

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
 GEORGE J. ANEST and )  
 ANDRIANOULA ANEST, ) CASE NO. BK87-1218  
 )  
 DEBTORS ) Chapter 12

MEMORANDUM OPINION

This matter came on for hearing on September 10, 1987, upon the debtors' motion for contempt against the First National Bank of Bayard. Appearing on behalf of the debtors was Eric Wood of Omaha, Nebraska. Appearing on behalf of the First National Bank of Bayard was Wayne Griffin of North Platte, Nebraska.

Facts

Debtors filed their petition for relief under 11 U.S.C. Chapter 12 on April 15, 1987. Prior to filing their petition, the debtors had maintained a banking relationship with and were borrowers from the First National Bank of Bayard (the "Bank").

On April 2, 1986, the debtors conveyed by quitclaim deed an unencumbered ten-acre tract of land, which tract included their homestead, to their children James George Anest and Rula K. Anest (the "debtors' children"). The stated consideration for the conveyance was "gift." The evidence indicated that the Bank was aware of this transfer; however, whether the Bank suggested or approved the transfer is a matter of dispute. The debtors then obtained an FmHA guaranteed loan through the Bank, for which they mortgaged the rest of their property. The amount of the loan is not disputed.

After the filing of the debtors' Chapter 12 petition, the Bank initiated a fraudulent conveyance action against James G. Anest and Rula K. Anest in the Morrill County District Court, which action is still pending. The Bank's petition states that the debtors, George and Andrianoula Anest, are indebted to the Bank. There is no evidence that the debtors' children are indebted to the Bank or that the Bank has reduced the indebtedness of the debtors to a judgment.

The debtors allege that the Bank has violated 11 U.S.C. § 362 by filing the fraudulent conveyance action against the debtors' children because the Bank's action is ultimately based on a claim

owed by the debtors. The Bank argues that the action is not a violation because it was filed against the debtors' children, not the debtors, and that the debtors are not necessary parties. The debtors have asked the Court to find the Bank in violation of the automatic stay and to impose sanctions on the Bank.

Issue

Does the fraudulent conveyance action filed by the Bank against the debtors' children violate 11 U.S.C. § 362?

Decision

The fraudulent conveyance action initiated against the debtors' children does violate the automatic stay, specifically 11 U.S.C. § 362(a)(6).

Discussion

The Bank contends that it may proceed with its fraudulent conveyance action without violating the automatic stay because it is a state action against the debtors' children and does not involve the debtors. The Bank argues that it is a "creditor" pursuant to Nebraska Revised Statute Section 36-601, (Reissue 1984), the Nebraska Uniform Fraudulent Conveyance Act. It further argues that the debtors are not necessary parties because they have parted with all interest in the conveyed property. For the same reason, the Bank also argues that the Trustee could not seek to recover the property of the bankruptcy estate. Finally, the Bank contends that it is entitled to a unique remedy - a lien on the conveyed property - that is available only to the Bank because it alone attacked the alleged fraudulent conveyance.

The Bank has cited a number of cases in support of these positions, and the Court has reviewed those cases. However, the Court believes that the Bank has missed the point in that it has failed to recognize that 11 U.S.C. § 362(a)(6) is dispositive of this case. Section 362(a)(6) reads as follows:

"(a) except as provided in subsection (b) of this section, a petition filed under Section 301, 302, or 303 of this title, or an application filed under Section 5(a)(3) of the Securities Investment Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of--

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;"

The Bank argues that its actions should not be stayed because the object of the action is property that is allegedly not part of the debtors' estate, which property is held by persons who are not subject to the bankruptcy petition. The question then arises as to why the Bank is pursuing that particular piece of property. The Bank admittedly is owed nothing by the debtors' children and has no claim against them. In its District Court petition, the Bank claims to be owed more than \$500,000 by the debtors, debts which are obviously pre-petition. Therefore, the answer to the question posed above can only be that the Bank is seeking a lien on the property in order to recover a claim against the debtors that arose before the commencement of the bankruptcy case. There is obviously no other basis here for the Bank's action.

The debtor has cited a case from another bankruptcy court that this Court finds particularly applicable in the instant case. In re Pioneer Valley Indoor Tennis Center, 20 B.R. 884 (Bkrtcy. D. Mass. 1982) involved a bank which was pursuing an action against an entity other than the debtors. The court found that the bank's action was subject to the stay:

"It is clear from the testimony heard, and from the arguments of counsel, that both sides have focused their sights upon Section 362(a)(3), but neither has made reference to the clearly applicable language of subsection (6) of Section 362(a). That language uniformly stays an entity, such as the bank, from any attempt to collect a debt which existed prior to the filing date. The only operative fact in all the evidence before the court is that the only debt in question is that of the debtor to the bank. It matters not that the bank seeks to satisfy that debt out of property which stands in the name of an entity other than the debtor, for Section 362(a)(6) makes no such distinction. [See Matter of Jandel, 8 B.R. 855, 7 BCD 320 (Bkrtcy. S.D. Ohio, 1981), where it was held that the stay bars action to collect or recover claim against the debtor from any source whatsoever, not just from the debtor itself.] Therefore it seems clear that any act by the bank which is capable of being characterized as an attempt to collect a pre-petition debt of this debtor will be a violation of the automatic stay, and should be enjoined as such, unless and until the bank seeks appropriate relief under Section 362(d)(1)."

Id. at 885. This Court also finds that the only debt involved in this case is that of the debtor to the Bank. Therefore, the Bank's action against the debtors' children is stayed by 11 U.S.C. § 362(a)(6).

The Court also believes that the Bank erred in its assertion that the trustee could not take action to recover the property in question. 28 U.S.C. § 157(b)(2)(H) provides that a proceeding to determine, avoid or recover fraudulent conveyances is a core proceeding that may be heard by the Bankruptcy Judge. Further, 11 U.S.C. § 544 gives the trustee the power to recover such fraudulent conveyances. Therefore, it is this Court's opinion that, if the property were recovered by the trustee or the Bank, it would become part of the bankruptcy estate. The Bank cannot be allowed to fashion for itself some unique remedy out of state law that would enable it to be in a position superior to that of the debtors' other creditors.

The Court finds that the Bank has violated the automatic stay. Pursuant to 11 U.S.C. § 362(h), it is ordered that the following sanctions be imposed:

1) The Bank is to pay attorney's fees and out-of-pocket expenses incurred on behalf of the debtors for the hearing in this matter and for briefs ordered at that hearing.

2) The Bank is to pay attorney's fees and out-of-pocket expenses incurred on behalf of the debtors for any and all appearances in the state court action.

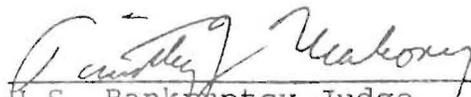
3) Until and unless it comes before this Court to obtain appropriate relief, the Bank is stayed or enjoined from continuing the action in state court against this property which, if the Bank were successful, would be property of the estate.

Debtors are to present to the Bank and to the Court the suggested attorney's fees and costs. The Bank has fifteen days thereafter to present written objections to the suggested fees and costs.

This is not a final order until the actual amount of fees and costs is determined by this Court.

DATED: November 13, 1987.

BY THE COURT:

  
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U.S. Bankruptcy Judge

Copies mailed to each of the following:

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