

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-34178

RIVER'S LANDING RESORT  
PROPERTIES, LLC

Debtor

**MEMORANDUM ON MOTION  
FOR USE OF CASH COLLATERAL**

APPEARANCES: BAILEY, ROBERTS & BAILEY, P.L.L.C.  
Robert M. Bailey, Esq.  
Post Office Box 2189  
Knoxville, Tennessee 37901  
Attorneys for Debtor

WALLACE & JONES  
Richard T. Wallace, Esq.  
111 Commerce Street  
Sevierville, Tennessee 37862  
Attorneys for Tennessee State Bank

**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

This matter is before the court on the Debtor's Motion for Use of Cash Collateral filed on August 24, 2001. The Debtor seeks continued use of the rental revenue from its Travelodge motel located in Pigeon Forge, Tennessee. On August 30, 2001, Tennessee State Bank (TSB) filed an Objection and Response to Debtor's Motion for Use of Cash Collateral (Objection). TSB contends that the rental revenue cannot be used as cash collateral because the funds were "absolutely assigned" to TSB in a "Construction Deed of Trust with Assignment of Rents, Leases, and Profits" (Deed of Trust) executed by the Debtor's predecessor in interest on October 30, 1995.<sup>1</sup>

An Agreed Order Authorizing Debtor to Use Alleged Cash Collateral was entered on October 17, 2001, permitting the Debtor's utilization of up to \$450,000.00 in room rents through January 11, 2002. An Agreed Order Authorizing Debtors [sic] Continued Use of Alleged Cash Collateral was then entered on January 28, 2002, permitting further use of rental revenues through March 14, 2002, unless sooner modified or terminated by court order. Both Agreed Orders preserved TSB's Objection.

Pursuant to the Pre-Trial Order also entered on January 28, 2002, the parties have submitted this matter for resolution upon stipulations and briefs. A Stipulations of Facts and Documents and Statement of Issues was accordingly filed on January 31, 2002, stipulating three closely interrelated issues for resolution:

1. Did the Debtor make a prepetition assignment of the Travelodge property revenues, and was such an assignment an absolute assignment?

---

<sup>1</sup> Steve and Linda Maples were the sole members of the Debtor. Mr. Maples died on April 27, 2001. The Debtor acquired the Travelodge from Maples Inn of Pigeon Forge, Inc. (Maples Inn) and assumed the Deed of Trust indebtedness as evidenced by an Assumption Agreement executed on July 29, 1998. Mr. and Mrs. Maples were also the sole shareholders of Maples Inn. Mr. Maples executed the present Deed of Trust as President of Maples Inn.

2. Are the revenues from the Travelodge property the property of the Debtor's estate or are the revenues property of TSB?
3. Is TSB presently entitled to the revenues from the Travelodge property?

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(M), (O) (West 1993).

## I

On October 30, 1995, Steve Maples executed the Deed of Trust<sup>2</sup> in favor of TSB, securing a note in the principal amount of \$3,000,000.00. The assignment language at issue appears within that instrument, stating in material part:

19. **Assignment of Rents, Leases and Profits.** All of the rents . . . and other benefits derived from the Mortgaged Property . . . are hereby absolutely and unconditionally assigned to Beneficiary, to be applied by Beneficiary in payment of the Obligations. . . . It is understood and agreed by the parties that this assignment from Borrower to Beneficiary [sic], and not merely the passing of a security interest; provided, however, that prior to an Event of Default, Borrower shall have a license, without joinder of Beneficiary, to enforce the Leases and to collect the Rents as they come due and to retain, use and enjoy the same.

Assignment is also addressed within the Deed of Trust's property description, which provides that the Maples Inn (now Travelodge) property:

together with all improvements located thereon or hereafter created on the property, and all easements, rights, appurtenances, rents (subject however to the rights and authorities given herein to the Lender to collect and apply such rents) . . . shall be deemed to be and remain a part of the property covered by this Deed of Trust (hereinafter referred to as the "Mortgaged Property").

---

<sup>2</sup> See *supra* n.2.

The Debtor's note to TSB matured on January 29, 2001. The note was not repaid prior to the Debtor's August 24, 2001 Chapter 11 filing. As of January 30, 2002, the TSB debt was \$6,274,249.69 with interest accruing at \$911.44 per day.

The TSB debt is secured by the Travelodge property and by property on which the Debtor operates the River's Landing Motel. The appraised value of the Travelodge is \$6,000,000.00, while the appraised value of the River's Landing Motel is \$2,900,000.00. The assignment of rents is an issue only as to the Travelodge.

## II

The Debtor brings its Motion for Use of Cash Collateral pursuant to 11 U.S.C.A. § 363 (West 1993 & Supp. 2001) contending that it needs the Travelodge rental revenue to operate its business activities, to preserve the asset value of the bankruptcy estate, and to formulate a plan of reorganization or sale of assets as a going concern." The use of cash collateral is governed by 11 U.S.C.A. § 363 which provides in material part:

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

11 U.S.C.A. § 363(c)(2) (West 1993).<sup>3</sup>

---

<sup>3</sup> The Debtor, as a Chapter 11 debtor in possession, holds the same § 363(c)(2) powers as a bankruptcy trustee. See 11 U.S.C.A. § 1107(a) (West 1993).

Cash collateral includes lodging revenues in which the bankruptcy estate and another entity share an interest. See 11 U.S.C.A. § 363(a)(West Supp. 2001). Because of the prerequisite that the estate must hold an interest in the subject property, rents that are not property of the estate under 11 U.S.C.A. § 541(a) (West 1993) are not available as cash collateral nor as a funding source for the debtor's reorganization plan." *In re Kingsport Ventures, L.P.*, 251 B.R. 841, 845-46 (Bankr. E.D. Tenn. 2000) (quoting *First Fidelity Bank, N.A. v. Jason Realty, L.P. (In re Jason Realty, L.P.)*, 59 F.3d 423, 425 (3d Cir. 1995)). Property of the estate includes nearly all legal or equitable interests of the debtor in property as of the commencement of the case" and "[p]roceeds, product, offspring, rents, or profits of or from property of the estate . . . ." 11 U.S.C.A. § 541(a)(1), (6) (West 1993).

### III

In Tennessee, the grant of a security interest in property and the absolute assignment of property are recognized as two distinct methods of generating credit against which a party may borrow funds. See *Kingsport Ventures*, 251 B.R. at 846 (collecting cases). Absolute assignment, the more severe of these two methods, divests the assignor of any legal right in the subject property as of the date of the assignment and vests those rights in the assignee." *Id.* at 848.

Under Tennessee law, it is presumed that assignment language creates a security interest only. See *id.* at 846-47. This presumption may be rebutted by proof that the parties intended an absolute assignment. See *id.* at 847. However, because absolute assignment generally does not effect the intent of the parties," courts require especially clear evidence" of such intent. *Federal*

*Deposit Ins. Corp. v. International Property Management, Inc.*, 929 F.2d 1033, 1036, 1038 (5<sup>th</sup> Cir. 1991).

In *Kingsport Ventures*, this court held that assignment language similar to that presently at issue constituted an absolute assignment, thereby precluding the debtor's use of the disputed motel revenues to fund its plan of reorganization. The court considered a number of factors in reaching its decision, including:

1. Whether the assignment is referred to as "absolute;"
2. Statements within the assignment indicating that it was actually intended as security;
3. Whether the assignment language is found in a deed of trust or within a separate instrument;
4. Whether the assignee is required to take any additional action to collect the rents after an event of default; and
5. Whether the assignee has total discretion regarding the application of rents collected by it after default.

*Kingsport Ventures*, 251 B.R. at 847-48.

In the present case, the Deed of Trust recites that the rental revenue is "absolutely and unconditionally assigned." Also in TSB's favor, the instrument provides that the assignment is "not merely the passing of a security interest." See *Kingsport Ventures*, 251 B.R. at 848 (approving similar phrasing); *In re 5877 Poplar, L.P.*, 268 B.R. 140, 148 (Bankr. W.D. Tenn. 2001) (same). Beyond this likely boilerplate language, however, the Deed of Trust does not contain the "especially clear evidence" necessary for the court to find that the parties intended an absolute assignment of the Travelodge revenues.

Unlike the agreement in *Kingsport Ventures*, the present assignment is not contained within a separate document. See *Jason Realty*, 59 F.3d at 428 (Although an assignment clause within a mortgage may be independent of the security interest, the court was “impressed that the instant assignment was contained in an agreement separate from the mortgage.”). Additionally, the present assignment does not give TSB discretion in its use of the assigned rents. Instead, it requires TSB to apply the revenue “in payment of the Obligations” owed by the Debtor. Cf. *Kingsport Ventures*, 251 B.R. at 848 (Assignment “provide[d] in permissive rather than mandatory terms that the rents ‘may’ be applied toward” the underlying debt.). Lastly, the Deed of Trust is silent as to the conditions under which TSB may revoke the Debtor’s “license” to collect the rents. See *5877 Poplar*, 268 B.R. at 148-49 (“[A] true or absolute assignment should clearly demarcate that a creditor is entitled to the rents without the requirement of re-entry.”); *Federal Deposit Ins. Corp.*, 929 F.2d at 1036-37 (“If the assignment . . . requires some action by the mortgagee after default to secure the rents, the clause will not be construed as an absolute assignment.”); cf. *Kingsport Ventures*, 251 B.R. at 848 (Assignment provided that “the Debtor’s license to collect the rents ‘shall automatically be revoked’ after an event of default and that the Assignee may take control and possession of the property and the rents ‘with or without bringing any action or proceeding.’”).

Accordingly, the Deed of Trust, construed in whole, does not contain sufficiently clear proof of the parties’ intent to create an absolute assignment of the Travelodge rental revenue. Instead, the Deed of Trust conveys to TSB a security interest only. The Travelodge rents are

therefore property of the estate under § 541(a)(1) and (6) and the rents further qualify as cash collateral under § 363(a).

TSB's Objection will be overruled and the Debtor's Motion for Use of Cash Collateral will therefore be granted. The court will consider the Debtor's continued entitlement to use cash collateral at the hearing presently scheduled on March 14, 2002.

An appropriate order will be entered.

FILED: March 8, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE



**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-34178

RIVER'S LANDING RESORT  
PROPERTIES, LLC

Debtor

**ORDER**

For the reasons stated in the Memorandum on Motion for Use of Cash Collateral filed this date, the court directs that the Objection and Response to Debtor's Motion for Use of Cash Collateral filed by Tennessee State Bank on August 30, 2001, is OVERRULED. The Debtor's Motion for Use of Cash Collateral filed August 24, 2001, is GRANTED.

SO ORDERED.

ENTER: March 8, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE