

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
PATRICIA L. KOONTZ,) CASE NO. BK01-40967
)
Debtor(s).) CH. 13

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on June 20, 2001, on the Motion for Relief from Stay by Lincoln Federal Savings Bank (Fil. #15) and Objection by the Debtor (Fil. #19). Richard Garden, Jr., appeared for the Bank, and Douglas DeLair represented the Debtor. 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).

In 1984, Debtor's parents signed a note and deed of trust with Lincoln Federal Savings Bank ("the Bank") on the residential real property at issue here. In 1997, Debtor's father (a widower by that time) transferred the property to the debtor via a warranty deed, without the authorization or knowledge of the Bank. Debtor and her father reside in the house.

Payments on the note stopped after July 2000. The Bank subsequently learned of the property transfer, and began foreclosure proceedings in January 2001. The debtor filed this Chapter 13 case in April 2001. No payments on the house have been made for more than a year, and the Bank seeks relief from the automatic stay to protect its interest.

The parties focus on the question of whether a debtor who has not assumed the note and deed of trust obligations and who is not in privity of contract with a lender can use Chapter 13 to cure the defaults and reinstate a debt on which she has no personal liability.

The U.S. Supreme Court held in Johnson v. Home State Bank, 501 U.S. 798 (1991), that a mortgage lien securing an obligation for which the debtor's personal liability had been discharged in his Chapter 7 case could be dealt with in a Chapter 13 plan because the lender's right to pursue an in rem remedy constitutes a "claim" under 11 U.S.C. § 101(5). Since then,

courts have split on their interpretation and application of the Johnson decision.

Some courts adhere to the facts of Johnson and apply its reasoning only in those cases where the debtor and creditor have a preexisting relationship so the creditor could more readily be required to accept treatment of the debt under a Chapter 13 plan. See, e.g., Ulster Savings Bank v. Kizelnik (In re Kizelnik), 190 B.R. 171 (Bankr. S.D.N.Y. 1995), and cases cited therein.

Other courts eschew the close adherence to the Johnson factual situation and apply its definition of "claim" in those cases where a third party who lacks privity with the lender has an interest in the real estate. See, e.g., In re Trapp, 260 B.R. 267 (Bankr. D.S.C. 2001) (Because debtor owned the property on which lender had a claim, lender held a "claim" against debtor's estate even though there was no privity between debtor and lender).

Under the facts and circumstances of the case at bar, the reasoning of Trapp and similar cases is more persuasive. While the Bank cautions against any such expansion of Johnson, expressing concern that it would simply encourage homeowners facing the consequences of default to convey the property to a third party unknown to the Bank, those concerns appear to be unfounded in this case. There is absolutely no evidence that the debtor's father conveyed the house to her on the eve of bankruptcy or to frustrate the Bank's collection efforts. Given the apparently legitimate transaction here, the Bank's motion for relief should be denied.

IT IS ORDERED the Motion for Relief from the Automatic Stay filed by Lincoln Federal Savings Bank (Fil. #15) is denied. Separate journal entry to be filed.

DATED: August 15, 2001

BY THE COURT:

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

Copies faxed by the Court to:

*Richard P. Garden, Jr., Atty. for Lincoln Federal Savings

Bank, 402/474-5393
Douglas D. DeLair, Atty. for Debtor, 402/483-7264

Copies mailed by the Court to:
United States Trustee
Kathleen Laughlin, Ch. 13 Trustee

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)	
)	
PATRICIA L. KOONTZ,)	CASE NO. BK01-40967
)	A
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No. 15, 19
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: August 15, 2001
<u>Defendant(s)</u>)	HEARING DATE: June 20, 2001

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief from Automatic Stay by Lincoln Federal Savings Bank, and Objection by Debtor.

APPEARANCES

Debtor: Douglas DeLair
Lincoln Federal Savings Bank: Richard Garden, Jr.

IT IS ORDERED:

The Motion for Relief from the Automatic Stay filed by Lincoln Federal Savings Bank (Fil. #15) is denied.

BY THE COURT:

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

Copies faxed by the Court to:

*Richard P. Garden, Jr., Atty. for Lincoln Federal Savings Bank, 402/474-5393
Douglas D. DeLair, Atty. for Debtor, 402/483-7264

Copies mailed by the Court to:

United States Trustee
Kathleen Laughlin, Ch. 13 Trustee

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