

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

In re

Case No. 03-32764

RODNEY LANE KENNEDY
d/b/a ROCKY TOP RESORTS

Debtor

**MEMORANDUM ON DEBTOR'S OBJECTION
TO CLAIM FOR REAL ESTATE COMMISSION FEE**

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

This contested matter is before the court on the Debtor in Possession's Objection to Claim for Real Estate Agent's Brokerage Fee (Objection), filed by the Debtor on August 13, 2003. The Objection requests that the court enter an order disallowing the claim filed by Netti Perry-Kennedy (Mrs. Kennedy). Pursuant to the Statement of Issues filed by the parties on February 17, 2004, the issues before the court are (1) whether there were valid listing contracts between the Debtor and Mrs. Kennedy concerning the sale of certain real properties; and (2) if so, the amount of damages that Mrs. Kennedy is entitled to recover from the Debtor from the rejection of those contracts.

The evidentiary hearing on the Objection was held on March 23, 2004. The record consists of seventeen exhibits introduced into evidence, along with the testimony of four witnesses, Karen Bradshaw, Penny Jones, Mrs. Kennedy, and the Debtor.

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

I

The Debtor and Mrs. Kennedy were married on June 1, 2002. Mrs. Kennedy is a licensed real estate agent and has been for more than sixteen years. She is currently affiliated with Elite Realty in Knoxville, Tennessee. Both prior to and during the parties' marriage, Mrs. Kennedy listed and sold real property for the Debtor. She did not charge any fees or commissions on properties sold for the Debtor during the marriage.

The parties separated in early February 2003.¹ Nevertheless, on February 12, 2003, the Debtor executed, in blank, a Sales Agency Contract with Mrs. Kennedy and Elite Realty listing for sale real property located at 1717 Springer Road, Sevierville, Tennessee, and a Sales Agency Contract listing for sale real property located at 2273 Red Bank Road, Sevierville, Tennessee (collectively, the Contracts). TRIAL EX. 2; TRIAL EX. 3. The Contracts, which were filled in by Mrs. Kennedy, granted Mrs. Kennedy and Elite Realty an exclusive right to list the real property for a one-year term. The Springer Road property was the parties' marital residence, and the Red Bank Road property was the Debtor's residence after the parties' separation.

Each of the Contracts also included a Multiple Listing Service agreement, which provided the agent, Mrs. Kennedy, with "the sole, exclusive and irrevocable right to sell the property[.]" TRIAL EX. 2; TRIAL EX. 3. The Multiple Listing Service agreement also states that during its term, the agent, Mrs. Kennedy, would be entitled to a commission, regardless of whether she or another person sold the properties, and that if suit for compensation was necessary, she would be entitled to costs and a reasonable attorney's fee. TRIAL EX. 2; TRIAL EX. 3.

The original Contract concerning the Springer Road property contains an alteration, which Mrs. Kennedy testified that she made with the Debtor's permission. Mrs. Kennedy testified that she initially wanted a commission of 10%, but the Debtor would not agree, so

¹ The Debtor testified that the separation occurred on February 1, 2003. Mrs. Kennedy testified that the parties separated on February 3, 2003.

she changed the commission rate to 6%. See TRIAL EX. 3. Otherwise, the original Contracts, introduced at trial as Exhibits 2 and 3, do not contain any alterations. Nevertheless, on the copies of the Contracts sent to the Knoxville Board of Realtors (Board of Realtors) for entry in the MLS system, Mrs. Kennedy changed the dates on the Contracts from February 12, 2003, to February 16, 2003. She explained that she changed the dates in order to avoid a possible fee assessment in the event that the Contracts were not received by the Board of Realtors within ten days, and because she and the Debtor were attempting to amicably separate, she would be mailing the Contracts to the Board of Realtors.

Following an argument between the parties on February 16, 2003, the Debtor filed a Complaint for Divorce against Mrs. Kennedy in the Chancery Court for Sevier County, Tennessee, on February 17, 2003. TRIAL EX. 6. The Complaint for Divorce also requested a restraining order prohibiting Mrs. Kennedy from entering onto the Springer Road property, and in accordance therewith, a Restraining Order was entered on February 19, 2003. TRIAL EX. 7.² Sometime thereafter, in late February or early March 2003, the Debtor telephoned Karen Bradshaw, the managing broker at Elite Realty, and verbally requested that she cancel the Contracts because he and Mrs. Kennedy were divorcing, and he had obtained a Restraining Order. Mrs. Bradshaw testified that she told the Debtor at that time that she would not cancel or release the Contracts. The Debtor then listed both the Springer Road property and the Red Bank Road property with agent Bill Easley and Re/Max All Pro

² Specifically, the Restraining Order “prohibited” Mrs. Kennedy “from any further contact with [the Debtor] . . . by any means or going about or into the [Debtor’s] residence at 1717 Springer Road, Sevierville, Tennessee.” TRIAL EX. 7.

Realtors. Combination locks were placed on the Red Bank Road property, which prevented Mrs. Kennedy's entry therein.

The Debtor filed the Voluntary Petition commencing his bankruptcy case under Chapter 13 of the Bankruptcy Code on May 19, 2003. The case was subsequently converted to Chapter 11 on July 24, 2003, and a Chapter 11 Trustee was appointed on October 7, 2003. Mrs. Kennedy was listed on the Debtor's Schedule F - Unsecured Nonpriority Claims as having a claim for real estate commissions in the amount of \$5,000.00. In the course of the Debtor's bankruptcy case, the Springer Road property was sold by Re/Max All Pro Realtors on June 23, 2003, for \$417,000.00, from which Mrs. Kennedy asserts a claim for a 6% commission, or \$25,020.00. See TRIAL EX. 17. On October 7, 2003, the Red Bank Road property was sold by Re/Max All Pro Realtors for \$217,500.00.³ See TRIAL EX. 18. Mrs. Kennedy asserts a claim to one-half of the total commission, or \$7,363.00.

On August 12, 2003, the Debtor filed a Motion to Reject Real Estate Listing Contract requesting that the court authorize the rejection of the Contracts with Mrs. Kennedy. At a hearing on September 4, 2003, the court was advised that the Debtor and Mrs. Kennedy were in agreement regarding the disposition of the Motion. Therefore, on January 29, 2004, the court entered an Agreed Order Authorizing Rejection of Real Estate Listing Contracts, prepared and approved by counsel for the Debtor and Mrs. Kennedy, deeming the Contracts rejected.

³ Re/Max All Pro Realtors and its agent, Bill Easley, received the agreed upon commissions associated with the sale of both the 1717 Springer Road and 2273 Red Bank Road properties.

On June 6, 2003, the clerk issued a Notice of Commencement of Case, which was mailed to all scheduled creditors. The Notice fixed October 1, 2003, as the deadline for non-governmental creditors to file proofs of claim. On July 29, 2003, Mrs. Kennedy filed a secured proof of claim in the amount of \$26,820.00 for services performed. She later filed a claim in the amount of \$48,500.00 on November 25, 2003. On March 23, 2004, Mrs. Kennedy filed an Amended Proof of Claim in the amount of \$34,183.00. After trial, on March 24, 2004, Mrs. Kennedy, with the court's permission, filed another Amended Proof of Claim in the amount of \$32,383.00 plus reasonable attorney's fees.⁴ Mrs. Kennedy's claims for commission are based upon the Contracts executed with Elite Realty for the sale of the Springer Road and the Red Bank Road properties. The Debtor filed his Objection to Mrs. Kennedy's claims, stating that she did not fulfill the Contracts because she did not procure a buyer for the real property and furthermore, the Contracts had been orally cancelled on February 19, 2003.

II

“A proof of claim executed and filed in accordance with [the Bankruptcy Rules] shall constitute prima facie evidence of the validity and amount of the claim.” FED. R. BANKR. P. 3001(f). Nevertheless, § 502 of the Bankruptcy Code, concerning the allowance of claims,

⁴ These claims, including the March 24, 2004 Amended Claim, were filed as secured claims. There is, however, no basis for Mrs. Kennedy to assert a secured status nor does her attorney in the Brief of Claimant, Nettie [sic] Perry-Kennedy filed February 17, 2004, argue or cite to any authority that would persuade the court that she has a secured claim. Mrs. Kennedy's claim will accordingly be dealt with as a nonpriority unsecured claim.

provides that “[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C.A. § 502(a) (1993). Rule 3007 addresses objections to claims, providing that

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

FED. R. BANKR. P. 3007.

Once a debtor files an objection to a creditor’s proof of claim,

[he] bears the burden of going forward and presenting evidence to rebut or cast doubt upon, the creditor’s proof of claim. The Debtor’s burden is to produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim’s legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim . . . by a preponderance of the evidence.

In re Giordano, 234 B.R. 645, 650 (Bankr. E.D. Pa. 1999) (quoting *Galloway v. Long Beach Mortgage Co. (In re Galloway)*, 220 B.R. 236, 243-44 (Bankr. E.D. Pa. 1998)); see also *In re Walsh*, 264 B.R. 482, 484 (Bankr. N.D. Ohio 2001); *Namer v. Sentinel Trust Co. (In re AVN Corp.)*, 248 B.R. 540, 547 (Bankr. W.D. Tenn. 2000).

Validity of a proof of claim first stems from the status of a party as a creditor of the debtor. Creditor is defined by the Bankruptcy Code as “[an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]” 11 U.S.C.A. § 101(10)(A) (West 1993). Claim is defined as “[a] right to payment, whether

or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]” 11 U.S.C.A. § 101(5)(A) (West 1993). Thus, the court must first determine if the Contracts were valid and binding, whereby Mrs. Kennedy became a creditor of the Debtor.

III

Under Tennessee law,

[w]hile a contract may be either expressed or implied, or written or oral, it must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced.

Johnson v. Central Nat'l Ins. Co., 356 S.W.2d 277, 281 (Tenn. 1962); *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002). The Debtor does not deny that he executed the Contracts in blank, but he avers that the parties did not have a meeting of the minds. Additionally, he argues that when Mrs. Kennedy altered the commission rate on the Contract for the Springer Road property and changed the date of the Contracts sent to the Board of Realtors from February 12, 2003 to February 16, 2003, she altered material terms, including the date of the listing exclusivity period, for which there was no meeting of the minds.

As an initial matter, “[o]ne of the most basic rules of contract formation is that a person who signs a written document embodying an agreement with another party is bound by the terms of the signed agreement. This is true even if the person signing the document did not read what he or she signed.” *Advantage Funding Corp. v. Mid-Tenn. Mfg. Co., Inc.*, No. M1997-

00133-COA-R3-CV, 2000 Tenn. App. LEXIS 38, at *10 (Tenn. Ct. App. Jan. 27, 2000). A question arises, however, when documents are executed in blank, and the court

must decide whether the missing terms can be supplied by operation of law or whether the parties simply never made a binding agreement. At this point, the focus of the inquiry devolves upon who supplies the additional terms, whether the additional terms are expressly or impliedly authorized, and, if applicable, whether enforcing the agreement as construed will affect the rights of third parties.

For example, a person rightfully possessing a signed document containing blanks has the implied authority to fill in these blanks in such a way 'as was anticipated by [the signer].' By filling in the blanks in a document in this way, the person deemed acting for the person who signed the document merely causes the completed document 'to speak in accord with its intended purpose and use.' In this circumstance, filling in the blanks after the document was signed completes a contract that the law will enforce.

A slightly different rule applies when the party filling in the blanks is the other contracting party. The fact that the document contains blanks does not, by itself, invalidate the agreement However, if the party fills in the blanks in an unauthorized manner, the person who signed the document containing the blanks may avoid the agreement. These insertions will not bind the signer if the instrument, as completed, does not reflect the parties' true agreement.

Advantage Funding Corp., 2000 Tenn. App. LEXIS 38, at *10-*12 (citations omitted).

The parties had entered into agreements for the sale of real estate in the past, and the Debtor clearly understood that his execution of the Contracts would result in a listing contract. The Debtor also does not deny that he executed the Contracts in blank, which gives rise to an intention by the Debtor to enter into a real estate listing contract on the date that he executed the Contracts.

Furthermore, even assuming that the Contracts themselves did not bind the Debtor, his representations that Mrs. Kennedy could fill in the blanks created an oral contract. "An

oral brokerage contract for the sale of real estate is enforceable in Tennessee. Statements made between the seller and broker are characterized as a contract if the proof is clear, cogent and convincing.” *Lay v. Fairfield Dev.*, 929 S.W.2d 352, 354 (Tenn. Ct. App. 1996); *Parks v. Morris*, 914 S.W.2d 545, 547 (Tenn. Ct. App. 1995) (citing *Alexander v. C.C. Powell Realty Co., Inc.*, 535 S.W.2d 154 (Tenn. Ct. App. 1975)).

The Debtor is correct that modifications to contracts also require the same “meeting of the minds” and mutual assent that is required for initial contracts. *See, e.g., Hilman v. Hilman*, No. M2002-00898-COA-R3-CV, 2003 Tenn. App. LEXIS 541, at *7 (Tenn. Ct. App. July 31, 2003) (“The contemplated mutual assent and meeting of the minds cannot be accomplished by the unilateral action of one party.”). If he did not agree to unilateral modifications by Mrs. Kennedy, the modifications would not be binding and valid upon the Debtor; however, that would not relieve the Debtor from his obligations to perform under the terms of the Contracts that he executed. *See Balderacchi v. Ruth*, 256 S.W.2d 390, 391-92 (Tenn. Ct. App. 1952) (pondering whether unilateral modifications “end” the original contract and “create” a new one and answering in the negative).

The first modification at issue is the commission rate for the Springer Road property, which Mrs. Kennedy testified was changed from the higher 10% to 6%. Mrs. Kennedy testified, to the court’s satisfaction, that she made this change, which would entitle her to a lesser commission on the higher priced property, at the Debtor’s insistence. The second modification at issue is the change from February 12 to February 16 on the copies sent to the

Board of Realtors. Clearly, a change in the dates of the Contracts would affect the exclusivity period of the Contracts. However, Ms. Bradshaw, the Principal Broker/Managing Broker of Elite Realty and Mrs. Kennedy's boss, testified that the change in the dates on the copies of the Contracts sent to the Board of Realtors did not have any affect on the validity of the Contracts as between the Debtor and Elite Realty. The court agrees. Furthermore, the MLS listings themselves do not refer to the date upon which the seller and the agent entered into their listing agreements. See TRIAL EX. 11.

The court finds that the Contracts executed by the Debtor on February 12, 2003, were binding listing contracts with Elite Realty for the sale of the Springer Road property and the Red Bank Road property. Pursuant to the Contracts, the Debtor agreed to pay commissions to Mrs. Kennedy, as agent for Elite Realty, upon the sale of the properties by any party within the exclusive listing period of February 12, 2003 through February 12, 2004.

IV

Because they were binding upon the Debtor, there is no question that he breached the Contracts.⁵ Nevertheless, the Debtor argues that even though he breached the Contracts, Mrs. Kennedy did not perform thereunder, and so she should not be entitled to a claim for her commissions but only to actual expenses incurred in the amount of \$2,500.00. Generally, in

⁵ The Debtor has acknowledged that if the Contracts were valid, he breached them on January 29, 2004, when the court entered an Agreed Order Authorizing Rejection of Real Estate Listing Contracts, granting his motion to reject any real estate listing agreements with Mrs. Kennedy. See TRIAL EX. 17. Under the Bankruptcy Code, "the rejection of an executory contract . . . of the debtor constitutes a breach of such contract . . . [if it] has not been assumed . . . immediately before the date of the filing of the petition[.]" 11 U.S.C.A. § 365(g)(1) (West 1993 & Supp. 2004).

order for a broker to be entitled to commissions, his or her efforts must be the “procuring cause of the sale” of the subject property. *Douglas v. Tibbs*, No. 02A01-9602-CH-00033, 1996 Tenn. App. LEXIS 808, at *6 (Tenn. Ct. App. Dec. 16, 1996) (citing *Pacesetter Props., Inc. v. Hardaway*, 635 S.W.2d 382 (Tenn. Ct. App. 1981)). “Even language giving the broker an exclusive agency is not sufficient to guarantee him a commission, unless he can show that he was the procuring cause of a completed sale.” *Alexander v. Hopkins*, No. 01A01-9710-CH-00590, 1998 Tenn. App. LEXIS 542, at *6 (Tenn. Ct. App. Aug. 5, 1998).

There is no dispute that Mrs. Kennedy was not the procuring cause of the sale of either the Springer Road property or the Red Bank Road property. However, she argues that she made every attempt to uphold her end of the Contracts by listing both properties through the MLS listing, in the *Homes Magazine*, in the *Knoxville News-Sentinel*, and on the internet through eBay. See TRIAL EX. 10; TRIAL EX. 11. Mrs. Kennedy also testified that she had inquiries by potential purchasers, but she was not allowed to enter the Springer Road property and was unable to show the Red Bank Road property. Furthermore, Mrs. Kennedy actually procured a Sales Contract and Receipt of Deposit on April 12, 2003, for the Red Bank Road property at a purchase price of \$145,000.00; however, this Sales Contract did not result in a sale.⁶ See TRIAL EX. 9.

⁶ The parties to this Sales Contract were New South Federal and David Neely. Mrs. Kennedy testified that she listed the seller as New South Federal based upon its representations to her that it was in the process of foreclosing upon the Red Bank Road property. At trial, Mrs. Kennedy conceded that she should have additionally listed the Debtor as seller. Nevertheless, the Sales Contract clearly evidences the Red Bank Road property as the subject real property. TRIAL EX. 9.

It appears that when the Debtor undertook to prevent Mrs. Kennedy's performance thereunder, he repudiated the Contracts, giving rise to a cause of action without her being required to fully perform. "In order to serve as an anticipatory breach of contract or repudiation, the words and conduct of the contracting party must amount to a total and unqualified refusal to perform the contract. In the alternative, a party may breach a contract by committing a voluntary act which renders the party unable or apparently unable to perform the contract." *Wright v. Wright*, 832 S.W.2d 542, 545 (Tenn. Ct. App. 1991) (citations omitted). Once the Debtor effectuated his anticipatory repudiation, Mrs. Kennedy was no longer under a duty to perform; however, "in order to maintain an action for damages, [she] must at least show a readiness to perform." *Chen v. Advantage Co., Inc.*, 713 S.W.2d 79, 81 (Tenn. Ct. App. 1986).

It appears that the Debtor breached the Contracts in February 2003, when he called Ms. Bradshaw with Elite Realty and requested cancellation of the Contracts. This is buttressed by his further actions of obtaining the Restraining Order barring Mrs. Kennedy's entry upon the Springer Road property and having locks put on the Red Bank Road property, thus rendering Mrs. Kennedy's full performance of the Contracts impossible. Nevertheless, Mrs. Kennedy did advertise the properties, and she even procured a Sales Contract and Receipt of Deposit dated April 12, 2003, for the Red Bank Road property. See TRIALEX. 9. Although this Sales Contract did not result in the sale of the Red Bank Road property, it is evidence that Mrs. Kennedy was attempting to uphold her end of that Contract.

On the other hand, by her own admission, Mrs. Kennedy never made any attempts to have the Restraining Order dissolved, nor did she attack it in any way. She was fully aware that the Restraining Order prohibited her from entering upon the Springer Road property. Despite any advertisements she purchased, after the Restraining Order issued on February 19, 2003, she knew that it would be impossible for her to perform to any real extent under the Springer Road property Listing Contract.

The court finds that the Debtor repudiated the Contracts; however, with regards to the Springer Road property, Mrs. Kennedy was in no way a part of the procurement of a sale thereof, and she is not entitled to claim any commission thereon. Conversely, while she was not the agent that actually sold the Red Bank Road property, she made every attempt to fully perform under the terms of that Contract, including obtaining a Contract for the sale of the property. Accordingly, the court agrees that she is entitled to a claim for \$7,363.00, representing one-half of the commission received by Re/Max All Pro Realtors in the amount of \$14,725.00 for the sale of the Red Bank Road property.⁷

⁷ Mrs. Kennedy seeks this commission based on the Debtor's listing agreement with Bill Easley and Re/Max All Pro Realtors which called for a 7% commission rather than on her February 12, 2003 Listing Contract with the Debtor which called for a 10% commission. The court presumes that her claim for one-half of the total commission rather than the entire 7% is grounded upon the fact that Mr. Easley and Re/Max All Pro Realtors, and not Mrs. Kennedy, procured the sale of the Red Bank Road property thus warranting a split of the commission between the selling and listing agents.

V

The final issue before the court is whether Mrs. Kennedy is entitled to any damages as a result of the Debtor's breach of the Contracts.

A renunciation or repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach. In other words, if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitled the nonrepudiating party to claim damages for total breach.

Jamison v. Jamison Pest Control Co., 852 S.W.2d 884, 885 (Tenn. Ct. App. 1992). After a party repudiates a contract, the other party's cause of action arises "when the acts and conduct of [the breaching party] evince an intention no longer to be bound by the contract." *Jamison*, 852 S.W.2d at 885.

"The purpose of assessing damages in breach of contract cases is to place the plaintiff as nearly as possible in the same position [she] would have been in had the contract been performed, but the nonbreaching party is not to be put in any better position by recovery of damages for the breach of the contract than he would have been if the contract had been fully performed." *Cantrell v. Knox County Bd. of Educ.*, 53 S.W.3d 659, 662 (Tenn. 2001) (quoting *Lamons v. Chamberlain*, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993)). "Generally speaking, damages for breach of contract include only such as are incidental to or directly caused by the breach and may be reasonably supposed to have entered into the contemplation of the parties." *BVT Lebanon Shopping Ctr., Ltd. v. Wal-Mart Stores, Inc.*, 48

S.W.3d 132, 136 (Tenn. 2001) (quoting *Simmons v. O'Charley's, Inc.*, 914 S.W.2d 895, 903 (Tenn. Ct. App. 1995)).

Mrs. Kennedy testified that she has incurred anywhere between \$6,000.00 and \$10,000.00 in expenses pursuant to her duties under the Contracts; however, she could not provide any proof of expenses other than approximately \$2,500.00 for advertising expenses. While conceding that Mrs. Kennedy has incurred actual expenses of \$2,500.00, the Debtor opposed any additional expenses. The court agrees that Mrs. Kennedy's testimony regarding expenses is speculative, and without any proof, not justified.

Additionally, Mrs. Kennedy has requested her attorney's fees, pursuant to the Contracts and their Multiple Listing Service agreements. To that end, at trial she introduced an Affidavit of Attorney, requesting fees in the amount of \$6,337.62 and expenses in the amount of \$322.89, for a total amount of \$6,660.51 through March 22, 2004. See TRIALEX. 15. Having found that Mrs. Kennedy is not entitled to any commission resulting from the Springer Road Contract, the court likewise will not award attorney's fees thereon. On the other hand, having found that Mrs. Kennedy is entitled to a commission from the sale of the Red Bank Road property, the court agrees that she is entitled to receive reasonable attorney's fees for the litigation associated therewith. Accordingly, the court finds that Mrs. Kennedy has a claim for one-half of the requested attorney's fees, \$3,168.81, and one-half of the requested expenses, \$161.44, for a total of \$3,330.25.

In summary, Mrs. Kennedy's claim will be allowed in the amount of \$13,193.25. The balance of her claim will be disallowed.

An order consistent with this Memorandum will be entered.

FILED: March 30, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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

In re

Case No. 03-32764

RODNEY LANE KENNEDY
d/b/a ROCKY TOP RESORTS

Debtor

ORDER

For the reasons stated in the Memorandum on Debtor's Objection to Claim for Real Estate Commission Fee, the court directs the following:

1. The Debtor in Possession's Objection to Claim for Real Estate Agent's Brokerage Fee filed by the Debtor on August 13, 2003, objecting to the allowance of the claim of Netti Perry-Kennedy, is SUSTAINED in part and DENIED in part.

2. The Amended Proof of Claim filed by Netti Perry-Kennedy on March 24, 2004, in the amount of \$32,353.00, plus reasonable attorney's fees, is disallowed as a secured claim but is allowed as a nonpriority unsecured claim in the amount of \$13,193.25, of which amount \$7,363.00 represents a claim for one-half of the real estate commission earned from the sale of the Debtor's real property at 2273 Red Bank Road, Sevierville, Tennessee, \$3,168.81 represents attorney's fees incurred in the prosecution of the claim, \$2,500.00 represents advertising expenses, and \$161.44 represents expenses incurred by Mrs. Kennedy's attorney.

3. Except as allowed herein, Netti Perry-Kennedy's Amended Proof of Claim filed March 24, 2004, is disallowed.

SO ORDERED.

ENTER: March 30, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE