

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED
AUG 23 2000
U.S. Bankruptcy Court
Greensboro, NC
KWC

IN RE:)
)
Thomas D. Chitty,) Case No. 00-10739C-7G
)
Debtor.)
)

ORDER

This case came before the court on August 22, 2000, for hearing upon a motion by the Trustee to require Debtor to turn over commissions and to provide documents related to listing agreements and real estate sale contracts involving the Debtor. Gerald S. Schafer appeared as Trustee and attorney for Trustee, J. Brooks Reitzel, Jr. appeared as attorney for the Debtor and Robin R. Palenske appeared on behalf of the United States Bankruptcy Administrator. Having reviewed the Trustee's motion, the Debtor's responses to the motion, the memoranda submitted by the parties, and the other matters of record in this case, and having heard arguments of counsel, the court finds and concludes as follows:

1. When this case was filed on March 28, 2000, and for several years prior thereto, the Debtor was a real estate agent associated with 1st Choice Realty of Greensboro, Inc. ("1st Choice"), a Remax franchisee located in Greensboro, North Carolina, pursuant to an agreement entitled Independent Contractor Agreement. The Debtor has

continued as a real estate agent associated with 1st Choice Realty of Greensboro, Inc., since the filing of this case.

2. When this case was filed there existed a number of exclusive right to sell real estate listing agreements which had been procured by the Debtor. There also existed a number of real estate sale contracts providing for the payment of real estate commissions and in which the Debtor was either the listing agent, the selling agent or both the selling and listing agent.

3. Under the listing agreements the owners of the real estate described in the listing agreements agree to pay a fee (usually consisting of 6% of the gross sales price) to 1st Choice if a ready, willing and able buyer is procured by anyone during the exclusive listing period on any terms acceptable to the seller or if the property is sold, exchanged, conveyed or transferred, or the seller agrees to sell, exchange, convey or transfer the property upon any terms whatsoever during the terms of the listing agreement or any renewal thereof. The listing agreements further provide that the fee "will be due and payable at closing or upon Seller's default of Offer to Purchase and Contract." The Independent Contractor Agreement provides that 1st Choice shall promptly transmit to the Debtor all commissions received by 1st Choice as a result of the efforts of the Debtor. As a result of the prepetition listing

agreements procured by the Debtor and real estate sale contracts in which the Debtor is the listing agent, the selling agent or both selling and listing agent, 1st Choice has received and continues to receive commissions. Pursuant to the Independent Contractor Agreement, 1st Choice is obligated to transmit such commissions to the Debtor and the Debtor has a legal claim to such commissions.

4. Shortly after the filing of this case the Trustee made demand upon the Debtor that the Debtor furnish to the Trustee documents reflecting the prepetition listing agreements procured by the Debtor, the prepetition real estate sale contracts in which the Debtor was a listing or selling agent and closings which have occurred involving properties covered by the listing agreements and sale contracts, and that the Debtor remit to the Trustee commissions or fees received by the Debtor with respect to such listing agreements and real estate sale contracts.

5. Since this case was filed closings have occurred with respect to at least 12 real estate sale contracts which were obtained prior to March 28, 2000, in which the Debtor was the listing agent, selling agent or both listing agent and selling agent. As a result of these closings on such prepetition contracts, the Debtor has received commissions from 1st Choice in the amount of \$80,493.23, plus a \$1,500.00 referral fee based upon a prepetition

referral by the Debtor, for a total of \$81,993.23. Notwithstanding continuing demands by the Trustee, the Debtor has not remitted any of the commissions and fees which have been received by the Debtor since the filing of this case. The Debtor also has not provided the Trustee with all of the documents requested by the Trustee and has stalled and delayed in providing the documents which have been produced.

6. The above-described commissions and fees of \$81,993.23 which have been received by the Debtor were earned when a purchaser who was ready, willing and able to buy the property on terms acceptable to the seller was located which, with respect to each of such commissions and fees, occurred prior to the filing of the petition in this case on March 28, 2000. Debtor's right to receive such commissions and fees arose prepetition and, pursuant to § 541 of the Bankruptcy Code, became property of the bankruptcy estate in this case when the petition was filed. This result is not altered by the fact that the commissions and fees were paid at closings that occurred after March 28, 2000, because these commissions and fees are rooted in and resulted from services which were provided prior to March 28, 2000, and are not the result of services provided since that date. Accordingly, these commissions and fees in the amount of \$81,993.23 constitute property of the bankruptcy estate which should

have been turned over to the Trustee upon receipt by the Debtor, and the Debtor will be ordered to do so.

7. The remainder of the documents which have been requested by the Trustee are needed, and a further hearing will be required, in order to determine the full amount of the real estate commissions and fees that are property of the estate. Accordingly, the Debtor will be required to produce for the Trustee and file with the court on or before September 11, 2000, copies of the following documents:

(a) All real estate listing agreements procured by the Debtor which were in effect on March 28, 2000;

(b) All real estate listing agreements procured by the Debtor which are dated or were signed on any date between March 28, 2000, and April 15, 2000;

(c) All real estate sales contracts that existed on March 28, 2000, in which the Debtor was either the selling agent or the listing agent or under which the Debtor otherwise is entitled to any commission or compensation if the property described in the agreement is sold;

(d) All real estate listing agreements or real estate sales contracts which were in existence on March 28, 2000, with respect to which the Debtor was entitled to or has received a referral fee since March 28,

2000;

(e) All real estate sales contracts that have come into existence since March 28, 2000, in which the Debtor is either the selling agent or the listing agent or under which the Debtor otherwise is entitled to any commission, referral fee or other compensation if the property described in the agreement is sold;

(f) All closing statements for any sales which have closed since March 28, 2000, with respect to which the Debtor has received or is entitled to receive any commission or compensation of any kind;

(g) All reports from 1st Choice Realty of Greensboro, Inc. received by the Debtor or available to the Debtor reflecting closed sales involving the Debtor and the commissions and other compensation paid to the Debtor during each month since March 28, 2000;

(h) All reports from 1st Choice Realty of Greensboro, Inc. received by the Debtor or available to the Debtor reflecting amounts which have been paid to 1st Choice Realty of Greensboro, Inc. by the Debtor for expenses, fees and other charges since March 28, 2000; and

(i) All reports from 1st Choice Realty of Greensboro, Inc. received by the Debtor or available to the Debtor reflecting Debtor's active listings as of March 28, 2000 and reflecting all commissions, referral fees, miscellaneous income or other compensation which the Debtor has received from or through 1st Choice Realty of Greensboro, Inc. since March 28, 2000.

8. Pending a final hearing on September 26, 2000, the Debtor also will be ordered to turnover to the Trustee the following: (a) all additional commissions and fees received by the Debtor subsequent to March 28, 2000, as a result of the closing of sales on any of the real properties which were the subject of any prepetition listing agreement and with respect to which there existed on March 28, 2000, a real estate sales agreement; and (b) 50% of all commissions and fees received by the Debtor subsequent to March 28, 2000, as a result of the closing of sales on any of the real properties which are the subject of any of the prepetition listing agreements whether or not the such properties also were the subject of a real estate sales contract on March 28, 2000. Upon receipt of the foregoing commissions and fees, the Trustee shall hold such commissions and fees in escrow pending the final hearing of this matter at which a complete determination can be made regarding the

full extent of the commissions and fees which constitute property of the bankruptcy estate and the amount, if any, which the Debtor is entitled to setoff as a result of the payment of fees and expenses by the Debtor.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

1. The Debtor hereby is ORDERED immediately to turn over to the Trustee the sum of \$81,993.23;

2. On or before September 11, 2000, the Debtor is ORDERED to deliver to the Trustee and file with the court copies of the documents which are listed in paragraph seven of this order;

3. Pending a final hearing on September 26, 2000, the Debtor is hereby ORDERED to turn over to the Trustee as received the following:

(a) All additional commissions and fees received by the Debtor subsequent to March 28, 2000, as a result of the closing of sales on any of the real properties which were the subject of any prepetition listing agreement and with respect to which there existed on March 28, 2000, a real estate sales agreement; and

(b) Fifty percent (50%) of all commissions and fees received by the Debtor subsequent to March 28, 2000, as a result of the closing of sales on any of the real

properties which are the subject of any of the pre-petition listing agreements whether or not such real properties also are the subject of a real estate sales contract which existed on March 28, 2000;

4. Upon receipt of the foregoing commissions and fees from the Debtor, the Trustee shall hold such commissions and fees in escrow pending the final hearing of this matter at which a complete determination can be made regarding the full extent of the commissions and fees which constitute property of the bankruptcy estate and the amount, if any, which the Debtor is entitled to setoff as a result of the payment of fees and expenses by the Debtor; and

5. The final hearing of this matter shall be held on September 26, 2000, at 9:30 a.m., in the United States Bankruptcy Court, Second Floor, Courtroom #1, 101 South Edgeworth Street, Greensboro, North Carolina.

This 23rd day of August, 2000.

William C. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge