

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
EVA MAE WALKER,	)	CASE NO. BK95-81092
	)	A95-8029
DEBTOR(S)	)	
	)	
FIRST NEBRASKA CREDIT UNION,	)	CH. 13
Plaintiff(s)	)	
vs.	)	
	)	
EVA MAE WALKER,	)	
	)	
Defendant(s)	)	

MEMORANDUM

Hearing was held on December 12, 1995. Appearances: Marion Pruss, Attorney for debtor/defendant; Donald Roberts, Attorney for plaintiff. This matter is not a core proceeding, although it does involve the claims allowance procedures. Reformation of an instrument is a contested matter related to, but not arising in, the case. The parties have consented to the court entering judgment.

Background

This is an action brought by First Nebraska Credit Union (FNCU) seeking reformation of a Deed of Trust executed by the debtor.

Findings of Fact

On October 23, 1991, the debtor borrowed \$11,692.94 from FNCU for what appears to be a consolidation loan. That is, certain earlier incurred debts were paid off by the use of the funds. The debtor executed a note for that amount and the note specifically provided "THIS NOTE IS SECURED BY A TRUST DEED OF EVEN DATE HEREWITH AND THE BORROWER GRANTS AS SECURITY AGREEMENT IN THE PROPERTY DESCRIBED AS: LOT 74 GLENBROOK ADDITION TO DOUGLAS COUNTY, NE."

The note further provides that \$1161.46 will be paid for some type of insurance from the proceeds of the note.

On the same date and at the same time, the debtor executed a Deed of Trust in the same real property described in the note. The Deed of Trust provided, among other things, that the interest in real property was granted:

FOR THE PURPOSE OF SECURING

a. Payment of indebtedness in the total principal amount of \$1,161.46, with interest thereon, as evidenced by that certain promissory note of even date (the "Note") with a maturity date of NOVEMBER 07, 2000, executed by Trustor, which has been delivered and is payable to the order of Beneficiary, and which by this reference is hereby made a part hereof, and any and all modifications, extensions and renewals thereof, and

b. Payment of all sums advanced by Beneficiary to protect the Trust Estate, with interest thereon at the rate of FOURTEEN percent (14%) per annum, ...

As is clear from the above-quoted language, the principal amount being secured as shown in the Deed of Trust is \$1,161.46, although the actual principal amount of the note on the date of its execution was \$11,692.94.

As a result of earlier litigation, the court has determined that the allowed secured claim of this claimant is \$1,161.46, and the balance is unsecured. That decision was made because of the specific language in the Deed of Trust.

At trial on the reformation of the Deed of Trust, the debtor testified that she did not remember borrowing \$11,692.94 and did not remember granting a Deed of Trust as security therefor. When faced with both of the documents, that is, the Promissory Note and Deed of Trust, she acknowledged her signature was on each. She also acknowledged that the proceeds of the \$11,692.94 Deed of Trust were appropriately used to pay off earlier obligations.

The court finds as a fact that the debtor did execute the Promissory Note and the Deed of Trust which was to secure the principal amount due on the Promissory Note.

In earlier litigation concerning the debtor's obligation to this creditor, the debtor, by affidavit, Exhibit 5 at the trial, admitted that this creditor is "simply the possessor of a Second lien, at the time of filing herein, in the amount of \$11,692."

A representative of FNCU testified that, although she could not be certain as to how or why the \$1,161.46 amount had been inserted in the Deed of Trust instead of the actual principal amount of \$11,692.94, she was certain that, consistent with the practice of the FNCU, the full amount of the principal was meant to be secured by the Deed of Trust. She also testified that the amount of \$1,161.46 that was inserted in the Deed of Trust was

exactly the same as the amount paid for a certain type of insurance and noted on the Promissory Note.

The court finds that FNCU has proved by clear and convincing evidence, from the documents which were executed contemporaneously, from the practices of FNCU when loaning money and taking security for such loan, and from the fact that the insurance premium noted on the Promissory Note was \$1,161.46 and that is the exact amount placed in the Deed of Trust, that the intent of the parties was for the full principal amount to be secured by the Deed of Trust and that the insertion of \$1,161.46 in the Deed of Trust was a scrivener's error.

#### Conclusions of Law

Under Nebraska law, reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument. Nebraska State Bank v. Pedersen, 452 N.W.2d 12, 234 Neb. 499, 506 (1990). The presumption that the written instrument correctly expresses the intention of the parties may be overcome by clear, convincing and satisfactory evidence. Id. at 506-07. Such evidence is "that amount of evidence which produces in a trier of fact a firm belief or conviction about the existence of the fact to be proved." Id. at 507.

According to the Pedersen case: "Reformation may be ordered where there has been mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party." Id.

There is no fraud alleged in this case. Therefore, reformation can be ordered only if a mutual mistake exists. See Id.

A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about the instrument.

The fact that one of the parties denies that a mistake was made does not prevent a finding of mutual mistake, nor prevent reformation.

An erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect

the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties.

Id. (citations omitted).

In this case, there has been a mutual mistake in that the scrivener inserted the wrong number as the principal in the Deed of Trust. Therefore, the Deed of Trust should be reformed to reflect that it secures the original principal amount of \$11,692.94.

The debtor suggests that because the debtor, once the Chapter 13 petition is filed, becomes a debtor-in-possession with some of the avoidance powers of the trustee, 11 U.S.C. § 544(A)(3) prohibits reformation of the instrument. The reason for the prohibition, argues the debtor, is that a debtor in possession, or trustee, stands in the shoes of a bona fide purchaser of real estate. According to the debtor, under Nebraska law, a bona fide purchaser of real estate is not subject to, nor affected by, reformation of an instrument between two unrelated parties. However, the Nebraska Supreme Court, in Mader v. Kallos, has determined that one cannot be a good faith purchaser if one has notice, actual or constructive, of another's rights or interest in the real estate. 219 Neb. 579, 581, 365 N.W.2d 408 (1985). The court stated:

A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice. This burden includes proving that he was without notice, actual or constructive, of another's rights or interest in the land.

Id. (citations omitted).

In this case, a hypothetical buyer would be held to have constructive notice of the lien in favor of FNCU because the Deed of Trust was properly recorded. That buyer would have a duty to investigate the actual balance due on the Promissory Note which was secured by the Deed of Trust. That balance could easily have been more than the amount originally inserted in the document as representing the principal amount of the debt. For example, taxes could have accrued and have been unpaid by the debtor and advanced by the credit union. Other notes could have been executed by the debtor and referred to and been secured by the Deed of Trust which is the subject of this litigation.

Therefore, a hypothetical buyer would have had constructive notice and an obligation to investigate further the interest of FNCU and could not have been a bona fide purchaser for value, but would have been and is subject to the reformation of the instrument.

Finally, neither the debtor nor FNCU have brought to the attention of the court any statutory or case law requirement that the actual amount of principal being secured be placed in the Deed of Trust. The statutory authorization for trust deeds under Nebraska law provides that trust deeds may secure existing debts or obligations created simultaneously with the execution of the trust deed, future advances necessary to protect the security, future advances made at the option of the parties or performance of an obligation of any other person named in the trust deed, and the fact that any obligations evidenced by and secured by the trust deed are paid off does not cause the trust deed to be invalidated as to any future advances unless the trust deed is released. NEB. REV. STAT. § 76-1002 (Reissue 1990). Therefore, since FNCU is not required to include the principal amount or any other specific reference to the Promissory Note, FNCU should not be penalized by a reduction of its secured status simply because of a scrivener's error. In addition, the Deed of Trust itself, at paragraph 6, provides for future advances to be secured by the Deed of Trust when evidenced by a Promissory Note stating that the notes are secured by the Deed of Trust.

#### Conclusion

It was the intent of the parties to the Promissory Note and the Deed of Trust that the Deed of Trust would secure the full principal and any future advances to protect the interest of FNCU. Because of a scrivener's error in specifically identifying the principal amount as \$1,161.46 instead of \$11,692.94, there is a need for and the FNCU has a right to reformation of the Deed of Trust to accurately represent the intent of the parties. Such reformation is granted and the Deed of Trust is reformed to the extent necessary to represent the principal amount being secured as \$11,692.94 on the date of execution of the Promissory Note and the Deed of Trust.

Separate journal entry shall be filed.

DATED: June 28, 1996

BY THE COURT:

Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

PRUSS, MARION	345-4278
ROBERTS, DONALD	346-8566

Copies mailed by the Court to:

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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	)	CH. 13
FIRST NEBRASKA CREDIT UNION,	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
EVA MAE WALKER,	)	DATE: June 28, 1996
	)	HEARING DATE: December
<u>Defendant(s)</u>	)	12, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding ADVERSARY PROCEEDING

APPEARANCES

Marion Pruss, Attorney for debtor/defendant  
Donald Roberts, Attorney for plaintiff

IT IS ORDERED:

Judgment is entered in favor of plaintiff and against defendant. The Deed of Trust executed by the parties on the 23rd day of October, 1991, is reformed to the extent that the correct principal amount of \$11,692.94 is substituted for the erroneous amount of \$1,161.46 referred to in paragraph a. of the Deed of Trust. See memorandum entered this date.

BY THE COURT:

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