



hearing, together with briefs and other documentation submitted by the parties and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

The Debtors filed a joint petition under Chapter 11 of the Bankruptcy Code with this Court on November 20, 1989. On January 23, 1990, Lawrence J. Lynch, Jr., M.D., filed an Application for Leave to Sell a 32% partnership interest in W. L. Square associates, a Georgia general partnership formed to acquire, improve, develop, and own real property. The partnership interest was to be sold for a purchase price of \$158,942.00.<sup>1</sup> Dr. Lynch had fallen several months behind in rental obligations to W. L. Square Associates and sought approval of the Court for the sale of his interest to the other partners pursuant to the sale clause in the partnership agreement. A hearing was held upon Dr. Lynch's Application to Sell the Partnership Interest on March 16, 1990, and on April 23, 1990, the Application was approved. On August 17, 1990, the Resolution Trust Corporation ("RTC"), as Receiver for Great Southern Federal Savings and Loan Association, moved for modification of the automatic stay to permit Great Southern to collect accounts receivable in which it has a first priority lien position and to direct Dr. Lynch to pay to Great Southern the proceeds from the sale of the partnership interest. Great Southern had obtained and properly recorded a \$474,118.35 Judgment in its favor against Dr. Lynch on November 16, 1988.

On September 4, 1990, a Modified Order on the sale was entered which clarified that the sale of the partnership interest was to be free and clear of liens, with valid liens to attach to the sale proceeds and that no portion of the sales proceeds were to be used or distributed to any

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<sup>1</sup> The Order provided: "[t]his figure may change depending on the date actual closing takes place."

creditor without further Order of this Court. On September 5, 1990, a Notice of Proposed Consent Order reflecting an agreement between Dr. Lynch and the RTC was served upon interested parties. The agreement provided for a distribution of accounts receivable and partnership proceeds to the RTC and to Pioneer Credit Corporation as judgment lienors.

On September 14, 1990, the Trust Company Bank of Georgia, Bank of Savannah, N.A. ("Trust Company") filed an Objection to the proposed Consent Order of the RTC on the grounds that, under applicable Georgia law, the RTC and any other general judgment lienors do not have a lien in or secured status with respect to any partnership interest which Dr. Lynch held pre-petition. Accordingly, Trust Company alleged that Great Southern and all other general judgment lienors were not proper parties in interest to obtain relief under 11 U.S.C. Section 362(d) with respect to the proceeds of the partnership interest.

On November 21, 1990, the parties filed the following Stipulation of Facts:

On October 31, 1988, the Superior Court of Chatham County, Georgia, entered a judgment in favor of Great Southern Federal Savings Bank against co-debtor, Lawrence J. Lynch, in the amount of \$474,036.85 plus court costs and interest on principal from the date of the judgment at the contractual rate of 10-1/4 percent per annum. A writ of *feri facias* was entered on the Superior Court Execution Docket No. 7, folio 8 on November 16, 1988.

On November 20, 1989, Lawrence J. Lynch and his wife, Sharon C. Lynch, filed a petition for bankruptcy protection under Chapter 11 of the U. S. Bankruptcy Code. On April 23, 1990, the Bankruptcy Court entered an order approving the application of Lawrence J. Lynch for leave to sell his interest in W. L. Square Associates, a Georgia general partnership to certain persons for the sum of \$159,094.00. Such sale was consummated and the proceeds thereof are being held by debtor awaiting further order of the Court.

The Debtor, Lawrence J. Lynch, Jr. ("Lynch") was a general partner in a Georgia general partnership known as W. L. Square Associates until he sold his interest in April, 1990. This partnership is subject to the Uniform Partnership Act, O.C.G.A. §14-8-1, *et seq.* The principal purpose of the partnership is to own, manage, and lease property located at 5400 Sutlive Street, Savannah, Chatham County, Georgia. Lynch was one of the tenants in possession and lessee of the partnership's property at 5400 Sutlive Street, until mid-March, 1990. The partnership agreement does not limit the right of any partner to lease or rent the partnership's property. In the partnership agreement, the partners waived the right to partition the partnership property. At all relevant times, the subject real property was titled in the name of the partnership and not in the names of the individual partners.

#### CONCLUSIONS OF LAW

The issue is whether a general partnership interest can be attached by a judgment lien in the absence of a charge order from a court of competent jurisdiction. Trust Company argues that Dr. Lynch's partnership interest is a chose in action which, under Georgia law, cannot be attached by a creditor of an individual partner in the absence of a charge order. In support of its Objection, Trust Company cites O.C.G.A. Section 9-12-80,<sup>2</sup> and Section 9-13-57,<sup>3</sup> and Matter of Smith, 17 B.R. 541 (Bankr. M.D.Ga. 1982). Smith involved the question of whether a judgment lien will attach to the proceeds of the sale of a debtor's interest in a limited partnership. The Court determined that an

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<sup>2</sup> O.C.G.A. §9-12-80 provides in pertinent part:

All judgments obtained in the Superior Court . . . of this State . . . shall bind all the property of the Defendant in judgment, both real and personal, from the date of such judgments except as otherwise provided in this Code.

<sup>3</sup> O.C.G.A. §9-13-57 provides:

[C]hoses in Action are not liable to be seized and sold under execution, unless made so specially by statute.

interest in a limited partnership is a chose in action under Georgia law and that the only means by which a judgment lien will attach to a chose in action is through a charge order from a court of competent jurisdiction. The Court focused on the fact that a limited partner does not have possession of any of the partnership assets and has only rights which may exist under the terms of the relevant partnership agreement. Since the creditor failed to comply with the requirements of obtaining a charge order, the Court held that the creditor was an unsecured claimant.

Great Southern (RTC) disputes that a partner's interest in a general partnership is a chose in action and cites O.C.G.A. Section 44-12-20 which defines a chose in action as "personalty to which the owner has a right of possession in the future or a right of immediate possession which is wrongfully withheld." RTC argues that the rights of a general partner are far different from those of a limited partner as addressed in Smith and specifically include the right to participate in management as well as the right to presently possess specific partnership property for partnership purposes. O.C.G.A. §14-8-25. Because the interest of a general partner includes the present right to possess partnership property, the RTC asserts a general partnership interest is not a chose in action as defined in O.C.G.A. Section 44-12-20. Rather, RTC argues that a general partner's interest is a chose in possession rather than a chose in action and thus its judgment attached in accordance with O.C.G.A. Section 9-12-80. I disagree.

Addressing the nature of the interest of a general partner in a limited partnership,<sup>4</sup> the United States Supreme Court has held that the interest is a chose in action; simply a right to share

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<sup>4</sup> There is virtually no distinction under the Georgia Revised Uniform Limited Partnership Act between the liabilities of a general partner in a general partnership and those of a general partner in a limited partnership. As set forth in O.C.G.A. §14-9-403(b):

Except as provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners.

in what would remain of the partnership assets after its liabilities are satisfied, or an interest in the surplus. Blodgett v. Silberman, 277 U.S. 1, 48 S.Ct. 410, 72 L.Ed. 749 (1927). State courts have similarly held that the interest of a partner in a partnership is a mere chose in action. See Lynch v. Kentucky Tax Commission, 333 S.W. 2d 257 (1960) (Where partners residing in Kentucky started a new business enterprise in North Carolina, the property used in the conduct and operation of that business enterprise acquired a business situs in North Carolina, and under the North Carolina uniform partnership act each partner's interest in the partnership was treated as personal property, and on the death of one partner his estate had a chose in action against the surviving partners or the right to demand money from them, and the value of that chose in action was includible in the deceased partner's gross estate for Kentucky inheritance tax purposes); State v. Elsbury, 63 Nev. 463, 175 P.2d 430 (1946) (A partner's right in partnership property is a mere chose in action and carries with it a right to an accounting); In re Dumarest's Estate, 146 Misc. 442, 262 N.Y.S. 450 (N.Y.Sun. 1933) (A partner's only right in partnership's property is a claim for an accounting, which is a mere chose in action which follows the domicile of the owner and is governed by the laws of that domicile). Accordingly, I find that a general partner's interest in a general partnership is a chose in action and, as such, the Debtor's interest in W. L. Squares Associates was not subject to attachment by the judgment of the RTC. Therefore the RTC comes before the Court as an unsecured creditor. O.C.G.A. §9-13-57.

I recognize that this ruling may appear to work a hardship upon the RTC. However, the hardship is no more severe than that sustained by the holder of an unperfected UCC Article 9 security interest. In that situation, the courts have uniformly held the improperly perfected security interest to be unsecured in a contest between the security interest holder and the trustee acting on behalf of general unsecured creditors. See 11 U.S.C. §544(a); O.C.G.A. §11-9-301; and Ford Motor Credit Co. v. Wilson, 385 F.2d 128 (5th Cir. 1967).

Finally, although the Consent Order contained an apparently un-objected to provision that proceeds of accounts receivable would be split by Pioneer and RTC I am unable on the record before me to determine if the agreement is enforceable in light of the conclusions I have reached herein. Therefore I will not attempt to deal with the receivables issue in the absence of a request from a party in interest.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the judgment lien of Resolution Trust Corporation, as successor in interest to Great Southern Federal Savings and Loan Association does not attach to the cash proceeds from the sale of the partnership interest of Lawrence J. Lynch, Jr., in W. L. Square Associates, a Georgia General Partnership.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of June, 1991.