

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
LELAND E. AND JOAN R. MULCAHY, ) CASE NO. BK87-2641  
DEBTORS ) CH. 12

MEMORANDUM

A telephonic hearing on Sheridan County's motion for relief from confirmation order, Filing No. 51, was heard on September 6, 1988. Frederick B. Allan of Allan, Bauer & Mullally, Seward, Nebraska, appeared on behalf of debtors, Mr. and Mrs. Mulcahy. James Nisley, North Platte, Nebraska, appeared on behalf of the County. Susan Williams of Murphy, Pederson, Piccolo & Pederson, North Platte, Nebraska, appeared on behalf of First National Bank of Gordon. Steven Olsen of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, Scottsbluff, Nebraska, appeared on behalf of the Federal Land Bank. Richard Lydick of Omaha, Nebraska, appeared as trustee. David Nuttleman of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, Gering, Nebraska, appeared as counsel for trustee.

Background

An amended Chapter 12 plan was filed on February 8, 1988. Initially, objections were filed to the plan and it was set for confirmation hearing on April 19, 1988. At the confirmation hearing, objections were withdrawn and the plan, as amended, was confirmed. Confirmation order was signed on April 19, 1988, and filed on April 25, 1988.

The plan proposed that debtors would keep certain real estate and pay specific amounts annually to creditors that had a lien on the real estate, including Sheridan County, Nebraska, which had a lien for taxes; Federal Land Bank of Omaha which had a lien by virtue of a mortgage; and First National Bank of Gordon which had a lien by virtue of a mortgage. In addition, the plan provided that certain real estate would be sold by the trustee with the proceeds to be paid to those creditors that had a lien on that real estate. Specifically, Paragraph 2.3 of the plan states:

FILED  
DISTRICT OF NEBRASKA  
AT SEP 8 1988  
Judith M. Napier  
Clerk, U.S. Bankruptcy Court  
By Deputy

Class 3 claim of Federal Land Bank of Omaha shall be satisfied through a sale by Chapter 12 Trustee of the following-described real estate within sixty (60) days from the

Confirmation of the Plan or at such time as may be agreed by the Trustee with Federal Land Bank of Omaha, Gladys Mulcahy and First National Bank of Gordon of ... : (legal description omitted). Terms of sale shall be determined by the Trustee and costs to be deducted from the sale proceeds.

At Paragraph 2.4, the plan provides for treatment of the First National Bank of Gordon and states, among other things,

(a) Creditor will receive balance of the proceeds of the sale as set forth in 2.3 above ... subject to the claims of Federal Land Bank of Omaha and Gladys Mulcahy and costs of sale.

The plan further provides at Paragraph 2.6:

Class 6 claim of Gladys M. Mulcahy in the amount of \$24,730.49, plus interest, shall be satisfied and paid in full by debtors as set forth in Paragraph 2.3 above.

The plan further provides at Paragraph 2.2 that Class 2 claims, which are those of the County taxing authority, will be paid in full by paying the amount due for real estate taxes to Sheridan County, Nebraska, and Cherry County, Nebraska, for 1986 and prior years in three annual installments of principal plus 14 percent statutory interest. The first annual installment is due on or before December 31, 1988.

At Paragraph 3.3, the plan provides that secured claimants shall retain their liens until the allowed secured claimants have been satisfied.

The summary plan form attached to the order confirming the plan as Exhibit A provides, among other things, that the Sheridan County Treasurer will be paid \$5,232.66 in three installments.

The trustee filed a motion to sell the real estate free and clear of liens pursuant to 11 U.S.C. § 363. The creditors, Federal Land Bank and First National Bank of Gordon, notified the County Attorney of Sheridan County that it was their understanding that the taxes encumbering the real estate to be sold were to be paid directly by debtors pursuant to the plan and that no funds would be withheld from the sale proceeds to pay such taxes. In addition, it was and is the position of the creditors that the tax lien, if any, of the County will not attach to the proceeds from the sale of the real estate.

As should be expected, the County does not interpret the plan in the same manner as the creditors do and objects to the sale free and clear of liens and has asked this Court to construe the plan and to relieve it from the terms of the confirmed plan if the plan really means what the creditors claim it means.

One other problem that the County raises concerns a decision by this Court which was filed after the date of confirmation of the plan. That decision, Equitable Life Assurance Society of the United States v. Ballentine Bros., Inc., \_\_\_ B.R. \_\_\_ (Bankr. D. Neb. 1988) determined that real estate taxes which arose during the pendency of a case were to be treated as administrative expenses and not as liens against the real estate with priority over consensual mortgages. The County, which relied upon the law as everyone understood it to be prior to the Ballentine Bros. case, believes that in addition to the plan interpretation by the creditors, it may be prejudiced by the application of the Ballentine Bros. rule with regard to post 1986 taxes which arose during the pendency of the bankruptcy case.

#### Discussion

When debtors filed their bankruptcy petition and schedules, they listed the County taxes due in an amount that the County agreed with. The County, therefore, did not file a claim and, pursuant to the local rules, the claim is deemed allowed as scheduled. Under Nebraska law, prepetition real estate taxes are liens upon real estate ahead of consensual encumbrances. The Ballentine Bros. case was filed after the order of confirmation in this case and, thus, is not applicable and shall not be retroactively enforced to the detriment of any parties to this case.

The plan itself provides that claimants with allowed secured claims will retain their liens until satisfied. The plan provides that certain real estate will be sold with the proceeds, after appropriate expenses are paid, applied first to the Federal Land Bank claim, next to the claim of Gladys Mulcahy and finally, if anything is left, to the claim of the First National Bank of Gordon. Although the plan does not state that real estate taxes will be paid first, there is no reason for the plan to so state. The law in this jurisdiction at the time of plan confirmation, both under Nebraska statutory provisions and Nebraska Bankruptcy Court prior interpretations, acknowledges the priority of the lien status of the County with regard to real estate taxes. Therefore, the plan can be properly construed, although silent as to taxes, as providing that the real estate will be sold and that the secured creditors will be paid following payment of the taxes. The First National Bank of Gordon will receive whatever is left.

The Bank objects to this construction of the plan because it claims to have misunderstood its treatment concerning the priority of the taxes. It did not object to such treatment because it believed it would receive a specific amount of money not being reduced by any tax priorities.

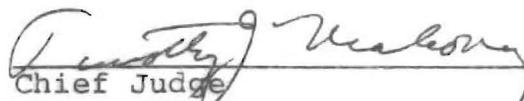
The Bank makes a good faith argument that should be considered. Had it understood that the amount of money it would receive after the sale of the land would be reduced by the real estate taxes, it may have objected to either that term of the plan or some other term of the plan. The plan's language was not exceptionally clear with regard to the treatment of the real estate taxes and, arguably, was inconsistent within the plan itself. However, the Bank's misinterpretation should not be given so much weight as to deny the County its lien rights. Therefore, the Court construes the plan to mean that the County taxes, prepetition and those which arose post petition, are liens against the real estate if they would have been liens outside of the bankruptcy context. The sale of the real estate may proceed free and clear of liens, but the County tax liens and all other liens attach to the proceeds. If, after the real estate sale and the application of the proceeds to the taxes and other liens, the First National Bank of Gordon believes it has been prejudiced, it may request the Court to set a hearing and determine whether or not debtors should be required to modify the plan to provide additional payments to the First National Bank of Gordon over the life of the plan.

The Court's construction of the plan, although perhaps costing debtors additional attorney fees and perhaps requiring a future modification of the plan, attempts to balance the rights of the creditor with those of debtors who proposed the plan and used the language which is now causing all parties so much grief.

Separate journal entry shall be filed.

DATED: September 8, 1988.

BY THE COURT:

  
Chief Judge