

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
LARRY & SHARON MACE, ) CASE NO. BK98-82999  
)  
DEBTORS. ) A99-8109  
\_\_\_\_\_)  
LARRY & SHARON MACE, )  
) CH. 13  
Plaintiffs, )  
vs. )  
)  
G.E. CAPITAL MORTGAGE SERVICES, )  
INC., and ROSEN AUTO LEASING, )  
)  
Defendants. )

MEMORANDUM

The parties have stipulated to certain facts and have submitted documentary evidence in support of the position of each party with regard to controverted facts. The matter has been submitted on the stipulation of facts, the documentary evidentiary materials, and written briefs. Appearances: Howard Duncan for the debtors; John T. Rogers for Rosen Auto Leasing, Inc.; and Donald G. Furlow for G.E. Capital Mortgage Services, Inc. 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

1. At all times relevant, the Maces have owned a leasehold interest in certain real estate identified as Lot 68, Chris Lake, a subdivision, as surveyed, platted and recorded in Sarpy County, Nebraska. Their home is located on the real estate.

2. On June 20, 1995, the Maces executed and delivered to Norwest Mortgage, Inc., ("Norwest"), a predecessor in interest to G.E. Capital Mortgage Services, Inc. ("G.E."), a promissory note in the amount of \$116,000.00, plus interest at the rate of 8.5% per annum. The balance due as of February 22, 2000, the date that the preliminary pretrial statement was prepared, was \$148,793.04.

3. To secure the promissory notes, on June 20, 1995, the Maces executed and delivered a Deed of Trust, describing the leased land upon which their home is located, to Stewart Title Guaranty Company, Trustee, for the benefit of Norwest, Beneficiary. The Deed of Trust was properly recorded.

4. G.E. obtained its interest by way of assignment of mortgage/deed of trust of Norwest on May 21, 1997.

5. On January 15, 1998, the Maces executed and delivered to Rosen Auto Leasing ("Rosen") a promissory note and security agreement ("Rosen Note") in the amount of \$35,400.00 with interest at the rate of 15% per annum, along with a document entitled Mortgage Security Agreement. The balance due as of February 10, 2000, was \$42,285.36.

6. The security agreement described the house and leasehold interest and was filed with the Sarpy County, Nebraska, Registrar of Deeds on January 20, 1998, and with the Nebraska Secretary of State on January 21, 1998.

7. The Maces intended to grant a first lien in the subject real estate and improvements thereon to Norwest with the Deed of Trust.

8. Rosen had actual knowledge of the Deed of Trust filed with the Sarpy County Registrar of Deeds.

9. At no time has Norwest or G.E. filed any financing statement with the Nebraska Secretary of State with regard to the subject real estate, improvements thereon, the Norwest/G.E. note or Deed of Trust.

10. The Maces filed a petition pursuant to Chapter 13 of the Bankruptcy Code on November 20, 1998.

#### Issues

1. Is the house located on the leased land, Lot 68, Chris Lake, real or personal property?

2. Does the interest of Norwest/G.E., represented by the Deed of Trust in real estate, or the interest of Rosen, represented by a security agreement and filed financing statement, take priority under the Nebraska statutes?

3. If the house is determined to be personal property, is the Deed of Trust interest held by G.E. a secured or unsecured claim in this bankruptcy case?

#### Decision

1. The house is personal property.
2. The Rosen security interest takes priority over the G.E. Deed of Trust.

3. The Deed of Trust represents an agreement between debtors and Norwest/G.E. to convey a security interest in all of the debtors' interest, whether it be real or personal property. Therefore, Norwest/G.E. holds a secured claim second in priority to that of Rosen.

#### Conclusions of Law and Discussion

The real estate lease documents which represent the interest in the real estate held by the debtors contain specific language concerning the status of improvements: "[A]ll improvements installed, erected or attached to the leased lot presently existing and all future improvements, shall be solely the property of the lessee." (Ex. 5D, page 1, and Ex. 5F, page 3.) In addition, the debtors received their interest in the real estate and the residence (the improvement) by an assignment of lease and a bill of sale, not a deed representing a conveyance of real estate.

The Nebraska Supreme Court, in Bank of Valley v. United States National Bank of Omaha, 341 N.W.2d 592, 215 Neb. 913 (1983), ruled that improvements to a leasehold interest in real estate are personal property if the lease document show an intent by the parties that the improvements remain personalty. The Supreme Court emphasized that a lessor of real property and a lessee of real property may contract with regard to the status of improvements as either "fixtures" or personal property.

In this case, the owner of the land and the tenant on the land, the Maces, have so contracted. Therefore, both the leasehold interest held by the Maces and the improvements on such leasehold are personal property of the Maces.

Rosen perfected its lien on the personal property by filing a financing statement with the Nebraska Secretary of State, as required in Neb. U.C.C. § 9-401(1)(c) (Reissue 1992). Neither Norwest nor G.E. filed a financing statement to perfect an interest in personal property. Therefore, Rosen's interest is superior to and has priority over the competing interest of G.E.

The debtors and Norwest/G.E. did enter into a detailed agreement with regard to a conveyance of a security interest in the property in which the debtors have either a leasehold interest or an ownership interest. In addition, the landlord entered into an agreement with Norwest/G.E. by which Norwest/G.E. would be permitted to foreclose on the Deed of Trust, cure any defaults under the lease held by the debtors, and be treated as having a first lien on the property to secure the obligation of the debtors. Therefore, as between the debtors and Norwest/G.E. there is a valid security agreement represented by the Deed of Trust.

Although not perfected under the Uniform Commercial Code, on the date the bankruptcy petition was filed Norwest/G.E. held a secured claim. Its lien has not been avoided, and is, therefore, an allowed secured claim to the extent of the value of the improvements and the leasehold interest after deduction of the value of the Rosen claim. It does not appear that a trustee would be able to bring an action at this point in time to avoid the unperfected lien because of the prohibitions contained in 11 U.S.C. § 546(a)(1). Therefore, Norwest/G.E.'s claim must be treated as an allowed secured claim.

Separate journal entry to be filed.

DATED: December 1, 2000.

BY THE COURT:

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

Copies faxed by the Court to:

ROGERS, JOHN 331-5230  
FURLOW, DONALD 113

DUNCAN, HOWARD T. 20

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.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
LARRY & SHARON MACE,	)	CASE NO. BK98-82999
	)	A99-8109
<u>DEBTOR(S)</u>	)	CH. 13
	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	DATE: December 1, 2000
<u>Defendant(s)</u>	)	HEARING DATE:

Before a United States Bankruptcy Judge for the District of Nebraska regarding Adversary Complaint.

APPEARANCES

Howard Duncan, Attorney for debtors  
John T. Rogers, Attorney for Rosen Auto Leasing, Inc.  
Donald G. Furlow Attorney for G.E. Capital Mortgage Services, Inc.

IT IS ORDERED:

1. The house is personal property.
2. The Rosen security interest takes priority over the G.E. Deed of Trust.
3. The Deed of Trust represents an agreement between debtors and Norwest/G.E. to convey a security interest in all of the debtors' interest, whether it be real or personal property. Therefore, Norwest/G.E. holds a secured claim second in priority to that of Rosen.

See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
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United States Trustee

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