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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
THEODORE V. OLSON,	)	CASE NO. BK85-1085
	)	
DEBTOR	)	A85-181
	)	
OVERLAND NATIONAL BANK OF GRAND ISLAND, A Banking Corporation,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
THEODORE V. OLSON, et. al.,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This matter came on for hearing on May 1, 1987, on the Motion for Summary Judgment filed herein by Prudential Insurance Company of America ("Prudential") on its Cross-Claim against the debtor's attorneys, William L. Needler & Associates, Ltd., Heinisch & Bryan Law Office, and Berry, Anderson, Creager & Wittstruck, Attorneys at Law ("Olson's Lawyers"). Appearing on behalf of Prudential was Greg Searson of Omaha, Nebraska. Appearing on behalf of Olson's Lawyers were Frank Heinisch of Geneva, Nebraska, Robert Creager of Lincoln, Nebraska, and William L. Needler of Chicago, Illinois. Appearing on behalf of the United States Department of Justice was James E. Shively of Washington, D.C.

Facts

The debtor filed a voluntary petition for relief under 11 U.S.C. Chapter 11 on March 1, 1982. The case was assigned to Judge Richard Stageman from the United States Bankruptcy Court for the Southern District of Iowa. On September 3, 1982, Prudential made application with the Court for adequate protection for its interest in the debtors' property. Because there was at issue the question of the nature of the proceeds of the debtors' 1982 corn crop and whether liens existed on the proceeds, on January 27, 1983, Judge Stageman ordered that those proceeds be deposited in an escrow account, the escrow agent to be chosen by the parties

then involved. He also ordered any entity having claims on the proceeds of the 1982 crop to make application to the Court for payment by February 25, 1983.

On February 24, 1983, pursuant to Judge Stageman's order, the debtor executed an escrow agreement with Prudential, among others, and Overland National Bank of Grand Island ("Overland"). In the agreement, Overland was designated as escrow agent to receive and hold proceeds from the 1982 corn crop. Although Judge Stageman ultimately issued an order with regard to the nature of the proceeds and the validity of the liens thereon, he did not order distribution and there was never any agreement as to distribution among the parties. Subsequently, on Prudential's motion, Judge Stageman dismissed the debtor's Chapter 11 petition and did not retain jurisdiction of the matter.

On July 27, 1984, after the original bankruptcy case was dismissed, Overland filed this interpleader action naming Olson's Lawyers and Prudential, among others, as defendants. The action was subsequently transferred to this Court. Overland was later discharged and dismissed as plaintiff in the case, whereupon it paid over the escrowed funds to the Clerk of the United States Bankruptcy Court for the District of Nebraska pending the outcome of the interpleader action. Olson's Lawyers filed an answer and cross-claim denying Prudential's claim of a lien on the proceeds of the 1982 crop and further alleging that they have a lien on the 1982 crop proceeds. Prudential filed an answer and cross-claim to the petition and interpleader, alleging that it has a lien on a portion of the 1982 crop proceeds that is superior to those of all other creditors.

On May 13, 1985, the debtor again filed for relief under Chapter 11.

Prudential has filed this motion for summary judgment against Olson's Lawyers claiming that as a matter of law it has a first lien on a portion of the 1982 corn crop proceeds by virtue of a foreclosure decree entered in Holt County, Nebraska, on June 28, 1984, in a foreclosure action instituted by O'Neill Production Credit Association. The foreclosure action included certain real estate upon which Prudential held a mortgage, which mortgage included a rents and profits clause. Prudential also alleged that, as a matter of law, Olson's Lawyers have no lien on the 1982 crop proceeds.

On August 24, 1987, a stipulation was filed, in which stipulation Prudential and Robert B. Creager, <u>one</u> of Olson's Lawyers, agreed that Prudential's interest in the proceeds of the 1982 corn crop is superior to any right or claim by Creager.

Issue

Is Prudential, as a matter of law, entitled to summary judgment on its cross-claim against Olson's Lawyers?

Decision

Prudential's motion for summary judgment should be and hereby is overruled.

Discussion

Before discussing the question of summary judgment, this Court wishes to address briefly the issue of the effect of dismissal of a prior bankruptcy case. Both parties have, in their briefs, relied at various points on portions of Judge Stageman's orders in the debtor's earlier bankruptcy. 11 U.S.C. §349 sets forth the effect of a dismissal, and the objective of that section is to undo the Title 11 case as much as is practicable. The judge may enter orders at the time of dismissal which protect rights acquired in reliance on the case. 2 Collier on Bankruptcy, 15th Ed., ¶ 349.01, p. 349-2. In the instant case, no such orders were entered. Therefore, this Court is not bound by the orders entered in the previous case.

Rulings on motions for summary judgment are governed in adversary proceedings in bankruptcy by Rule 7056 which adopts Rule 56 of the Federal Rules of Civil Procedure. That rule authorizes the Court to render a summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, all inferences of fact must be drawn against the moving party, who carries the burden of showing no issue of material fact exists and that it is entitled to judgment as a matter of law.

After having reviewed the file, the briefs and the exhibits, this Court does find that Prudential has an apparent first lien on a portion of the 1982 corn crop proceeds by virtue of the Decree of Foreclosure entered in Holt County on June 28, 1984. This lien may be subject to an attorney's lien in favor of Olson's Lawyers if such a lien is found to exist. The Holt County District Court found that Prudential had a first lien on certain real estate upon which a portion of the 1982 crops were grown. The evidence presented indicates that the real estate was subsequently sold for less than the amount of Prudential's lien. The rents, issues and profits clause of Prudential's mortgage on the real estate entitles it to an interest in the crops grown on the real estate in 1982.

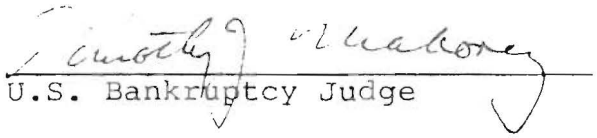
Olson's Lawyers have raised in their brief the issue of whether the real estate was worth less than the Prudential debt and what portion of the 1982 crop was raised on the land subject to that mortgage. The first issue was resolved by the fact that the land was, in fact, sold for an amount that was less than the debt. As to the second, Prudential has not claimed that it is entitled to all the 1982 crop proceeds but rather only to those from crops raised on the real estate on which it held a mortgage.

As to the issue of whether Olson's Lawyers have a lien for their services on the proceeds from the 1982 corn crop, this Court is unable to say that, in drawing all inferences of fact against the moving party, the moving party is entitled to judgment as a matter of law. It is the opinion of this Court that there is still a genuine issue of fact as to the existence of an attorney's lien in favor of Olson's Lawyers, and the priority of such lien, if any. Specifically, there is an issue as to whether Olson's Lawyers have a lien on the proceeds in question pursuant to Neb. Rev. Stat. § 7-108 (Reissue 1983), which provides in part that an attorney has a lien on money belonging to his client that is in the hands of an adverse party. At trial, the Court will consider evidence as to whether Overland was an adverse party and whether it was holding funds that did, in fact, belong to the debtor.

Motion for Summary Judgment filed by Prudential against Olson's Lawyers is overruled.

DATED: September 17, 1987.

BY THE COURT:



U.S. Bankruptcy Judge

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