

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
JEFFREY MILLER, )  
) ) CASE NO. BK03-82793  
Debtor(s). ) A04-8021  
\_\_\_\_\_  
JEFFREY MILLER, )  
)  
Plaintiff, ) CH. 11  
)  
vs. )  
)  
RHODES RANCH ASSOCIATION, INC., )  
a Nevada corporation; and )  
NLVK, LLC, a Nevada limited )  
liability company, )  
)  
Defendants. )

MEMORANDUM

This matter is before the court on the plaintiff's motion for summary judgment (Fil. #25) and resistance (Fil. #47), and on defendant NLVK, LLC's motion for summary judgment (Fil. #33) and resistance (Fil. #40). D.C. (Woody) Bradford represents the debtor, and David Hicks represents the defendant. The motion was taken under advisement as submitted without oral arguments. 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)(E).

This adversary proceeding was filed by the Chapter 11 debtor to avoid a post-petition transfer of real estate owned by the debtor in Las Vegas, Nevada. The property was sold in foreclosure by Rhodes Ranch Association, allegedly in violation of the automatic stay, to NLVK to satisfy a delinquent homeowners' assessment lien. The debtor asserts that under 11 U.S.C. § 549(a), the transfer should be set aside because it transferred property of the bankruptcy estate post-petition without authorization by the court. Default judgment has already been granted against Rhodes Ranch (Fil. #21).

Summary judgment is appropriate only if the record, when

viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997), cert. denied, 523 U.S. 1124 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992).

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "We look to the substantive law to determine whether an element is essential to a case, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Williams v. Marlar (In re Marlar), 252 B.R. 743, 751 (B.A.P. 8th Cir. 2000) (quoting Ries v. Wintz Properties, Inc. (In re Wintz Cos.), 230 B.R. 848, 858 (B.A.P. 8th Cir. 1999)) (internal quotations omitted).

The debtor here did not list Rhodes Ranch as a creditor in his bankruptcy petition or give notice to it of his bankruptcy filing. Approximately five weeks after the petition date, Rhodes Ranch conducted a foreclosure sale and sold the property to NLVK, which recorded the deed 12 days later. NLVK evidently paid \$3,847 in cash to purchase the property; that amount equaled the delinquent assessments and foreclosure costs owed to Rhodes Ranch. NLVK asserts that it also assumed approximately \$500,000 "in senior deed of trust and/or property tax liens" on the property. The property appears to be worth \$630,000 to \$650,000.

Under § 549(a), the debtor may avoid a post-petition transfer not authorized by the court. There is no dispute that such an unauthorized transfer occurred here. The only issue is whether NLVK falls within the protections of § 549(c).

A trustee, or debtor standing in the shoes of a trustee, may not avoid a post-petition transfer of real property under § 549(a) if the transfer was made to a good-faith purchaser without knowledge of the commencement of the case, for present

fair equivalent value, unless a copy or notice of the petition was on file where the deed would be recorded. § 549(c). A good-faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property to the extent of any present value given, unless a copy or notice of the petition was so filed before the transfer was perfected. Id.

Any entity asserting the validity of a transfer under § 549 bears the burden of proof. Fed. R. Bankr. P. 6001. Therefore, NLVK must show that the elements of § 549(c) have been met.

The parties do not really dispute that NLVK was a good-faith purchaser without knowledge of the bankruptcy case, and that no copy of the debtor's bankruptcy petition was filed with the Clark County, Nevada, recorder of records. That leaves only the issue of whether NLVK paid "present fair equivalent value" for the property.

Satisfaction of antecedent debt is not "present value." In re Major, 218 B.R. 501, 505 (Bankr. W.D. Mo. 1998) (citing In re Penfil, 40 B.R. 474 (Bankr. E.D. Mich. 1984), which cited the Bankruptcy Act § 70d and Collier on Bankruptcy). See also T.F. Stone Co., Inc. v. Harper (In re T.F. Stone Co.), 72 F.3d 466, 469 (5th Cir. 1995) (collecting cases).

Here, the evidence is that NLVK paid \$3,847 in delinquent pre-petition assessments and foreclosure costs. This was antecedent debt. NLVK claims to have given additional value by way of debt assumption, but there is no evidence of that. In fact, debtor's evidence indicates that as of mid-August 2004, 10 months after the sale, NLVK had not taken steps to assume the mortgage. In other words, NLVK paid no new value for the property. Thus, NLVK has not met its burden of demonstrating that the transfer was valid under § 549(c) and its motion for summary judgment will be denied. However, it shall be granted a lien on the property to the extent of the cash it paid.

As for the debtor's argument that Rhodes Ranch and NLVK violated the automatic stay by transferring the property post-petition without leave of the court, it appears that any such violation was inadvertent as the defendants had no notice of the bankruptcy case at the time of the sale. Because there was no willful violation of the stay, imposition of sanctions is not warranted.

IT IS ORDERED plaintiff debtor's motion for summary judgment (Fil. #25) is granted. Defendant NLVK, LLC's motion for summary judgment (Fil. #33) is denied. The transfer to NLVK, LLC, is avoided, but NLVK shall have a lien on the property to the extent of the \$3,847 it paid. Separate judgment will be entered.

DATED: October 25, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*D.C. (Woody) Bradford/Ryan Dougherty

\*David Hicks

U.S. 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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RHODES RANCH ASSOCIATION, INC., )  
a Nevada corporation; and )  
NLVK, LLC, a Nevada limited )  
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Defendants. )

JUDGMENT

This matter is before the court on the plaintiff's motion for summary judgment (Fil. #25) and resistance (Fil. #47), and on defendant NLVK, LLC's motion for summary judgment (Fil. #33) and resistance (Fil. #40). D.C. (Woody) Bradford represents the debtor, and David Hicks represents the defendant. The motion was taken under advisement as submitted without oral arguments.

IT IS ORDERED: Judgment is hereby entered in favor of the plaintiff debtor and against defendant NLVK, LLC. The post-petition transfer of real estate is avoided. However, NLVK is entitled to a lien for \$3,847 against the property. See the Memorandum entered this date.

DATED: October 25, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

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\*David Hicks U.S. Trustee

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