

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DEANNA DIEKEN,) CASE NO. BK03-40428
)
Debtor(s).) CH. 13

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on March 13, 2003, on the motion for relief from stay by Commercial Federal Bank (Fil. #3) and objection by the debtor (Fil. #10). Stanley Foster appeared for the debtor, and Michael Currans appeared for Commercial Federal. 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(b)(2)(G).

I. FACTS

Commercial Federal Bank ("the bank") is the trustee for the benefit of Commercial Federal Mortgage Corporation, assignee of Community Mortgage Company, on a deed of trust on the debtor's residence. The deed of trust was executed in June 2000. Debtor subsequently defaulted on her payments, and Commercial Federal accelerated the loan. The debtor was unable to cure the default, so Commercial Federal gave the necessary notices, although debtor refused delivery of hers, and scheduled a trustee's sale. The bank, as successor to Commercial Federal Mortgage Corporation, purchased the property at the February 4, 2003, trustee's sale. The trustee's deed was executed on February 13, 2003. The debtor filed her bankruptcy petition on February 6, 2003.

On February 19, 2003, prior to becoming aware that Ms. Dieken had filed bankruptcy, the bank served a three-day notice to quit on her. After being made aware of the bankruptcy filing, the bank moved for relief from the automatic stay in order to proceed with a forcible entry and detainer action to obtain possession of the property.

The issue is the finality of the trust sale. The bank, in reliance on interpretations of the Nebraska Trust Deeds Act by the Nebraska Supreme Court and the bankruptcy court in this

jurisdiction, asserts that the sale became final at the time the auction was closed after the bank's bid was accepted.

The debtor, however, argues that under the terms of the statute, a trustee's sale does not cut off a debtor's rights until the deed is conveyed to the purchaser. She contends that judicial interpretations have ignored the language of Neb. Rev. Stat. § 76-1010:

(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 interests and of all persons claiming by, through or under them, in and to the property sold

II. LAW and DISCUSSION

Previous decisions concerning this issue, on which the bank relies, include Judge Minahan's ruling in In re Jones, 214 B.R. 492 (Bankr. D. Neb. 1997) and the undersigned's rulings in Daniel J. Rhoads, Neb. Bkr. 99:37, and Brenda Secord, Case No. BK99-82220, Journal Entry and Order of Jan. 24, 2000 (Fils. #25 and 26) (appeal dismissed March 15, 2000).

In Jones, a Chapter 7 case, the trust deed sale was conducted two days before the bankruptcy case was filed. The purchaser made the down payment and signed a purchase agreement, and closing was to take place within thirty days. The court analogized 11 U.S.C. § 1322(c)(1), which precludes a debtor from curing a default and reinstating a mortgage or trust deed loan after the property has been sold at a foreclosure sale. The court stated, "I conclude, from a policy standpoint, that a similar result should prevail in Chapter 7 cases. In other words, the trust deed sale should be regarded as terminating the debtors' ownership interest in the property." 214 B.R. at 493.

The court reasoned that the trust deed sale terminated the debtors' ownership rights under Nebraska law because the debtors no longer had a right to cure payment defaults, nor was there a post-sale right of redemption or requirement that the sale be judicially confirmed. The court noted that the trustee's deed

had not been delivered at the time the bankruptcy was filed, but declared that to be of no effect because the purchaser "has the specifically enforceable right to obtain the deed. See Neb. Rev. Stat. § 76-1010." Id.

As a result of the sale, the debtors had only a possessory interest in the property and that interest could not be maintained under state law, according to the court, so the creditor's motion for relief to proceed with closing was granted.

In Rhoads, the debtor filed his Chapter 13 petition approximately five hours after the trust deed sale. The deed was conveyed to the purchaser five days after the sale. The purchaser then learned of the bankruptcy filing, and moved for relief from stay in order to record the deed and obtain possession of the property.

The focus of that decision was on when a sale should be considered complete under § 76-1009. The court found that the statutory language implied that "the act of conducting the auction, accepting the bid, and closing the auction include all elements necessary for completion of the sale." Neb. Bkr. 99:39.

The Nebraska Supreme Court opinion of Commercial Fed. Sav. & Loan Ass'n v. ABA Corp., 230 Neb. 317, 431 N.W.2d 613 (1988), which clarified that the trust sale rule of irrevocable bids, as found in § 76-1009, should be adopted for judicial sales as well, was cited for support. After considering the ABA Corp. case and the statutory language, I concluded, in accordance with the Jones holding, 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." Neb. Bkr. 99:40. Accordingly, the debtor had only physical possession, not an ownership interest, so relief from the stay was granted to the purchaser.

Likewise, in the Secord case, the debtor filed a Chapter 13 bankruptcy case the day after the trustee's sale. The buyers delivered certified funds in payment of their bid at the time of the sale, but did not receive a deed at that time. I followed Jones, Rhoads, ABA Corp., and Bank of Papillion v. Nguyen, 252 Neb. 926, 567 N.W.2d 166 (1997), in holding that the sale was complete when the bid was accepted.

It appears that both Nebraska bankruptcy judges may have overlooked a salient fact of the Nguyen case when citing it for the proposition that a trust deed sale becomes final at the time the high bid is accepted, as opposed to any other relevant date in the sale or transfer process. In Nguyen, the issue was the statute of limitations in the Trust Deeds Act for seeking a deficiency judgment against the borrowers. The court needed to determine when the three-month limitations period began to run, so the date of sale was relevant. In Nguyen, the auction of the property by the trustee was held May 24 and the delivery of the trustee's deed occurred on the same date. The deed was recorded three days later.

In considering what "sale of the property under a trust deed" means, the court considered several provisions of the Trust Deeds Act and determined:

Thus, when a bank which is both the trustee and beneficiary under a trust deed submits the highest bid at a public auction conducted pursuant to the [Trust Deeds] Act, the resulting conveyance from the bank as *trustee* to the bank as *purchaser* constitutes the "sale of property under a trust deed" from which the 3-month limitations period is computed pursuant to § 76-1013.

252 Neb. at 933 (emphasis in original).

The court found, under the facts of the case, that the "sale of property under a trust deed" occurred on May 24. When reviewing the language quoted in the preceding paragraph, it seems apparent that the Supreme Court focused on the conveyance of title to the property as the definitive event constituting a "sale" of the property. With all due deference to Judge Minahan, this fact was overlooked by both of us.

Likewise, a closer reading of the ABA Corp. case suggests that its rule focuses on the rights as between the trustee as seller and the buyer, or as between two potential buyers. The court interpreted § 76-1009, which deals with the manner in which the sale should be conducted, while § 76-1010 is the section that provides the procedure for transfer of title from the trustee and is applicable to the rights as between the trustor, the debtor in this case and in each of the above described bankruptcy cases, and the trustee.

Under the facts of this case, it is clear that at the time the bankruptcy petition was filed, the trustee had not delivered a deed to the buyer, and therefore had not conveyed the interest of the trustor, debtor, to the buyer. When the bankruptcy petition was filed, Ms. Dieken held both a legal and equitable interest in the property, which allows her to reorganize or decelerate the obligation.

III. CONCLUSION

It is clear from the language of Neb. Rev. Stat. § 76-1010 and the Nguyen case that a trust deed sale is not complete to cut off the rights of a debtor until title is conveyed by the trustee to the purchaser.

The creditor had a legitimate basis for its motion and its reliance on the Jones, Rhoads, and Secord decisions. However, based on the legal conclusions reached here, Rhoads and Secord are overruled to the extent those decisions are inconsistent with today's ruling.

The motion for relief is denied. Separate order to be entered.

DATED: March 28, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Michael Currans
Stanley Foster
Chapter 13 Trustee
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.

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ORDER

Hearing was held in Lincoln, Nebraska, on March 13, 2003, on the motion for relief from stay by Commercial Federal Bank (Fil. #3) and objection by the debtor (Fil. #10). Stanley Foster appeared for the debtor, and Michael Currans appeared for Commercial Federal.

IT IS ORDERED: The motion for relief is denied. At the time the bankruptcy petition was filed, the trustee had not delivered a deed to the buyer, and therefore had not conveyed the interest of the trustor, debtor, to the buyer. When the bankruptcy petition was filed, Ms. Dieken held both a legal and equitable interest in the property, which allows her to reorganize or decelerate the obligation.

See Memorandum filed this date.

DATED: March 28, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

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Chapter 13 Trustee
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