

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:) CASE NO. BK03-81943
)
CALVIN DONALD CRAWFORD and)
CARMEN LeNEA CRAWFORD,)
) CH. 13
Debtor(s).)

MEMORANDUM

Trial was held on October 27, 2003, in Omaha, Nebraska, on Filing #4, Motion for Relief from Stay filed by Wayne R. Stock, and Filing #13, Resistance filed by the debtors. Thalia Carroll appeared for the debtors, and Richard Dwornik appeared for the movant. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(2)(A) & (O).

Prior to filing bankruptcy, the debtors, to secure a debt represented by a note, executed a deed of trust on their residential real estate. The debtors eventually defaulted on their financial obligations with regard to the note and deed of trust. The trustee named in the deed of trust, following the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 *et seq.*, gave the debtors a notice of default and published a sale date. The sale date was April 29, 2003, at 3:00 p.m. On that date, the trustee opened the sale at 3:04 p.m. and recorded the bid of the beneficiary of the deed of trust, requested other bids, and closed the sale at 3:22 p.m. The trustee had, prior to the time of sale, prepared and signed a deed, leaving only the name of the grantee to be inserted upon the completion of the sale process. Upon the closing of the bids, the trustee did insert the name of the grantee. However, he did not receive payment of the purchase price at that time, and did not deliver the deed at that time.

At approximately 3:30 p.m. on April 29, 2003, the debtors filed a Chapter 13 bankruptcy in the District of Nebraska. That bankruptcy case was dismissed on May 20, 2003, for failure to comply with local procedures concerning the need to file a plan and other matters.

On June 3, 2003, the trustee mailed the deed to the purchaser and received from the purchaser the net amount due after deducting the principal obligation. The net amount due apparently represented the costs incurred by the trustee in preparing for and holding the sale.

The grantee recorded the deed on June 5, 2003. On June 16, 2003, the debtors again filed a pro se bankruptcy case, under Chapter 7. Thereafter, the debtors converted this case to Chapter 13 with the aid of counsel.

The purchaser at the deed of trust sale, now the grantee under the deed of conveyance from the trustee, filed a motion for relief from the automatic stay so that he could proceed in state court with an eviction of the debtors. The motion for relief has been resisted on the theory that the sale had not been completed at the time the bankruptcy case was filed, because the deed had not been delivered, and the delivery of the deed after the dismissal of the original Chapter 13 case was not effective. It is the position of the debtors that the delivery was not effective because delivery of the

deed is part of the sale process and, by statute, if the sale process cannot be completed, or must be postponed, it may only be postponed for one day without rescheduling the sale date and republishing the notice of sale. As statutory support for such a position, the debtors point the court to Neb. Rev. Stat. § 76-1009. The relevant portion of that statutory provision states:

The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale. No other notice of the postponed sale need be given unless the sale is postponed for longer than one day beyond the day designated in the notice of sale in which event notice thereof shall be given in the same manner as the original notice of sale is required to be given.

In other words, the debtors assert that because delivery of the deed was delayed as a result of the automatic stay which came into place upon the filing of the original Chapter 13 case, the sale was not completed and needed to be postponed. Because the trustee did not republish notice and reschedule the sale, the trustee's delivery of the deed prepared in conjunction with the original sale was void. That being the case, the delivery of the deed and the recording of such deed gave the purchaser no greater interest than the purchaser had prior to the sale, and left the debtors with legal and equitable title. Under such a scenario, the debtors may deal with the debt secured by the deed of trust in a Chapter 13 plan.

This court has recently determined that the interest of a debtor in residential real property which is encumbered by a deed of trust is not terminated until the delivery of the deed from the trustee to the purchaser at the deed of trust sale. See In re Deanna Dieken, Case No. BK03-40428, Neb. Bkr. 03:39 (Bankr. D. Neb. Mar. 28, 2003). In the Dieken case, the sale was held on February 4, 2003. The debtor filed a Chapter 13 case on February 6, 2003, and the trustee's deed was executed and delivered on February 13, 2003. The debtor took the position that the intervening bankruptcy case, filed before the delivery of the deed, halted the completion of the sale process, thereby giving the debtor in the Chapter 13 case the right to deal with the original financial obligation in a Chapter 13 plan.

The facts of this case are, with regard to the initial bankruptcy filing, the same as the facts in the Dieken case. The trustee scheduled and held a sale. The trustee received a bid and closed the sale. The trustee then completed the execution of a deed to the purchaser. Before the delivery of the deed, the debtors filed a bankruptcy case. The automatic stay that arose in the first bankruptcy case prohibited the delivery of the deed and the termination of the interest of the debtors in the real property.

However, that is where the similarity ends. In this case, the first bankruptcy petition was dismissed. The trustee delivered the deed, and the deed was recorded prior to the second bankruptcy being filed. There is no language in the Trust Deeds Act that requires a rescheduling of the sale or a republication of the notice of the sale date simply because the deed is not delivered to the purchaser within one day beyond the day designated in the notice of sale.

The statutory provision that deals with the delivery of the deed is found at Neb. Rev. Stat. § 76-1010 and it is not specific with regard to the timeframe for delivery of the deed. The relevant sections of that statutory provision are:

(1) The purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee shall execute and deliver his deed to such purchaser.

...
(2) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest and claim of the trustor and his successors in interest and of all persons claiming by, through or under them, in and to the property sold, including all such right, title, interest and claim in and to such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

The language of the statute is that the "purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee shall execute and deliver his deed" "Forthwith" in that context means "within a reasonable time under the circumstances." Gilroy v. Ryberg, 266 Neb. 617, 630, 667 N.W.2d 544, 557 (2003) (After reviewing dictionary definitions, the court concluded that the definition of "forthwith" as "'within a reasonable time under the circumstances of the case' is more consistent with the underlying purpose of § 76-1010.").

In this case, the trustee scheduled the sale at the Douglas County, Nebraska, courthouse. The trustee had the authority from the beneficiary of the deed of trust (the lender) to enter a bid equivalent to the amount of the debt then owing. The beneficiary/purchaser was not present at the sale. The trustee did enter a bid pursuant to his authority and prepared the deed naming the beneficiary as the purchaser and, therefore, the grantee under the deed. Within minutes thereafter, a bankruptcy case was filed, giving rise to the automatic stay and prohibiting delivery of the deed.

The fact of the original bankruptcy filing is a circumstance that must be considered when determining whether the deed was delivered and the purchase completed "forthwith" as required by the statute. Additionally, within two weeks after the dismissal of the original Chapter 13 case, the deed was delivered and the purchase price paid. The deed was then recorded. Since there is nothing in either Section 76-1009 or Section 76-1010 that requires re-noticing under circumstances such as those in this case, I must conclude that re-noticing is not required, and the sale was completed by virtue of the delivery of the deed in early June 2003, prior to the current bankruptcy case being filed. The delivery of the deed conveyed to the purchaser all of the debtors' rights to the property, and therefore the property is not available for the debtors to deal with in their Chapter 13 case.

The debtors suggest that this result is unfair and unworkable. They give as an example a debtor involved in a Chapter 13 case which was filed after the bidding was completed but before the deed was delivered. This court, by the Dieken case, has agreed that such a debtor could deal with the property in a Chapter 13 plan. However, the debtors suggest that if the debtors in such a hypothetical case made payments under a Chapter 13 plan and then defaulted and the case was dismissed, if my conclusion is correct, then the trustee would simply deliver the deed to the purchaser, depriving the debtors of the benefit of the payments the debtors had made during the pendency of the case. From the point of view of these debtors, such a result is extremely unfair and results from a tortured construction of the statutory language.

However, using the hypothetical suggested by the debtors, it appears that such a result is exactly appropriate. The debtors would have been given a chance to deal with the debt in the Chapter 13 plan. Since the debt represents an obligation secured by a lien on their personal

residence, pursuant to 11 U.S.C. § 1322(b)(2), they would not have been able to modify the terms of the obligation, but for deceleration of the note and curing of the pre-petition delinquency. Assuming that they made payments through the Chapter 13 plan on the pre-petition delinquency and they made regular payments outside the plan on the mortgage obligation, if the case were then dismissed without the pre-petition delinquency being cured, the trustee would be within its rights to deliver the deed to the purchaser of the foreclosure sale. Upon receipt of the purchase price, the proceeds would be distributed first to the lien holder with priority, then to other lien holders, and if there was a balance left, the surplus would be distributed to the debtors for their remaining interest in the home. On the other hand, if the beneficiary had simply bid the amount of the debt in consideration for delivery of the deed, the debtors would receive no surplus, but they would have been in possession throughout the Chapter 13 plan and any payments they made would, from their perspective, simply be rent.

However, if the debtors in the hypothetical case referred to above actually finished the Chapter 13 plan and cured the pre-petition delinquency, they would have a right to a court order setting aside the sale and prohibiting the delivery by the trustee of the deed, because the whole cause of the sale was the pre-petition delinquency. That delinquency having been cured by virtue of federal law in the Chapter 13 case, the sale and delivery would not be allowed to be completed.

In conclusion, the Nebraska Trust Deeds Act does not require a rescheduling and republication of a sale simply because of a delay in the delivery of the deed following a trustee's sale resulting directly from the filing of a bankruptcy case which is later dismissed.

Separate order to be entered.

SO ORDERED.

DATED this 18th day of November, 2003.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

Thalia Carroll
*Richard Dwornik
Kathleen Laughlin
U.S. Trustee

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

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ORDER

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IT IS ORDERED: For the reasons stated in the Memorandum filed contemporaneously herewith, the motion for relief from stay (Fil. #4) is granted.

DATED this 18th day of November, 2003.

BY THE COURT:

Timothy J. Mahoney
Chief Judge

Notice given to:
Thalia Carroll
*Richard Dwornik
Kathleen Laughlin
U.S. Trustee

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