

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

FILED

at 9 O'clock & 20 min. A.M.
Date 7/22/98

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

In the matter of:)
)
JERRY DOUGLAS CASHWELL)
)
Debtor)

Chapter 7 Case

Number 98-40213

ORDER

Jerry Cashwell (hereinafter "Debtor") filed for bankruptcy relief under Chapter 7 on January 21, 1998. After commencement of the bankruptcy case Debtor and his wife, Betty Cashwell, became parties to a divorce action in Superior Court. The panel Trustee, Wiley Wasden III (hereinafter "Trustee"), then filed a motion to employ a real estate broker to sell the parties' residence. Debtor's estranged wife opposed the Motion. This Court held a hearing on April 22, 1998, to consider the Trustee's motion. The parties have briefed the issue to the Court. This Court has examined the relevant authorities and submissions of the parties.

Mrs. Cashwell's objection lies in her assertion that the Debtor at one time promised to transfer his one-half interest in the marital residence to her and that, as a result, the residence was not property of the Debtor's estate when he filed bankruptcy. She argues that this Court should, in effect, abstain from determining any rights of the parties in the property until the divorce action is final. The Trustee contends that the

residence was estate property at the instant the bankruptcy was filed and that no subsequently filed divorce case can divest the Trustee's interest in it.

The ultimate issue to be resolved therefore is not the narrow question of whether to employ a realtor, but the fundamental, threshold question of whether Debtor's one-half interest in the real estate is or is not estate property. This Court cannot determine the interests of the parties in this property, nor authorize an eventual sale of the property, in a motion proceeding; such determinations are properly presented to the Court in an adversary proceeding. FED. R.BANKR. P. 7001(2), 7001(3). As the positions of the parties now stand, an attempt to rule on the Trustee's motion would entangle this Court in conclusions based on assumptions, rather than the appropriate evidentiary requirements of an adversary. The Trustee must therefore file an adversary complaint in order to obtain a determination of his rights in the marital residence.¹ The Motion is therefore denied, without prejudice.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 20th day of July, 1998.

¹ Based upon the briefs submitted by the parties and extensive review of applicable law relating to the ultimate legal question, it appears, at least preliminarily, that the Debtor's one-half interest became part of the estate at filing. The parties should consider, in analyzing the required adversary proceeding, the impact of the following: (1) City Nat'l Bank of Miami v. General Coffee Corp., 828 F.2d 699, 704-705 (1st Cir. 1987), *cert. denied*, 485 U.S. 1007, 108 S.Ct. 1470, 99 L.Ed.2d 699 (1988); (2) O.C.G.A. § 23-1-20 (1997); (3) Davenport v. Davenport, 243 Ga. 613, 618 (1979); (4) Segars, Admrx. v. Brooks, 248 Ga. 427, 428 (1981); (5) In re Moretz, Ch. 13 No. 95-41767 (Bankr. S.D.Ga. Jun 10, 1996) (Davis, J.); (6) 11 U.S.C. § 502(b).