

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
LEO TOBIN FARMS, INC.,) CASE NO. BK85-2806
DEBTOR) A85-353
LEO TOBIN FARMS, INC.,)
Plaintiff)
vs.)
FIRST NATIONAL BANK OF TEKAMAH,)
Defendant)

MEMORANDUM

Background

In a memorandum dated January 8, 1988, this Court found that the mortgage and promissory note between plaintiff/mortgagor Leo Tobin Farms, Inc. (Farms), and defendant/mortgagee Federal Deposit Insurance Corp (FDIC), successor in interest to First National Bank of Tekamah (Bank), was fraudulent under the Nebraska Uniform Fraudulent Conveyance Act. Farms became insolvent following the contested transaction; fair consideration was not given; the consideration was disproportionately small compared to the value of Farms' property; an unsecured creditor with an unmatured claim existed at the time of the transaction; and 11 U.S.C. § 544 permitted the invocation by the trustee of the Nebraska Uniform Fraudulent Conveyance Act.

Analysis

The remedy afforded by the Nebraska Uniform Fraudulent Conveyance Act permits the Court to:

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FILED (a)
DISTRICT OF NEBRASKA
AT _____ M
JUN 27 1988 (b)
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By _____ Deputy

Restrain the defendant from disposing of his or her property,
Appoint a receiver to take charge of the property,

- (c) Set aside the conveyance or annul the obligation, or
- (d) Make any order which the circumstances of the case may require.

Neb. Rev. Stat. § 36-610 (Reissue 1984).

Farms requested the Court to annul the entire transaction, but the FDIC contended such remedy was not appropriate. The Court requested both parties to provide legal arguments concerning the remedies provided in Section 36-610 of the Nebraska Uniform Fraudulent Conveyance Act. The Court has received and reviewed these arguments.

The FDIC points out that it acts in two different capacities when a bank is closed--as the Receiver and in its corporate capacity. The FDIC in its corporate capacity purchases bank assets from the Receiver. Thus, the FDIC contends, in its corporate capacity it becomes a bona fide purchaser for value and Section 36-610 of the Uniform Fraudulent Conveyance Act does not apply to "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase." Neb. Rev. Stat. § 36-609(1).¹ In the alternative, the FDIC argues that the conveyance should be avoided only to the limited extent necessary to protect creditors who are actually injured as a result of the fraudulent conveyance. Or, if the Court invalidates the entire debt, the Court should transform the FDIC's claim into that of an unsecured creditor entitled to a pro rata share of the distribution of the estate together with the other unsecured creditors.

The FDIC's characterization of itself as a bona fide purchaser for value is an affirmative defense to Farms' claim of fraudulent conveyance. In re Tacoma Boatbuilding Co., 81 Bankr. 248, 259-60 (Bankr. S.D.N.Y. 1987). This defense was not pleaded in the FDIC's answer or by motion nor was it briefed by the FDIC prior to trial. Moreover, no evidence was presented at trial on the factual issues required to support a bona fide purchaser defense, i.e., knowledge, good faith and value. Therefore, the FDIC has waived this defense. Id.; Fed. R. Civ. P. 8(c), 12(b); 2A Moore's Federal Practice ¶ 8.27[3] (2d ed. 1987).

Neither party submitted Nebraska decisional law imposing any of the remedies of Section 36-610. The Court finds that Section 36-610's provisions grant the Court broad discretion. In the instant case, however, subsections (a) and (b) are not

¹Section 36-610 requires reliance on Section 36-609, "Rights of creditors when claims have matured," because Section 36-610 remedies are available to a creditor whose claims have not matured "against any person against whom he or she could have proceeded had his or her claim matured." Neb. Rev. Stat. § 36-610 (Reissue 1984).

appropriate. The Court's decision, therefore, will rely on subsections (c) and (d). Subsection (c) allows the Court to "[s]et aside the conveyance or annul the obligation" and subsection (d) permits the Court to "[m]ake any order which the circumstances of the case may require." Neb. Rev. Stat. § 36-610(c), (d) (Reissue of 1984).

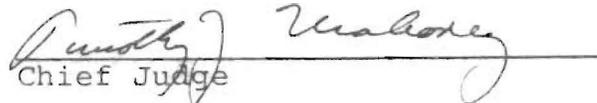
The net result of the transaction by which Farms executed a note and mortgage to Bank as additional security for Ranch debt is that Farms became insolvent, Farms received no consideration for the conveyance, and the Bank, now the FDIC, is the only beneficiary of such transaction. This Court has previously found that the transaction meets all of the definitional standards of a fraudulent conveyance. Since Farms received no consideration or benefit for the conveyance, the appropriate remedy is to place Farms in the position it held prior to the transaction. Such action will benefit Farms' creditors and not place Bank in any worse position than it was before the transaction.

It is, therefore, ordered that the note and mortgage which are the subjects of this adversary proceeding are annulled pursuant to Nebraska Revised Statute Section 36-610(c).

Separate Journal Entry shall be filed.

DATED: June 27, 1988.

BY THE COURT:


Chief Judge

Appearances:

Michael Helms, Attorney for Debtor, 1800 First Nat'l. Center,
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