UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

A.J.C. APARTMENTS, INC.	CASE NO. 01-63387
Debtor	Chapter 11

APPEARANCES:

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, LLP Attorneys for Creditor Midwest Holding Corp. 1400 First Federal Plaza Rochester, New York 14614	STEVEN E. LAPRADE, ESQ. Of Counsel
THE ANTONUCCI LAW OFFICE Attorneys for Debtor Bonadio Building 12 Public Square Watertown, New York 13601	DAVID P. ANTONUCCI, ESQ. Of Counsel
HISCOCK & BARCLAY, LLP Attorneys for Longley Jones Financial Plaza P.O. Box 4878 Syracuse, New York 13221-4878	J. ERIC CHARLTON, ESQ. Of Counsel
GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI & PRIORE, LLP Attorneys for Gerald Jordan 258 Genesee Street Utica, New York 13502	NICHOLAS S. PRIORE, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief .S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion ("Motion") filed by Midwest Holdings Corporation ("Midwest") on April 11, 2002, seeking a determination of whether certain funds previously

collected and paid out by Robert Chetney, Sr. ("Chetney") in his capacity as temporary receiver of real property belonging to A.J.C. Apartments, Inc. ("Debtor") are property of the estate or properly payable to Midwest.[1] Opposition to Midwest's Motion to the extent that it seeks turnover of the funds to Midwest was filed by the Debtor on April 25, 2002.

The Motion was originally scheduled to be heard at the Court's regular motion term in Syracuse, New York, on April 30, 2002. It was adjourned to May 28, 2002, on consent of both parties. Following oral argument on May 28, 2002, the Court adjourned the Motion to June 25, 2002, to allow the parties to file memoranda of law in support of their respective positions. The matter was submitted on that date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS

The Debtor filed a voluntary petition ("Petition") pursuant to chapter 11 of the Code on May 25, 2001. According to Schedule A of the Petition, the Debtor owns several parcels of income producing real property in Oswego County, New York, ranging from single family units

[1] In the event that the Court determines that the monies are property of the estate, Midwest requests relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") to proceed with collection and execution of its judgment.

to five-family units. Listed in Schedule B of the Petition and identified as Debtor's personal property are "all assets accumulated by receiver." Midwest is identified in Schedule D as a secured creditor with a "contingent" claim of $821,620.94 pursuant to a judgment.

According to the background presented by Midwest, it commenced an action in New York State Supreme Court ("State Court") on or about August 12, 1998, for monies due and owing by the Debtor based on twenty-one notes and mortgages executed by the Debtor and by Alan J. Cole, principal and sole shareholder of the Debtor. *See* Exhibit G of the Motion. By order, dated March 13, 2000, in the State Court action, Chetney was appointed temporary receiver "for all the real property currently titled to Alan J. Cole, Inc."[2] *See* Exhibit A of the Motion. On November 13, 2000, the Hon. John J. Elliott, Acting Justice of the New York State Supreme Court, Oswego County, granted summary judgment in favor of Midwest and awarded it a money judgment in the amount of $630,521.84, plus interest from November 17, 2000, as well as costs and disbursements. *See* Exhibit B of the Motion.

By order of the State Court, dated March 19, 2001, the temporary receivership was terminated and Chetney was relieved of his duties. *See* Exhibit C of the Motion. According to Midwest, Chetney was officially relieved of his duties as of May 4, 2001, when the successor receiver, E. Carlyle Smith ("Smith"), President, Longley Jones Management Corporation, assumed control of the Debtor's properties. *See* Motion at ¶¶ 11-12. Under the terms of the March 19, 2001, order of the State Court, Chetney was to turn over any surplus monies to Smith and to provide an accounting within 45 days of service of the order. Chetney provided a final

---

[2] Allegedly, this nomenclature was changed in a supplemental temporary order of the State Court, dated May 23, 2000, to reflect the name of the Debtor herein.

accounting on or about June 26, 2001, some 90 days after entry of Judge Elliot's March 19, 2001 order. *See* Exhibit E of the Motion. According to the accounting, monies had been paid to Chetney and his attorney, Howard D. Olinsky, Esq. ("Olinsky") between May 2, 2000, and May 3, 2001, from the escrow account into which rents had been deposited. *See id.* On or about October 8, 2001, Midwest filed an objection in State Court to the final accounting and pursuant to Article 64 of the New York Civil Practice Law and Rules ("NYCPLR") moved for an order directing Chetney

> to pay all amounts to Midwest Holdings which are determined by the court to have been improper payments made during his tenure as temporary receiver and directing Howard D. Olinsky, Esq., and his law firm, Olinsky & DiMartino, to disgorge all payments made by the former temporary receiver to them during the course of the temporary receivership . . .

Affidavit of Steven Laprade, Esq., sworn to October 8, 2001, attached as Exhibit G of the Motion. On March 11, 2002, Judge Elliott rendered a Letter Decision and Order ("Letter Decision"). *See* Exhibit H of the Motion. In the Letter Decision, he found that "the original action was not a mortgage foreclosure action and the receivership was established for the enforcement of the plaintiff's judgment granted against defendant." *Id.* He went on to state that "[t]he temporary receiver owed his duty to the judgment creditor (and the Court) . . . ." *Id.* Judge Elliott directed that all but $5,000 paid to Olinsky in attorney's fees be refunded to Midwest. Judge Elliott also declined to award commissions to Chetney and directed that the sum of $6,355.83 previously paid to him as commissions be refunded to Midwest. He also granted judgment in favor of Midwest with respect to certain expenditures made with respect to one property owned by Alan J. Cole individually and six properties owned by the Debtor but not

subject to Midwest's mortgages, for which Chetney had not collected rents.[3]

DISCUSSION

The issue confronting the Court is whether any funds recovered as a result of Judge Elliott's Letter Decision of March 11, 2002, are property of the estate or whether Midwest is entitled to the monies. While filed as a motion, the relief Midwest is actually seeking is a declaratory judgment, which is more properly brought within the context of an adversary proceeding pursuant to Rule 7001(9) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). As this Court has previously noted,

> where the rights of the affected parties have been protected and the parties have had an opportunity to be heard, form will not be elevated over substance, and the matter will be allowed to proceed on the merits as originally filed. (citation omitted).

In re Friedman, 184 B.R. 883, 887 (Bankr. N.D.N.Y. 1994), *aff'd* 184 B.R. 890 (N.D.N.Y. 1995).

Judge Elliott's order of March 13, 2000, appointed Chetney as temporary receiver. According to Midwest, his supplemental order, dated May 23, 2000, required that any monies Chetney collected in rents be held in escrow after payment of all necessary expenses and fees necessary to maintain the real property, as well as Chetney's commissions, pending further order of the court. The order granting summary judgment in favor of Midwest on November 13, 2000,

---

[3] Allegedly, Chetney understood, based on conversations with Olinsky, that he was to oversee only those properties owned by the Debtor that were subject to mortgages of Midwest. As pointed out by Judge Elliott's Letter Decision, the receivership was established to enforce Midwest's judgment with respect to all the Debtor's real property, not just those on which Midwest had a mortgage.

and awarding a money judgment of $630,521.84 made no provision for turnover of monies to Midwest prepetition by Chetney. Chetney was relieved of his duties on May 4, 2001, and Smith assumed control of the Debtor's properties by virtue of Judge Elliott's order of March 19, 2001. The Debtor filed its petition on May 25, 2001, prior to Chetney's final accounting and Midwest's objection to said accounting. At the time the Debtor filed its Petition, there had been no "further order" of the State Court requiring that any monies being held in escrow by Chetney during his tenure as receiver be turned over to Midwest. Indeed, Judge Elliott's order of March 19, 2001, required that Chetney turn any surplus monies over to Smith. Thus, there had been no prepetition action taken by order of the State Court which transferred ownership in either the properties or the rents to Midwest.

As a matter of law, the prepetition appointment of a receiver did not terminate the Debtor's ownership of the properties or the rents they generated. *See Matter of Willows of Coventry, Ltd. Partnership*, 154 B.R. 959, 962 (Bankr. N.D. Ind. 1993). It merely deprived the Debtor of its right to possession. *Id.*, *see also In re Constable Plaza Assoc.*, 125 B.R. 98, 106 (Bankr. S.D.N.Y. 1991) (stating that "the prepetition appointment of a state court receiver did not cut off all of the debtor's property interests in the future rents . . . . The debtor continues to possess a residual interest in the rents which results in characterizing such rents as property of the estate . . . ."); *Greenwich Sav. Bank v. Samotas*, 17 N.Y.S.2d 772, 774 (N.Y. Mun. Ct. 1940) (indicating that "[t]he title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made.").

Code § 543 gives this Court authority to review the actions of a state court receiver. *See*

In re Paren, 158 B.R. 447, 450 (Bankr. N.D. Ohio 1992) (citation omitted). According to the House and Senate Reports on the Bankruptcy Reform Act of 1978, Code § 543

> requires a custodian appointed before the bankruptcy case to deliver to the trustee and to account for property that has come into his possession, custody, or control as a custodian. "Property of the debtor" in section (a) includes property that was property of the debtor at the time the custodian took the property, but the title to which passed to the custodian. The section requires the court to protect any obligations incurred by the custodian, provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by the custodian and to surcharge the custodian for any improper or excessive disbursement, unless it has been approved by a court of competent jurisdiction. Subsection (d) reinforces the general abstention policy in section [305] by permitting the Bankruptcy Court to authorize the custodianship to proceed notwithstanding this section.

S.REP.NO. 95-989, 95th Cong. Ad.News at pp. 5787, 7871; H.REP. NO. 95-595, 95th Cong. 2nd Sess. at 370, 1978 U.S. Code Cong. Ad.News at pp. 5785, 6326 (emphasis added).

Allowing a receiver to remain in possession of estate property is in the nature of abstention and is permitted if the interests of the creditors and the debtor would be better served. *See In re 400 Madison Ave. Ltd. Partnership*, 213 B.R. 888, 895 (Bankr. S.D.N.Y. 1997). Although Chetney was relieved of his duties prepetition, this Court certainly had the authority to examine the accounting filed by Chetney postpetition and, as indicated above, "to surcharge the custodian for any improper or excessive disbursement." Indeed, Chetney should have been required to file his accounting with this Court once the bankruptcy case had been commenced. Nevertheless, at this juncture of the case, it would be elevating form over substance to again review Chetney's accounting given Judge Elliott's thorough analysis as set forth in this Letter Decision of March 11, 2002. In so finding, the Court views it also as being in the nature of abstention to accept the findings of the State Court made postpetition with respect to the

accounting of a receiver whose appointment was terminated prepetition. The only issue this Court has is with the distribution of the monies found by the State Court to have been improperly disbursed by Chetney.

The State Court certainly was within its jurisdiction to review the activities of Olinsky and Chetney, as well as those of Alan J. Cole in connection with the accounting filed by Chetney. This Court takes no issue with Judge Elliott's findings in connection with those activities or with his requirement that certain monies be disgorged by Chetney and Olinsky. However, because the review of the accounting occurred postpetition and because the monies had never been awarded to Midwest by order of the State Court prepetition, the Debtor has an interest in any monies "refunded." At the time the Petition was filed, the Debtor held title to the properties and to any monies held in escrow by Chetney. The monies ordered to be "refunded" to Midwest, while subject to its judgment lien, never were in the possession of Midwest. The fact that they were in the possession of Chetney in his capacity as receiver does not alter this conclusion. As receiver, Chetney arguably acted as agent of the State Court. He was not the agent of Midwest although appointed to maintain the property subject to Midwest's judgment lien pending further order of the State Court. When the Debtor filed its Petition in May of 2001, any monies held in Chetney's account became property of the estate. Once the State Court had reached its determination that certain disbursements made by Chetney were improper, the issue of entitlement to any refunds should have been left to the jurisdiction of this Court. Under the facts of this case, this Court concludes that any monies ordered by the State Court to be "refunded" were property of the estate, subject to Midwest's judgment lien.

Midwest obviously recognized the possibility that the Court would conclude that the

monies were property of the estate. As alternative relief in its Motion, Midwest requests relief from the automatic stay pursuant to Code § 362(d) to proceed with the collection and execution of any judgment it had against Chetney and Olinsky.[4] The Court believes it appropriate that there be further argument of this portion of the Motion. Accordingly, it will return Midwest's Motion to the October 1, 2002, calendar in Syracuse, New York. In the interim, the Court will require that any monies recovered pursuant to Judge Elliott's Letter Decision of March 11, 2002, continue to be held in the attorney trust account of Midwest's counsel as required by this Court's prior Order of July 24, 2002.

Based on the foregoing, it is hereby

ORDERED that any monies refunded pursuant to Judge Elliott's Letter Decision of March 11, 2002, are deemed to be property of the estate, and it is further

ORDERED that a hearing on Midwest's Motion pursuant to Code § 362(d) be held on October 1, 2002, at the U.S. Courthouse, 100 S. Clinton Street, Syracuse, New York, at 10:00 a.m.

---

[4] On July 24, 2002, the Court signed an Order approving a stipulation whereby Midwest was permitted to enter a judgment against all entities ordered to pay money to Midwest in the State Court action and to take the necessary steps to execute upon the judgment. Under the terms of the stipulation, any monies received in satisfaction of the judgment were to be held in an attorney trust account by Midwest's counsel pending further order of this Court.

Dated at Utica, New York

this 19th day of September 2002

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge