

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
JOHN E. EVERROAD, JR., ) CASE NO. BK95-81959  
 ) CH. 13  
DEBTOR(S) )

MEMORANDUM

Hearing was held on July 25, 1996, on the Motion for Relief from Automatic Stay filed by First National Bank. Appearances: Bruce Barnhart, Attorney for debtor; Janice M. Woolley, Attorney for First National Bank; and C. Jan Headley, Attorney for Clifford Flanagan. 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)(A), (G) and (O).

This debtor obtained a Chapter 7 discharge in an earlier bankruptcy case. When he filed that case, he apparently had an ownership interest in certain real property legally described as Lot 8, Block 25, Prairie Lane Addition, an addition to the City of Omaha, Douglas County, Nebraska (the "real estate"). During the administration of that case, the Chapter 7 trustee conveyed the debtor's interest in the real estate to the debtor's spouse.

The debtor has now filed a Chapter 13 case and has listed an equitable interest in the real estate as property of this bankruptcy estate.

The First National Bank of Omaha (the Bank), prior to the filing of this Chapter 13 case, had filed a real estate foreclosure action in the Douglas County, Nebraska, courts. The debtor was not named as a defendant in the foreclosure action and did not intervene in it. However, when the debtor filed this Chapter 13 case, he made it known to counsel for the Bank that he believed he had an interest in the real estate which was protected by the automatic stay of 11 U.S.C. § 362(a) and strongly suggested to the Bank that it should not proceed.

As a protective measure, the Bank has filed this motion for relief from stay. Counsel for the debtor argued at the hearing that Nebraska case law provides that a spouse residing in property owned by the other spouse has an equitable interest in that property. Case law cited for such position included a dissolution of marriage case in which the Nebraska Supreme Court stated that the trial judge in a dissolution of marriage

case had the power to distribute property to the parties on an equitable basis notwithstanding the manner in which title was held. Richardson v. Johnson, 97 Neb. 749, 151 N.W. 314 (1915).

Such authority of a court of equity in a dissolution of marriage case is unquestioned. However, this is not a dissolution of marriage case and the debtor has not presented any statutory or case law authority for the proposition that the debtor has any legal or equitable interest in real property presently owned by his spouse.

A suggestion was made that perhaps the historical dower interest would be sufficient to give the debtor an equitable interest. However, the estate of dower was abolished in Nebraska years ago. NEB. REV. STAT. § 30-104 (Reissue 1995). Today, under Nebraska law, spouses may claim an interest in a deceased spouse's property by electing to claim no more than one-half of the augmented estate of the deceased spouse (estate minus costs and living spouse's interest), instead of taking by will or intestate succession. NEB. REV. STAT. § 30-2313 (Reissue 1995). Real estate in the state of Nebraska which had been owned by a deceased spouse and that had been transferred during the life of that spouse and during the marriage of the parties without joining the surviving spouse, is treated as having been validly conveyed under this section of the Nebraska statutes. Id. (c).

It, therefore, appears from a review of the above statutory section that the spousal interest in the augmented estate of a deceased spouse is actually an interest in personal property. That is, the surviving spouse has a right to claim no more than one-half of the augmented estate of the deceased spouse. There is no specific right to claim real property or to an interest in real property owned by the deceased spouse.

Another statutory section that comes close, but does not quite provide an interest in real property to a non-owning spouse, is the homestead exemption provided for in NEB. REV. STAT. § 40-101 (Reissue 1993). That exemption is the equivalent of a right to exempt from execution up to \$10,000 of the equity in the real estate under certain circumstances. See also NEB. REV. STAT. § 30-2322 (Reissue 1995) (similarly granting a homestead exemption up to \$7,500 to surviving spouse). It is not an interest in real property, but is an interest in the cash proceeds representing equity.

Neither the debtor nor the court have been able to find any authority for the proposition that a non-owning spouse has a legal or equitable interest in real property titled in the name of the other spouse. In order to be property of the bankruptcy

estate under 11 U.S.C. § 541, the debtor must have some type of equitable or legal interest. Finding none, it must be concluded that the real property titled in the name of the debtor's spouse is not property of the estate, nor property of the debtor, nor is it protected by the automatic stay of 11 U.S.C. § 362. Therefore, any proceeding in which the Bank attempts to enforce its state law rights against the real property is not subject to the automatic stay.

On the other hand, even if the court were to find the debtor has some legal or equitable interest in the real property, the Bank has shown that the debtor has failed to make payments on the mortgage note obligation and has failed to prove that the property is necessary for an effective reorganization. In addition, the debtor has not made sufficient payments to the Chapter 13 trustee since the beginning of this case to permit the court to find that the debtor has made payments equivalent to that which would be necessary to service the secured obligation to the Bank. Therefore, even if the real estate is property of the estate, relief from the automatic stay is granted and the Bank is permitted to proceed with its foreclosure action.

Separate journal entry to be filed.

BY THE COURT:

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

Copies faxed by the Court to:

BARNHART, BRUCE	384-1109
WOOLLEY, JANICE	496-4494
HEADLEY, CHARLES JAN	333-1093

Copies mailed by the Court to:

Kathleen Laughlin, Trustee  
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.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

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JOHN E. EVERROAD, JR., )  
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DEBTOR(S) )  
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Plaintiff(s) )  
vs. )  
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Defendant(s) )

CASE NO. BK95-81959  
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CH. 13  
Filing No. 95, 109

JOURNAL ENTRY

DATE: August 1, 1996  
HEARING DATE: July 25,  
1996

Before a United States Bankruptcy Judge for the District of  
Nebraska regarding Motion for Relief filed by First National  
Bank and Resistance by debtor.

APPEARANCES

Bruce C. Barnhart, Attorney for debtor  
Janie M. Woolley, Attorney for Bank  
C. Jan Headley, Attorney for Clifford Flanagan

IT IS ORDERED:

The real property is not property of the bankruptcy estate  
and it is not subject to the automatic stay of 11 U.S.C. §  
362(a). Even if it were determined that the real estate is  
property of the bankruptcy estate, relief from the automatic  
stay is granted. See memorandum entered this date.

BY THE COURT:

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

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WOOLLEY, JANICE 496-4494  
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