

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
MAYNARD & NONIE KUBICEK,) CASE NO. BK01-41271
)
Debtor(s).) CH. 12

MEMORANDUM

Hearing was held on August 15, 2001, on a Motion for Relief from Automatic Stay filed by Cumis Insurance Society, Inc. (Fil. #37) and Resistance by the Debtors (Fil. #50).
Appearances: John Hahn for the debtors and Frederic Coldwell for Cumis Insurance Society, Inc. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

The motion for relief was filed to permit Cumis to enforce the terms of a settlement agreement between the parties. Debtor Nonie Kubicek admits that she deposited a check in the amount of \$29,063.77, which had been altered to reflect an amount of \$89,063.77, at the Lincoln USDA Credit Union in Lincoln, Nebraska, in July 2001. The proceeds of that check were used by the Maynard V. and Nonie Kubicek Trust to purchase a house in Lincoln, Nebraska.

Cumis is the insurer of the credit union, and paid \$89,063.77 on the credit union's bond claim. Cumis then sued the Kubiceks and the trustee of their trust. That case was settled when the debtors agreed to make full restitution to Cumis, with an immediate payment of \$29,063.77 and a note for \$60,000 secured by a second deed of trust on the house.¹ After the settlement was reached but before it was executed, the Kubiceks filed the present bankruptcy case. The debtors have made no payments to Cumis on the settlement.

The issue here is whether the house is property of the bankruptcy estate and thereby protected by the automatic stay. The house is owned by the Trust. Under the trust agreement by which the trust was created, the debtors reserved to themselves the right to withdraw property from the trust at

¹The lending institution which financed the remainder of the purchase price holds the first deed of trust on the property.

any time. The debtors assert that this reservation of rights means the house actually belongs to the debtors and should be considered property of their bankruptcy estate.

Cumis asserts that because the house was purchased with funds obtained illegally, equity imposes a constructive trust on the property in Cumis's favor. Moreover, the trustee of the debtors' trust executed a confession of judgment to settle the state court lawsuit with Cumis wherein he admits that Cumis is entitled to and shall have a constructive trust in the property to the extent of the value of the funds flowing from the altered check. See Ex. 8 to the Affidavit of Gary Young (Ex. 9).

Two factors are to be considered when determining whether a constructive trust can be imposed: (1) whether the bankruptcy court has the authority to impose a constructive trust in favor of a single creditor, and (2) whether state law warrants the imposition of a constructive trust. First Amer. Title Ins. Co. v. Lett (In re Lett), 238 B.R. 167, 197 (Bankr. W.D. Mo. 1999).

The Eighth Circuit has held that a bankruptcy court has the power, under certain circumstances, to impose constructive trusts. Chiu v. Wong, 16 F.3d 306 (8th Cir. 1994); Abramowitz v. Palmer, 999 F.2d 1274 (8th Cir. 1993). These cases are not inconsistent with the principle that constructive trusts imposed for the benefit of a single creditor conflict with the fundamental bankruptcy concept of equitable distribution of assets because they dealt with interests asserted in exempt property. See also In re Lett, 238 B.R. at 198-99 (citing cases noting factual distinctions which permit unconflicting interpretations of the case law in light of bankruptcy policy).

Specifically,

[W]e need not reach the thorny issues of whether § 541(d) contemplates and/or authorizes the use of constructive trusts in bankruptcy, or whether constructive trusts are inimical to the Bankruptcy Code's principles of equitable distribution. Exempt property would not be available for distribution to the general body of creditors, so segregating it for distribution

to one creditor only deprives the debtor of what was not rightfully his in the first place.

Lett, 238 B.R. at 199.

Under Nebraska law, a constructive trust is a relationship subjecting the person who holds title to property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment. Wait v. Cornette, 612 N.W.2d 905, 911 (Neb. 2000) (citing Chalupa v. Chalupa, 574 N.W.2d 509 (Neb. 1998) and Hanigan v. Trumble, 562 N.W.2d 526 (Neb. 1997)). A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. Id.

Here, the debtors and the trustee concede that they hold the real property in constructive trust for Cumis.

In addition, the debtors claim a homestead exemption in their equity in the real property. The debtors and Cumis both agree that Cumis's interest is subject to the lender's first deed of trust for approximately \$120,000. Likewise, the retirement account from which Debtors propose to make the initial payment of \$29,063.77 is exempt from the claims of creditors. No creditor objected to Cumis's motion for relief. As noted above, the courts are more willing to permit a constructive trust to be imposed in property which would not otherwise be used to pay creditors.

While the debtors assert that their right as grantors of the trust to withdraw the real property from the trust brings the house within the definition of "property of the estate," the bankruptcy Code does not support that assertion. Their legal right to withdraw the property may belong to the bankruptcy estate, but that interest of the debtors does not translate into a legal right to the house such that it becomes property of the estate under 11 U.S.C. § 541.

IT IS ORDERED: For the reasons stated above, Cumis Insurance Company's motion for relief from the stay (Fil. #41) is granted. Cumis may pursue the entry of final judgment in its state court action against the debtors and the trust. Cumis may perfect its lien against the residence owned by the Maynard & Nonie Kubicek Trust, and it may pursue the

appropriate remedies upon the debtors' default under Cumis's deed of trust.

Separate journal entry to be filed.

DATED: September 14, 2001

BY THE COURT:

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

Copies faxed by the Court to:

*Frederic L. Coldwell, Atty. for Cumis Insurance Society,
Inc., (303)399-8014
John Hahn, Atty. for Debtors, 402/483-6333

Copies mailed by the Court to:

United States Trustee
Maynard & Nonie Kubicek, Debtors, 5130 N. 20th St.,
Lincoln, NE 68521

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
MAYNARD & NONIE KUBICEK,) CASE NO. BK01-41271
) A
DEBTOR(S)) CH. 12
) Filing No. 37, 50
Plaintiff(s))
vs.) JOURNAL ENTRY
)
) DATE: September 14,
2001)
Defendant(s)) HEARING DATE: August 15,
2001

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief from Automatic Stay filed by Cumis Insurance Society, Inc. (Fil. #37) and Resistance by the Debtors (Fil. #50).

APPEARANCES

John Hahn, Attorney for debtors
Frederic Coldwell, Attorney for movant

IT IS ORDERED:

Cumis Insurance Company's motion for relief from the stay (Fil. #41) is granted. Cumis may pursue the entry of final judgment in its state court action against the debtors and the trust. Cumis may perfect its lien against the residence owned by the Maynard & Nonie Kubicek Trust, and it may pursue the appropriate remedies upon the debtors' default under Cumis's deed of trust. See memorandum entered this date.

BY THE COURT:

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

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