

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 RAYMOND AND ENID KICKEN,) CASE NO. BK87-2100
)
 DEBTORS) Chapter 12

MEMORANDUM OPINION

This matter came on for hearing on October 8, 1987, upon the debtors' objection to the claim of the Federal Intermediate Credit Bank of Omaha (the "FICB"). Appearing on behalf of the debtor was Michael Snyder of Kearney, Nebraska. Appearing on behalf of the FICB was Tim Haight of Omaha, Nebraska.

Facts

Debtors filed a Chapter 12 petition on July 7, 1987. The FICB has filed a claim in the approximate amount of \$424,000, a part of which is unsecured. The debtors have objected to that claim, specifically to the unsecured portion of it. The debtor claims that the unsecured portion is a result of the fact that the FICB sold collateral that it had repossessed without giving notice of the sale to the debtors as required by the Nebraska Uniform Commercial Code. This collateral includes, among other things, rye, a Graham plow, and the a planter.

In 1984, prior to the filing of the bankruptcy, the FICB had commenced a replevin action against the debtors in the District Court of Brown County, Nebraska. Pursuant to a temporary replevin order entered in that action, the FICB repossessed and sold the debtors' farm machinery and crops, and the proceeds were applied to the balance due on the debtors' loans with the FICB. Debtors subsequently complained that the FICB had improperly sold the debtors' one-half interest in a John Deere planter and had failed to give the debtors notice of the sale of the planter as required by the U.C.C.

In May of 1985, the debtors and the FICB agreed to settle the replevin action, and a consent order was entered disposing of the case. This Consent Judgment was entered on the 26th of June, 1985. After some preliminary paragraphs setting forth the facts, the Consent Order provides in pertinent part as follows: that the plaintiff FICB denies that the plaintiffs, the debtors herein, suffered damages as a result of the plaintiff taking possession of and selling of the farm equipment. However, the plaintiff, without admitting liability, and for the purpose of compromise, agrees to the following: to pay the defendants/debtors \$1,000; to release or cause to be released any security interest in favor of the Valentine PCA or plaintiff as assignee of the Valentine PCA in a particular 1982 Ford truck; and to redeliver to the defendants

the certificate of title to that truck. In exchange, the defendants/debtors agree to the entry of the Consent Judgment; to execute delivery to plaintiff of a separate release/discharge by the defendants/debtors to the plaintiff "from any and all claims of every kind and nature which were or could have been asserted in this replevin action, or which are related to the items or any of them set forth in Paragraphs 4 and 5 of this Consent Judgment." (Plaintiff's Exhibit 2 at 4)

The Consent Judgment also provides that the defendants have accepted the compromise offered by the plaintiff as set forth. Paragraph 8 of the Consent Judgment provides that the plaintiff acknowledges receipt of the release referred to above, and defendants acknowledge that they received the payment, the release of the security interest, and the redelivery of the certificate of title referred to above.

It should be noted that nowhere in this Consent Judgment does the plaintiff specifically agree to release any and all claims that it has against defendant, so there is no specifically stated mutual release of claims in this document.

The FICB is now claiming a deficiency judgment against the debtors. The debtors maintain that, because the FICB did not give them proper notice of the sale of the equipment, the lack of notice acts as a bar to recovery of the deficiency judgment.

Issue

1. May the FICB pursue a deficiency judgment against the debtors with respect to the property that was the subject of the Consent Judgment filed in the replevin action?
2. Are the debtors precluded by the Consent Judgment entered in the replevin action from raising lack of notice as a defense against a deficiency judgment?

Decision

The Consent Judgment executed by the parties was a compromise and settlement that settled all issues relating to property and right referred to in that judgment. The FICB may not pursue a deficiency judgment on that property.

Discussion

Simply stated, it is the position of the debtors that when they released their claims with respect to the collateral, they released only their claims and not any defenses that they might raise. Therefore, the debtors believe that they can raise the defense of improper notice against the creditor. The creditor's position is apparently that the Consent Judgment does not preclude it from seeking a deficiency judgment with regard to the balance

of the debt not covered by proceeds of collateral. Further, the creditor asserts that the debtors' waiver of any and all claims against the creditor precludes the debtor from raising the defense of improper notice against the creditor with regard to the deficiency judgment that the creditor seeks.

In support of their position, the debtors cite Allis-Chalmers Corporation v. Haumont, 220 Neb. 509, 371 N.W.2d 97 (1985). In that case the Nebraska Supreme Court did state that compliance with the statutory notice requirements is a condition precedent to the right of a creditor to recover a deficiency judgment, and that the failure to give the requisite notice is an absolute bar to recovery. Id. at 512.

In support of its position, the creditor cites, inter alia, Section 9-504(3) of the Nebraska U.C.C., which reads in pertinent part as follows:

"Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or intended disposition is to be made shall be sent by the secured party by the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale."

Nebraska Revised Statute Section 9-504(3) (Reissue 1980) (emphasis added). Creditor maintains that this section of the Code and its reference to a waiver of notice by the debtor signed after default is directly applicable to the instant case. The creditor believes that the debtor signed a waiver modifying his right to notification of sale when he signed the release included in the Consent Judgment. Creditor argues that such waiver of notice is valid if it is signed post-default, which was the case here, and cites cases from other jurisdictions in support of its position. See Nelson v. Monarch Investment Plan, 452 S.W.2d 375 (Ky. Ct. App. 1970), Underwood v. First Alabama Bank, 453 So. 2d 742 (Ala. Ct. App. 1983). Finally, in support of its contention that the release signed by the debtor extinguishes not only claims but also defenses that might be used by the debtor, the creditor cites a Nebraska Supreme Court case, Dougherty v. Robson, 214 Neb. 802, 336 N.W.2d 316 (1983).

Dougherty v. Robson is a completely different set of facts from the instant case, and the debtor maintains that, because of this, it is not applicable in the instant case. However, Dougherty stands for the proposition that "after an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper

subject of suit or defense, where fraud, mistake or duress in procuring the contract is not pleaded." Id. at 808. Springfield Fire and Marine Insurance Company v. Peterson, 93 Neb. 46, 140 N.W. 760 (1913). These cases support the creditor's assertion that the signing of the Consent Judgment precludes the debtors from raising any defense against the creditor. If one applies the reasoning in Dougherty to this case, then it would seem that the creditor is also precluded from seeking a deficiency judgment against the debtor, if indeed that Consent Judgment settled the controversy between the parties.

According to CJS, "Ordinarily, when the parties to a pending suit compromise, this suit is ended." The compromise acts as "a waiver of the respective rights of the parties," and both parties "must accept the burden as well as the benefits" of the compromise. 15A CJS Compromise and Settlement Section 22 (1967). 15A CJS Compromise and Settlement Section 25 (1967) goes on to say, "Ordinarily a valid compromise agreement includes defenses and counterclaims with respect to the original claim or cause of action ... as a general rule, a valid compromise agreement concludes the primary claim, as discussed supra Section 24a, as well as defenses and counterclaims with respect thereto." (footnotes omitted)

In the brief of the FICB, counsel for the FICB states that, "the debtors and the FICB agreed to settle their differences with respect to the replevin action, and a Consent Order was entered disposing of the case." FICB brief at 3. FICB counsel goes on to say, "According to William Yates, former president of the Valentine PCA, and vice-president of the FICB, it was well understood when the release was signed by the debtors, FICB would be released from any claims the debtors may have had against the FICB arising from the repossession and the sale of the debtors' one-half interest in the planter. (citation omitted) Certainly it was Mr. Yates' understanding that the release disposed of any issues relating to the repossession and sale of collateral, and the FICB did not expect the debtors to resurrect any issue at a later date." Id. at 3, 4. (emphasis added)

In the letter brief sent to the Court on October 9, 1987, by Michael R. Snyder, counsel for the debtor, Mr. Snyder states as follows: "Thereafter the debtor and the FICB entered into a compromise and settlement agreement for a Consent Judgment in the replevin action and the debtor agreed to release and discharge the FICB 'from any and all claims of every kind and nature which were or could have been asserted through replevin action or which are related to the items or any of them set forth in Paragraphs 4 or 5 of this Consent Judgment'." Debtors' letter brief at 1.

It appears from the briefs of both the FICB and the debtors that both parties considered the Consent Judgment in the nature of a compromise and settlement agreement. That being the case, applying the reasoning in Dougherty and from the section on

Compromise and Settlement in CJS, one could definitely conclude that this compromise and settlement agreement bound both parties and effectively ended any further litigation with regard to the collateral that was the subject of the Consent Judgment.

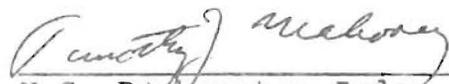
The FICB's brief includes the following statement: "As part of the negotiations, in an attempt to resolve the debtors' objection to the sale without notice of the debtors' one-half interest in the planter and the debtors' claim of wrongful repossession of certain items of property, the FICB negotiated for and received a release, signed by the debtors, ..." Brief of FICB at 3. (emphasis added) If there had been no objection to the sale without notice and to the repossession of certain property, there would have been no settlement and no Consent Judgment.

Although the Consent Judgment did not include language expressly giving up the right to a deficiency judgment on the part of the FICB, that right was precisely what was being challenged by the debtors' objection to sale without notice. When the FICB settled that objection with the debtors by paying certain consideration, it concluded the entire matter and gave up its right to a deficiency judgment, regardless of whether it admitted any liability. The Consent Judgment was a compromise and settlement that effectively ended the replevin action and all matters arising out of it, including the right to pursue a deficiency judgment on the note. The Court reaches this result because Nebraska law absolutely bars such a deficiency judgment if proper notice is not provided regarding the sale of collateral. See Allis-Chalmers Corporation v. Haumont, 220 Neb. 509, 371 N.W.2d 97 (1985). The release and waiver and consent judgment are not considered a post-default statement by the debtor renouncing the right to notice under Section 9-504(3) of the Nebraska U.C.C.

Debtors' objection to the unsecured portion of the claim of the FICB is sustained. A decision on the FICB's motion to dismiss and on its Objection to the debtors' Chapter 12 plan will be continued until a determination is made as to the confirmability of the plan.

DATED: November 25, 1987.

BY THE COURT:



U.S. Bankruptcy Judge

Copies to each of the following:

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