

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
CYNTHIA GILROY, ) CASE NO. BK94-81573  
 )  
 )  
DEBTOR ) CH. 13

MEMORANDUM

Hearing was held on November 10, 1994, on a motion to stay filed by the debtor. Appearing on behalf of debtor was James Crampton of Omaha, Nebraska. Appearing on behalf of Metropolitan Federal Bank FSB were Henry Pfeiffer and Richard Garden of Cline, Williams, Wright, Johnson & Oldfather, Lincoln, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (G).

Background

The debtor, Cynthia Gilroy, filed for Chapter 13 bankruptcy protection on October 12, 1994. On the petition date, an emergency hearing was held to determine the applicability of the automatic stay, and the Court temporarily stayed the execution of a Writ of Restitution which would have caused the debtor and her family to be evicted from the property which served as their only residence. Metropolitan Federal Bank (the Bank), a creditor, filed a motion for relief from the automatic stay and requested an expedited hearing to determine whether relief may be granted so the writ of restitution may be carried out. An evidentiary hearing was held on November 10, 1994, concerning both the debtor's Motion to Determine Application of Stay and the Bank's Motion for Relief from Stay.

A brief summary of the events which preceded this bankruptcy case illustrates the nature of the relationship between the Bank and the debtor and her family.

February 12, 1992

The date scheduled for a Trustee's Sale of the debtor's residence pursuant to a Deed of Trust held by the United States Small Business Association (SBA), the priority lien holder of the debtor's residence. The sale was stayed because the debtor's husband, John M. Gilroy, filed for Chapter 13 bankruptcy protection (Case Number BK92-80256) with this Court.

April 6, 1992                   The husband's bankruptcy case (BK92-80256) was dismissed for failure to file schedules and/or a plan.

May 1, 1992                    The debtor filed for Chapter 13 bankruptcy protection with this Court (Case Number BK92-80804).

May 28, 1992                  The date scheduled for the SBA's second Trustee's Sale, which was stayed by the debtor's Chapter 13 bankruptcy case (BK92-80804).

July 21, 1993                 The Court lifted the automatic stay in the debtor's Chapter 13 case (BK92-80804) to permit the Bank to recover and sell the debtor's residence.

December 8, 1993              The debtor's husband filed for Chapter 11 bankruptcy protection (Case Number BK93-82011) hours before the Bank's scheduled Trustee's Sale of the debtor's residence was to take place.

February 10, 1994            The debtor's bankruptcy case (BK92-80804) was dismissed.

March 8, 1994                The SBA obtained relief from the automatic stay in the Chapter 11 case (BK93-82011) and scheduled a Trustee's Sale of the debtor's residence for May 18, 1994 . The debtor and her husband satisfied the lien of the SBA before the sale took place.

June 24, 1994                The Chapter 11 case (BK93-82011) was dismissed.

August 23, 1994              The debtor's husband filed a motion in state court for a Temporary Order to enjoin the Bank from holding a Trustee's Sale which was scheduled for August 24, 1994.

August 24, 1994              The Bank got the Temporary Order overturned, and the Trustee's Sale was held. The Bank purchased the property at the sale.

August 26, 1994              The Bank received a Trustee's Deed and recorded the Trustee's Deed at the Office

of the Register of Deeds in Omaha, Douglas County, Nebraska.

September 21, 1994           The District Court of Douglas County, Nebraska found that the Trustee's Sale was conducted in accordance with the Nebraska Trust Deeds Act.

October 3, 1994             Praecipe for Writ of Restitution was filed by the Bank.

October 12, 1994            Sheriff arrived at the debtor's residence to take possession of the property pursuant to the Writ. The debtor filed for Chapter 13 bankruptcy protection (Case Number BK94-81573) to stay the enforcement of the Writ.

The debtor is requesting that the Court continue to stay the Writ of Restitution so that the debtor may redeem the house from the Bank by virtue of the right of redemption that the lienholder behind the Bank, the United States through the Internal Revenue Service (the IRS), possesses. The Bank resists the debtor's motion. The Bank takes the position that because it perfected both the legal title and the equitable title to the property prior to the bankruptcy case, the property is not part of the bankruptcy estate and, therefore, the automatic stay does not stay the enforcement of the Writ of Restitution. In the alternative, if the Court finds that the automatic stay is applicable, the Bank requests that the Court lift the automatic stay.

#### Issue

Does the automatic stay of 11 U.S.C. § 362 apply to preclude the Bank from continuing to obtain possession of the real property.

#### Decision

The automatic stay is not applicable in this situation.

#### Findings of Fact

The Bank purchased the property at the Trustee's Sale for approximately \$125,000. The debtor lists the fair market value of the property at \$160,000 in her schedules. Filing no. 10, Schedule D. The total value of liens encumbering the property is listed at \$184,000 in the debtor's schedules. Filing no. 10, Schedule A. The debtor has stated that she intends to have all of the liens on the property set aside as fraudulent conveyances, but no fraudulent conveyance action has yet been filed. In addition to the Bank's interest, the IRS has a \$9,000 lien, and the debtor's parents have a \$50,000 lien against the premises. Both of these liens may have

been eliminated, except for redemption rights, as a result of the Trust Deed sale.

In September of 1994, the debtor's spouse returned to his prior occupation as an attorney after being unemployed for approximately two years. Because he is now able to contribute significantly to the family's income, the probability that the debtor can submit a confirmable bankruptcy plan is better than in previous bankruptcy cases. For this reason, the Court will not consider the Bank's argument that this bankruptcy case was filed in bad faith.

The debtor testified that if her parents could come up with enough money, they were willing to lend her the money to repurchase the property from the Bank. There is no evidence that the parents are financially able to repurchase the property.

The debtor has shown that the residence is important to her and her family. If the debtor and her family are evicted, there is no guarantee that the family can find rental property in the same school district, and therefore, the debtor's two dependant children may be forced to relocate to a new school. The debtor also stated that moving will be an excessive burden and cost. If the debtor cannot afford to move, she certainly could not afford a Chapter 13 Plan which would redeem the property, but this issue is relevant to confirmation, not to the motion to lift the automatic stay.

### Discussion and Decision

#### A. The Automatic Stay

The automatic stay applies to property of the estate pursuant to Section 362(a)(3), which states that the bankruptcy petition operates to stay "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The Court's October 12, 1994 Journal Entry caused the stay to remain in effect until an evidentiary hearing on the applicability of the stay could be held. Filing no. 5.

Since the automatic stay only applies to acts to obtain possession of the property of the estate, the relevant issue before the Court is whether the residence is "property of the estate," which is subject to the automatic stay.

#### B. The Bankruptcy Estate

##### 1. Property of the Estate

The interests which comprise the bankruptcy estate are defined at Section 541(a) and include "all legal or equitable interests of the debtor in property as of the commencement of the

case." 11 U.S.C. § 541(a)(1). To determine what interests the debtor still may possess in the residence property, "the law of the state where the property is situated governs questions of property rights." Justice v. Valley Nat'l Bank, 849 F.2d 1078, 1084 (8th Cir. 1988) (citing Butner v. United States, 440 U.S. 48, 54-55, 99 S. Ct. 914, 917-18, 59 L. Ed. 2d 136 (1979); Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 273-74 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984)). "[A]bsent a specific grant of authority from Congress or exceptional circumstances, a bankruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law. Johnson, 719 F.2d at 274.

Under Nebraska law, the Nebraska Trust Deeds Act extinguished any remaining legal or equitable title the debtor had to the property once the property was sold at the Trustee's Sale:

(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 such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

NEB. REV. STAT. § 76-1010(2)(Reissue 1990)(emphasis added). Because the trustee's deed does not convey title to the property to the purchaser until after the trustee's sale, a trust deed is a secured instrument. See Blair Co. v. American Sav. Co., 184 Neb. 557, 558 169 N.W.2d 292 (Neb. 1969) (stating that a trust deed secures the performance of obligations and confers a power of sale on the trustee to satisfy the obligation secured).

Property rights are defined broadly to protect an individual's due process rights under the United States Constitution, thus:

[T]he guarantee [of due process] extends to property rights less substantial than full legal title, whether they come from a private contract, or state law. Even a merely arguable right to possession constitutes property. A person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules . . . that support his

claim of entitlement to the benefit and that he may invoke at a hearing.

Federal Deposit Ins. Corp. v. Morrison, 747 F.2d 610, 614 (11th Cir. 1984), cert. denied, Morrison v. Federal Deposit Ins. Corp., 474 U.S. 1019, 106 S. Ct. 568, 88 L. Ed. 553 (1985) (holding that under Alabama law, the statutory right to redemption and the equitable right to redemption at common law are property interests protected by the Fifth Amendment).

Bankruptcy Courts generally agree that where all property rights under state law are extinguished prior to bankruptcy, the property is not part of the bankruptcy estate. In re Liggett, 118 B.R. 213 (Bankr. S.D.N.Y. 1990) (holding that cause existed to lift the automatic stay when the debtor did not have a legal or equitable title to the property, did not have a legally cognizable right to possession of the property, and did not have a right to equity of redemption under New York law); Nimai Kumar Ghosh v. Financial Fed. Sav. and Loan Ass'n (In re Nimai Kumar Ghosh), 38 B.R. 600 (Bankr. E.D.N.Y. 1984) (holding that under New York law, which does not provide a period of redemption, debtor's legal and equitable interest in the real estate was extinguished at the pre-petition foreclosure sale, and thus, the debtor may not regard the real estate as property of the estate and attempt to reinstate or cure the mortgage); Jenkins v. Peet (In re Jenkins), 13 B.R. 721 (Bankr. D. Colo. 1981) (holding that state property rights which terminated prior to the entry of the order for relief in the bankruptcy case do not become property of the estate).

Once the Trustee's Deed is delivered to the purchaser, the Nebraska Trust Deeds Act denies the trustor/debtor the right to redeem the property from the purchaser and transfers any remaining rights or interests of the trustor/debtor to the purchaser. Thus, the purchaser, that is the Bank, took both legal and equitable title of the property upon the delivery of the deed following the sale. When state law extinguishes all of the debtor's legal and equitable interests in the property prior to filing of the bankruptcy petition, the property is not part of the bankruptcy estate, and a bankruptcy plan may not re-vest the debtor with property that is not a part of the bankruptcy estate. Boyd v. United States, 11 F.3d 59, 60-61 (5th Cir. 1994).

## 2. Possessory Property Interests

A notable exception to the general rule is explained in In re Delex Management, 155 B.R. 161 (Bankr. W.D. Mich. 1993). The bankruptcy court in Delex found that a property interest still passed to the bankruptcy estate when a debtor who lost the legal and equitable titles to the property pre-petition refused to vacate the property. 155 B.R. at 167. The court held that the debtor's interest in the property was a "tenancy at sufferance." The court concluded that "a tenancy at sufferance is a possessory interest in

real property within the scope of the estate in bankruptcy under section 541." Id. (quoting Convenient Food Mart no. 144 v. Convenient Indus. of Am., Inc. (In re Convenient Food Mart no. 144), 968 F.2d 592, 594 (6th Cir. 1992) (citations omitted); citing accord Cuffee v. Atlantic Business and Community Corp. (In re Atlantic Business and Community Corp., 901 F.2d 325, 328 (3d Cir. 1990); In re 48th St. Steakhouse, Inc., 835 F.2d 427, 430 (2d Cir. 1987); Schewe v. Fairview Estates (In re Schewe), 94 B.R. 938, 942, 946 (Bankr. W.D. Mich 1989) (holding that a "tenancy at will" is property of estate)).

"A tenancy at sufferance arises where one comes into possession of land by a lawful title otherwise than by act of law, and occupies it thereafter without any right or title at all." 51C C.J.S. Landlord & Tenant § 175, at 485 (1968) (footnotes omitted). A "tenancy at sufferance" exists when the following requirements are met: (1) possession of the property must be without the permission of nor under an agreement with the owner; (2) the possessor originally possessed the property lawfully; (3) the continued possession is the result of the owner's laches or negligence in failing to evict the possessor. Id. at 485-86. Such possession is without title or right and is wrongful. Id.

The debtor in this case does not have a property interest as a "tenant at sufferance." The debtor is on the property without the permission of the owner, and the debtor once lawfully possessed the property. However, the debtor's continued possession is not due to laches or negligence on the part of the Bank. The Bank acted shortly after recording the Trustee's Deed to gain possession of the property by causing the Writ of Restitution to be issued and served. At common law, notice of eviction was not necessary, but in Nebraska, the owner must serve three days notice pursuant to the forcible entry and detainer section of the Nebraska Revised Statutes to remove a person in possession. NEB. REV. STAT. §§ 25-21,220, 25-21,221 (Reissue 1989); Nebraska v. Cooley, 56 N.W.2d 129, 156 Neb. 330, 339 (Neb. 1952); Clark v. Turkey Land Co., 106 N.W. 328, 328, 75 Neb. 326 (Neb. 1905). Therefore, the Bank's actions prevent the debtor from becoming a "tenant at sufferance," and the property is not part of the debtor's bankruptcy estate.

### 3. Lifting the Automatic Stay

Even if the debtor was found to have a property interest under the "tenancy at sufferance" doctrine, the automatic stay would still be lifted in this case. The motion to lift the automatic stay is pursuant to Section 362(d)(1), which provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such

stay -- for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1).<sup>1</sup>

In Delex, the court found that the debtor possessed a property interest that belonged to the bankruptcy estate but the Delex court lifted the automatic stay "for cause" to permit the owner of the legal and equitable titles to serve a writ of restitution to evict the debtor and gain possession of the property. 155 B.R. at 168. The court refused to protect the debtor's property interest when there was no legally cognizable claim to the property. Id. 168-69.

It is the law in Nebraska that a tenant at sufferance possesses the property unlawfully, and the party entitled to lawful possession is entitled to evict the party in possession. Cooley, 156 Neb. at 340. Unlawful possession of property would be cause for this Court to lift the automatic stay. See Delex, 155 B.R. at 168 (holding that cause exists to lift the automatic stay under 11 U.S.C. § 362(d)(1)); see also Liggett, 118 B.R. at 218 (holding that court-ordered eviction papers denied the estate a property interest in the bare occupancy of the debtor, and even if bare possession is an equitable interest in the property, the automatic stay should be lifted because the "property interest" is so tenuous). Since the debtor has no recognizable right in the property under state law which can be redeemed through the bankruptcy process and since the only potential interest that the debtor possesses is without a legal basis, the bankruptcy court cannot give the debtor more property rights than already exist at state law.

Even though the Court would lift the automatic stay on legal grounds, the Court notes that a procedural reason may have existed to leave the automatic stay in place. The Bank neglected to serve the Motion for Relief on the debtor as required by Neb. Bankr. R. 4001(c), which states that the moving party must serve "the debtor and debtor's attorney." The Bank's Motion for Relief shows that the debtor's attorney and the Chapter 13 Trustee were served, but not the debtor.

Because the Court concludes that the automatic stay is not applicable in this case and because this conclusion is the equivalent of ruling on the debtor's motion to determine whether

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<sup>1</sup> Even though the debtor does not have an equity position in the property, the Bank did not seek to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(2). The third lienholder on the debtor's property is the debtor's parents, and but for their lien, the debtor's would have equity in the property.

the automatic stay applied in this case, the issue of proper service of the Bank's Motion to Lift Stay is moot.

C. The IRS's Redemption Right

The debtor's final argument is that even though the debtor has no legal or equitable right to the property under state law, she does possess a right of redemption under federal law. The debtor is correct that federal interests will supersede state law in the bankruptcy court. Butner v. United States, 440 U.S. 48, 54-55, 99 S. Ct. 914, 917-18, 59 L. Ed. 2d 135 (1979); Johnson, 719 F.2d at 273-74. However, since the right of redemption belongs to the United States on behalf of the Internal Revenue Service (the IRS), there is no basis upon which to treat this redemption right as belonging to the debtor and thus, to the bankruptcy estate.

The IRS may redeem property from a prior lienholder pursuant to Section 7425 of the Internal Revenue Code, which provides:

In the case of a sale of real property to which subsection (b) [of § 7425] applies to satisfy a lien prior that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

26 U.S.C. § 7425(d)(1). When the United States redeems pursuant to Section 7426(d)(1), the United States takes "all the rights, title, and interest in and to such property acquired by the person from whom the United States redeems such property by virtue of the sale of such property." 26 U.S.C. § 7425(d)(3)(C).

The IRS is permitted to redeem property from a prior lienholder to encourage the lienholder to bid a fair price for the property at a foreclosure sale. The Senate Finance Committee explained the purpose of Section 7425(d)(1) as follows:

By exercising its power of redemption the Government can purchase property sold at distress prices and resell the property at a profit. This profit, of course, is applied in satisfaction of the taxpayer's liability. In some instances this procedure is the only means by which the Government can collect taxes due. In all instances, however, the exercise of this power, where redeemed property is sold at a profit, inures to the benefit of delinquent taxpayers.

S. REP. NO. 1708, 89th Cong., 2d Sess. 31-32, reprinted in 1966 U.S.C.C.A.N. 3722, 3753; Delta Sav. & Loan Ass'n v. Internal Revenue Serv., 847 F.2d 248, 251 (5th Cir. 1988).

From the plain language of the statute and from the legislative history, it appears that there is no intent on the part of Congress to grant taxpayers a personal redemptive right to the property. The statute was created to encourage fair bidding and to allow the IRS to collect delinquent taxes. The debtor may not personally redeem the property from the Bank, nor does the debtor possess a right to force the IRS to redeem. If the IRS is not served with notice of the foreclosure sale as directed in Section 7425(c)(1), the sale is not voidable, instead the IRS's lien is left undisturbed. 26 U.S.C. § 7425(b)(1). Thus, the IRS's right of redemption does not touch upon the debtor's interest in the property.

The debtor is not precluded from purchasing the property from the IRS, should the IRS decide to redeem its interest before the 120 days from the date of the sale expires, which is approximately December 22, 1994. The property is worth a considerable amount more than the price paid by the Bank, and therefore, the IRS could recover its lien by redeeming the property from the Bank and reselling the property at a profit. However, if this occurs, it will occur outside of the jurisdiction of the bankruptcy court because the property and the IRS's right of redemption do not constitute "property of the estate." The debtor lost any and all property rights she had to the property prior to the bankruptcy petition date, and any attempt to regain the property must be outside of the bankruptcy case and pursuant to state law or other federal law.

#### Conclusion

The legal and equitable titles to the property vested in the Bank prior to the filing of the bankruptcy petition. The Nebraska Trust Deeds Act provides that the debtor may not redeem the property once a Trustee's deed is issued. When the debtor filed her bankruptcy petition, the debtor had no legal or equitable interests in the property, and therefore, the property was not property of the bankruptcy estate and the automatic stay does not protect the real property.

The Bank may proceed with the Writ of Restitution to recover the premises. However, the Bank's right to proceed is subject to a ten-day waiting period. The debtor testified that it will be a difficult task to remove the debtor's family's belongings from the property. Even though the premises do not constitute property of the estate, the contents in and around the premises are property of the bankruptcy estate. Therefore, the debtor is allowed ten days to remove belongings from the home. The Bank may pursue its remedies under state law no earlier than December 17, 1994.

The IRS possesses a 120-day right of redemption, but this right does not extend to the debtor. The debtor may repurchase the property from the IRS, if the IRS does in fact redeem the property, and if the IRS decides to sell the property to the debtor, but the debtor does not possess a legal or equitable interest in the IRS's redemption right to cause the redemptive right to be part of the bankruptcy estate.

Separate journal entry to be filed.

DATED: December 6, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

*CRAMPTON, JAMES	341-4045
GARDEN, RICHARD JR.	8-402-474-5393
PFEIFFER, HENRY	397-1806

Copies mailed by the Court to:

Kathleen Laughlin, Trustee

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

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
CYNTHIA GILROY,	)	CASE NO. BK94-81573
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 13
	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: December 6, 1994
<u>Defendant(s)</u>	)	HEARING DATE: November
	)	10, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding a motion to stay filed by the debtor.

APPEARANCES

James Crampton, Attorney for debtor  
Henry Pfeiffer and Richard Garden, Attorneys for Metropolitan  
Federal Bank FSB

IT IS ORDERED:

The automatic stay does not protect the real property from the state law remedies of the Bank. However, the Bank may not proceed prior to December 17, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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GARDEN, RICHARD JR.	8-402-474-5393
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