

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
 HARVEY MAHLOCH,)
)
 Debtor.)
)
 DORIS VILLM,)
)
 Plaintiff,)
)
 v.)
)
 C. G. WALLACE, III, Trustee,)
)
 Defendant.)

CV. 86-0-263
BK. 82-670

FILED
DISTRICT OF NEBRASKA
AT _____ M
JUL 14 1987
William L. Olson, Clerk
By _____ Deputy

MEMORANDUM-OPINION -

This matter is before the Court on appeal from a bankruptcy court ruling filed March 24, 1986. Therein, the United States Bankruptcy Judge for the District of Nebraska, Timothy J. Mahoney, ruled that Doris Villm held a valid lien on property sold by the Trustee, C. G. Wallace, III, and directed the Trustee to pay her proceeds from the sale of the property plus interest. Upon careful consideration of the record and arguments submitted by the parties, the Court finds Judge Mahoney's ruling should be affirmed.

Before this Court addresses the merits of the appeal, it is prudent to state the general standard of review which guides the Court in matters such as this. On appeal a district court is not bound by the Bankruptcy Judge's conclusions of law;

however, the Bankruptcy Judge's findings of fact are entitled to stand unless clearly erroneous. In re Martin, 761 F.2d 472, 474 (8th Cir. 1985); see also, Bankruptcy Rule of Procedure 8013.

The parties do not dispute the following findings of fact made by the Bankruptcy Court. On August 1, 1978, Doris Villm and her now deceased husband, Fred Villm, entered into an Agreement for Deed in Escrow as sellers with Harvey Mahloch as buyer for the sale and purchase of certain real property in Perkins County, Nebraska. The contract called for yearly payments through August 1, 1986. The agreement provided that the deed, abstract to the property and the agreement itself would be held in escrow subject to the agreement's terms and conditions. The escrow agreement provides for installment payments over a period of years, and upon the final payment, delivery and recording of the deed. Without the knowledge or authorization of the sellers, the deed was filed with and recorded by the Perkins County Clerk on the same day that it and the sale contract were signed by the parties. Apparently neither document was ever delivered to an escrow agent. The Bankruptcy Court concluded Harvey Mahloch either was not aware the deed had been recorded, or if he was aware it had been recorded, Mr. Mahloch treated the recording as a mistake.

Mr. Mahloch continued to make payments according to the escrow agreement through August 1, 1981. On April 9, 1982, he filed a Chapter 11 bankruptcy proceeding and C. G. Wallace, III, was ultimately appointed trustee of his estate. A Plan of

Reorganization dated June 3, 1983, and modified August 29, 1983, was prepared and submitted to the Bankruptcy Court for approval. The plan was approved by the Court on December 2, 1983.

The Reorganization Plan listed the claim in question as a Class 5 claim and was identified as "the allowed secured claim of Fred Villm." Article IV(B)(1) of the Plan provides that Class 5 claims shall:

Be entitled to retain the liens securing their claims until property subject to the lien is sold by the Trustee as hereinafter provided or the claims are satisfied in full pursuant to 11 U.S.C. § 1129(b)(2)(A)(i); and in the event of sales of property subject to said claims or liens, the liens shall attach to any proceeds from such sale pursuant to 11 U.S.C. § 1129(b)(2)(A)(ii) * * *.

Article IV(B)(5) provides that Class 5 claims shall:

Be entitled to immediate receipt of proceeds received from the sale of assets subject to the claimant's liens unless the validity, extent, or priority of their liens is at issue.

The real estate was sold by the Trustee for \$108,000 in August of 1984. Although plaintiff made demand for payment, the Trustee refused to pay any of the sale proceeds to the plaintiff. According to the agreement terms, there remains due and owing to plaintiff the sum of \$55,715.80, plus interest from and after August 1, 1981.

Based upon the above facts, the Bankruptcy Court held the Trustee was required by the confirmed plan to satisfy Ms. Villm's claim from the proceeds of the real property sale. He found that the provisions of a confirmed plan proposed by

creditors and a Trustee bind the debtor and any creditor. 11 U.S.C. § 1141. The Plan classified appellee's claim as an "allowed secured claim" and it should be treated as such. In addition, the Bankruptcy Court ruled the Nebraska state law theory of merger was not applicable to this case. The terms of the escrow agreement were not nullified by the recording of the deed since the deed was recorded by mistake.

On appeal, the Trustee argues the Bankruptcy Court's ruling was incorrect. First he claims the Court essentially ignored an issue central to this case. Pursuant to 11 U.S.C. § 544(a)(3), the Trustee has the rights and powers of a bona fide purchaser of real property from the debtor as of the commencement of the case. The bona fide purchaser's status is given to the Trustee without regard to any knowledge held by the Trustee or any creditor. The scope of the Trustee's rights and powers as a presumed bona fide purchaser of real property is determined by state law. In re Gurs 27 B.R. 163 (Bankr.App. 9th Cir. 1983).

In this case Nebraska law applies. A bona fide purchaser or good faith purchaser of land is one who purchases for value and without notice of any suspicious circumstances which would put a prudent man on inquiry. *Mader v. Kallos*, 219 Neb. 579, 365 N.W.2d 408 (1985); *Love v. Fauquet*, 184 Neb. 250, 166 N.W.2d 742 (1969). The party who alleges he is a bona fide purchaser has the burden to prove he purchased the property for value and without notice. *Mader*, 219 Neb. at 581, 365 N.W.2d at

410. This burden includes proving he was without actual or constructive notice of another's rights or interests in the land. Id.

Based upon the Bankruptcy Court's factual findings and the exhibits presented during the hearing below, this Court finds the Trustee could not enjoy the status of a bona fide purchaser of the land at issue in this case. When Harvey Mahloch's bankruptcy petition was filed, the county court records included not only the warranty deed but also the agreement for deed in escrow. Both documents were filed the day they were signed with the agreement being docketed in the county real estate records five minutes prior to the warranty deed.

Upon execution of the agreement for deed in escrow, an equitable lien was created in favor of the sellers as to the land sold to Mr. Mahloch. *DeBoer v. Oakbrook Home Ass'n, Inc.*, 218 Neb. 813, 359 N.W.2d 768 (1984); *First Nat'l Bank of Hays Center v. Rose*, 213 Neb. 611, 330 N.W.2d 894 (1983). The recording of the agreement constituted constructive notice of the lien imposed upon the real estate. While there may have been some doubt as to whether or not the agreement was still in effect since the deed had in fact been filed, a prudent man would have inquired into the suspicious circumstances evidenced by the record. Upon inquiring into the facts surrounding the transaction, he would have found the contract was still in effect and that Harvey Mahloch had made regular payments under the contract and no default had occurred. Moreover, he would have found the deed itself was mistakenly recorded.

Next, the Trustee asserts the Bankruptcy Court improperly denied application of the doctrine of merger to this case. The Supreme Court of Nebraska defines the theory of merger as:

The rule of merger, stated simply, is that upon delivery and acceptance of an unambiguous deed all prior negotiations and agreements are deemed merged therein. (Citations omitted). However, the doctrine of merger does not apply where there has been fraud or mistake.

Bibow v. Gerrard, 209 Neb. 10, 13, 306 N.W.2d 148, 150 (1981).

The Bankruptcy Court ruled the theory of merger is inapplicable to the facts of this case because the deed was recorded by mistake. The Trustee does not dispute the finding that the deed was recorded by mistake. He contends, however, that a deed which is void as between the parties because recordation was obtained by fraud or mistake is nevertheless sufficient to grant good title to a bona fide purchaser without notice of the circumstances of the recordation. The Trustee asserts he falls within this exception. Since the Court has found the Trustee does not qualify as a bona fide purchaser, the Trustee cannot avail himself of this exception.

Finally, the Trustee argues the Bankruptcy Court improperly applied 11 U.S.C. § 1141. Since this Court finds Doris Villm held a valid lien in the property sold by the Trustee which could not be avoided by the Trustee, this issue need not be

addressed. Accordingly, an order affirming the Bankruptcy Court ruling will be entered this date.

DATED this 14th day of July, 1987.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lyle E. Strom", written over a horizontal line.

LYLE E. STROM
UNITED STATES DISTRICT JUDGE