

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
TERESA ANN ANDERSON,) CASE NO. BK01-83252
)
DEBTOR) CH. 13

MEMORANDUM

Hearing was held on January 17, 2002, on Motion for Relief filed by Sol's Jewelry & Loan. Appearances: Marion Pruss, attorney for the debtor, and Daniel Rock, attorney for Sol's Jewelry & Loan. 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).

Introduction

This matter is before the court on Sol's Jewelry and Loan's Motion for Relief From the Automatic Stay and the debtor's Resistance thereto. Sol's filed this Motion for Relief originally arguing that the ring that the debtor pawned is not an asset of the bankruptcy case because the right to repurchase the ring expired before the bankruptcy case was filed. Sol's later additionally argued, after the court requested the attorneys to brief the matter, that, 1.) pawn agreements according to Nebraska Law are agreements for sale with the right to repurchase, 2.) the agreement at issue in this case provided for a sale with the right to repurchase, 3.) that the sale was not an adhesion contract and, 4.) that 11 U.S.C. § 108(b) governs the situation and that the statutory extension of time allotted by the statute has passed thus leaving the debtor with no interest in the property.

In opposition, the debtor argues, 1.) that the agreement between Sol's and herself is not a sale but instead a loan arrangement whereby Sol's loaned the debtor money and took the ring as security for the loan and, 2.) that the agreement between the parties is ambiguous and should be construed against Sol's. The agreement, according to the debtor, is an adhesion contract because the debtor and Sol's held uneven bargaining positions regarding the pawn. Because the debtor's brief was filed prior to Sol's brief, the debtor was not able

to respond to issues raised by Sol's for the first time in the court-ordered brief.

Facts

The facts are relatively simple and undisputed. On June 7, 2001, the debtor pawned a diamond ring at Sol's Jewelry and Loan, receiving \$400.00 consideration. According to the terms of the agreement, the debtor had until October 7, 2001, to redeem the ring by making a payment of \$560.00. The agreement between the debtor and Sol's appears to be a contract of sale with the right to redeem the property. The agreement states that the debtor "may repurchase the personal property at any time within four months from date for a price to be determined by the following formula. . . ." Additionally, the debtor had the option of extending her rights to repurchase by thirty days and did so by paying \$40.00 on October 7, 2001.

The debtor filed for protection under Chapter 13 of the United States Bankruptcy Code on November 5, 2001, two days before the debtor's right to repurchase the diamond ring expired. Sol's filed this Motion for Relief on December 19, 2001, arguing that the ring that the debtor pawned is not an asset of the bankruptcy case because the right to repurchase the ring expired before the bankruptcy case was filed. The debtor has listed the ring as an asset and Sol's as a secured creditor on her schedules. The debtor proposes to repay Sol's as if it was a secured creditor according to the terms of the debtor's Chapter 13 Plan.

Analysis

Section 541 creates a bankruptcy estate, including all of a debtor's legal and equitable interests, when a case is commenced. In re Jackson, 133 B.R. 541 (Bankr. W.D. Okla. 1991) (citations omitted). State law creates and determines the dimensions of the property right. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136(1979). In Evans v. Mid City Jewelry Inc. (In re Evans), 22 B.R. 608 (Bankr. D. Neb. 1982), the court looked to Neb. Rev. Stat. § 69-209 to determine if the debtor had any interest in the property that is placed in pawn. According to Section 69-209, it is unlawful for a pawnbroker to sell any goods during the four months after the date they are purchased or received. The court ruled that during the four-month

period prescribed by the statute "the debtor retains a sufficient legal or equitable interest to make them [the pawned goods] part of the estate created by 11 U.S.C. § 541." In re Evans, 22 B.R. at 610. The court also ruled that a debtor may retain whatever interest they have in the property by extending the redemption period according to the terms of the agreement. Id.

In the present case, the debtor placed the items in pawn on June 7, 2001, and, therefore, according to the statute, had until October 7, 2001, to redeem her property. The debtor did not redeem at this time but instead purchased one additional month in which to redeem the ring. Prior to the expiration of this redemption period, the debtor filed for bankruptcy. Thus, the debtor's interest in the pawned good became part of the bankruptcy estate.

According to Nebraska law, a pawnbroker is "any person engaged in the business of lending money upon chattel property for security and requiring possession of the property so mortgaged on condition of returning the same upon payment of a stipulated amount of money, or purchasing property on condition of selling it back at a stipulated price, is declared to be a pawnbroker. . . ." The statute states that a pawnbroker can either be a lender or a conditional purchaser so it is necessary to look to the agreement of the parties to know, in this case, the role of the pawnbroker.

The agreement at issue in this case was an agreement for a sale with a right to repurchase. The agreement states, in several places, that the debtor has a "right to repurchase" the property placed in pawn. It also states that the "Bill of Sale" must be present when repurchasing any pawned items. This is hardly ambiguous language. The debtor's interest in the pawned good is clearly stated as the "right to repurchase." Therefore, according to the terms of the agreement, the debtor had an interest in the property and this interest became property of the bankruptcy estate.

Accordingly, pursuant to 11 U.S.C. § 108(b), the debtor had an additional sixty days after the petition date in which to redeem the property. Johnson v. First Nat'l Bank, 719 F.2d 270 (8th Cir. 1983); Counties Contracting & Construction v. Constitution Life Ins Co., 855 F.2d 1054 (3rd Cir.1988). The bankruptcy petition was filed on November 5, 2001, so the

sixty-day extension period ran until January 4, 2002. However, the Motion for Relief and Resistance were filed prior to the running of the sixty-day time period. A valid question of law concerning the meaning of the contract was raised by the debtor in response to the motion. Due to this court's hearing schedule and briefing schedule, this matter was not taken under advisement until after the sixty-day statutory period for redemption had passed. The court does not feel that the debtor should be penalized for the court's calendar. Therefore, the court shall treat that sixty-day period as tolled and the debtor shall now be granted sixteen days to redeem the ring by repurchase. (The motion was filed on December 19, 2001, and the last date for repurchase, per 11 U.S.C. § 108(b), was January 4, 2002, a period of sixteen days). If the sixteen-day period passes and the debtor does not repurchase the ring, she no longer has any interest in it and Sol's is free to dispose of the property.

Although the debtor has a confirmed plan which deals with Sol's as a secured claim, the confirmation process is not the correct vehicle in which to determine the status or existence of Sol's interest in the ring. Therefore, the terms of the plan and order of confirmation are not binding on the court or the parties with regard to this issue.

Conclusion

The debtor has ten days from the date of entry of this order to repurchase her ring.

Separate order to be entered.

DATED: March 8, 2002

BY THE COURT:

s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
85 PRUSS, MARION

Copies mailed by the Court to:

Daniel Rock, Esq., 8805 Indian Hills Dr., Suite 280,
Omaha, NE 68114

Copies electronically sent to:

Kathleen Laughlin, Chapter 13 Trustee
United States Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
TERESA ANN ANDERSON,) CASE NO. BK01-83252
) A

DEBTOR(S)) CH. 13
) Filing No. 6, 10; 11
Plaintiff(s))
vs.) ORDER
)
)

Defendant(s)) DATE: March 8, 2002
HEARING DATE: January
17, 2002

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Sol's Jewelry & Loan and Resistance; Motion to Strike Affidavit of Daniel Rock.

APPEARANCES

Marion Pruss, Attorney for debtor
Daniel Rock, Attorney for Sol's Jewelry & Loan
(X) Copy to Law Clerk

Motion for relief from stay shall be granted if debtor fails to repurchase the ring within sixteen days of the entry of this order. It shall be the obligation of counsel for the movant to inform the court, by affidavit or declaration, if debtor fails to repurchase timely. See Memorandum filed contemporaneously herewith.

BY THE COURT:

s/Timothy J. Mahoney

Chief Judge

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
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TERESA ANN ANDERSON,) CASE NO. BK01-83252
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DEBTOR) CH. 13

ORDER NUNC PRO TUNC

The Memorandum Opinion, Filing No. 29, is amended by correcting the "Conclusion" to read: "The debtor has sixteen days from the date of entry of this order to repurchase her ring."

DATED: March 26, 2002

BY THE COURT:

s/Timothy J. Mahoney
Chief Judge

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