

Motion to Dismiss
11 U.S.C. § 303
Fed. R. Bankr. P. 1004
O.R.S. § 67.140
O.R.S. § 67.015(1)

In re Loverin Ranch, Case No. 12-38626-rld12

6/10/2013 RLD

Published

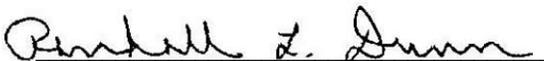
The bankruptcy court held an evidentiary hearing on a motion to dismiss ("Motion") filed by a secured creditor. In the Motion, the secured creditor contended that the debtor's chapter 12 case should be dismissed because it had not been properly authorized by its partners.

After determining that the debtor was an Oregon general partnership, the bankruptcy court addressed the question of whether the filing of the chapter 12 bankruptcy case had been properly authorized by all of the debtor's partners. Oregon law generally requires unanimous partners consent to actions outside the ordinary course of partnership business. Neither the provisions of the partnership agreement nor the historical conduct of the partnership's business justified departing from the general rule. The bankruptcy court then found that one of the partners did not consent to filing the voluntary chapter 12 bankruptcy case.

The bankruptcy court therefore granted the Motion, concluding that the debtor's chapter 12 bankruptcy filing was not properly authorized with the consent of all of the partners.

P13-4(10)

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
LOVERIN RANCH,) No. 12-38626-rld12
Debtor.) MEMORANDUM OPINION

On May 13, 2013, I held an evidentiary hearing ("Hearing") on the Motion to Dismiss ("Motion") this chapter 12¹ case filed by Francis Carrington ("Carrington"). Following my review of the submissions filed by the debtor Loverin Ranch ("Loverin Ranch") and Carrington and the admitted exhibits, and hearing testimony and argument, I advised the parties that I intended to grant the Motion, but an order dismissing the case would be entered only after I prepared and entered a written opinion setting forth my findings of fact and conclusions of law.

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules." The Oregon Revised Statutes are referred to as "ORS."

1 This Memorandum Opinion sets forth the court's findings of fact
2 and conclusions of law under Civil Rule 52(a), applicable with respect to
3 this contested matter under Rules 7052 and 9014.

4 Factual Background

5 This case was initiated by the filing of a chapter 12 petition
6 on November 19, 2012.² The petition was signed in behalf of Loverin
7 Ranch by Eulaina Lynne Loverin ("Lynne") as a "partner." Loverin Ranch
8 filed its chapter 12 plan for reorganization of its affairs (the "Plan")
9 on February 19, 2013 (Docket No. 11). A confirmation hearing was
10 scheduled for April 1, 2013, at 1:30 pm (Docket No. 16).

11 Carrington filed the Motion on March 22, 2013, supported by the
12 Declaration of his counsel, Laura J. Walker. See Docket Nos. 23 and 24.
13 In substance, the Motion argued that Loverin Ranch's chapter 12 case
14 should be dismissed because it was not properly authorized, in that
15 Loverin Ranch was an Oregon partnership, and unanimous consent of the
16 partners was required to authorize a bankruptcy filing in behalf of the
17 partnership. Carrington argued that not all Loverin Ranch partners
18 consented to its chapter 12 filing. On March 25, 2013, Carrington filed
19 an objection to confirmation of the Plan, coupled with a motion for
20 continuance of the confirmation hearing to allow time for further
21 investigation/discovery. See Docket No. 26. A preliminary hearing on
22 the Motion was scheduled at the same time as the confirmation hearing.
23 See Docket No. 29.

24
25 ² I have taken judicial notice of the docket and documents filed in
26 Loverin Ranch's chapter 12 case for purposes of confirming and
ascertaining facts not reasonably in dispute. Federal Rule of Evidence
201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).

1 2002 amendments to Rule 1004; In re SWG Assocs., 199 B.R. 557, 559-60
2 (Bankr. W.D. Pa. 1996).

3 At the time that the Motion was filed, there was some question
4 as to what kind of partnership entity Loverin Ranch is, a general
5 partnership or a limited partnership. The Loverin Ranch partnership
6 agreement, as amended ("Partnership Agreement"), identifies certain
7 partners as "General Partners" and others as "Limited Partners." See
8 Exhibit 1, p.2. Paragraph 15 of the Partnership Agreement provides:

9 No limited partner shall be personally liable for any
10 of the debts of the partnership, or any of the losses
11 thereof beyond the amount originally contributed by
12 him, except for the debts existing or the debts
incurred in the initial formation of the partnership
structure with the P.C.A., F.H.A. or other lending
institutions or extensions thereof.

13 However, under Oregon law, in order to form a limited partnership, a
14 certificate of limited partnership including certain required information
15 "must be executed and submitted for filing to the Office of Secretary of
16 State." ORS § 70.075(1) (emphasis added). The limited partnership is
17 not actually formed until the Oregon Secretary of State files the limited
18 partnership certificate. ORS § 70.075(2). At the Hearing, the parties
19 conceded that no limited partnership certificate ever was prepared or
20 filed for Loverin Ranch. They agreed, as do I, that Loverin Ranch should
21 be treated as an Oregon general partnership in this case.

22 Filing a voluntary bankruptcy case is a paradigm action outside
23 the ordinary course of partnership business. See, e.g., In re Century/ML
24 Cable Venture, 294 B.R. at 27 and 28 n.27; In re SWG Assocs., 199 B.R. at
25 559:

1 The filing in this case of a Chapter 11 petition in
2 bankruptcy, which has as its purpose the
3 reorganization of the affairs of a debtor, cannot, in
4 good conscience, be viewed as an act whereby the 3
5 petitioning partners in this partnership debtor sought
6 to carry on its business in the usual way. Such a
7 conclusion is mandated by the relief sought by
8 petitioners in a Chapter 11 case, which is anything
9 but the normal process by which an entity conducts its
10 business.

11 In determining whether Loverin Ranch's chapter 12 filing was
12 properly authorized, two provisions of Oregon general partnership law,
13 ORS §§ 67.005-67.365, are particularly relevant. ORS § 67.140, entitled
14 "Partner's rights and duties," subparts 7 and 11 provide as follows:

15 (7) Each partner has equal rights in the management
16 and conduct of the partnership business.

17 . . .
18 (11) A difference arising as to a matter in the
19 ordinary course of business of a partnership may be
20 decided by a majority of the partners. An act outside
21 the ordinary course of business of a partnership and
22 an amendment to the partnership agreement may be
23 undertaken only with the consent of all the partners.
24 (Emphasis added.)

25 ORS § 67.140(11) states the general rule that actions outside the
26 ordinary course of partnership business can only be undertaken in behalf
of the partnership with the consent of all partners.

ORS § 67.015(1) provides a counterweight to the general rule,
stating, with exceptions not relevant in this case, "relations among the
partners and between the partners and the partnership are governed by the
partnership agreement." Neither the parties nor I have been able to find
any Oregon authorities interpreting the subject provisions of
ORS § 67.140(7) and (11) and 67.015(1) in this or a similar context.
However, there is nothing in the language of the Oregon general

1 partnership law that would preclude partners from providing in their
2 partnership agreement that decisions outside the ordinary course of
3 business could be made with less than unanimous consent of the partners.
4 In this case, the question is whether the Partnership Agreement in fact
5 provides for approval of a voluntary bankruptcy filing on less than
6 unanimous consent of the partners. I find that it does not for the
7 following reasons.

8 Exhibit 2 incorporates a series of resolutions ("Resolutions")
9 purporting to authorize and implement a chapter 12 filing in behalf of
10 Loverin Ranch. Its preamble states: "The undersigned partner on behalf
11 of [Loverin Ranch] . . . does hereby take the following action by consent
12 of the partnership." The Resolutions are signed by Lynne and dated
13 effective November 19, 2012, the date of Loverin Ranch's bankruptcy
14 filing. The Resolutions have all the earmarks of professional
15 preparation to document the decision of the Loverin Ranch partners to
16 authorize a chapter 12 filing in behalf of the partnership. I note that
17 no evidence was presented at the Hearing 1) that the Loverin Ranch
18 partners kept a "minute book" of partnership minutes or resolutions or 2)
19 that any minutes or written resolutions had been prepared previously by
20 the Loverin Ranch partners to document approved partnership actions.

21 In the Partnership Agreement, Lee is designated as both a
22 general and a limited partner of Loverin Ranch. See Exhibit 1, p.2. In
23 his Declaration filed in support of the Motion and in his testimony at
24 the Hearing, Lee testified that he did not consent to a voluntary chapter
25 12 bankruptcy filing in behalf of Loverin Ranch. See Docket No. 45, p.1.
26 Based on this evidence, I find that not all Loverin Ranch partners

1 consented to its chapter 12 filing.

2 Contrary to the argument of Loverin Ranch's counsel, the
3 Partnership Agreement does not generally provide "that a majority of the
4 votes will control the decisions of the partnership." Loverin Ranch
5 Memorandum in opposition to the Motion, Docket No. 40, p.4. However, the
6 Partnership Agreement contains several specific provisions that allow
7 decisions outside the ordinary course of the partnership's business to be
8 made by majority vote.

9 For example, Paragraph 8 of the Partnership Agreement provides
10 that, "The capital contributions of the limited partners shall be upon
11 the following terms: . . ." and subparagraph 8.2 thereafter provides:

12 The capital accounts of the limited partners shall be
13 expressed in terms of limited partnership shares which
14 shall consist of 683,000 shares of Class A limited
15 partnership shares and 57,000 shares of Class B
16 limited partnership shares. Each share shall have one
17 vote, with a majority vote controlling. (Emphasis
18 added.)

19 Embedded as it is in a Partnership Agreement paragraph expressly relating
20 to limited partner capital contributions and capital accounts,
21 subparagraph 8.2 is an unlikely vessel to provide that all partnership
22 decisions are to be made by majority vote of the partners. The subject
23 statement in context lends itself more to the interpretation that each
24 limited partner share will have one vote, and among the limited partners,
25 a majority vote will control in relation to partnership decisions on
26 capital contributions and capital accounts.

That interpretation is reinforced by the provisions of
Paragraphs 9 and 11 of the Partnership Agreement. Paragraph 9 provides
that, "The limited partners shall receive the distribution of the profits

1 and losses of the partnership as determined by a majority vote of the
2 general partners.” Paragraph 11 provides that:

3 The general partner or partners shall have no interest
4 in the income or capital of this partnership except as
5 expressed below: The general partner or partners may
6 receive such reasonable salary as may be from time
7 [to] time agreed upon by a majority vote of the
8 respective shares of the general and limited partners.
9 The remaining income of the partnership shall be
10 divided among the limited partners as determined by a
11 majority vote of the general partners. (Emphasis
12 added.)

13 There are no other partner voting provisions in the Partnership
14 Agreement. There is no provision in the Partnership Agreement generally
15 authorizing the partners to make decisions outside the ordinary course of
16 partnership business by majority vote, and there is no specific provision
17 authorizing the partners to approve a voluntary bankruptcy filing by
18 majority vote of the partners.

19 Counsel for Loverin Ranch argued that even if the Partnership
20 Agreement itself did not clearly provide that partners could make
21 decisions outside the ordinary course of Loverin Ranch’s business by
22 majority vote, the course of conduct of Loverin Ranch’s business
23 historically must lead to the conclusion that the partners had agreed
24 that all business decisions for the partnership, whether in or outside
25 the ordinary course, would be made by majority partner votes.

26 Lynne testified, consistent with the Partnership Agreement,
that the partnership was formed in 1984. See Exhibit 1, p.8. Yet, the
only partnership decision outside the ordinary course of its business
that Lynne could identify specifically in her testimony that was made
without the consent of all partners was the 2003 decision to enter into

1 the \$250,000 loan transaction with Carrington.³ See Exhibit 5.

2 As a bottom line matter, the Partnership Agreement does not
3 contain any provision authorizing the Loverin Ranch partners to make
4 decisions, including the decision to file a voluntary chapter 12
5 bankruptcy in behalf of the Partnership, outside the ordinary course of
6 partnership business by majority vote of the partners. Even if that lack
7 could be supplemented by evidence as to a consistent historical pattern
8 of outside the ordinary course decision making by a majority of the
9 partners, one or possibly two outside the ordinary course decisions over
10 the approximately thirty year life of the partnership do not establish a
11 sufficient pattern to justify departing from the general statutory
12 presumption set forth in ORS § 67.140(11) that acts outside of the
13 ordinary course of the partnership's business "may be undertaken only
14 with the consent of all of the partners."

15 Since Loverin Ranch's chapter 12 filing was not properly
16 authorized with the consent of all of the partners, I conclude that I
17 must grant the Motion.

18 Conclusion

19 Consistent with the foregoing discussion of relevant facts and
20 the applicable law, I will grant the Motion. An order dismissing Loverin
21 Ranch's chapter 12 case will be entered contemporaneously with this
22 Memorandum Opinion.

23
24 ³ Lynne also generally identified the 1992 loan transaction with the
25 Farm Services Administration ("FSA") of the U.S. Department of
26 Agriculture (see Exhibit 6). However, it was not clear from her
testimony that the FSA financing transaction was entered into without the
consent of all Loverin Ranch partners.

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cc: Virginia Andrews Burdette
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