

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
GARY & DIANE FRERICHS,)	CASE NO. BK87-1962
)	
DEBTOR)	A93-8037
)	
GARY & DIANE FRERICHS,)	
)	CH. 12
Plaintiff)	
vs.)	
)	
USA (FmHA) and COLERIDGE NATIONAL)	
BANK,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on the adversary proceeding concerning avoidance of a mortgage lien. Appearing on behalf of debtors was Wanda Howey Fox. Appearing on behalf of Coleridge National Bank was David Copple. Appearing for USA was Laurie Barrett. 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)(K).

Facts

On April 8, 1987, Gary and Diane Frerichs, the debtors, filed a Chapter 12 bankruptcy petition. Prior to the Frerichs' bankruptcy, the Farmers Home Administration (FmHA), made a loan to debtors secured by a mortgage covering three different tracts of land belonging to the debtors. Prepetition, Coleridge National Bank (CNB) advanced money to the debtors and received security in various forms, including a third mortgage on one of the tracts of real estate also mortgaged to the FmHA.

The debtors contend that this dispute concerns only one tract of land, which is legally described as SW 1/4 of section 31, T 30 N, R 3 E, 6th P.M. Cedar County, Nebraska (Tract 2 of 3). The stipulated value of Tract 2 is \$94,000.00. The first mortgage is held by the Gladys P. Lofgren Trust in the amount of \$94,000.00.

The debtors obtained confirmation of a Chapter 12 plan, and pursuant to the confirmed plan, the debtors were granted discharge of their unsecured and undersecured debts, including those representing the FmHA's and the CNB's allowed unsecured claims on November 25, 1991. Shortly thereafter, the bankruptcy case was closed.

The debtors reopened the case and filed this adversary proceeding to obtain a determination of whether the FmHA's and the CNB's respective liens may be avoided with regard to Tract 2.

It is the debtors' position that both the FmHA's second mortgage and the CNB's third mortgage with regard to the Tract 2 referred to above are, as of confirmation date, completely undersecured and void. Therefore, the debtors are requesting the Court to require the creditors to release their respective liens on the property pursuant to 11 U.S.C. § 506(d), the provision of the Bankruptcy Code which defines "secured claims" and states that liens which secure claims that are not "allowed secured claims" are void.

FmHA argues that there was only one loan, secured by one mortgage, covering all three tracts collectively, which cannot be broken down and partially avoided at the debtors' insistence into three separate mortgages. FmHA maintains that "the lien" represented by the mortgage may not be avoided until its allowed secured claim has been paid in full.

CNB asserts that a post-petition stipulation granted a lien on Tract 2 even though the prepetition third mortgage contained no equity on the confirmation date.

Discussion

Section 506(a) of the Bankruptcy Code is a general provision "which purports to define whether, and to what extent, a claim is 'secured.'" In re Jones, 152 B.R. 155, 163 (Bankr. E.D. Mich. 1993). 11 U.S.C. § 506(a) provides:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.

Thus, by virtue of Section 506(a) a creditor's secured claim is bifurcated into an allowed secured claim representing the value of the collateral and an allowed unsecured claim representing any amount remaining in excess of the value of the collateral.

Bankruptcy Code Section 506(d) contains a lien voiding provision. 11 U.S.C. § 506(d) states:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim such lien is void, unless 1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or 2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

In Dewsnup v. Timm, ___ U.S. ___, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992), the Supreme Court dealt with the applicability of Sections 506(a) and 506(d) in a Chapter 7 case. In Dewsnup, the debtor owed approximately \$120,000.00 to a creditor with a lien on real property having a value of only \$39,000.00. The debtor using Sections 506(a) and 506(d) attempted to strip down the creditor's lien to the value of the collateral. The Supreme Court held that the Chapter 7 debtor could not utilize Section 506(d) to strip down the secured creditor's lien. The Court said "that the words 'allowed secured claim' in Section 506(d) need not be read as an indivisible term of art defined by reference to Section 506(a), which by its terms is not a definitional provision." Id. at 777. Instead, the Supreme Court read the words in Section 506(d) "term-by-term to refer to any claim that is, first, allowed, and, second, secured." Id. Thus, the Supreme Court held that since this creditor's claim was both allowed and secured, "it does not come within the scope of § 506(d), which voids only liens corresponding to claims that have not been allowed and secured." Id.

However, the Supreme Court was reluctant to extend its decision to other situations and said "[h]ypothetical applications that come to mind. . . illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day." Dewsnup, 112 S. Ct. at 778.

In In re Jones, 152 B.R. 155 (Bankr. E.D. Mich. 1993), the court, although dealing with a Chapter 13 case, discussed the

applicability of Sections 506(a) and 506(d) to Chapter 12 cases and concluded that although lien stripping is prohibited in Chapter 7 cases, it is a necessary element in many Chapter 12 cases. Other cases acknowledging the Chapter 12 debtor's right to avoid liens to the extent the lien secures claims in excess of the value of the collateral include Kinder v. Security Bank & Trust Co. (In re Kinder), 139 B.R. 743 (Bankr. W.D. Okla. 1992), and In re Leverett, 145 B.R. 709 (Bankr. W.D. Okla. 1992).

It appears from the discussion in Jones, Kinder and Leverett that, under certain circumstances, a Chapter 12 debtor may avoid a lien which contributes no "value" to the secured claim. In this jurisdiction, the courts have previously dealt with lien retention issues in Chapter 12 cases in the context of confirmation issues. The Circuit Court in The Abbott Bank-Thedford v. Hanna (In re Hanna), 912 F.2d 945, 949 (8th Cir. 1990), has specifically ruled that 11 U.S.C. § 1225(a)(5)(B)(i) requires that a Chapter 12 plan must provide that the creditor retain the lien securing a secured claim. (Emphasis added).

In a case with facts somewhat similar to Frerichs, the United States District Court for the District of Nebraska held that the creditor had a right to retain the lien securing the claim and that the creditor who held a single mortgage that covered two parcels of agricultural property could not be forced to give up any part of the lien which was security for the allowed secured claim. Mahlin Farms, Inc., Neb. Bkr 88:141 (D. Neb. 1988).

The allowed secured claim of the FmHA is represented by one loan, secured by one mortgage, covering three parcels of real property. Because the mortgage of the FmHA is behind one or more other mortgages on each of the parcels on the date of confirmation, the FmHA could not look to any value in Tract 2. That is, the lien interests having priority over the interest of FmHA in Tract 2 absorbed all of the value of Tract 2 on the date of confirmation. Therefore, there was no "value" in Tract 2 to contribute to the allowed secured claim of the FmHA. Although this lack of value impacts upon the total amount to be paid to the FmHA on its allowed secured claim for the purpose of confirmation, it should not affect the right of the FmHA to retain the lien which secures its allowed secured claim. The lien is represented by one mortgage covering three tracts. The FmHA may only collect approximately \$102,000.00, which was the total remaining value of all of its collateral after deducting prior liens, but it certainly has the right to look to all of its security for repayment of that amount.

With regard to the real estate lien held by CNB in the form of a third mortgage on Tract 2, the debtors entered into a stipulation which was incorporated into the plan and, therefore, survived confirmation, which provided for the retention of a post-petition security interest in the real property. Although the debtors may be correct that since there was no equity in Tract 2 for the benefit of CNB, the mortgage lien could have been avoided by the debtors pursuant to the terms of 11 U.S.C. § 506(d). The fact is that the debtors agreed that the lien interest of CNB in Tract 2 would continue post confirmation. That being the case, the debtors shall not now be allowed to avoid the lien.

Conclusion

The mortgage lien interest of the FmHA and CNB in Tract 2 is not avoided.

Separate journal entry shall be filed.

DATED: March 31, 1994.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

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<u>DEBTOR(S)</u>)	
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GARY & DIANE FRERICHS,)	CH. 12
Plaintiff(s))	Filing No.
vs.)	<u>JOURNAL ENTRY</u>
)	
USA (FmHA) AND COLERIDGE)	
NATIONAL BANK,)	
)	DATE: March 31, 1994
<u>Defendant(s)</u>)	

Before a United States Bankruptcy Judge for the District of Nebraska regarding adversary proceeding.

APPEARANCES

Wanda Howey Fox, Attorney
David Copple, Attorney
Laurie Barrett, Attorney

IT IS ORDERED:

The mortgage lien interest of the FmHA and CNB in Tract 2 is not avoided. See memorandum this date.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.