

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
THEODORE & LEONA DOMANSKI,) CASE NO. BK91-81073
)
DEBTOR) CH. 13
) Filing No. 95

MEMORANDUM

Hearing was held on July 22, 1993, on a Motion for an Order Staying Trustee Sale, Motion for Sanctions, Attorney Fees and Costs, and Motion for Emergency Telephone Hearing. Appearing on behalf of debtor was Wm. Switzer of Switzer Law Offices, Omaha, Nebraska. Appearing on behalf of Nebraska National Bank was John Andreasen of McGrath, North, Mullin, & Kratz, P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (G).

These debtors are operating under a confirmed Chapter 13 plan. Although there is some dispute about it, the Court will assume, for purposes of this order, that the debtors are in default with regard to payments to a secured creditor, Nebraska National Bank.

Nebraska National Bank (Bank) is a creditor owed approximately \$21,000.00. The debt is secured by a deed of trust on rental real property owned by debtors executed prepetition. The confirmed plan, although it modifies the monthly payments provided for in the note and deed of trust, assumes all other obligations under the note and deed of trust, including a balloon payment that was due shortly after confirmation. The balloon payment was not made and the Bank, without obtaining relief from the automatic stay, proceeded with a non-judicial foreclosure under the Nebraska Trust Deed Act. Neb. Rev. Stat. §§ 76-1001, et seq. (Reissue 1990). The property has been advertised for sale for five weeks and sale is scheduled for tomorrow, July 23, 1993.

The debtor has filed a motion requesting the Court find that the actions by the creditor are in violation of the automatic stay of Section 362 of the Bankruptcy Code and finding that the

sale should be stayed and sanctions should be awarded in favor of the debtor and against the creditor for the violations of the automatic stay.

Hearing was held on an expedited basis on the morning of July 22, 1993. The debtor argues that the creditor cannot proceed against property of the estate or property of the debtor without obtaining relief from the automatic stay. The Bank argues that the automatic stay terminated as of the confirmation date and, therefore, the Bank is permitted to proceed to protect its position and enforce its lien rights without obtaining relief from the automatic stay.

Although the parties focused their attention on the provisions of Chapter 13, including Section 1327(b), which vests property of the estate in the debtor as of confirmation, and Section 1306, which defines property of the estate as the property specified in Section 541 and all property acquired after the commencement of the case but before the case is closed, dismissed or converted, the Court finds that it is not necessary to analyze either Section 1327 or Section 1306 to resolve the issue.

Assuming, as the creditor desires, that property of the estate becomes vested in the debtor as of confirmation of the plan, such vesting does not permit the creditor to proceed without obtaining relief from the automatic stay. Section 362(a)(5) prohibits the creditor from taking any act to enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case. The deed of trust which encumbers the real property of the debtor is a lien. The action by the Bank to sell the property pursuant to the terms of the deed of trust is an action to enforce against the property of the debtor a lien securing a claim that arose before the commencement of the case. The Bankruptcy Code at Section 362(c) provides that the automatic stay continues against property of the estate until such property is no longer property of the estate. Section 362(c)(1). It further provides that the stay of any other act under Section 362(a) continues until the time the case is closed, dismissed or discharge is granted or denied. Section 362(c)(2).

If confirmation of the Chapter 13 plan does not divest the estate of the property which is subject to the deed of trust, then the stay remains in effect and prohibits the Bank from proceeding against property of the estate without relief from the stay. On the other hand, if the real property is no longer property of the estate upon confirmation as a result of the vesting provision of Section 1327, such real property is property

of the debtor. The Bank is prohibited from enforcing a prepetition lien securing a prepetition claim against property of the debtor until the case is closed, dismissed or discharge is granted or denied. 11 U.S.C. § 362(a)(5) and (c)(2). See Littke v. Trustcorp. Mortgage Co. (In re Littke), 105 Bankr. 905 (Bankr. N.D. Ind. 1989). See also Michaela M. White, The Effects of Chapter 13 Plan Confirmation and Case Conversion on Property, 26 Creighton L. Rev. 785, 791-93 (1993).

Therefore, the Court concludes that the actions by the Bank are in violation of the automatic stay because either the property is property of the estate post-confirmation and the Bank is attempting to obtain possession of or exercise control over that property in violation of 11 U.S.C. § 362(a)(3) or the property is property of the debtor post-confirmation and the Bank is attempting to enforce a prepetition lien securing a prepetition claim against property of the debtor in violation of 11 U.S.C. § 362(a)(5). The Bank is ordered to refrain from proceeding with the purported sale on July 23, 1993.

The debtors have requested sanctions against the Bank for violation of the automatic stay. The Court can make no determination of the appropriateness of sanctions without an evidentiary hearing. Therefore, if the debtors desire an evidentiary hearing on these issues, the debtors and the Bank shall file a preliminary pretrial statement within thirty days and the matter will be scheduled for trial.

Separate journal entry shall be entered.

(X) Clerk to give immediate notice of the Court's ruling to counsel appearing at the hearing.

DATED: July 22, 1993.

BY THE COURT:

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

