

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
DAVID E. McDANIEL)	
PATSY S. McDANIEL)	Number <u>89-4121</u>
(Chapter 7 Case <u>87-40354</u>))	
)	
<i>Debtors</i>)	
)	
)	
JAMES L. DRAKE, JR.,)	
TRUSTEE)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
LAKE CABLEVISION, INC.)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

On March 8, 1991, and April 1, 1991, hearings were held upon a Complaint for Turnover of Property filed by the Chapter 7 Trustee appointed in the liquidation case of David E. and Patsy S. McDaniel. The property at issue consists of certain equipment and contract rights related to a cable television system. The Defendant,

Lake Cablevision, Inc., ("Lake Cablevision") purportedly purchased the system from Danny McDaniel, the son of the Debtors, in 1988. The issue turns upon whether Danny McDaniel had any ownership right to transfer at that time or whether he had previously conveyed all of his interest in 1985 to the Debtors. After consideration of the evidence adduced at the hearings, a review of the history of this case, the briefs and other documentation submitted by the parties, as well as applicable authorities, I make the following Findings of Fact and Conclusions of Law .

FINDINGS OF FACT

On July 21, 1985, Danny McDaniel, the son of the Debtors, as president of a corporation known as Spectra-Tronics, Inc., ("Spectra-Tronics") signed a document transferring all of the assets of that corporation to Tel-Cable Construction Company/Tel-Cable TV ("Tel-Cable"), including a cable television system with its associated equipment and contracts to provide cable television service to:

- A) Lake Arrowhead/Purcell Company, Inc., contract number 211, dated March 9, 1983, signed March 11, 1983, and in effect until March 11, 2082.
- B) The City of Waleska, Georgia, contract dated June 2, 1983, and in effect until June 2, 1998.

(Exhibit P-1).

At the time of the July, 1985, transfer, both the Debtor, David McDaniel, and his son Danny were officers of Spectra-Tronics. Tel-Cable, a proprietorship wholly owned by the Debtor was a separate entity from Spectra-Tronics. The transfer was arranged to bolster the Debtor's financial statement so that he could obtain financing to complete the Lake Arrowhead system.

In late 1985, David and Danny McDaniel approached Great Southern Federal Savings Bank for the loan. Loan Officer Bill Atkinson testified that both David and Danny McDaniel represented that David McDaniel owned the Lake Arrowhead cable system. As part of the loan application process, Atkinson insisted on receiving a copy of a bill of sale conveying the Lake Arrowhead system to David McDaniel (Exhibit P-1) and also insisted that David McDaniel personally sign each page of his financial statement in Atkinson's presence (Exhibits P-2 and P-3). Great Southern ultimately refused to make the loan in the amount originally sought by the McDaniels, but made a smaller loan, partially in reliance upon David McDaniel's ownership of the Lake Arrowhead system.

Defendant's Exhibit D-2 purports to be a "Reversal" of the July 21, 1985, sales agreement. The document is dated January 10, 1986, and states that the 1985 conveyance is "null and void". However, the purported cancellation is not signed by Spectra-Tronics or Danny McDaniel. It was only signed by David McDaniel, owner of Tel-Cable.

Subsequently, on or about March 27, 1986, Danny McDaniel submitted

a credit application in David McDaniel's name to Builderama (Exhibit P-5). The statement was prepared by Danny but David McDaniel signed his own name (See Proposed Findings of Fact and Conclusions of Law, paragraph 11, prepared by counsel for the Defendant and filed on May 23, 1991). The application is in the name of "Tel-Cable Constr.", and cites "sole/owner" in the area marked "Corporation (list of officers below)." The only individual named anywhere on the application is David McDaniel.

The Debtors filed a petition under Chapter 7 of the Bankruptcy Code with this Court on April 9, 1987, yet David McDaniel failed to reveal his ownership of the Lake Arrowhead system among his assets. He revealed his ownership when questioned at the meeting of creditors by the various creditors who had previously received copies of his financial statements which valued the cable system variously at \$300,000.00 to \$900,000.00. In addition to admitting his ownership of the system at the meeting of creditors, he again admitted ownership at an examination taken pursuant to Bankruptcy Rule 2004 and a third time at the trial upon the objection to discharge.

On November 19, 1987, the Honorable Herman W. Coolidge entered a detailed order denying David McDaniel a Chapter 7 discharge, concluding, based upon "overwhelming evidence", that David McDaniel owned the Lake Arrowhead system, its associated equipment and contracts yet deliberately failed to reveal it on his bankruptcy schedules in order to defraud the Trustee and creditors. The Defendant Lake Cablevision was not a party to that proceeding nor did it have any notice of either that proceeding or the McDaniels' bankruptcy, and is therefore not bound by the findings in that case.

In January of 1988, three months after Judge Coolidge's order, Danny McDaniel and Spectra-Tronics purported to sell the Lake Arrowhead system to Lake Cablevision for \$ 150,000.00.

The Plaintiff, James L. Drake, Jr., the Chapter 7 Trustee in the David and Patsy McDaniel case, relying on David McDaniel's admission of ownership and Judge Coolidge's order, attempted to sell the Lake Arrowhead system. When he called Lake Arrowhead to arrange a tour for prospective purchasers, he learned that Defendant Lake Cablevision was in possession of the system. Drake demanded return of the system and this litigation ensued.

The Trustee asserts that title to the assets comprising the Lake Arrowhead cable television system was vested in David E. McDaniel on July 21, 1985, and title to those assets remained in David E. McDaniel until he filed bankruptcy on April 9, 1987. Thus the Trustee acquired title to those assets by operation of law on April 9, 1987. The Trustee further asserts that neither Danny McDaniel nor Spectra-Tronics, Inc., owned any interest in the assets as of January 25, 1988, and therefore had no interest to convey to Lake Cablevision, Inc., on that date. Therefore, the Trustee argues, Lake Cablevision holds no legal interest in the Lake Arrowhead system.

The Defendant, Lake Cablevision, asserts that the contract of July 21, 1985, purporting to transfer the Lake Arrowhead cable television system from Spectra-Tronics to Tel-Cable was contingent upon the grant of a loan from Liberty Savings Bank

as a condition precedent to the transfer. Therefore, the Defendant asserts that due to the failure of that condition precedent, title to the assets comprising the Lake Arrowhead cable television system never vested in David E. McDaniel. Thus, Lake Cablevision asserts, it acquired title to those assets by the sales agreement dated January 25, 1988, as neither David E. McDaniel or Patsy S. McDaniel owned any interest in the assets as of that date.

While the Defendant has been in possession of the Lake Arrowhead system it has realized gross revenues of approximately \$66,730.00. The Defendant has been unable or unwilling to prove the direct operating costs actually associated with the system. Defendant paid \$150,000.00 for the system in 1985. Testimony as to the current value ranged from \$126,000.00 (number of houses served X \$900.00) to \$356,000.00 (gross revenues X 11). In the absence of more conclusive testimony as to the net operating profits or losses I find the value to be \$150,000.00. Because the system was only partially completed at the time of the sale, the price was obviously discounted, and Defendant bore the cost of completion and the risk of profitability. Thus the estate's interest is limited to the consideration agreed on in the arm's length transaction, or \$150,000.00. Defendant may have paid the wrong person for the system but there is no evidence that a fair price was not paid. The estate should not receive a windfall for the enhanced value attributable to Defendant's stewardship, but is entitled to recovery of the value agreed on at the date of sale.

CONCLUSIONS OF LAW

Section 542 of the Bankruptcy Code requires any entity in possession of property of the bankruptcy estate to surrender that property or its value to the trustee and to "account". Property of the bankruptcy estate includes all property in which the debtor had an interest at the time the bankruptcy commenced. 11 U.S.C. §541.

The Trustee's burden under Section 542 is to show that the Lake Arrowhead system is property of David McDaniel's bankruptcy estate. The Trustee has carried that burden. I have found as a matter of fact that David McDaniel owned the Lake Arrowhead cable system at the time he filed bankruptcy. As a matter of law that system became property of the bankruptcy estate.

David and Danny McDaniel, father and son, transferred the asset to David in July, 1985. The "Reversal" of that transaction was a sham invented on the eve of this trial as clearly evidenced by the equivocal testimony of David McDaniel and by the subsequent financial statement given to Builderama. It was apparently created to spare Danny the consequences of his fraudulent sale to Defendant. However, its validity is belied by the fact that David never produced the document at the earlier trial when it could conceivably have exonerated him, and by the March 1986 financial statement. I conclude for those dual reasons, therefore, that the "Reversal" is entitled to no weight. Likewise, the evidence that obtaining the loan was a condition precedent to the transfer is unpersuasive. The conveyance is unambiguous and contains no such language. Parol evidence is inadmissible to vary its terms and the evidence proffered lacked credibility. *See Andrews v. Skinner*, 158 Ga. App. 229, 231, 279 S.E.2d 523 (1981) (Where the

writing appears complete and certain, parol evidence is inadmissible to vary the terms of the writing itself, in the absence of fraud, accident, or mistake). Alternatively, even if the "Reversal" had been executed in January, 1986, I find that it is legally insufficient to constitute a cancellation or rescission of the July, 1985, agreement. The agreement lacks the signature of one of the parties to the original conveyance and is therefore not mutually binding or enforceable. Hoffman v. Franklin Motor Car Co., 32 Ga. App. 229, 122 S.E. 896 (1924) (A rescission must be definite and fully executed to be enforceable).

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant pay the Trustee the sum of \$150,000.00 or at Trustee's option convey all its right, title and interest in and to the Lake Arrowhead system to the Trustee.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1991.