

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

WILLIAM ARTHUR ROWSE, JR., and)
PAMELA SUE ROWSE,)

CASE NO. BK80-934

DEBTORS)

A80-536

JOHN A. WOLF, TRUSTEE,)

Plaintiff)

vs.)

WILLIAM ARTHUR ROWSE, JR.,)
and PAMELA SUE ROWSE and)
MILDRED O. ROWSE,)

Defendants)

MEMORANDUM

In this adversary proceeding, plaintiff, trustee in the above-captioned bankruptcy proceeding, seeks a determination that a second mortgage on real estate held by the defendant, Mildred Rowse, is voidable as to him as trustee in bankruptcy.

Although the language of the complaint filed by the plaintiff premises his cause of action on §544 of the New Bankruptcy Code, in fact, the trustee's cause of action lies under 11 U.S.C. §547, the preference section.

The facts before me are stipulated and are that defendants William Arthur Rowse, Jr., and Pamela Sue Rowse are husband and wife and Mildred O. Rowse is the mother of William Arthur Rowse, Jr. On October 1, 1977, Mildred O. Rowse loaned to William Arthur and Pamela Sue Rowse the sum of \$29,361.78 so that Mr. Rowse could start his own business in Superior, Nebraska. On October 1, 1977, William Arthur and Pamela Sue Rowse executed a promissory note in the amount of \$29,361.78 payable to Mildred O. Rowse upon demand. On that date and concurrently with the loan, William and Pamela Rowse executed a real estate mortgage securing the note and mortgaging an interest in property legally described as:

"Lot Seven (7), Block Twenty-Three (23),
North Superior, an addition to the original
town of Superior, Nuckolls County, Nebraska."

On March 26, 1980, the real estate mortgage described above was actually filed of record with the County Clerk of Nucknolls County, Nebraska. On May 5, 1980, the bankruptcy petition of William Arthur Rowse, Jr., and Pamela Sue Rowse was filed in the United States Bankruptcy Court for the District of Nebraska.

11 U.S.C. §547 has as its purpose the elimination of preferences by debtors to certain creditors on the eve of bankruptcy. In general, the preference period for avoidance of transfers to certain creditors at the expense of other creditors is ninety days prior to the filing of the petition in bankruptcy. Under the stipulated facts, the loan was made by Mrs. Rowse to the debtors and the mortgage taken from the debtors by Mrs. Rowse over two years before it was filed of record. The recording came within ninety days of the filing of the Rowse's petition under Chapter 7.

Section 547 seeks to avoid all types of transfers occurring within the ninety-day reachback period which result in one creditor obtaining an advantage over other creditors when liquidation follows. For the purpose of §547, the Bankruptcy Code defines "transfer" broadly, as follows:

"'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest." 11 U.S.C. §101(40).

For the purpose of §547, the transfer of real estate is deemed to have been made when

"a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee;"

Under Nebraska law, an unfiled real estate mortgage is not valid as against a bona fide purchaser who would take free and clear of the interest of the mortgage holder. See §76-238 R.R.S. 1943. Accordingly, for the purpose of §547, the transfer occurred when the real estate mortgage was filed of record with the County Clerk.

Given the foregoing, the elements of §547(b) are met. Here the mother, a creditor for over two years, received a transfer (the recording of the mortgage) which operated to give her a secured claim instead of an unsecured claim which, until recording occurred, this debt was. The evidence before me is lacking on the stipulated facts as to the third element of sub-paragraph (b) which requires that the evidence before me disclosed the debtor to be insolvent at the time of the transfer. However, sub-paragraph 4 of sub-section (e) of §547 provides that:

". . .the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the petition."

The fourth element of sub-paragraph (b) is met because the transfer for purpose of §547 occurred within ninety days prior to the filing of the bankruptcy petition as previously discussed. The fifth element is never an issue of litigation because any transfer by way of security or other consideration to an unsecured creditor leaves the balance of the claim still unpaid or unsecured as a claim against the estate. The unpaid or unsecured claim still remaining in the hands of the creditor after the transfer would become a claim against the estate and would share pro rata with other unsecured creditors. Accordingly, the payment to a creditor on behalf of an antecedent debt always results in that creditor's obtaining more than other creditors would receive in Chapter 7 liquidation. Accordingly, I conclude that all elements of sub-section (b) are met.

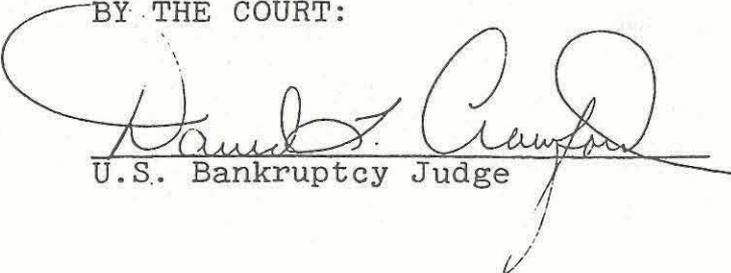
Sub-section (c) of §547 provides exceptions which, although preferential, are not to be deemed voidable by the trustee because of the special nature of the circumstances involved. I am unable to find an exception under sub-section (c) which applies to these facts and, accordingly, conclude that the evidence establishes the voidability of the mortgage held by Mildred Rowse.

The separate judgment which will be entered in this proceeding will not only avoid the second mortgage held by Mildred Rowse but will also preserve that mortgage in favor of the trustee for the benefit of the estate under 11 U.S.C. §551. That statutory provision automatically preserves liens which are avoided by the trustee under separate statutory provisions for the benefit of the estate.

Accordingly, my finding is generally in favor of the plaintiff and against the defendants. A separate judgment is entered in accordance with the foregoing.

DATED: March 24, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

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