

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
ANGIE CUTLER,) CASE NO. BK03-81840
)
Debtor(s).) CH. 13

ORDER

Hearing was held in Omaha, Nebraska, on January 26, 2006, on the debtor's third amended plan (Fil. #67) and objection by Beneficial Nebraska, Inc. (Fil. #70), and on Beneficial Nebraska, Inc.'s objection to exemptions (Fil. #78) and resistance by the debtor (Fil. #79). Marion Pruss appeared for the debtor, and Kristin Simpson appeared for Beneficial Nebraska, Inc.

Beneficial held a deed of trust lien against the debtor's residence. The debtor filed an adversary proceeding to determine the validity, priority, or extent of that lien pursuant to 11 U.S.C. § 544(a)(3) because the deed of trust had not been recorded and therefore Beneficial's lien was not perfected. The parties settled the litigation by stipulating that Beneficial holds an unsecured claim and that the debtor's plan would administer the non-exempt equity in the house in accordance with the provisions of the Bankruptcy Code.

The debtor's third amended plan proposes that the holders of allowed unsecured claims will share \$13,700 pro rata, with all previous payments to Beneficial to be credited against the \$13,700 and offset against any distribution to Beneficial. The debtor took a homestead exemption of \$12,500 into account when calculating the amount to be paid to unsecured creditors. Beneficial objects to this treatment, arguing that the debtor did not claim the full amount of the homestead exemption and should not now be allowed to claim it to the detriment of unsecured creditors. Beneficial also objects to the claimed homestead exemption, asserting that the increased equity resulting from the avoidance of Beneficial's lien inures to the benefit of the estate, not of the debtor, pursuant to §§ 550 and 551.

A similar scenario was addressed in Sergeant v. G.R.D. Investments L.L.C. (In re Schaefer), 331 B.R. 401 (Bankr. N.D. Iowa 2005), where the court said:

Moreover, the trustee's avoidance powers cannot defeat the Schaefer's homestead exemption. Assuming the trustee avoided the April 2003 mortgage either as a

preference or as a fraudulent transfer, the mortgage would be preserved for the benefit of the estate. 11 U.S.C. § 551. Because the mortgage was a voluntary transfer, Schaefer's would not be able to exempt any such property recovered by the trustee. 11 U.S.C. § 522(g). Avoidance of the mortgage, however, would not defeat the debtors' claim of exemption in the equity in their home. Debtors would retain the homestead subject to a mortgage held by the trustee. Schaefer's homestead exemption claim appears to be limited to their equity in the property. Therefore, plaintiff has not shown that the exemption was not properly claimed.

331 B.R. at 413-14.

In the present case, § 551 prevents the debtor from now asserting an exemption in the amount of the avoided lien. She may claim an exemption in her equity in the property, which appears to be the \$1,927.34 stated in her original Schedule C. The debtor argues that § 522(i)(2) permits her to claim an exemption in the avoided lien notwithstanding § 551. However, that section refers to the extent to which the debtor could exempt the property under § 522(g), which is inapplicable here because § 522(g) deals with the avoidance of involuntary transfers. Therefore, Beneficial's objections to the plan and to the claimed exemption will be sustained.

IT IS ORDERED the objection to confirmation by Beneficial Nebraska, Inc. (Fil. #70) is sustained. Beneficial Nebraska, Inc.'s objection to exemptions (Fil. #78) is also sustained. The debtor shall file an amended plan by March 2, 2006.

DATED: January 30, 2006

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Marion Pruss
*Kristin Simpson
Kathleen Laughlin
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.