

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
WILLIAM KOUTH,) CASE NO. BK92-81479
)
) DEBTOR) CH. 7
) Fil. No. 18, 23, 24

MEMORANDUM

Hearing was held on Trustee's Objection to Claim of Allen and Gloria Kouth; Resistance by Allen and Gloria Kouth; and Resistance by William Kouth on March 15, 1993. Appearing on behalf of debtor was Thomas Emery of Emery, Nye, Blazek, & Hemphill of Omaha, Nebraska. Appearing on behalf of Allen & Gloria Kouth was Mary Powers of Omaha, Nebraska. Richard Myers of Schmid, Mooney & Frederick, P.C., Omaha, Nebraska, appeared as trustee. 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).

Decision

The trustee's objection to the secured claim of Allen and Gloria Kouth is overruled.

Background

The issue arises because of the situation that began when the debtor and his former spouse (Linda Kouth) were divorced in October, 1988. According to the decree of dissolution, the parties were awarded equal interest as tenants in common in their house at 2717 Country Club Avenue, Omaha, Nebraska, with possession of the house granted to Linda Kouth and custody of the couple's minor child granted to Linda Kouth. Prior to the entry of the decree of dissolution, the debtor and his wife had owned the home as joint tenants. In December, 1988, Linda Kouth appealed the decision to the Nebraska Supreme Court.

After the appeal was filed, the debtor borrowed \$13,000.00 from Allen and Gloria Kouth and secured the loan with a trust deed on his interest in the property at 2717 Country Club Avenue, as authorized by Neb. Rev. Stat. §§ 76-1001 et seq. (Reissue 1990).

In 1992, the debtor filed his Chapter 7 bankruptcy petition. The property was subsequently sold and the part of the proceeds subject to the claim of Allen and Gloria Kouth are being held by the trustee. The trustee now objects to Allen and Gloria Kouth's secured claim on the grounds that the trust deed is invalid because the debtor and Linda Kouth were still married at the time the trust deed was made, a homestead cannot be encumbered without the signatures of both spouses, and Linda Kouth did not sign the trust deed.

Discussion

Without addressing the arguments as to whether the judgment awarding property rights pursuant to the decree of dissolution was stayed pending appeal or whether the appellate affirmance relates back to the original entry of the dissolution decree, this Court believes it can resolve the issue by reference to Nebraska statutes and case law. Even assuming that the debtor and his former wife still held the property as joint tenants in December, 1988, when the trust deed was executed, regardless of whether the terms of the dissolution decree had made them tenants in common at that point, a unilateral encumbrance by conveying Mr. Kouth's interest for security by deed of trust severed the joint tenancy and debtor and Linda Kouth became tenants in common. See, e.g., Krause v. Crossley, 202 Neb. 806, 277 N.W.2d 242 (1979) (The creation and continued existence of a joint tenancy requires unity of possession, interest, time and title. Any act by a joint tenant which destroys one or more of the unities severs the joint tenancy.) See also, Robert G. Simmons, Jr., Effect of Owners (sic) Execution of Land Contract or Mortgage upon Joint Tenancy, 34 Neb. L. Rev. 285 (1955).

Absent authorization or ratification by his co-tenants, a co-owner may convey or mortgage only such interest as he has, and the sale or lien will not affect the interests of the other co-owners. First Nat'l. Bank of Tekamah v. Hansen (In re Hansen), 60 Bankr. 359 (D. Neb. 1982), appeal dismissed, 702 F.2d 728 (8th Cir. 1983); cert. denied, 463 U.S. 1208, 103 S. Ct. 3539 (1983); Jolliffe v. Maxwell, 3 Neb. (Unoff.) 244, 91 N.W. 563, 565-66 (1902). Therefore, the debtor encumbered only his undivided one-half interest in property.

However, the homestead issue comes into play here. Nebraska law provides "[T]he homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. . . ." Neb. Rev. Stat. § 40-104 (Reissue 1988). The case law holds that three conditions must be met

before a homestead right can be claimed, at least for exemption purposes: 1. the claimant must be head of the family; 2. the claimant must own the real estate in question; and 3. the claimant must occupy the property as a family residence. In re Foley, 97 F.Supp. 843 (D. Neb. 1951).

In the present case, applying the above factors, Linda Kouth is the only one who can claim a homestead right in the property, because, at the time, she as head of household and her minor child were living in the house while the debtor evidently resided at another location, according to his address on the trust deed. If the debtor encumbered only his interest in the property, Linda's homestead rights in her half of the property were unaffected, and there was no requirement for her to sign the trust deed or other documents.

Therefore, the claim of Allen and Gloria Kouth is properly allowed as a secured claim.

Separate journal entry to be entered.

(X) Clerk to give immediate notice of the Court's ruling to Richard Myers, Trustee; Thomas Emery, Attorney for the debtor; and Mary Powers, Attorney for Gloria and Allen Kouth.

DATED: May 10, 1993.

BY THE COURT:

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
WILLIAM KOUTH,)
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DEBTOR(S))
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Plaintiff(s))
vs.)
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)
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Defendant(s))

CASE NO. BK92-81479
A

CH. 7
Filing No. 18, 23, 24

JOURNAL ENTRY

DATE: May 10, 1993
HEARING DATE: March 15,
1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Objection to Claim of Allen and Gloria Kouth; Resistance by Allen and Gloria Kouth; and Resistance by William Kouth.

APPEARANCES

Thomas Emery, Attorney for debtor
Mary Powers, Attorney for Allen & Gloria Kouth
Richard Myers, Trustee

IT IS ORDERED:

The claim of Allen and Gloria Kouth is allowed as a secured claim. See memorandum entered this date.

(X) Clerk to give immediate notice of the Court's ruling to all parties in interest.

BY THE COURT:

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