

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
DANIEL J. RHOADS, ) CASE NO. BK98-82850  
) CH. 13  
DEBTOR(S). ) Filing No. 6, 11

MEMORANDUM

Hearing was held on February 10, 1999, on Motion for Relief filed by Commercial Federal Mortgage Corporation. Appearances: Daniel Rhoads pro se and Thomas Ostdiek for movant. 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)(G).

Background

After appropriate notice, Commercial Federal Bank, as trustee under a deed of trust, sold certain residential real property owned by the debtor at a trustee's sale at 10:00 A.M. on November 4, 1998. Later that day, at 3:28 P.M., the debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code.

The purchaser at the trustee sale, Commercial Federal Mortgage Corporation (CFMC), had no notice of the bankruptcy and, on or about November 9, 1998, it accepted a deed from the trustee conveying the interest of the trustee and the debtor in the real property.

Eventually, and prior to recording of the deed, officials at CFMC were informed of the bankruptcy filing. The deed was held and not recorded, and it has not yet been recorded.

CFMC then filed a motion for relief from the automatic stay so that it could record the deed, take whatever action was necessary to evict the debtor from the premises, and enjoy the rights and benefits of possession of the property. A preliminary and then a final hearing were held on the motion for relief from automatic stay. Evidence was presented and argument made. This memorandum contains findings of fact and conclusions of law concerning the issues presented.

Decision

Relief from the automatic stay is granted.

Findings of Fact

1. In October of 1994, the debtor, a single person, did convey an interest in the real property described as Lot 23, Block 6, Clairmont, an addition to the City of Omaha, Douglas County, Nebraska, to Commercial Federal Bank as trustee under a deed of trust. CFMC was named in the deed of trust as beneficiary.
2. Debtor did default on payments on the promissory note which was secured by the deed of trust.
3. The trustee, at the request of the beneficiary, declared the entire unpaid principal balance, together with interest thereon, immediately due and payable.
4. The trustee then recorded a Notice of Default and mailed notice thereof to the debtor by certified mail in compliance with Neb. Rev. Stat. § 76-1008 (Reissue 1996).
5. The debtor failed to cure the default within thirty days after the recording of the Notice of Default.
6. The trustee executed a Notice of Trustee's Sale in conformance with the statutes and provided a copy to the debtor by certified mail.
7. The trustee published the Notice of Trustee's Sale as required by the statutes.
8. The trustee conducted a sale of the real property at public auction on November 4, 1998, at or about 10:00 A.M. at the location described in the Notice of Trustee's Sale.
9. At the sale, the trustee accepted the bid of CFMC in the amount of forty-one thousand, four hundred thirty-eight dollars and eighty-one cents (\$41,438.81) as the highest bid.
10. The Notice of Trustee's Sale provided that "The highest bidder will deposit with the Trustee, on the day and time of sale, the full amount of the bid, in cash or certified funds, except this requirement is waived when the highest bidder is the beneficiary." Pursuant to such notice and

exception, the trustee did not require the beneficiary to make a cash or certified funds payment, but accepted the bid as a credit bid against the debt.

11. Debtor filed a Chapter 13 plan on November 18, 1998, which proposes to "pay to the arrears of mortgage approximately \$6,500.00" and "pay to arrears of second mortgage approximately \$2,000.00" and "remainder shall be distributed to all unsecured claims." In other words, the debtor proposes to cure the default concerning the amount due CFMC under its promissory note which was secured by the deed of trust.

### Conclusions of Law and Discussion

The Bankruptcy Code at 11 U.S.C. § 1322(c)(1) permits a debtor to cure a default through a Chapter 13 plan until the real property is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law. The non-bankruptcy law that is applicable to the sale of the subject real property is Neb. Rev. Stat. §§ 76-1001-1018 and, specifically, 76-1009. Section 76-1009 authorizes the trustee under a deed of trust to sell the property at public auction to the highest bidder, after following all the notice requirements of the statute. In this case, the trustee did hold a public auction and did accept the bid of the highest bidder. The trustee then closed the auction. The purchaser, CFMC, asserts that once the public auction was held, a bid accepted, and the auction closed, the sale is completed under state law and the debtor no longer has the right to cure any default through a Chapter 13 plan because of the limitation set forth in 11 U.S.C. § 1322(c)(1).

The Nebraska statute itself does not specifically address the question concerning when a sale is complete under Section 76-1009. However, it does specifically state that the trustee is authorized to "sell the property at public auction to the highest bidder." It further states that "if the purchaser refuses to pay the amount bid by him for the property struck off to him at the sale, the trustee may again sell the property at any time to the highest bidder." (Emphasis added.) Neb. Rev. Stat. § 76-1009. The operative words are "sell," "struck off to him at the sale" and "may again sell the property." These words and phrases imply that the act of conducting the auction, accepting the bid, and closing the auction include all elements necessary for completion of the sale.

Although there is no Nebraska appellate decision exactly on point, the Nebraska Supreme Court did also imply, in Commercial Federal Savings & Loan Ass'n. v. ABA Corp., 230 Neb. 317, 431 N.W.2d 613 (1988), that actions taken pursuant to the statutory language of Section 76-1009 are the equivalent of the completion of a trustee sale, just as such actions taken under the auction provisions of the Nebraska Uniform Commercial Code, Neb. U.C.C. § 2-328 (Reissue 1992) result in a completed sale. The court stated that "[t]he Legislature recognized the need for stability and integrity in a particular type of auction when it enacted the Nebraska Trust Deeds Act in 1965." Commercial Federal, 230 Neb. at 321, 431 N.W.2d at 616. It then quoted Section 76-1009 and applied some of its provisions to judicial sales of real property. In doing so, it used the following language: "If the highest bidder at a judicial sale refuses to pay the amount bid by him, thus requiring the property to be *resold*, that person or entity shall be liable for the difference between the price on *resale* and his, her, or its highest bid." Id. (Emphasis added.) The words "resold" and "resale" imply that once a bid is accepted at either a deed of trust sale or a judicial foreclosure sale, the sale is complete and, if the purchaser refuses to make payment, the property may once again be "resold."

From the above analysis, I conclude that the Nebraska Trust Deeds Act contemplates, and the Supreme Court of Nebraska has so interpreted it to mean, that once the highest bid at a trustee sale is accepted, the property has been sold and the sale is complete. This conclusion is in accord with Judge Minahan's opinion in the Chapter 7 case of In re Jones, 214 B.R. 792 (Bankr. D. Neb. 1999).

Since the sale was complete prior to the filing of the bankruptcy petition, the debtor is precluded from curing the default by virtue of the limitations in 11 U.S.C. § 1322(c)(1).

The finding that the debtor is precluded from curing the default after the completion of the sale does not in itself remove the property from the jurisdiction of the Bankruptcy Court. Section §1322(c)(1) of the Bankruptcy Code provides that the termination of the right to cure due to a foreclosure sale is contingent upon the sale being conducted in accordance with applicable nonbankruptcy law, necessarily implying that the court retains jurisdiction to consider circumstances of the sale. Nebraska Revised Statute Section 76-1010 provides

in part that "[t]he 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 . . . to the property sold," suggesting that the debtor's interest continues to some extent until the delivery of the deed. Furthermore, although the debtor had only the smallest interest in the property at the conclusion of the sale (perhaps only a bare possessory interest), the automatic stay enjoins creditors from taking "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).

Had Commercial Federal Bank been aware of the filing of the debtor's bankruptcy petition on November 4, 1998, the delivery of the deed thereafter would have been a violation of the automatic stay. Commercial Federal Bank was, however, unaware of the filing when it delivered the deed to CFMC, and CFMC, now aware, has correctly filed a motion with this court for relief from the automatic stay to proceed further with this matter.

Because the debtor's interest consists solely of physical possession, the Bankruptcy Code provides the debtor no real relief concerning the real estate. Therefore, it is appropriate to grant CFMC's motion for relief from the automatic stay so that it may proceed with recordation of the deed and actions to obtain possession of the property.

Conclusion

The debtor may not cure the default. CFMC is granted relief from the automatic stay to record the deed and take whatever action is appropriate under state law to obtain possession of the property.

Separate journal entry to be filed.

Dated: February 19, 1999

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

7 OSTDIEK, THOMAS

Copies mailed by the Court to:

Daniel J. Rhoads, 2485 N. 47th Ave., Omaha, NE 68104

Kathleen Laughlin, Trustee  
United States 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.

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FOR THE DISTRICT OF NEBRASKA

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DANIEL J. RHOADS,	)	CASE NO. BK98-82850
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_____ DEBTOR(S). _____	)	CH. 13
	)	Filing No. 6, 11
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: February 19, 1999
_____ Defendant(s) _____	)	HEARING DATE: February 10, 1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Commercial Federal Mortgage Corporation; Resistance by debtors.

APPEARANCES

Daniel Rhoads, debtor (pro se)  
Thomas Ostdiek, Attorney for movant

IT IS ORDERED:

The debtor may not cure the default. CFMC is granted relief from the automatic stay to record the deed and take whatever action is appropriate under state law to obtain possession of the property. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

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