Court decided that no grounds existed to rescind a Sale and Settlement Agreement (the "Settlement Agreement") executed in November 1996, in connection with the settlement of a motion for relief filed in the Debtor's Virginia bankruptcy case by Land Fund II Limited Partnership ("Land Fund"), the predecessor-in-interest to Atcco Mortgage, Inc. ("Atcco"), which Settlement Agreement forms the basis for Atcco's claim in this case. Doc. Nos. 86 and 87. On June 6, 2003, the Court vacated that portion of its order allowing Atcco's claim as a secured claim. Doc. Nos. 100 and 101. On

that date, the Court also issued a procedural order and set a non-evidentiary hearing to decide two issues: (1) whether Atcco's claim is secured; and (2) if unsecured, whether Atcco's claim should be allowed or disallowed in its entirety based on the terms of the Settlement Agreement or the Debtor's prior Chapter 11 bankruptcy proceeding in Virginia. Doc. No. 102. In accordance with the Court's procedural order, Atcco amended its claim and attached to it as support the Virginia bankruptcy court's order approving the Settlement Agreement, the Settlement Agreement itself, the Debtor's Chapter 11 bankruptcy plan and order confirming it, and the abstract of the judgment that forms the underlying basis for Atcco's claim. POC 11.

The Debtor continued to object to the allowance of Atcco's claim. Doc. Nos. 118 and 119. The Court held a hearing on August 26, 2003, to determine whether Atcco's claim should be allowed or disallowed in the previously determined amount of \$120,293.95. After considering Atcco's proof of claim, the pleadings submitted by the parties, and the argument of counsel, the Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. DISCUSSION**

The facts relevant to this matter have been set forth previously in the Court's memorandum opinions dated April 18, 2003, and June 6, 2003. Doc. Nos. 86 and 100. Additional facts necessary for the Court's decision will be set out in this discussion as needed. At the hearing, Atcco and the Debtor agreed that Atcco's claim is not secured. Accordingly, the only issue before

the Court is whether the Settlement Agreement or the Debtor's Virginia bankruptcy case bar Atcco from having an allowed unsecured claim in this proceeding in the previously liquidated amount of \$120,293.95.

It is undisputed that the Settlement Agreement was incorporated into the Debtor's Chapter 11 plan in his Virginia bankruptcy case. The plan provided that Land Fund's claim would be treated "in accordance with the provisions of the Sale and Settlement Agreement." POC 11, Exhibit 2 at ¶ 6.3. Thus, Atcco's claim in this bankruptcy proceeding must be based solely upon the Settlement Agreement. The Settlement Agreement itself and the order approving it both provide that in the event the Debtor's Virginia bankruptcy case was dismissed, the Settlement Agreement would remain in full force and effect should there be another bankruptcy filing.

The Debtor takes the position that the Settlement Agreement is non-recourse, i.e., Atcco cannot seek payment from the Debtor personally for any shortfall on the Fairfax I Property, the McLean Property, or the Mississippi Property even though the values of these properties, which were transferred to Atcco and/or Land Fund under the terms of the Settlement Agreement, did not meet the parties' expectations,<sup>1</sup> because under the terms of the Settlement Agreement recovery was limited to those particular parcels. According to the Debtor, he met his obligations under the Settlement Agreement, which included the following:

- A. Delivering a deed to the Fairfax I Property pursuant to paragraph 2 of the Settlement Agreement;
- B. Delivering a deed to the McLean Property pursuant to paragraph 3 of the Settlement Agreement; and

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<sup>1</sup> Prior to executing the Settlement Agreement, Land Fund had obtained appraisals which set forth values of \$354,000.00 for the McLean Property, \$391,500.00 for the Fairfax I Property, and \$476,000.00 for the Mississippi Property, in which the Debtor had a one-half interest.

- C. Consenting to relief from the automatic stay so that Land Fund could pursue its rights against the Mississippi Property when Land Fund failed to recover \$350,000.00 from the sale of the McLean Property pursuant to paragraphs 10 and 12 of the Settlement Agreement.

As a result, the Debtor states that under paragraph 19 of the Settlement Agreement Land Fund and its successor-in-interest, Atcco, should have released its liens and “forgive[n] any deficiency thereunder.” Atcco argues that the Settlement Agreement has not been consummated in its entirety and therefore paragraph 19 does not require it to forgive any deficiency. Paragraph 19 reads “[u]pon consummation of this Agreement in its entirety, Land Fund II will release its liens and forgive any deficiency thereunder.”

From the face of the Settlement Agreement it is apparent that the parties anticipated that the McLean Property may not be sold for its \$354,000.00 appraised value. For that reason, the Settlement Agreement provided at paragraph 12 that in the event of a shortfall on the McLean Property, i.e., that Land Fund did not net \$350,000.00 from the sale of the property, Land Fund could foreclose on the Mississippi Property to cover the difference. The Settlement Agreement further provided that Land Fund would receive an additional \$50,000.00 from the sale of the Mississippi Property as some type of penalty for having to pursue foreclosure of that property. In addition, the Settlement Agreement provided that “[t]he balance of any proceeds thereafter from the sale of the [Mississippi] Property will go to Mr. Morley.” What the Settlement Agreement failed to provide was what was to happen if the sale of the Mississippi Property did not generate enough proceeds to cover payment of the \$350,000.00 plus the \$50,000.00 penalty, which is what ultimately occurred. Atcco’s attorney candidly admitted that this scenario appears not to have been contemplated by the parties and, therefore, it was not explicitly addressed in the Settlement Agreement. The Court now has the unenviable task of determining from the evidence presented

what the parties' rights and obligations are under the Settlement Agreement as drafted and executed by the parties.

Having considered the Settlement Agreement and the context in which it was executed, the Court finds that Atcco has not satisfied its burden of persuading the Court that the Settlement Agreement is a recourse agreement and that its claim should be allowed as an unsecured claim in the Debtor's Chapter 13 bankruptcy case. See In re Colonial Bakery, Inc., 108 B.R. 13, 15 (Bankr. D.R.I. 1989) (explaining that (1) a claimant establishes a prima facie case against a debtor upon the execution and filing of a proof of claim in accordance with Federal Rule of Bankruptcy Procedure 3001; (2) the objecting party is then required to produce evidence to rebut the claimant's prima facie case; (3) once the objecting party produces such rebuttal evidence, the burden shifts back to the claimant to produce additional evidence to prove the validity of the claim by a preponderance of the evidence; and (4) the ultimate burden of proof always rests upon the claimant) (cited in In re Pontarelli, 169 B.R. 499, 501 (Bankr. D.R.I. 1994)). See also In re Narragansett Clothing Co., 143 B.R. 582, 583 (Bankr. D.R.I. 1992). The Court reaches this conclusion for several reasons.

First, the Settlement Agreement did not provide that the Debtor owed a sum certain to Land Fund, but rather provided that Land Fund would be paid certain sums after the delivery of deeds and subsequent sale, redemption or foreclosure of up to three separate parcels of property. If Land Fund had wanted to ensure that it would collect a certain amount from the Debtor as part of the settlement, the Settlement Agreement could have stated that the Debtor would pay a sum certain, with such sum being paid first with proceeds from the disposition of the Fairfax I Property, the McLean Property, and the Mississippi Property and second with other assets of the Debtor, e.g., money in bank accounts or future income. The Settlement Agreement made no such provision,

which leads the Court to conclude that the Settlement Agreement did not seek to impose personal liability on the Debtor, assuming the Debtor complied with the terms of the agreement, which no one is disputing that he did.

Second, the Settlement Agreement provided that \$50,000.00 would have to be paid to Land Fund if it were forced to foreclose on the Mississippi Property, which amount appears to be intended to compensate it for the risk that the McLean Property would not realize its appraised value and any delay in receiving the funds that it had anticipated receiving under the Settlement Agreement. If Land Fund had wanted to ensure that it received a sum certain, the Settlement Agreement could have provided that the Debtor would be personally liable if the Mississippi Property failed to sell for an amount sufficient to cover the amount Land Fund sought to be paid. Land Fund knew how to limit its risk that the McLean Property would not sell for its appraised value (i.e., any shortfall would be paid from the proceeds of foreclosure of the Mississippi Property). However, for some reason, it chose not to protect itself for any shortfall with respect to the Mississippi Property. Land Fund failed to bargain for the payment of an additional penalty or sum of money if the foreclosure of the Mississippi Property did not cover the McLean Property deficiency. The Court finds that this militates against finding that the Debtor should be held personally liable for any perceived shortfall with respect to the Mississippi Property. The Settlement Agreement limited Land Fund's recourse to recovery from the Debtor's real property.

#### **IV. CONCLUSION**

For the reasons set forth above, the Court holds that the Settlement Agreement is non-recourse. Accordingly, Atcco's claim of \$120,293.95 set forth in POC 11 shall be disallowed. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with

Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: September 10, 2003

/s/ J. Michael Deasy  
J. Michael Deasy  
Bankruptcy Judge