UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF | ) | |
| | ) | |
| JESSE H. DEAN, | ) | CASE NO. BK92-80879 |
| | ) | |
| DEBTOR | ) | CH. 13 |

## MEMORANDUM

Hearing was held on September 9, 1993, on Motion for Relief filed by Wilkie & Co. Appearing on behalf of the debtor was Richard A. Rowland of Omaha, Nebraska. Appearing on behalf of Wilkie & Co. was Dennis Martin of Martin & Martin, 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)(G).

The movant waived the thirty-day requirement for ruling on a motion for relief. The Court, in its September 9, 1993, Order, ordered that the stay remain in effect until the Court's final ruling on this matter.

## Background

The debtor filed a petition for Chapter 13 bankruptcy relief on May 14, 1992. A plan was confirmed on October 9, 1992. The confirmed plan was a three-year plan that paid disposable income to the trustee.

The bankruptcy estate consisted primarily of rental property that the debtor had purchased as a retirement investment. The rents were to be used to pay the trustee under the plan.

Wilkie & Co. (Wilkie) filed this Motion for Relief from the Automatic Stay on August 13, 1993. Wilkie purchased one of the debtor's rental properties on January 15, 1991, at a tax foreclosure sale. The sale date was prior to the filing of the bankruptcy petition. The foreclosure sale was pursuant to an action filed in the District Court of Douglas County, Nebraska, by the county for failure by debtor to pay real estate taxes. Wilkie is seeking relief from the automatic stay to procure an Order of Confirmation of Sale under state law.

The debtor's plan provided for payments to be made to the Douglas County Treasurer, secured creditors, and two classes of unsecured creditors. The debtor's plan does not mention Wilkie's interest in the property, nor did the debtor ever provide Wilkie with any notice of the bankruptcy. As a result, Wilkie was unaware of these proceedings until recently.

## Issues

(1) Whether the automatic stay tolled the running of the Nebraska redemption period; (2) whether the confirmation of the plan subjects Wilkie & Co. to the payment schedule under the plan; and (3) which Nebraska statutory redemption period applies.

## Decision

(1) The automatic stay does not suspend the running of the period of redemption.

(2) The confirmed plan in this case does not bind the purchaser to the payment schedule under the plan.

(3) The Nebraska statutory redemption period of two years from the sale applies and relief is granted.

(4) Relief from the automatic stay is granted.

## Discussion

### 1. Tolling of the Period of Redemption

In the Eighth Circuit, 11 U.S.C. § 362(a) does not stay a state law statutory period of redemption of real property from a foreclosure sale. Johnson v. First Nat'l Bank of Montevideo, Minn., 719 F.2d 270 (8th Cir. 1983), cert. denied, 465 U.S. 1012, 79 L. Ed. 2d 245, 104 S. Ct. 1015 (1984). It is well-established that state law determines the property rights of the parties to a bankruptcy case, and the debtor is entitled only to redeem the property within the period established under Nebraska law. "To hold that § 362(a) operates as an automatic stay of the running of the statutory period of redemption would be to enlarge property rights created by state law, a result we view as unjustified by the language of § 362(a) and as unintended by Congress." Id. at 277.

The state law period of redemption is not tolled by the automatic stay. More than sixty days have passed from the date of filing the bankruptcy petition and even considering the statutory extension of time to act authorized by 11 U.S.C. § 108(b)(2), the debtor is entitled to redeem the property only within the period stated under Nebraska law.

2. The Binding Effect of the Confirmed Plan

Nebraska law requires that the debtor redeem the property "by paying to the clerk of the district court the amount found due against the same, with interest and costs to the date of redemption and, in addition thereto, where the land has been sold at sheriff's sale to a purchaser other than the [debtor], any subsequent taxes paid by such purchaser, as shown by tax receipts filed by such purchaser with the clerk of the district court, with interest at the rate specified in Section 45-104.01." Neb. Rev. Stat. § 77-1917 (1990). The law requires that the debtor make a lump-sum payment within the statutory time limit to redeem foreclosed property and does not permit the debtor to make installment payments beyond the period of redemption. A Chapter 13 plan which provides for installment payments over a time period greater than that allowed under state law for redemption does not redeem the property. DeMers v. Federal Land Bank of Omaha (In re DeMers), 853 F.2d 605, 606 (8th Cir. 1988). Bankruptcy plans may not displace state law periods of redemption. Id. at 605.

Even though DeMers dealt with a plan that was not confirmed, the analysis extends to this case. The debtor failed to list Wilkie as a creditor to this bankruptcy proceeding. It is clear from the record that Wilkie did not have notice of this proceeding before the plan was confirmed, nor did this Court have notice of Wilkie's existence. Wilkie is also omitted from the debtor's bankruptcy plan. The debtor provides for the payment of the delinquent taxes to the County Treasurer, but the debtor does not address Wilkie's interest.

Wilkie's interest is an independent property interest, separate from Douglas County's claim. Even though the plan addresses payment of the delinquent taxes to the county, payment to the county does not override Wilkie's right to obtain legal title once the redemption period ends. Wilkie's interest in the property is that of a perpetual lien holder. Neb. Rev. Stat. 77-1912 (1990). Upon the passage of time, Wilkie has the right to a deed representing title to the real property. Since Wilkie had no notice of the case nor an opportunity to object to the plan and since the plan does not provide for satisfaction of Wilkie's interest within the redemption period, Wilkie is not bound by the debtor's plan.

### 3. The Redemption Period

According to the affidavit of an assistant county attorney for Douglas County, Nebraska, Douglas County follows the two-year period of redemption. See Neb. Rev. Stat. §§ 77-1901, 1903 (1990). Under this method, the county attorney brings an action in the Douglas County District Court to foreclose the lien for all taxes then delinquent. After a decree of foreclosure is entered, the court orders that the property be sold at a sheriff's sale. After the expiration of the period of redemption, the court will usually confirm the sale. In this case, the sale was held on January 15, 1991. The county attorney filed a motion to confirm sale on January 20, 1993, after the expiration of the two-year redemption period. The sale has not yet been confirmed because the bankruptcy was filed during the redemption period.

The debtor has responded by acknowledging that a two-year period of redemption is followed in Douglas County. However, the debtor believes that the two-year period represents a minimum period after which the debtor may redeem at any time. In support of his position, the debtor cites the Nebraska Constitution, which states that the period of redemption is "a period of not less than two years from such sales thereof." Neb. Const. art. VIII, § 3. Under the debtor's theory, the debtor may redeem property before the confirmation of the sale simply by filing a bankruptcy plan that provides for installment payments running long past the two-year redemption period. However, the debtor has cited no authority, and the Court has found none that restricts the power of the legislature to limit the redemption period to the minimum time allowed by the Constitution. The legislature has enacted the two-year redemption period in Section 77-1901, 1903 (1990). As discussed above, the debtor must pay a lump-sum payment to redeem and may not make installment payments. Therefore, the debtor only had two years from and after January 15, 1991, to redeem the property. The plan did not provide for a full redemption payment within two years. The redemption period has expired.

### Conclusion

The debtor had two years from January 15, 1991, to redeem the property by payment pursuant to Nebraska statutes. He failed to redeem. The automatic stay did not extend the redemption period. The confirmed plan did not deal with Wilkie's rights. The debtor has no equity, but only bare legal title. Relief from the automatic stay is granted to Wilkie to permit confirmation of the sale and conveyance of title to Wilkie.

Separate journal entry to be entered.

DATED: November 19, 1993

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[X] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

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| DEBTOR(S) | ) | |
| | ) | CH. 13 |
| | ) | Filing No. |
| Plaintiff(s) | ) | |
| vs. | ) | JOURNAL ENTRY |
| | ) | |
| | ) | |
| | ) | DATE: November 23, 1993 |
| Defendant(s) | ) | HEARING DATE: September 9, 1993 |

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Wilkie & Co.

APPEARANCES

Dennis Martin, Attorney for Wilkie & Co.
Richard A. Rowland, Attorney for debtor

IT IS ORDERED:

Motion for relief from the automatic stay is granted. See memorandum this date.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[X] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.