UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JAMES J. KOPECKY,	)	CASE NO. BK87-2833
	)	
DEBTOR	)	A87-443
	)	
ROBERT J. AND DOROTHY J. KOPECKY,	)	
	)	CH. 7
Plaintiff	)	
	)	
vs.	)	
	)	
DOUGLAS COUNTY BANK AND TRUST CO.,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

On December 18, 1987, a hearing on Robert and Dorothy Kopecky's motion for a temporary restraining order (No. 1) was held. Appearing on behalf of Mr. and Mrs. Kopecky was Thomas McGowan; appearing on behalf of Douglas County Bank and Trust Co., was Eric Kruger. The Court found that this matter was a core proceeding pursuant to 28 U.S.C. Section 157 (1987) and that the Court could enter final judgment.

Statement of Facts

In 1983, Mr. and Mrs. Kopecky became obligors with their son, James J. Kopecky, on a $60,000 promissory note in favor of American Charter Federal Savings and Loan Association. The note was secured by a deed of trust in which Mr. and Mrs. Kopecky conveyed their home in Douglas County and James Kopecky conveyed a property in Saunders County to American Charter Federal Savings and Loan Association as trustee and beneficiary. The loan proceeds were paid to James Kopecky, not to Mr. and Mrs. Kopecky.

In 1984, Jimko Construction, Inc., a corporation in which James Kopecky had an interest, executed a $50,000 note to Douglas County Bank and Trust Co. secured by a second mortgage on James Kopecky's property in Saunders County. Subsequently, the note and deed of trust held by American Charter Federal Savings and Loan Association was assigned to Douglas County Bank and Trust Co. As a result, Douglas County Bank and Trust Co. ("Bank") has a first

and second position on the parcel of property in Saunders County and a second position on Mr. and Mrs. Kopecky's property in Douglas County.[1]

On September 18, 1987, James Kopecky filed for Chapter 7 relief. James Kopecky has defaulted on Bank's promissory note, and Bank wishes to initiate a transfer of Mr. and Mrs. Kopecky's property as provided by the deed of trust, the first step being public notice of sale. Mr. and Mrs. Kopecky object to the notice and transfer, claiming that notice of sale will irreparably harm Mr. Kopecky's reputation in his business as a real estate broker and contractor. Mr. and Mrs. Kopecky claim they also will be harmed if they lose their principal residence. Mr. Kopecky has a business office in the home and Mrs. Kopecky operates a beauty shop in the home.

Mr. and Mrs. Kopecky contend that the equitable doctrine of marshaling assets requires Bank to satisfy the debt from the property in Saunders County before pursuing the property of Mr. and Mrs. Kopecky. Mr. Kopecky testified at the hearing that the value of his home is greater than the debt. The Court took judicial notice of James Kopecky's Schedule A-2 showing a value of $115,000 for the Saunders County property and a debt owing on the property of $115,000.

The Court temporarily enjoined Bank from proceeding with the transfer pending the Court's decision following the December 18, 1987, evidentiary hearing.

Issues Presented

I. Whether Mr. and Mrs. Kopecky are harmed by the transfer of their home under the Deed of Trust?

II. Whether the equitable doctrine of marshaling assets is applicable to a codebtor?

Analysis

I. The Court is satisfied from the testimony of Mr. Kopecky that he would be harmed by the public notice of sale and subsequent sale. Such notice is published in the Daily Record which paper is read by Mr. Kopecky's business associates who could then believe that Mr. Kopecky was in financial difficulties. Therefore, his business reputation as a real estate broker and contractor would be injured by the publication of the sale. Additionally, both Mr. and Mrs. Kopecky would be injured by the subsequent sale of their home not only because they both maintain offices within the home but because it is their principal dwelling in which they have lived for a considerable period of time.

---

[1]Mr. and Mrs. Kopecky have a small first mortgage on their home.

II. The doctrine of marshaling assets is well settled in Nebraska law. This equitable doctrine "rests upon the basic principle that a senior creditor who has two funds from which he may satisfy his debt may not defeat another junior creditor who may resort only to one of these assets. It is not founded upon the law of contract or liens but rather the doctrine is based in equity and is designed to promote fair dealing and justice." Platte Valley Bank of North Bend vs. Kracl, 185 Neb. 168, ___, 174 N.W.2d 724, 728 (1970) (citations omitted). So, the question the Court must first resolve is whether Mr. and Mrs. Kopecky are creditors of debtor.

A creditor is defined in Section 101(9)(A) of the Bankruptcy Code as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." "Claim" in Section 101(4)(A) is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Clearly, under the instant facts, Mr. and Mrs. Kopecky have a contingent claim against James Kopecky. As soon as Mr. and Mrs. Kopecky's property is transferred by the Bank under the Deed of Trust, Mr. and Mrs. Kopecky become creditors of James Kopecky, and as Mr. and Mrs. Kopecky contend, Section 509 of the Bankruptcy Code becomes applicable. Section 509(a) provides that "an entity that is liable with a debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment." 11 U.S.C. 509(a) (1987).

However, even though Mr. and Mrs. Kopecky may be classified under the Bankruptcy Code as creditors of debtor, James Kopecky, they remain debtors of Bank. Mr. and Mrs. Kopecky cosigned the promissory note with James Kopecky as borrowers. The terms of the note, plaintiff's Exhibit No. 1, do not address which of the properties should be sold first if the obligors default nor does the note designate Mr. and Mrs. Kopecky differently from James Kopecky. In other words, Mr. and Mrs. Kopecky are codebtors, not guarantors or sureties.

"The doctrine of marshaling assets ordinarily does not apply as between debtor and creditor, but only as between different creditors or mortgagees. The doctrine is called into exercise by, and for the benefit of, the creditor who will profit by it, and operates in favor of a creditor as against the debtor." 55 C.J.S. Marshaling § 14 (footnotes omitted). Further, "ordinarily, the debtor cannot invoke the doctrine of marshaling, for by doing so he would disregard the express provisions of the contract on which the creditor is entitled to rely." Id. at § 15 (footnotes omitted). Thus, in their status as debtors in relationship to Bank, Mr. and Mrs. Kopecky may not assert the doctrine of marshaling assets.

Bank may proceed with its sale under the Deed of Trust.

The Court's temporary restraining order entered December 4, 1987, is terminated.

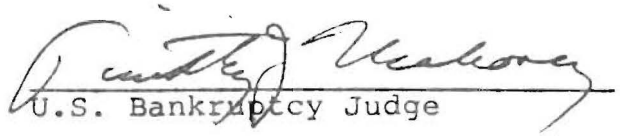
Because legitimate factual and legal issues were presented by Mr. and Mrs. Kopecky, Bank's request for attorneys fees under 28 U.S.C. Section 1927 is overruled.

Bank has fifteen days to submit actual damages to the Court. The Court will review and determine if any of the bond shall be used for such damages.

A separate Journal Entry shall be entered this date.

DATED: January 26, 1988.

BY THE COURT:



U.S. Bankruptcy Judge

Copies mailed to:

Thomas McGowan, Attorney, 1100 One Central Park Plaza, 222 S. 15th Street, Omaha, NE 68102

Eric Kruger, Attorney, 212 S. 108th Ave., Suite #1, Omaha, NE 68154