

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF) CASE NO. BK91-80281
)
CALVIN & FRANCES ERWIN,) CH. 7
)
DEBTOR(S)) Filing No. 260, 264, 269,
 and 271

MEMORANDUM

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief from Automatic Stay filed by Land Reutilization Commission, Resistance filed by Debtors, Notice of Intent to Sell filed by Debtors, and Resistance filed by Land Reutilization Commission.

APPEARANCES

Marion Pruss: Debtors
William Ginsburg: Land Reutilization Commission

(X) Copy to Law Clerk

IT IS ORDERED:

The Land Reutilization Commission of Douglas County, Nebraska (LRC) has moved for relief from the automatic stay in this Chapter 11 case to permit it to obtain confirmation of the Sheriff's sale concerning property of the bankruptcy estate. The Debtors resist.

On December 5, 1984, the real property located at 2858 Sailor Street, Omaha, Douglas County, Nebraska, was foreclosed for nonpayment of taxes. A decree was entered on the 4th day of December 1985 with regard to the foreclosure action.

The Sheriff's sale was held on February 25, 1986. No individual or entity bid on the property in question and, pursuant to Neb. Rev. Stat. § 77-3211 (Reissue 1990), the LRC was deemed to have bid the full amount of all tax bills included in the judgment, interest, penalties, fees, and costs then due.

It is not clear from the evidence whether the LRC received a deed from the Sheriff, but it is clear that the sale was not confirmed prior to the bankruptcy case being filed. The bankruptcy case was filed in February of 1991.

The property in question, although subject to the rights of the LRC, was property of the Debtor on the date the bankruptcy

petition was filed and is property of the bankruptcy estate. It is used in the operation of the Debtors' business. Until and unless the LRC receives from the Sheriff a deed and records the deed, the LRC does not have rights superior to the Debtor. The Debtor has the absolute right to redeem the property from the results of the foreclosure sale up to the date the foreclosure sale is confirmed. Neb. Rev. Stat. § 77-1917 (Reissue 1990).

The LRC desires to obtain relief from the stay at this time, more than three years after the bankruptcy case was filed, because the LRC has now obtained an offer to purchase the property. The procedure that the LRC will use at this point in time is to obtain confirmation of the sale, obtain a deed from the Sheriff and issue and execute a special warranty deed to the proposed purchaser. The LRC will then take the proceeds of the sale and distribute those proceeds to the various taxing authorities as their interests may appear. If there are funds remaining after paying the costs and distributing tax dollars, the LRC will retain the balance. (The procedure just described was obtained from a review of the Land Reutilization Authority n/k/a Commission of Douglas County Rules and Regulations published March 10, 1989, which Rules and Regulations were received from Martin A. Barnhardt, Director, by letter dated August 30, 1994).

The automatic stay of 11 U.S.C. § 362(a)(2) and (3) prohibits the LRC from obtaining possession of the property without first obtaining relief from the automatic stay. Relief from the automatic stay can be granted under 11 U.S.C. § 362(d)(2) only if the Debtor does not have an equity in the property and such property is not necessary to an effective reorganization. It appears that the Debtors do not have equity in this property because its value is fully encumbered by the tax liens against it. However, the Court finds that the property is necessary to an effective reorganization because it is used as part of a larger parcel upon which are located buildings which are used by the Debtors in the Debtors' business.

By separate order entered in this case on a Motion to Convert to Chapter 7, the Court has granted the Debtors until February of 1995 to file a plan and disclosure statement. Since it is likely that this property would be listed as a part of the property necessary for the Debtor to properly reorganize, relief from the stay is not appropriate at this time.

The Motion for Relief from the Automatic Stay filed by the LRC is denied.

In response to the Motion filed by LRC, the Debtors filed a Notice of Intent to Sell the property and lease it back. The price at which the Debtors desire to sell the property is a few hundred dollars higher than the price that the LRC had obtained. The Debtors suggest that it is proper for them to be permitted to sell the property to their buyer because their buyer will agree to a lease of the property and therefore the property will continue to be able to be used by the Debtors in the operation of their business.

The underlying assumption of the Debtors is that the property could be sold free and clear of liens, including tax liens, and free and clear of the interest of the LRC and the proceeds of the sale could be delivered to the taxing authorities, through the offices of the Douglas County Treasurer, and that the Debtors would be able to give clear title to the purchaser. However, that scenario depends upon the Debtors obtaining an order avoiding the unrecorded interest of the LRC, determining the extent and validity of the tax liens and avoiding any tax lien over and above the market value of the property. Such orders may only be obtained either by consent of the County and the LRC or by a judgment entered in an adversary proceeding brought pursuant to Federal Rule of Bankruptcy Procedure 7001 and 11 U.S.C. § 506(a) and 11 U.S.C. § 544.

Because there has been no determination of the allowed secured claim, or the extent and validity of the lien claimed by the taxing authority, and the unrecorded interest of the LRC has not been avoided, the request by the Debtors to sell the property free and clear of liens is premature and must be denied.

Separate Journal Entry will be filed.

BY THE COURT:

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

Copies faxed by the Court to:
MARION PRUSS 551-0466

Copies mailed by the Court to:
*WILLIAM GINSBURG, 2120 SO. 72ND ST., SUITE 646, OMAHA, NE 68124
UNITED STATES TRUSTEE

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JOURNAL ENTRY

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APPEARANCES

Marion Pruss: Debtors
William Ginsburg: Land Reutilization Commission

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IT IS ORDERED:

The Land Reutilization Commission's motion for relief is denied. Debtors' request to sell property free and clear of liens is denied.

BY THE COURT:

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

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