

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
DANNY L. & PENNY A. NICHOLSON,) CASE NO. BK01-82538
)
DEBTOR) CH. 13

MEMORANDUM

Hearing was held on September 10, 2001, on a Motion for Relief from Automatic Stay. Appearances: Wayne Griffin for the debtors and T. Randall Wright for the movant. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

Facts

In April, 2000, the debtors purchased certain real property from the moving party. The debtors paid a portion of the purchase price and from the balance of the purchase price gave the movant a promissory note and secured the promissory note by executing a deed of trust granting a power of sale to the trustee. The debtors were to pay the balance in three annual installments. They missed the first installment due in the year 2001. The trustee then, following the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 through 1018, declared a default, gave appropriate notice and scheduled a sale.

The sale was held on August 20, 2001. The winning bidder, a third party, bid \$440,950.00, an amount in excess of the amount owed by the debtors.

Immediately following the sale, the trustee and the purchaser executed an "Agreement For Sale and Purchase of Real Estate," and, on the same date, the purchaser paid the cash down payment of \$88,190.00 to the trustee.

On August 22, 2001, a date which was after the sale date, but prior to the scheduled closing of the sale as provided in the above-reference Agreement, the debtors filed this Chapter 13 case. The trustee has filed this motion for relief from the automatic stay requesting authority to complete the

closing, accept the funds from the winning bidder, and deliver the deed.

The debtors object. It is their position that because no deed was conveyed prior to the bankruptcy petition being filed, the bankruptcy estate's interest in the real property is such that the debtors should be able to obtain confirmation of a plan which will, in effect, set aside the trustee sale and cure the delinquency.

Law and Discussion

The Bankruptcy Code, at 11 U.S.C. § 1322(c)(1), provides that a default with respect to a lien on the debtor's principal residence may be cured until such residence is sold at a foreclosure sale conducted in accordance with applicable non-bankruptcy law. Therefore, the issue is whether the acceptance of a bid at a properly-held trustee sale under the Nebraska Trust Deeds Act, the acceptance of a down payment, and the execution of a contract of sale with a final closing date for delivery of the balance of the purchase price and conveyance of a deed by the trustee is sufficient under Nebraska law to permit the court to find that "such residence is sold at a foreclosure sale" as that phrase is used in 11 U.S.C. § 1322(c)(1).

The applicable Nebraska law is Neb. Rev. Stat. §§ 76-1009 and -1010. Section 1009 states, in relevant part,

On the date and at the time and place designated in the notice of sale, the trustee shall sell the property at public auction to the highest bidder. The attorney for the trustee may conduct the sale. Any person, including the beneficiary, may bid at the sale. Every bid shall be deemed an irrevocable offer, and 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. The party refusing to pay shall be liable for any loss occasioned thereby and the trustee may also, in his discretion, thereafter reject any other bid of such person.

Section 1010(1) states, in relevant part, "[T]he 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."

Section 1010(2) states, with regard to the rights of the parties,

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. . . .

The three statutory sections referred to above encompass a statutory scheme by which a trustee may offer the property for sale, accept an irrevocable bid, accept the purchase price and convey all interest in the property by deed.

Upon trustee's acceptance of the bid, the bidder has a right, assuming delivery of payment, to specific performance of the contracted-for transfer of the real property from the trustee. The trustee has a right to full payment of the bid price upon offering to deliver conveyance of the real property by deed. The trustor/debtor is basically a bystander at this point. If the money is delivered pursuant to the bid and the deed is conveyed pursuant to the statute, all interest of the trustor is transferred to the purchaser. Following the acceptance of the bid, but prior to the delivery of the purchase price and deed, the interest of the trustor is possessory only. A provision of the Trust Deeds Act, Neb. Rev. Stat. § 76-1012, eliminates the trustor's right to cure the default and redeem or reinstate the obligation and the trust deed because the default had not been cured within a specific amount of time after the notice of default, and prior to the sale.

After receipt of the sale price and conveyance of title by the trustee, Neb. Rev. Stat. § 76-1013 provides the beneficiary of the deed of trust the right to bring an action to recover the balance due if the trustee sale did not bring a sufficient amount to pay the full outstanding obligation. The Nebraska Supreme Court in Bank of Papillion v. Nguyen, 252 Neb. 926, 567 N.W. 2d 166 (1997) found that the "date of sale," for purposes of determining whether an action for the deficiency had been timely brought, was the actual date that

the property was offered and the bid was received by the trustee, even though the deed conveying the property was not recorded for several days thereafter. Judge Minahan, in the published opinion of In the Matter of Jones, 214 B.R. 492 (Bankr. D. Neb. 1997), found that a sale was completed under the Nebraska Trust Deeds Act upon acceptance of the bid by the trustee, thereby negating sufficient interest in the trustor/bankruptcy debtor or the bankruptcy estate to set aside the trustee sale. Judge Minahan's conclusion was consistent with Bank of Papillion v. Nguyen, supra.

The undersigned judge has also dealt with this issue in the context of a Chapter 13 case. In In the Matter of Daniel J. Rhoads, Neb. Bkr. 99-37 (1999), this court found that once the trustee had accepted a bid at a properly-held trustee sale, the only interest remaining in the debtor/trustor was that of a right to possession. Such a right to possession was not a sufficient interest to enable the debtor, through a Chapter 13 plan, to set aside the trustee's transaction, force the return of a down payment on the purchase price, or cure a delinquency and reinstate the deed of trust.

This case seems even more appropriate for the application of the ruling in Rhoads. Here, a third party actually paid a significant portion of the bid price to the trustee on the date the bid was accepted. The parties entered into a written agreement providing for a specific closing date. The debtors had notice that they were delinquent for several months prior to the scheduled sale. They had the opportunity under Nebraska law to cure the deficiency within the statutorily permitted time frame, or bid at the sale, if they had sufficient financing. Finally, they had time to file a Chapter 13 case prior to the scheduled sale date. To interpret the Nebraska Trust Deeds Act as they request, and permit them to file a bankruptcy case after the statutorily-authorized sale process in hopes of unwinding the consequences of the sale, would create instability in the real estate foreclosure proceedings in the State of Nebraska.

The Nebraska Supreme Court in Commercial Fed. Sav. & Loan v. ABA Corp., 230 Neb. 317, 431 N.W. 2d 613 (1988), emphasized the legislature's intent to recognize the need for stability and integrity in real estate foreclosure transactions when it enacted the Nebraska Trust Deeds Act. Such recognition of the need for stability must be considered by this court when attempting to determine whether a bankruptcy debtor or a

bankruptcy estate in a case filed after the scheduled trustee sale under the Nebraska Trust Deeds Act retains a sufficient interest in the real property to permit a cure of the default pursuant to 11 U.S.C. § 1322(c).

Conclusion

Consistent with Judge Minahan's opinion in In the Matter of Jones, and the undersigned's opinion in In the Matter of Rhoads, it is hereby determined that neither the debtor nor the estate has a sufficient interest in real estate after the trustee has accepted a bid at a properly-held trustee sale pursuant to the Nebraska Trust Deeds Act to enable either the debtor or the estate to cure a default through a Chapter 13 plan.

The Motion for Relief from the Automatic Stay is granted.

Separate journal entry to be filed.

DATED: September 18, 2001

BY THE COURT:

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

Copies faxed by the Court to:

05 GRIFFIN, WAYNE
29 WRIGHT, T. RANDALL

Copies mailed by the Court to:

Kathleen Laughlin, Chapter 13 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.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
DANNY L. & PENNY A. NICHOLSON,)
)
DEBTOR(S))
_____)
)
Plaintiff(s))
vs.)
)
)
)
2001)
Defendant(s))

CASE NO. BK01-82538
A
CH. 13
Filing No. 2, 6
JOURNAL ENTRY
DATE: September 18,
HEARING DATE: September
10, 2001

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion for Relief from Automatic Stay;
Resistance.

APPEARANCES

Wayne Griffin, Attorney for debtor
T. Randall Wright, Attorney for movant

IT IS ORDERED:

The Motion for Relief from the Automatic Stay is granted.
See Memorandum entered this date.

BY THE COURT:

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

Copies faxed by the Court to:

05 GRIFFIN, WAYNE
29 WRIGHT, T. RANDALL

Copies mailed by the Court to:

Kathleen Laughlin, Chapter 13 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.