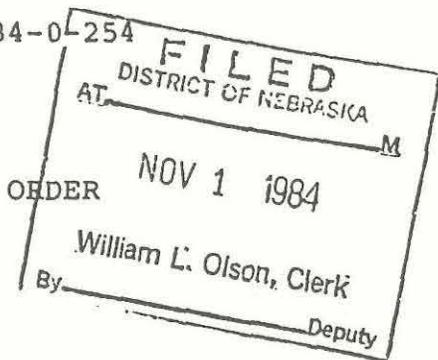


IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

IN RE: )  
)  
HARRY SAYERS AND MARY SAYERS, )  
)  
Debtors. )  
)  
ROGER A. HABROCK AND )  
KRISTINE J. HABROCK, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
MERLE NICOLA, Trustee, )  
)  
Defendants. )

BK 83-739  
A 83-0694

CV 84-0



This matter is before the Court on appeal from an order of the Bankruptcy Court for the District of Nebraska dismissing the plaintiffs' petition in the adversary proceeding at the close of the plaintiffs' case-in-chief. The Bankruptcy Judge dismissed the petition for the reason that the plaintiffs failed to establish a prima facie case for breach of a real estate sales contract.

The plaintiffs executed a contract (Exhibit 1) with the defendant (Trustee) to purchase real property located at 3209 South 48th Avenue from the debtors' bankruptcy estate. The trustee's real estate agent prepared the contract. The contract provided that the sale of the debtor's real property was contingent on the sale and closing of the plaintiffs' former residence by October 28, 1983. The closing and possession date for the sale of the debtors' real property was to also be on or before October 28, 1983. In addition, the contract allowed

a reasonable time for the seller to cure any title defects and for rescission by either seller or purchaser if defects were not satisfactorily cured. (Exhibit 1).

The plaintiffs contracted to sell their residence (Exhibit 2) on September 15, 1983, and the sale closed October 26, 1983 (Exhibit 5).

The trustee initiated notice and hearing procedures as required by 11 U.S.C. § 363(b). Two objections were filed against the sale of the property. One objection was settled by stipulation, and the other was resolved on appeal after November 11, 1983. (Transcript at 64-67, 69-71). The debtors were still in possession of 3209 South 48th Avenue on October 28, 1983. (Transcript at 60-61). The trustee delivered possession of 3209 South 48th Avenue to the plaintiffs on November 10, 1983, and conveyed title to the plaintiffs on December 2, 1983. (Exhibits 9, 12 and 19).

The plaintiffs initiated the adversary proceeding to recover special damages allegedly incurred because the trustee failed to close and to deliver possession of 3209 South 48th Avenue on October 28, 1983. The plaintiffs argued that time was of the essence in the contract.

The Bankruptcy Judge held that the plaintiffs failed to state a prima facie case for three separate reasons, (1) that time was not of the essence in the contract, (2) that the contract by its own terms gave the seller a reasonable time to cure any title defects, allowing rescission if the defects could not be cured, and (3) that on the date designated for closing two defects

existed -- an objection to the sale filed pursuant to 11 U.S.C. § 363(b), and the debtors' actual possession of the property.

The plaintiffs have raised three issues on appeal. First, was time of the essence in the contract? Second, did the Bankruptcy Court properly exclude certain evidence offered by the plaintiffs to show the real estate agent had actual knowledge time was of the essence in the contract? Third, was the evidence sufficient to sustain a prima facie case against the defendant for alleged breach of contract? For the reasons stated below the order of the Bankruptcy Judge is affirmed.

I.

In the typical contract for the sale of real estate, "time is not of the essence unless so provided in the instrument itself or it is clearly manifested by the agreement construed in light of surrounding circumstances." Menke v. Foote, 199 Neb. 800, 261 N.W.2d 635, 638 (1978); Richards v. Bycroft, 197 Neb. 478, 249 N.W.2d 743 (1977); Dowd Grain Co. v. Pflug, 193 Neb. 483, 227 N.W.2d 610 (1975). The Court agrees that the Bankruptcy Court's statement of the law of Nebraska that "magic words" are required in a contract to make time of the essence was not a proper conclusion of law.

However, this is not reversible error because the Bankruptcy Judge properly based his ruling on two other separate and distinct reasons. If the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. Zirinsky v. Sheehan, 413 F.2d 481, 484 at n.5 (8th Cir. 1969), cert. denied, 396 U.S. 1059 (1970). Judgment of district court even if based on possibly erroneous theory must

be sustained if it is correct on other grounds. McClain v. Kitchen, 659 F.2d 870, 873 (8th Cir. 1981).

The Bankruptcy Judge found that the real estate purchase contract expressly stated that the trustee's performance was contingent upon his ability to give clear title. The relevant portion of the contract expressly states:

If title defects are found, Seller, after written notice thereof, shall endeavor to correct the same to Purchaser's satisfaction within a reasonable period of time [emphasis added]. If the defects are not cured within a reasonable time, then either Purchaser or Seller may rescind this agreement and Seller shall refund to Purchaser the deposit made. Purchaser agrees to close said purchase within Oct. 28 1983 [sic] days after delivery of said abstract of title, or title commitment (binder) or in event the defects are found in said title, within (10) days after such defects are cured. (Exhibit 1).

The Bankruptcy Judge found that two title defects existed on October 28, 1983. (Transcript at 74). The evidence supported this finding. First, the trustee's notice of intent to sell property of the debtors' estate resulted in two objections being filed. One of the objections was still pending on October 28, 1983. (Transcript at 65, 69-70). The trustee had no power to convey the real property until the 11 U.S.C. § 363(b) notice and hearing procedure was followed through to its conclusion. (Bankr. Rules 2002, 6004). Second, the Bankruptcy Judge found that the debtors' continued possession of 3209 South 48th Avenue on October 28, 1983, also constituted a title defect precluding closing and giving of possession on that date. (Transcript at 60-61, 69). The evidence showed that the plaintiffs were given possession of 3209 South 48th Avenue by the middle of November, 1983, (Transcript at 61) and that closing occurred on December

2, 1983. (Exhibit 12 and 19). The evidence supports the holding that the trustee cured the defects within a reasonable time. The Court notes that there was no evidence that either party elected to rescind the agreement because of the title defects. In view of the above reasons and supporting evidence, it cannot be said that the decision of the Bankruptcy Court was clearly erroneous.

## II.

In addition, the plaintiffs contend that the Bankruptcy Court improperly excluded certain evidence offered by the plaintiffs to show that the real estate agent of the trustee had actual knowledge that time was of the essence to the plaintiffs and other parties to the real estate purchase contract. While this Court agrees that error was made as to the admissibility of Exhibit 3 and possibly to certain oral testimony, this Court finds such errors to be harmless.

Exhibit 3 should have been admitted under Fed. R. Evid. 801(d) (2) (D) as an admission made by an agent of a party opponent. Both Exhibit 1 and testimony (Transcript at 11) indicate that Debbie Twiss was the real estate agent for the trustee and, therefore, the letter she wrote was an admission against interest and should have been admitted in evidence. The Court notes that the plaintiffs did not offer any legal argument for the admissibility of the letter on this basis. Such an argument would have given the Bankruptcy Judge an opportunity to reconsider his ruling. (Transcript at 23).

"To constitute reversible error, it must be established that the error complained of affected the substantial rights of the objecting party." Gilliam v. City of Omaha, 524 F.2d 1013, 1015 (8th Cir. 1975). "Burden is on appellant to demonstrate prejudice as well as error." Fed. R. Civ. P. 61. Slatinsky v. Bailey, 330 F.2d 136, 141 (8th Cir. 1964). See also, Air Line Pilots Ass'n, Intern. v. Northwest Airlines, Inc., 415 F.2d 493 (8th Cir. 1969), cert. denied, 397 U.S. 924 (1970). That Exhibit 3 was not admitted cannot be said to be reversible error. The letter appears to be the plaintiffs' notification to the trustee that one of the contract contingencies to the purchase of 3209 South 48th Avenue had come to pass. The entire contract was contingent on the sale and closing of the plaintiffs' former residence. (Exhibit 1). The letter (Exhibit 3) provides notice of the sale and targeted closing date of their former residence. In view of the holding by the Bankruptcy Court that the contract provided for reasonable time for Seller to cure title defects, the fact the letter was not admitted did not prejudice the plaintiffs. Whatever knowledge the trustee had with regard to that matter would not invalidate the particular portion of the contract allowing the Seller time to cure title defects.

With regard to the oral testimony, an appellate court will not determine "whether excluded testimony should have been admitted where record failed to disclose by offer of proof or otherwise particular testimony which was excluded." Moorhead v. Stearns-Rogers Mfg. Co., 320 F.2d 26, 29 (10th Cir. 1963). It cannot be held to be an abuse of discretion in absence of showing in the record what the additional evidence was. McMain v. Tomey,

368 F.2d 63, 65 (10th Cir. 1966). Thus, it cannot be said that the Bankruptcy Court abused its discretion when it excluded the oral testimony by the plaintiffs as to statements made by Debbie Twiss. (Transcript at 21). The plaintiffs' offer of proof is a general vague statement, not specific enough to preserve the matter for this Court to review whether exclusion of the statements was erroneous and prejudicial.

In addition, the plaintiffs offered testimony that Debbie Twiss was both the real estate agent for the trustee and also the plaintiffs' real estate agent representing them in the sale of their former residence. The Bankruptcy Court excluded this evidence as not relevant. (Transcript at 49). The testimony probably should have been admitted as relevant to the issue of whether the trustee's agent had notice of the plaintiffs' need to have possession of 3209 South 48th Avenue on or before October 28, 1983. However, the Bankruptcy Court has much discretion in whether to admit or exclude evidence on the basis of relevance. In any event, if the exclusion of the evidence could be classified as erroneous, the error would be harmless for the same reasons the error of excluding Exhibit 3 was harmless. (Supra).

### III.

Finally, this Court agrees with the Bankruptcy Court that the evidence was insufficient to sustain a prima facie case against the trustee for breach of contract. On appeal from dismissal of an action at close of plaintiffs' case, evidence is to be viewed in light most favorable to the plaintiffs giving them the benefit of every favorable inference that might fairly

be drawn. Jeanes v. Milner, 428 F.2d 598, 601-02 (8th Cir. 1970). Even if the Bankruptcy Court had considered that the trustee had notice that the plaintiffs needed to have possession of and title to 3209 South 48th Avenue on or before October 28, 1983, the Bankruptcy Court was not clearly erroneous in finding that the contract itself allowed the trustee a reasonable time to cure title defects. The plaintiffs themselves offered evidence of the title defects in existence on October 28, 1983. (Transcript at 29-30, 60-61, 65-57, 69-70). Therefore, the Bankruptcy Court did not error in determining upon the presented evidence that the trustee did not breach the contract when he failed to deliver possession and to close on October 28, 1983, because there were title defects. The trustee cured the defects, and delivered possession and title to the property within a reasonable time. This was not a breach of contract, but rather compliance with a clause in the contract.

IT IS THEREFORE ORDERED that the judgment of the Bankruptcy Court is affirmed.

DATED this 1st day of November, 1984.

BY THE COURT:



C. ARLEN BEAM  
UNITED STATES DISTRICT JUDGE