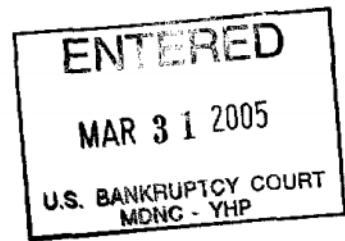


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)	
)	
North Carolina Technological)	Case No. 03-83278C-7D
Development Authority, Inc.,)	
)	
Debtor.)	
_____)	
)	
North Carolina Technological)	
Development Authority, Inc.,)	
and Sara A. Conti, Trustee,)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 05-9004
)	
State of North Carolina,)	
)	
Defendant.)	
)	

MEMORANDUM OPINION

This adversary proceeding came before the court on March 24, 2005, for hearing upon the defendant's motion to dismiss for lack of jurisdiction based upon the sovereign immunity embodied in the Eleventh Amendment of the United States Constitution. Having considered the motion, the plaintiffs' response, the authorities submitted by the parties and the arguments of counsel, the court has concluded that the motion to dismiss should be denied for the reasons that follow.

BACKGROUND

North Carolina Technological Development Authority, Inc., one of the plaintiffs in this adversary proceeding and the Debtor in the underlying Chapter 11 case, is a nonprofit corporation that was

established by the North Carolina General Assembly primarily to help promote economic development involving biotech, information technology, internet and other technologies. This adversary proceeding involves a building located at 2 Davis Drive in Durham County, North Carolina, that was conveyed to the Debtor by the State of North Carolina on September 1, 1991. The Debtor still owned and was in possession of the 2 Davis Drive property when it filed for relief under Chapter 11 of the Bankruptcy Code on October 3, 2003, and remains in possession of the 2 Davis Drive property.

The deed conveying the 2 Davis Drive property to the Debtor is recorded in Book 1695 at Page 657 in the Durham County Registry. The words of transfer in the deed provide as follows:

"[t]he party of the first part [State of North Carolina] has bargained and sold and by these presents does hereby bargain, sell and convey unto the said party of the second part [the Debtor], its successors and assigns, a fee simple determinable estate in and to that certain tract or parcel of land situate, lying in the County of Durham, Research Triangle Park, North Carolina, and more particularly described as follows"

(Emphasis supplied).

The Debtor's title and ownership of the 2 Davis Drive property was controlled entirely by the 1991 deed until September of 2003. On September 25, 2003, approximately one week before the Debtor filed its Chapter 11 case, the State of North Carolina caused an instrument pertaining to the 2 Davis Drive property to be recorded

in the Durham County Registry which was designated as a "deed of correction." This instrument purported to be a correction deed from the State of North Carolina to the Debtor and recited that the inclusion of the words "its successors and assigns" in the conveyance portion of the original deed occurred as a result of a mutual mistake and purported to eliminate the reference to "its successors and assigns." Although the purported deed of correction recited that "the parties" wished to correct the mutual mistake, the instrument was filed unilaterally by the State of North Carolina and without the consent or participation of the Debtor.

This adversary proceeding was commenced by the Debtor on January 28, 2005, with the filing of a complaint which names the State of North Carolina as the defendant in this proceeding. A summons was issued and a copy of the summons and complaint have been served on the State. In the complaint the Debtor alleges that the "deed of correction" is not valid under North Carolina law and was improperly recorded and seeks a judgment declaring that the "deed of correction" is a legal nullity and that the State's reversionary interest in the 2 Davis Drive property is subject to the language of the original deed such that the reversion of the property to the State would not occur so long as the property is used as a business incubator by the Debtor or by successors or assigns of the Debtor.

ANALYSIS

It is well established that the Eleventh Amendment to the United States Constitution bars suits against states in federal courts whether brought by citizens of another state or by citizens of the state involved.¹ See Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464, 65 S. Ct. 347, 351, 89 L. Ed. 389 (1945); Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842 (1890). As the Supreme Court recently recognized, however, states may still be bound by some federal judicial actions without their consent notwithstanding their Eleventh Amendment immunity. Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 1909, 158 L. Ed.2d 764 (2004). Hood involved an example of a judicial action to which a state may be subjected. The debtor in Hood commenced an adversary proceeding against an agency of the State of Tennessee to determine the dischargeability of a student loan. The lower courts rejected the State's plea of sovereign immunity based upon the waiver contained in § 106 of the Bankruptcy Code and held the student loan dischargeable. Without addressing the constitutionality of § 106, the Supreme Court held that the undue hardship determination sought

¹The waiver of sovereign immunity contained in § 106 of the Bankruptcy Code plays no role in this matter because the law in the Fourth Circuit is that "Congress' effort to abrogate the states' Eleventh Amendment immunity through its 1994 enactment of 11 U.S.C. § 106(a) is unconstitutional and ineffective." Schlossberg v. Maryland (In re Creative Goldsmith of Washington, D.C., Inc.), 119 F.3d 1140, 1147 (4th Cir. 1997).

in the bankruptcy court was not a suit against a state for purposes of the Eleventh Amendment and that the bankruptcy court's exercise of its in rem jurisdiction in discharging the student loan indebtedness did not infringe upon state sovereignty. Hood, 124 S. Ct. at 1912-13. The Court found support for upholding the exercise of in rem jurisdiction in a number of earlier decisions in which the Court had "endorsed individualized determinations of States' interests with the federal courts' in rem jurisdiction." Hood, 124 S. Ct. At 1912. The Court cited with approval Van Huffel v. Harkelrode, 284 U.S. 225, 52 S. Ct. 115, 76 L. Ed. 256 (1931), where it held that the bankruptcy court had the authority to sell the debtor's property free and clear of a state's lien, and Gardner v. New Jersey, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947), where the court sustained the jurisdiction of the bankruptcy court to allow or disallow a state tax claim. The Court stated that "[a]t least when the bankruptcy court's jurisdiction over the res is unquestioned, our cases indicate that the exercise of its in rem jurisdiction to discharge a debt does not infringe state sovereignty." Hood, 124 S. Ct. at 1911 (citation omitted).

The present proceeding is one in which the in rem jurisdiction of this court has been invoked. The complaint seeks an adjudication regarding specific property, i.e., the 2 Davis Drive property. Under either the 1991 deed or the 2003 purported correction deed the Debtor holds a fee simple determinable estate

in the 2 Davis Drive property² and the State is left with only a future interest known as a possibility of reverter.³ A fee simple determinable constitutes the entire estate throughout its continuance while retaining its defeasible quality until the happening of the stated event by which it is to be determined, or until it is converted into a fee simple absolute. See Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950). Moreover, except for the limiting event, the owner of a fee simple determinable has the same rights in the land as the owner of a fee simple estate. See Webster's Real Estate Law in North Carolina § 4-13(a)(1) (4th ed. 1994). While the State contends that termination of Debtor's estate would occur if the Debtor conveyed the property, there is no contention that any such conveyance has occurred or that the Debtor has lost its fee simple determinable estate in the property. Under 28 U.S.C. § 1334(e), the bankruptcy court in which a bankruptcy case is pending has exclusive jurisdiction of all of the property of the debtor as of the commencement of the case, and of property

²According to § 4-13(a) of Webster's Real Estate Law in North Carolina, a fee determinable estate is created when apt and appropriate language is used by a grantor or deviser indicative of an intent on the part of the grantor or deviser that a fee simple estate conveyed for devise will expire automatically upon the happening of a certain event or upon the discontinuance of certain existing facts.

³According to § 4-13(a) of Webster's Real Estate Law in North Carolina, "[u]ntil the occurrence of the limiting event, the grantor or (deviser), or the grantor's heirs, have a future interest known as a 'possibility of reverter.'"

of the estate. Thus, as "property of the debtor," the 2 Davis Drive property is subject to the exclusive jurisdiction granted this court and to the in rem jurisdiction of this court.

The fact that this proceeding involves an exercise of in rem jurisdiction by this court, however, does not necessarily mean that the Eleventh Amendment is not applicable to this proceeding. The Court made this absolutely clear in the Hood case when it stated: "Nor do we hold that every exercise of a bankruptcy court's in rem jurisdiction will not offend the sovereignty of the State." Hood, 124 S. Ct. at 1913 n.5. As the Court explained, the basis for the decision in Hood was not that a bankruptcy court's in rem jurisdiction overrides sovereign immunity, but rather that the bankruptcy court's exercise of its in rem jurisdiction to discharge a student loan was not "an affront to the sovereignty of the State." Id. The decisive question thus is whether the exercise of in rem jurisdiction in this proceeding would result in an affront to the sovereignty of the State of North Carolina. The court is satisfied that this question should be answered in the negative.

Whether the exercise of in rem jurisdiction will result in an affront to the sovereignty of a State depends upon "the essential nature and effect of the proceeding as it appears from the entire record.'" See Official Committee of Unsecured Creditors v. Public Utilities Comm'n of Cal. (In re 360networks (USA), Inc.), 316 B.R. 797, 806-07 (Bankr. S.D.N.Y. 2004) (quoting Ex parte New York, 256

U.S. 490, 500, 41 S. Ct. 588, 65 L. Ed. 1057 (1921)). "A suit offends a State's sovereign immunity where either 'the judgment sought would expend itself on the public treasury', or the 'effect of the judgment would be to restrain the Government from acting, or compel it to act.'" Id. at 807 (quoting Dugan v. Rank, 372 U.S. 609, 620, 83 S. Ct. 999, 10 L. Ed.2d 15 (1963)).

Viewed as a whole, the record in this case reflects that a judgment granting the relief sought in the complaint would not offend the sovereignty of the State of North Carolina. The plaintiff does not seek in this proceeding to recover monetary damages from the State of North Carolina nor to require any type of expenditure or payment by the State. Thus, a judgment favorable to the plaintiff would not "expend" itself on the State's treasury by requiring any type of payment of State funds. Nor does the plaintiff in this proceeding seek to restrain the State or to require the State to execute any documents, turnover possession of property or perform any act regarding the 2 Davis Drive Property. In fact, the 2 Davis Drive property is in the possession of the Debtor and in this respect the present case involves a situation comparable to the one involved in California v. Deep Sea Research, Inc., 523 U.S. 491, 118 S. Ct. 1464, 140 L. Ed.2d 626 (1998). Deep Sea Research was an in rem action brought in federal court involving a dispute between the State of California and a salvage company seeking rights to a wreck and cargo located by the salvage

company. In rejecting California's immunity plea, the Court held in Deep Sea Research that the Eleventh Amendment does not bar federal jurisdiction over in rem admiralty actions when the state is not in possession of the property. The rationale underlying this holding is that if the state is not in possession of the property then the granting of relief does not require the issuance of in personam legal process that would divest the state of possession and therefore is strictly in rem in nature. After noting that there is a correlation between sovereign immunity principles applicable to states and to the federal government, the Court in Deep Sea Research explained that "'proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court.'" 116 S. Ct. at 1473 (quoting The Davis, 10 Wall. 15, 19 L. Ed. 875 (1869)). In affirming the applicability of this rationale where it is the bankruptcy court rather than the admiralty court exercising in rem jurisdiction, the Court in Hood stated that "we see no reason why the exercise of the federal courts' in rem bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their in rem admiralty jurisdiction." Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 1912, 158 L. Ed.2d 764 (2004).

The last issue to be addressed is whether there are procedural

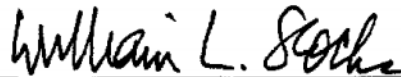
aspects of this proceeding which give rise to sovereign immunity for the State of North Carolina. This proceeding was commenced through the filing of a complaint and the State has been hailed into this court through the issuance of a summons and service of the summons and complaint upon the State. This proceeding thus closely resembles a traditional civil lawsuit. Does this mean that this proceeding must be treated as a "suit" against the State for purposes of the Eleventh Amendment? The opinion in Hood makes it clear that this question should be answered in the negative. Just as in the matter now before the court, the proceeding in Hood was an adversary proceeding in which the State had been served with a summons and complaint. In rejecting the argument that such a procedural format standing alone resulted in sovereign immunity, the Court held that the decisive circumstance was that the proceeding in Hood involved an exercise of in rem jurisdiction which did not affront the sovereignty of the State of Tennessee. Hood, 124 S. Ct. at 1913. Having held that the bankruptcy court's exercise of in rem jurisdiction in order to adjudicate the dischargeability of a student loan did not constitute an affront to state sovereignty, the Court concluded in Hood that "whether an in rem adjudication in a bankruptcy court is similar to civil litigation in a district court is irrelevant." 124 S. Ct. at 1914. Similarly, the proceeding now before the court involves an exercise of in rem jurisdiction by the bankruptcy court which does not

result in an affront to the sovereignty of the State of North Carolina. Hence, consistent with the decision in Hood, the procedural aspects of this proceeding are irrelevant in deciding whether sovereign immunity applies under the Eleventh Amendment.

CONCLUSION

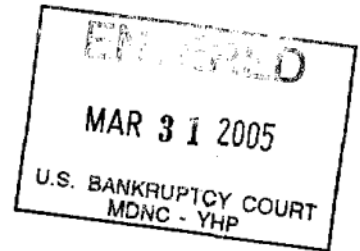
Since this proceeding involves an exercise of in rem jurisdiction which does not result in an affront to the sovereignty of the State of North Carolina, the court concludes that this proceeding does not constitute a suit against the State of North Carolina for purposes of the Eleventh Amendment and that the State's motion to dismiss therefore should be denied. An order so providing is being entered contemporaneously herewith.

This 30th day of March, 2005.



WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



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v.) Adversary No. 05-9004
)
State of North Carolina,)
)
Defendant.)
)

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The motion to dismiss for lack of jurisdiction filed on behalf of the State of North Carolina is hereby overruled and denied; and

(2) The State of North Carolina shall have 20 days from the date of this order within which to file answer to the plaintiff's complaint.

This 30th day of March, 2005.

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