

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
MONROE G. EVANS and JOAN Y. EVANS,) CASE NO. BK94-81183
)
DEBTOR) CH. 13
) Fil. 46, 57

MEMORANDUM

Hearing was held on Motion for Authorization to Pursue Causes of Action of the Estate. Appearing on behalf of debtors was Marion Pruss of Omaha, Nebraska. Appearing on behalf of Edward and Sharon Becker was Mark Dickhute of Omaha, Nebraska. 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) and (F) and (K).

Background

The debtors have filed a motion requesting authority to bring actions in the name of the estate. Attached to the motion is a copy of a complaint which the debtors propose to file naming MOMAX PARTNERSHIP, a Nebraska general partnership, Edward L. Becker and Sharon E. Becker, persons who hold a state court judgment against MOMAX PARTNERSHIP and a levy on certain real estate which, at the time of the judgment and the levy, was titled in the name of MOMAX PARTNERSHIP; and Dora E. Bacome and Betty E. Oldro, persons who hold a judgment against both the partnership and the debtors individually.

The gist of the complaint is that the debtors assert that the partnership existed in name only and that they, in their individual capacities, were the true owners of the real property in question and that any judgment lien against such real property or other property owned by MOMAX or the debtors may be avoided by the exercise of the trustee's strong-arm powers under the Bankruptcy Code.

Only the Beckers have objected to the motion. It is their position that even if the debtors were the equitable owners of the property in question as of the judgment date or the levy date, whatever interest the debtors actually held in the property may be protected in the appropriate state court proceeding which will need to be brought to confirm a sale held as a result of the execution on the judgment. Beckers allege that the activities of MOMAX PARTNERSHIP and the debtors prior to the bankruptcy filing are fraudulent and should not be condoned by this Court.

Decision

The Court finds that the request of the debtors to be permitted to bring an action for the benefit of the estate should be and is hereby denied.

Findings of Fact, Conclusions of Law and Discussion

The debtors held themselves out as general partners of a Nebraska partnership. The Nebraska partnership is a separate legal entity. MOMAX PARTNERSHIP held legal title to the real estate in question. When MOMAX PARTNERSHIP was sued by the Beckers, neither it nor the debtors entered an appearance or defended the claim by the Beckers. Both the individual debtors and the partnership had the opportunity to litigate the issue of the true nature of the partnership and the debtors' interest in it, but failed to do so in the appropriate forum.

After judgment was entered against the partnership and execution was levied upon real property titled in the name of the partnership, but before the sale of such real property, the debtors caused the partnership to convey title to partnership property to one of the debtors in her individual capacity, for no consideration, thereby making the partnership insolvent. Such action, on its face, is fraudulent as to the Beckers. See NEB. REV. STAT. § 36-706(a) (Reissue 1993).

The debtors now come into the bankruptcy court and desire to exercise the powers of the trustee to do several things. First, they want to litigate the issue of whether or not the partnership is actually a real entity or simply the alter ego of the debtors individually. Next, they want a court order that determines that the partnership's existence is a sham, even though both the partnership and the debtors held out to the public the legal and factual existence of the partnership, at least for a time prior to the transfer of the asset from the partnership to the debtors. Finally, if they are successful in obtaining such an order, they want the Court to determine that the judgment lien held by the Beckers against property of the partnership, and/or its alter ego, the debtors, is preferential and avoidable.

This Court finds that the debtors do not come before this Court with clean hands. They have acted under Nebraska law to create a general partnership. They have taken title to Nebraska real property in the name of a general partnership. They have apparently, with regard to other property, even executed security documents on the part of the partnership. Those security documents were foreclosed and the property titled in the name of the general partnership and secured by such documents was sold pursuant to Nebraska law, apparently without any issue being raised by the debtors as to the true nature of their interest. After such a sale, the partnership became a defendant in a

deficiency judgment action brought by the Beckers. Neither the partnership nor the debtors raised the issue of the debtors' individual interest in property titled in the name of the partnership.

Following a judgment entry and following execution on that judgment, the debtors caused the partnership to transfer title to one of the debtors individually, but not in her name as eventually listed on the bankruptcy petition. Instead, on July 21, 1994, title was conveyed to Joan Maxine Yates, apparently a pseudonym for Joan Evans. Four days after the transfer of the property to her as Joan Maxine Yates, she filed a bankruptcy petition in which she asserted her name was Joan Max Yates Evans and failed to list any name under which she had operated in the prior six years, except that she claimed she had operated as d/b/a MOMAX PARTNERSHIP during that time period. As Joan Evans she claims an ownership interest in the property transferred to Joan Yates. Such failure to disclose the recent use of the name Joan Maxine Yates and to claim an interest in the property as Joan Evans is a violation of the requirement to truthfully and fully disclose all information requested on the Official Bankruptcy Forms. It also might be considered fraud on this court, and may be perjury.

The debtors' actions as general partners, and Joan Evans' failure to disclose her use of names other than her own do not meet the unwritten, but generally acknowledged in bankruptcy, "smell test." These debtors should not get the benefit of the powers of the bankruptcy system which are to be reserved for honest debtors. This Court will not tolerate manipulation of the Bankruptcy Code in this manner.

Order

The motion filed by the debtors requesting authorization to pursue causes of the estate is denied.

Separate journal entry to be entered.

DATED: December 13, 1994

BY THE COURT:

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

Copies faxed by the Court to:

PRUSS, MARION 551-0466

Copies mailed by the Court to:

Mark Dickhute, 10227 Monroe Street, Omaha, NE 68127-5404
Kathleen Laughlin, Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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MONROE G. EVANS and)	
JOAN Y. EVANS,)	CASE NO. BK94-81183
)	A
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No. 46, 57
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: December 14, 1994
<u>Defendant(s)</u>)	HEARING DATE: December
)	2, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Authorization to Pursue Causes of Action of the Estate.

APPEARANCES

Marion Pruss, Attorney for debtors
Mark Dickhute, Attorney for Edward and Sharon Becker

IT IS ORDERED:

The motion filed by the debtors requesting authorization to pursue causes of the estate is denied. See memorandum dated December 13, 1994.

BY THE COURT:

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

Copies faxed by the Court to:
PRUSS, MARION 551-0466

Copies mailed by the Court to:
Mark Dickhute, 10227 Monroe Street, Omaha, NE 68127-5404
Kathleen Laughlin, 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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MONROE & JOAN EVANS,)	CASE NO. BK94-81183
)	A
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No. 6, 14, 17, 22
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: December 13, 1994
<u>Defendant(s)</u>)	HEARING DATE: December
)	2, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding motion for relief from the automatic stay filed by Edward and Sharon Becker.

APPEARANCES

Marion Pruss, Attorney for debtors
Mark Dickhute, Attorney for Beckers

IT IS ORDERED:

Judgment lien creditors, Edward and Sharon Becker have filed a motion for relief from the automatic stay to permit them to proceed with the sale of certain real property in which the Beckers hold an executed judgment lien and which was transferred to the debtors immediately prior to the filing of this bankruptcy case. This Court, in a companion memorandum and journal entry filed on this date, has made certain findings with regard to prepetition actions by the debtors which this Court determined to be fraudulent as to the Beckers. Because of such findings, this Court refused to allow the debtors to bring an action on behalf of the estate and attempt to avoid the judgment lien of the Beckers in the real property which is the subject of this motion for relief from the automatic stay.

If the debtors actually have an interest in the real property which is superior to that of the Beckers, they have an adequate forum in the state district court to litigate such issue. The debtors acknowledge that the property is over encumbered if the judgment lien of this creditor is valid. The debtors have no equity in this property and the property is not necessary for an effective reorganization. In addition, because of the prepetition activities of the debtors in causing title to

the property to be conveyed from a Nebraska general partnership in which they each were general partners to one of them, using a fictitious name after judgment was entered against the general partnership, after the judgment was executed upon and before the sale of the property, this Court finds cause to grant relief from the automatic stay.

Therefore, the motion for relief from the automatic stay is granted.

BY THE COURT:

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

Copies faxed by the Court to:

PRUSS, MARION 551-0466

Copies mailed by the Court to:

Mark Dickhute, 10227 Monroe Street, Omaha, NE 68127-5404
Kathleen Laughlin, 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.