IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
HORSESHOE NAIL RANCH, L.P.,	§	Case No. 06-41556
	§	(Chapter 11)
Debtor.	§	

ORDER GRANTING IN PART AND DENYING IN PART
OBJECTIONS TO THE CLAIM OF BRUNSWICK HOMES, LLC

On February 15, 2007, Brunswick Homes, LLC filed Claim No. 5 against the Debtor, Horseshoe Nail Ranch, LP, in the amount of not less than $2,882,421. The Debtor and the Chapter 7 trustee for the bankruptcy estate of James H. Moore object to the allowance of Claim No. 5. This Court has jurisdiction to consider the objections to Brunswick Homes' claim pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157(a), and the Court may enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

I. FINDINGS OF FACT

This matter involves a tangled web of transactions by and between the Debtor, Brunswick Homes, LLC, Brunswick Properties, LLC, James H. Moore and Associates, Inc. and a number of other business entities. James H. Moore is at the center of the web, managing many of the different business entities and transferring funds from one entity to another, without adequate documentation, to suit his own purposes. The Debtor and Mr. Moore's business associates have spent years trying to decipher their books and records to make sense of the transfers made by Mr. Moore in his various capacities. However, they are unable to agree on the nature and character of certain of the transactions and now

present the matter to the Court. The Court, having considered the arguments and evidence presented by the parties at the hearings on June 22 and 26, 2007 and July 13, 2007, makes the following findings of fact and conclusions of law:[1]

A. The Formation and Funding of the Debtor

1. Mr. Moore is a sophisticated, educated businessman. He has an undergraduate degree in engineering from Southern Methodist University, a master's degree from Dallas Theological Seminary, and a real estate license. Mr. Moore has been involved in the real estate market since the 1970s and has, at various times, participated in numerous real estate and investment companies.

2. In the 1980s, all of the real estate ventures in which Mr. Moore directly or indirectly participated were lost. He was sued many times by many people but did not have the financial ability to satisfy all of his creditors. Thereafter, in or around 1989-1992, Mr. Moore and his wife, Elizabeth, entered into agreements to partition their community property. During this same general time frame, Mr. Moore's wife formed a company called JHM Properties, Inc., which pays substantially all of Mr. Moore's living expenses pursuant to an employment agreement between Mr. and Mrs. Moore dated December 20, 1991.

3. Rod Miller is primarily in the business of oil and gas exploration. Mr. Miller met Mr. Moore in or around 1997. They subsequently formed Brunswick Homes. JHM Properties owns 50% of Brunswick Homes. The remaining 50% of Brunswick Homes is owned directly or indirectly by Mr. Miller.

[1] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. Likewise, to the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.

4. Brunswick Homes is in the business of building homes and developing lots. Brunswick Properties, LLC is an affiliate of Brunswick Homes. Brunswick Homes and Brunswick Properties were formed as investment vehicles for the same individuals and entities, are managed by the same people, and share the same offices.

5. The Debtor, Horseshoe Nail Ranch, LP, was formed on or around May 22, 2001 for the purpose of purchasing, developing and subdividing certain real property known as Horseshoe Nail Ranch and Dane Ranch (collectively, the "Ranch"). Trey Wasser is the General Partner for the Debtor as well as a 38% Limited Partner. In addition, Mia Hendrickson, who is related to Mr. Wasser, is a 10% Limited Partner of the Debtor, and Brunswick Homes is a 51% Limited Partner of the Debtor.

6. The Agreement of Limited Partnership for Horseshoe Nail Ranch, L.P. (the "Partnership Agreement") anticipated that the Debtor would subdivide the Ranch into a total of 31 lots ranging in size from approximately 2.2 acres to 8.6 acres. As part of the Partnership Agreement, Brunswick Homes agreed that, upon approval of a plat of the Ranch by Denton County, it would purchase the first lot from the Debtor. Brunswick Homes further agreed to purchase every fourth lot in order to ensure that the Debtor could meet its anticipated financial obligations to Northstar Bank of Texas.

7. Articles VII and XI of the Partnership Agreement contemplate that the partners may make loans to the partnership "pursuant to a written agreement approved by the General Partner." Section 7.03 provides that "[l]oans made by a Partner to the Partnership shall not be considered capital contributions." Article XI limits the interest on such loans to the lesser of (1) one percent of the base rate as published from time to

time by Northstar; or (2) the maximum permissible interest rate allowable under applicable usury laws.

8. The Partnership Agreement also allows the General Partner to solicit voluntary contributions from the Limited Partners. Section 6.04 of the Partnership Agreement provides in pertinent part: "Within 10 days following the receipt of notice from the General Partner …, each Limited Partner may contribute cash or property to the Partnership as a 'voluntary capital contribution' on the terms and subject to the conditions set forth in the notice from the General Partners [sic]."

9. On May 29, 2001, the Debtor obtained a $1,450,000 loan from Northstar Bank of Texas ("Northstar"). Northstar filed a Deed of Trust on June 1, 2001 securing its blanket interest in the Debtor's real and personal property. In addition to the security interests granted by the Debtor to secure repayment, Mr. Wasser testified that he personally guaranteed the repayment of the Northstar loan.

10. At the request of Northstar, the Debtor and Brunswick Homes executed a Tri-Party Agreement with Northstar (the "Tri-Party Agreement"). In the Tri-Party Agreement, the Debtor and Brunswick Homes represented to Northstar that there were provisions in the Partnership Agreement requiring Brunswick Homes to purchase a sufficient number of lots from the Debtor to repay the Northstar loan on a regular basis. Paragraph 4 of the Tri-Party Agreement states:

> Horseshoe and Brunswick represent to NORTHSTAR that there are provisions in their Agreement of Limited Partnership of Horseshoe Nail Ranch, L.P. which require Brunsiwck to purchase a sufficient number of lots to enable Horseshoe to repay the NORTHSTAR loan on a regular basis, as described in the loan documents. Both Horseshoe and Brunswick represent to NORTHSTAR that, notwithstanding such provisions, both Horseshoe and Brunswick shall make sufficient funds available to make all payments due to NORTHSTAR on a timely basis. Further, such

payments shall be made without regard to the source of the funds, even if lot sales are never sufficient for such purpose.

11. Brunswick Homes contributed $500,000 to the Debtor as an initial capital contribution. Mr. Wasser and Mia Hendrickson contributed certain real property to the Debtor. The Debtor's balance sheet as of December 31, 2002 showed that Mr. Wasser and "Brunswick Investments" each held a $500,000 equity interest in the Debtor.

12. Except for two interest payments, Brunswick Homes provided the funds for all of the payments on the Northstar loan.[2] Beginning in March 2002 through a final payment in May 2006, Brunswick Homes paid the total amount of $1,638,404.31 to Northstar. Nine months later, in February 2007, Brunswick Homes requested and received an "assignment" of the note and associated liens from Northstar.

13. Although the Partnership Agreement contemplated that the payments to Northstar would be made from the sale of lots to third parties and Brunswick, no sales occurred because the Debtor was unable to obtain prompt approval from Denton County of a plat subdividing the Ranch. Brunswick Homes, therefore, made the required payments directly to Northstar instead of purchasing lots or acreage from the Debtor as contemplated by the Partnership Agreement. In its bankruptcy schedules, the Debtor claims an ownership interest in the entire 170-acre Ranch free and clear of any liens, claims or encumbrances by Brunswick Homes or Northstar.

14. The Debtor's pre-bankruptcy tax returns and financial statements reflect that the Debtor did treat any of the payments Brunswick Homes made to Northstar as capital contributions. With respect to the Debtor's treatment of additional advances made

[2] The documents reflect that Brunswick Homes borrowed money from ROM Financial, Inc. to make some of the payments. The sole payment from JHM Properties, Inc. was made with funds taken from Brunswick Homes.

to the Debtor by Brunswick Homes, which are discussed more fully below, Mr. Wasser approved and signed two notes extending lines of credit totaling $1,000,000 to the Debtor, and he acknowledged in correspondence that Brunswick was owed $1,000,000 on these loans. In a letter dated January 25, 2006, Mr. Wasser stated that his own audit of the Debtor's financial information confirmed the amounts Brunswick claimed to have advanced to or on behalf of the Debtor.

B. Mr. Moore's Management of the Debtor

15. In addition to his involvement with JHM Properties, Brunswick Homes and Brunswick Properties, Mr. Moore owned and operated a company called James H. Moore and Associates, Inc. ("Associates"). Mr. Moore originally formed Associates to do real estate brokerage. Mr. Moore testified that Associates was inactive at the beginning of 2001.

16. The Debtor executed a Management Agreement with Associates on May 29, 2001. Associates was thereby appointed as the "exclusive agent" for the management and development of the Ranch. Associates was to provide all accounting services for the project, and all mail was directed to Associates. The address listed for Associates in the Management Agreement was the same address used by Brunswick Homes and Brunswick Properties.

17. At the time he executed the Management Agreement, Mr. Moore was the manager of Brunswick Homes and Brunswick Properties as well as the co-president and manager of JHM Properties. Mr. Moore had authority to sign checks on the accounts held by Brunswick Homes, Brunswick Properties and JHM Properties. The Debtor did not have a checking account during 2001 or 2002. Although Associates was supposed to

provide accounting services to the Debtor under the Management Agreement, in fact, Mr. Moore directed various individuals employed by Brunswick Homes to provide accounting services to the Debtor.

18. Mr. Wasser did not know Mr. Moore prior to the formation of the Debtor. Mr. Moore led Mr. Wasser to believe that he "*was*" Brunswick Homes and that he was very wealthy. Mr. Miller was not involved in the day to day operations of Brunswick Homes or Brunswick Properties during 2002 or 2003.

C. Richmond Construction's Work on the Ranch

19. During 2001, Brunswick Properties was doing landscaping work for Brunswick Homes at various properties. Brunswick Properties was using the name "Richmond Construction" for its landscaping work. Brunswick Homes provided the funds for the purchase of bulldozers and excavators during 2001 and 2002, which were titled in the name "Richmond Construction."[3]

20. Notwithstanding his knowledge that Brunswick Properties was doing business as Richmond Construction, Mr. Moore, as the president of Associates, filed an assumed name certificate for the name "Richmond Construction" on March 15, 2002. Mr. Moore opened a bank account for Associates d/b/a Richmond Construction at Compass Bank at around this time. The business address Mr. Moore provided to Compass Bank for Richmond Construction was the same address used by Brunswick Homes and Brunswick Properties.

21. In or around March 2002, Mr. Wasser determined that the Debtor needed additional funding to pay for the construction of roads, ponds and utilities on the Ranch.

[3] It is clear to the Court from the testimony and evidence presented by the parties that Mr. Moore and Mr. Miller do not understand the difference between an assumed name and a separate corporate entity.

Mr. Wasser and Mr. Moore wrote a letter to Debtor's Limited Partners requesting voluntary capital contributions. In a letter dated March 23, 2002 and written on Brunswick Homes' letterhead, Mr. Moore stated that he had received responses to all of the Debtor's requests for additional capital contributions requests and that all partners had elected not to contribute any additional capital to the Debtor. However, Mr. Moore – who managed the day-to-day operations of Brunswick Homes and who Wasser believed "*was*" Brunswick Homes – expressed an interest in loaning the Debtor $500,000 pursuant to an amended business plan attached to the letter.

22. Mr. Moore and Mr. Wasser negotiated the amended business plan in a series of letters exchanged over the next several months. Mr. Moore drafted a Promissory Note and a Deed of Trust and Security Agreement (the "May 2002 Note") as if he intended to advance a line of credit to the Debtor through his wholly-owned company, James H. Moore & Associates, Inc. d/b/a Richmond Construction. Mr. Wasser and Mr. Moore executed the May 2002 Note on or about May 22, 2002. However, Mr. Moore did not take any action to perfect an interest in the Debtor's property.

23. Mr. Miller did not receive copies of correspondence between Mr. Moore and Mr. Wasser relating to the Debtor's requests for additional capital contributions or the May 2002 Note. Mr. Miller testified, credibly, that Mr. Moore orally informed him of the Debtor's request for additional capital contributions and that he orally declined the request. Mr. Miller testified, credibly, that he agreed to extend a $500,000 line of credit from Brunswick Homes to the Debtor. However, Mr. Miller was not aware that Mr. Moore documented the loan as if the funds were to be advanced by Associates. Associates did not have funds to advance to the Debtor.

24. Brunswick Properties d/b/a Richmond Construction began constructing roads, lakes and utilities on the Debtor's property in early 2002. Richmond Construction generated invoices for its work and provided those invoices to Mr. Wasser. The invoices were titled "DBA: Richmond Construction." Mr. Moore testified that Richmond Construction performed more than $800,000 of work on the Ranch; Mr. Miller testified that Brunswick Homes transferred more than $1 million to Richmond Construction during 2002 and 2003.

25. Brunswick Homes funded substantially all of these improvements through checks written by Mr. Moore to Richmond Construction.[4] These payments totaled more than $500,000 and were generally made in round numbers – that is, payments of $10,000 or $25,000, etc. – which was consistent with Brunswick Homes' agreement to provide the Debtor with a line of credit. Like any other business, Richmond Construction used the funds it received to pay its operating expenses.

26. At some point in late 2002, Mr. Miller became aware that Mr. Moore had registered Richmond Construction as an assumed name of Associates. At Mr. Miller's request, Mr. Moore withdrew Associates' assumed name certificate for Richmond Construction on January 8, 2003.[5] Brunswick Properties filed an assumed certificate for Richmond Construction on the same day stating that, as of January 1, 2003, it would be conducting business as Richmond Construction.

[4] The Debtor paid for only about $100,000 of the improvements to the Ranch from the sale of a pipeline easement.

[5] Mr. Moore testified that his withdrawal of the assumed name certificate was part of a larger agreement to sort out Brunswick Homes' books and records for 2002. He testified that, as part of this agreement, he also transferred all of Richmond Construction's assets to Brunswick Properties and received, in exchange, forgiveness of the funds advanced by Brunswick Homes to purchase the equipment used by Richmond Construction.

27. Mr. Moore was unofficially terminated as the manager of Brunswick Homes and Brunswick Properties in or around December 2002.

28. On December 12, 2003, the Debtor and Brunswick Properties d/b/a Richmond Construction executed a Deed of Trust and Security Agreement (the "December 2003 Note") pursuant to which Brunswick Properties agreed to advance another $500,000 to the Debtor, secured by an interest in the Debtor's real property. Mr. Miller did not take any action to perfect a secured interest in the Debtor's property based on the December 2003 Note. Mr. Wasser testified, credibly, that the improvements to the Ranch had already been completed by December 2003 and that the Debtor's operating expenses were minimal. Mr. Wasser further testified, credibly, that the purpose of the December 2003 loan was to provide the Debtor with the funds necessary to pay Northstar.

29. Denton County finally approved a plat for the Ranch in or around October 2005. As approved, the plat consists of 15 developed lots totaling 67.81 acres, two parcels of undeveloped real property totaling 74.22 acres, and a 16-acre ranch. The 16-acre ranch includes a large indoor arena with an attached barn, a two bedroom house with swimming pool, a two bedroom apartment, three additional barns with 64 stalls, a shop building, two additional storage buildings, two mobile homes and a horse walker.

30. In or around November 2005, long after Brunswick Homes had advanced $500,000 to the Debtor pursuant to the May 2002 agreement, Mr. Miller discovered that the agreement of Brunswick Homes to advance these funds to the Debtor was undocumented. Mr. Miller also discovered that Mr. Moore and Mr. Wasser had executed the May 2002 Note in which Associates d/b/a Richmond Construction promised to extend

a $500,000 line of credit to the Debtor. Mr. Miller testified that he had not previously seen the May 2002 Note or approved Mr. Moore's amended business plan for the Debtor.

D. Allegations of Fraud by Mr. Moore

31. In or around May 2002, Mr. Miller became aware of certain irregularities in Mr. Moore's business dealings. He asked his accounting manager, Brian Swigert, to look into the accounting records for Brunswick Homes and Brunswick Properties for any evidence of embezzlement or fraud by Moore. Brunswick Homes alleges that Mr. Swigert discovered, among other things, that Mr. Moore had taken company assets from Brunswick Homes for personal uses.[6]

32. After his own investigation of the Debtor's books and records, Mr. Wasser formed the opinion that Mr. Moore had overcharged the Debtor approximately $300,000 for work performed by Richmond Construction on the Ranch. Mr. Moore, Mr. Wasser and Mr. Miller exchanged many letters regarding Mr. Moore's alleged misdeeds. Mr. Moore was officially terminated from his management roles for Brunswick and the Debtor in December 2005

33. On May 2, 2006, Mr. Moore filed a petition under Chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the Northern District of Texas. He described the business of Associates as "landscaping" in his bankruptcy schedules, and he represented that the business was worthless.

34. Prior to Mr. Moore's personal bankruptcy filing, on July 8, 2005, Associates forfeited its corporate charter. Nonetheless, Mr. Moore, as the president of

[6] In a memorandum dated September 3, 2003, Mr. Miller stated that Brunswick Homes intended to correct its books and records in order to complete its 2002 tax return. Mr. Miller listed the adjustments he planned to make. Most of these adjustments related to Mr. Moore's self-dealing in real estate transactions unrelated to Richmond Construction. The only mention of Richmond Construction was a reference to a prior agreement to transfer the assumed name "Richmond Construction" to Brunswick Properties.

Associates, filed a notice of change of address in the Debtor's bankruptcy case on November 15, 2006. Mr. Moore requested that all correspondence be sent to his residence at 5432 Bent Tree Drive, Dallas, Texas 75248.

35. In Mr. Moore's personal bankruptcy case, Brunswick Homes filed an objection to the dischargeability of Mr. Moore's alleged obligations to it under §523 of the Bankruptcy Code. In addition, Cadle Company objected to Mr. Moore's general discharge under §727 of the Bankruptcy Code. Judge Jernigan denied Mr. Moore's general discharge in a written opinion entered on May 15, 2007. Her decision was based on, among other things, Mr. Moore's failure to honestly and forthrightly disclose his involvement with numerous entities in his bankruptcy schedules.

E. Horseshoe Nail Ranch Files for Bankruptcy

36. The Debtor's general partner, Mr. Wasser, commenced this bankruptcy case on September 22, 2006. According to the "takedown schedule" attached to the Debtor's Third Amended Disclosure Statement, the Debtor anticipates selling the entire Ranch for a total of $3,587,700. This figure includes $1,142,632 for the two undeveloped parcels of land and approximately $2,160,700 for the 15 developed lots.

37. Brunswick Homes filed proof of its claim against the Debtor on February 15, 2007. Brunswick Homes thereby asserts a claim in the total amount of not less than $2,882,421, as follows:[7]

[7] Although the May 2002 and December 2003 notes purport to allow a rate of interest inconsistent with the limits set forth in the Partnership Agreement, Brunswick Homes calculated the outstanding interest at the rate set forth in the Partnership Agreement.

	Principal	**Interest**	**Total**
Payments to Northstar	$1,638,404.31		$1,638,404.31
5/22/02 Note	$500,000	$130,815.69	$630,815.69
12/13/03 Note	$500,000	$95,829.24	$595,829.24
Excess payments pursuant to DOT	$16,023.24	$1,348.52	$17,371.76
	$2,654,427.55	$227,993.45	$2,882,421.00

In its post-hearing brief, Brunswick asserts that it is entitled to a secured claim in the amount of $1,638,404.31 and an unsecured claim in the amount of $1,244,016.69.

38. According to Brunswick Homes, it is $4.5 million in debt to creditors and its capital accounts are "askew" in the amount of $2.5 million. Brunswick Homes does not have $7 million in assets. According to Brunswick Homes, its claim will not result in a distribution to its partners even if allowed in full by this Court.

II. LEGAL CONCLUSIONS

39. A proof of claim, if it is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure, constitutes *prima facie* evidence of the validity and amount of that claim. FED. R. BANKR. P. 3001(f); *Matter of Fidelity Holding Co.*, Ltd., 837 F.2d 696 (5th Cir. 1988). A proof of claim, however, does not qualify for that *prima facie* evidentiary effect if it is not executed and filed in accordance with the Bankruptcy Rules. *See First Nat'l Bank of Fayetteville v. Circle J. Dairy (In re Circle J Dairy, Inc.)*, 112 B.R. 297, 300 (W.D. Ark. 1989). Bankruptcy Rule 3001 generally sets forth the requirements for filing a proof of claim, and one of those requirements states that:

> when a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

FED. R. BANKR. P. 3001(c). Likewise, if a creditor claims a security interest in property of the debtor, Rule 3001(d) requires the creditor to accompany his proof of claim with evidence that the creditor perfected a security interest.

40. The burden of persuasion under the bankruptcy claims procedure always lies with the claimant, who must comply with Bankruptcy Rule 3001 by alleging facts in the proof of claim that are sufficient to support the claim. If the claimant satisfies these requirements, the burden of going forward with the evidence then shifts to the objecting party to produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objecting party meets this evidentiary requirement, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence. *See In re Consumers Realty & Development Co.*, 238 B.R. 418 (B.A.P. 8th Cir. 1999); *In re Alleghany International, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992).

41. In this case, since Brunswick Homes filed a claim in compliance with the Federal Rules of Bankruptcy Procedure, including the attachment of a copy of the agreement upon which its claim is based, the claim is entitled to *prima facie* validity. To rebut that effect, the Debtor alleges that Brunswick Homes is not a secured creditor of the Debtor and that its advances to the Debtor were, in fact, capital contributions. The Chapter 7 trustee for Jim Moore alleges that the Associates d/b/a Richmond Construction has a claim against the Debtor for unpaid invoices and that Brunswick Homes is merely a creditor of Jim Moore's estate with respect to the payments allegedly made by Brunswick

Homes to Associates d/b/a Richmond Construction. The evidence submitted by the Debtor and the Chapter 7 trustee at the hearing was sufficient to bring the legitimacy of the claim amount as well as the propriety of the alleged security interest into question and to overcome the *prima facie* validity of such claim. Thus, it became incumbent upon Brunswick Homes to establish the amount of its claim by a preponderance of the evidence.

A. The Loan from Northstar

42. As previously discussed, Brunswick Homes agreed to purchase lots from the Debtor on a schedule that would provide the Debtor with sufficient funds to make payments to Northstar. In particular, Brunswick Homes and the Debtor agreed that, if the development of the Ranch occurred as anticipated and Brunswick purchased lots as required by Section 6.06 of the Partnership Agreement, Brunswick would receive in exchange real property worth approximately $923,230 based on the median values of the 31 lots listed in Exhibit F to the Partnership Agreement. Section 6.07 of the Partnership Agreement alternatively provided that, if the Debtor did not meet its sales goals, then Brunswick would provide funds to the Debtor by purchasing lots from the Debtor on an "at cost" basis of $12,350 per acre.

43. Events did not unfold as planned. Brunswick Homes nonetheless provided the funds necessary for the Debtor to stay current on its obligation to Northstar. Brunswick Homes made payments directly to Northstar and, in December 2003, agreed to advance an additional $500,000 to the Debtor primarily for the purpose of paying Northstar. In response to the objection to its proof of claim, Brunswick argues, *inter alia*,

that it has a secured claim against the Debtor to the extent of its payments to Northstar based on the doctrine of equitable subrogation.

44. Texas law has recognized the doctrine of equitable subrogation for over a century. *See Faires v. Cockrill,* 31 S.W. 190, 194 (Tex. 1895) ("Perhaps the courts of no state have gone further in applying the doctrine of subrogation than has the court of this state..."). The purpose of equitable subrogation is to prevent unjust enrichment of the debtor. *First Nat'l Bank of Kerrville v. O'Dell,* 856 S.W.2d 410, 415 (Tex. 1993); *Smart v. Tower Land & Inv. Co.,* 597 S.W.2d 333, 337 (Tex. 1980). In the context of secured debt, the party paying the debt is subrogated to the liens and priorities of the original lienholder to the extent of the debt paid, and, to the extent necessary for full justice to be accomplished between the parties, equity will treat the original liens as subsisting. *Faires v. Cockerell,* 31 S.W. 190, 194 (1895).

45. The doctrine of equitable subrogation does not require that the new lender obtain an assignment of the debt and lien from the existing creditor receiving payment. The equitable doctrine is applied independently of any formality of assignment and regardless of whether the creditor receiving payment executes a release. *Farm Credit Bank of Texas v. Ogden,* 886 S.W.2d 305, 311 (Tex. App. - Houston [1st Dist.] 1994, no writ.); *Med Ctr. Bank v. Fleetwood,* 854 S.W.2d 278, 287 (Tex. App. - Austin 1993, writ denied); *Leonard v. Brazosport Bank,* 628 S.W.2d 216, 220 (Tex. App. - Houston [14th Dist.] 1982, writ ref'd n.r.e.). Thus, in this case, the fact that the "assignment" of the Northstar note to Brunswick Homes occurred after the loan had been fully paid is not determinative of any right Brunswick Homes has to equitable subrogation.

46. The two key elements of equitable subrogation are: (1) that the party on whose behalf the claimant discharged a debt was primarily liable on the debt, and (2) that the claimant paid the debt involuntarily. *See* TEX. JUR. 3d., *Subrogation*, §11. With respect to the involuntariness of payment, the doctrine of equitable subrogation "is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own." *First Nat'l Bank of Kerrville v. O'Dell*, 856 S.W.2d 410, 415 (Tex.1993).

47. Here, the Debtor, not Brunswick Homes, was primarily liable on the Northstar loan. Brunswick Homes was not a mere stranger to the Northstar loan and did not act as a volunteer in repaying the Northstar loan. The Court concludes that Brunswick Homes established by a preponderance of the evidence that it may seek equitable subrogation in order to prevent the unjust enrichment of the Debtor. *See, e.g.*, *In re Celotex Corp***.,** 289 B.R. 460, 467 (Bankr. M.D. Fla., 2003).

48. Brunswick Homes has established by a preponderance of the evidence that it made payments totaling $1,638,404.31 to Northstar. Although Brunswick Homes honored the Tri-Party Agreement by providing funds for the payment of the Northstar loan, Brunswick Homes did not receive in exchange any of the developed lots or undeveloped acreage that comprise the Ranch. The failure to adhere to the "takedown" schedule attached to the Partnership Agreement was not due to any fault of Brunswick Homes or the Debtor, but to the delay in obtaining approval of a plat subdividing the Ranch. Moreover, the Debtor has less than a handful of unsecured claims, and does not

appear that allowing Brunswick Homes' claim will harm the Debtor's creditors. *See* TEX. JUR., *Subrogation* § 22 (Co-obligors and Partners).

49. Under the circumstances, Brunswick Homes is entitled to be equitably subrogated to the liens and priorities of Northstar for a portion of the $1,638,404.31 it paid to Northstar. In particular, the Court concludes that Brunswick Homes should be equitably subrogated to the liens of Northstar to the extent necessary for $923,230 of its claim to be secured by the Debtor's 15 developed lots, which is similar to what Brunswick Homes would have received if it had purchased the Debtor's first lot and every fourth lot thereafter based on the median values of the 31 lots listed in Exhibit F to the Partnership Agreement. The Court further concludes that $215,174 of Brunswick Homes' claim is secured by the two undeveloped parcels of land (described as Additional Acreage A and Additional Acreage B in the Debtor's current takedown schedule). With respect to the additional $500,000 paid to Northstar, Brunswick Homes agreed to loan the Debtor the funds to make these payments in December and may not use the doctrine of equitable subrogation to elevate its unsecured claim for repayment to secured status.

B. The May 2002 Loan

50. Brunswick Homes established by a preponderance of the evidence that it agreed to loan the Debtor $500,000 to pay for the development of the Ranch in or around May 2002. This loan agreement was never formally documented. However, the May 2002 Note created by Mr. Moore generally sets forth the terms of the parties' agreement and reflects Mr. Wasser's approval of the loan.

51. Loan agreements are generally required to be in writing under Texas law. *See* TEX. BUS. COMM. CODE §26.02. One exception to the application of the statute of

frauds is when one party has fully performed under the contract and the only thing remaining is performance by the other party. *McElwee v. Estate of Joham,* 15 S.W.3d 557, 559 (Tex.App. - Waco 2000, no pet.). This exception has specifically been applied to an agreement to loan money requiring payments to be made over a period greater than one year. *Id.; Estate of Kaiser v. Gifford,* 692 S.W.2d 525, 525-26 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.).

52. Here, Brunswick Homes fully performed its promise to loan $500,000 to the Debtor by advancing the funds. The only performance remaining is repayment by the Debtor. Thus, the statute of frauds does not apply to the loan by Brunswick Homes.

53. The testimony of John James Jenkins, a certified public accountant, for the Chapter 7 trustee tended to support Brunswick Homes' claim. Mr. Jenkins based his opinions on an interview of Mr. Wasser, correspondence between the parties, and partial business records from the Debtor, Brunswick Homes and Associates. Although he was unable to clearly connect the payments from Brunswick Homes to particular invoices submitted by Richmond Construction to the Debtor, his review of Associates' bank statements confirmed that funds flowed from Brunswick Homes into Richmond Construction's account during 2002.

54. The Chapter 7 trustee for Mr. Moore's bankruptcy estate attempts to make much of the fact that many of the checks from Brunswick Homes, which were written by Mr. Moore, were issued to Richmond Construction and bore the notation "loan" on the memo line.[8] The Chapter 7 trustee argues that the Court should interpret the notation as

[8] The memo line on the checks was altered by someone at some point, and the altered checks were provided by Brunswick Homes to Mr. Wasser. It is unclear from the record who altered the checks or when the checks were altered or whether Brunswick Homes was aware that the memo lines on the checks had been altered when it supplied copies of the checks to Mr. Wasser.

evidencing an agreement by Brunswick Homes to loan funds to Associates d/b/a Richmond Construction. However, there is no evidence in this case, written or otherwise, as to the essential terms of the alleged loan agreement between Brunswick Homes and Associates, such as the amount Brunswick Homes agreed to loan to Richmond Construction, the interest rate, or the terms of repayment. *See, e.g., BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd.,* (Tex. App. – Houston [14th Dist], 2007) (discussing notation on cashiers check and other evidence of an alleged loan agreement).

55. Mr. Moore's vague testimony that Brunswick Homes loaned funds to Associates was not credible. All evidence that would suggest a loan from Brunswick Homes to Associates and from Associates to the Debtor was created by Mr. Moore. Mr. Moore drafted the May 2002 Note, wrote self-serving letters about the May 2002 Note, and wrote the word "loan" on the memo line of checks he wrote to Richmond Construction from Brunswick Homes' account.

56. Moreover, Mr. Moore's testimony that Associates actually did business as Richmond Construction during 2002 was not credible. Although Mr. Moore filed an assumed name certificate for "Richmond Construction," the mere filing of an assumed name certificate does not in and of itself give the registrant the right to use the name or constitute actual use of the name. *See* TEX. BUS. COM. CODE §36.17. The filing of an assumed name certificate also does not, in this case, establish which entity provided the services at issue.

57. Prior to the time Mr. Moore filed an assumed name certificate for the name "Richmond Construction," Brunswick Properties was doing business as Richmond

Construction. The documentary evidence admitted at the hearing is consistent with the continued use of the name "Richmond Construction" by Brunswick Properties. For example, the bank account Mr. Moore opened for Richmond Construction at Compass Bank was in the name of "Richmond Construction" without any indication that Richmond Construction was an assumed name of Associates. The invoices generated by Richmond Construction for its work on the Ranch do not state that Richmond Construction is an assumed name of Associates. The payee on the checks issued from Brunswick Homes to Richmond Construction is simply "Richmond Construction," and the payee's address is the same address used by Brunswick Properties. And the revenue associated with Richmond Construction's work on the Ranch during 2002 was not included in Associates' tax return, but in the 2002 tax return of Brunswick Properties.

C. Loans or Capital Contributions

58. Finally, the Court addresses the Debtor's argument that the all of the advances made by Brunswick Homes should be construed as capital contributions rather than loans. "Whether an advance by a partner is a loan or an added contribution to the capital of the firm is a question of fact." *Park Cities Corp. v Byrd*, 522 SW2d 572 (Tex Civ App -- Beaumont, 1975), *rev'd on other grounds*, 534 SW2d 668 (Tex. 1976). Advances or loans by partners are entirely proper under Texas law. *See* TEX. BUS. ORG. CODE §153.003; *King v. Evans*, 791 S.W.2d 531, 532 (Tex. App.-San Antonio, 1990).

59. The Partnership Agreement in this case sets forth procedures for obtaining voluntary capital contributions from the Limited Partners or, alternatively, for obtaining loans from the Limited Partners. The Debtor did not obtain an agreement from Brunswick Homes to make an additional capital contribution for the development of the

Ranch as required by the Partnership Agreement. Rather, the Debtor understood that the line of credit advanced by Brunswick Homes for the development of the Ranch was a loan. Mr. Wasser signed the May 2002 Note, and the Debtor's balance sheet for 2002 referred to the $500,000 advanced by Brunswick Homes as a "loan from Brunswick."

60. With respect to the Northstar loan, the Debtor did not solicit voluntary capital contributions from Brunswick Homes to make the required payments to Northstar. The Debtor also did not treat any of Brunswick's payments to Northstar as capital contributions. The Debtor's financial records simply show Brunswick's initial capital contribution of $500,000 and its subsequent $500,000 loan.

61. Brunswick Homes never agreed to risk more than $2.5 million of its own money with the Debtor. While Brunswick Homes expected to provide the Debtor with the funds necessary to pay Northstar, it anticipated that it would receive in exchange an ownership interest in a portion of the Debtor's real property pursuant to the Partnership Agreement. The May 2002 Note and the Debtor's books and records reflect the parties' intent that the line of credit advanced by Brunswick Homes to develop the Ranch would *not* be treated as a capital contribution. The Court, therefore, concludes that the advances from Brunswick Homes to the Debtor and the payments made by Brunswick Homes to Northstar should be characterized as loans rather than capital contributions.

III. CONCLUSION

For all the foregoing reasons,

IT IS ORDERED that the objections by the Debtor and the Chapter 7 trustee to Claim No. 5 should be **GRANTED IN PART AND DENIED IN PART** as set forth below.

IT IS FURTHER ORDERED that Brunswick Homes shall have an allowed secured claim against the Debtor in the amount of $1,138,404.00 and an allowed unsecured claim in the amount of $1,244,017.00.

IT IS FURTHER ORDERED that all other objections to Brunswick Homes' Claim No. 5 are hereby denied.

Signed on 7/20/2007

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE