

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

LEONARD C. GOWEN,

DEBTOR

CASE NO. BK83-961

MEMORANDUM OPINION

This matter came on for final hearing on the motion filed by Hazel Gowen requesting the Court to order the Trustee to abandon real property to the movant, Mrs. Gowen, the contract seller. The matter was heard before Timothy J. Mahoney in Omaha, Nebraska, on August 21, 1985. The debtor, Leonard C. Gowen, did not appear in person or by counsel. The Trustee, John A. Wolf, did not appear, but was represented by counsel, Donald L. Swanson. The movant, Hazel Gowen, appeared and was represented by attorneys Richard N. Berkshire and Robert Zelinsky.

The debtor filed a petition for relief under Chapter 7 of the United States Bankruptcy Code on June 3, 1983.

The evidence shows that the debtor and his spouse purchased the real estate in question from debtor's mother and father on June 30, 1979. The purchase was by installment contract and the purchase price was \$268,000. On April 14, 1983, the debtor was in default, on the land contract payments in the amount of \$31,509. The contract balance was \$242,000 plus accrued interest of \$12,863.51. On that date the debtor and his spouse reconveyed their interest in the land to debtor's mother, Hazel Gowen, his father having died prior to April 14, 1983. Debtor filed his Chapter 7 petition on June 3, 1983. On April 26, 1984, Trustee filed a Complaint to set aside the conveyance of the land. The Complaint alleged the reconveyance was with intent to hinder, delay or defraud creditors under 11 U.S.C. §548.

Following trial on April 3, 1985, Judge Crawford found that the conveyance from debtor to his mother was void and granted the Trustee the power to sell the land free and clear of interests of Hazel Gowen, Leonard Gowen and his spouse, Maxine Gowen. Judge Crawford further ordered that the interests of Hazel Gowen, Leonard Gowen and Maxine Gowen attached to the proceeds of such sale.

The moving party, Hazel Gowen, then filed a Motion for Relief from the Automatic Stay of 11 U.S.C. §362; Motion to Require Trustee to Sell Property; and this Motion for Abandonment.

The Motion for Relief was overruled after hearing on June 7, 1985. The Motion to Require Sale was overruled following hearing on July 16, 1985. On July 16, 1985, this Motion for Abandonment was set for trial.

The Trustee apparently believed and the Court agreed, that at the time of the reconveyance of the land to Hazel Gowen in April of 1983, the value of the land was in excess of the amount due Mrs. Gowen on the contract. Therefore, the transfer to Mrs. Gowen kept a valuable asset away from the Trustee.

Now, however, the evidence is clear that the value of the land is \$159,000 and the amount due Mrs. Gowen is \$242,000. She feels that the Trustee has no interest in the land or the contract that could benefit the estate.

On the other hand, the Trustee argues that Mrs. Gowen participated in a fraudulent conveyance in 1983 and, therefore, the Court should not require the Trustee to abandon the property. Instead the Trustee argues that the land should be held by the estate for an indefinite time until, perhaps, land prices increase to the point that there is equity and a benefit will accrue to the estate.

The land is subject to a lease to a tenant. Annual lease payment is \$24,000, payable in two \$12,000 installments each year. The second payment of \$12,000 for 1985 is due in November, 1985. The lease was entered into by Mrs. Gowen in 1983 and terminates in 1988. Therefore, the tenant will pay \$12,000 in 1985, \$24,000 in 1986 and 1987 for a total future payment of \$60,000.

The Trustee claims that the estate has the right to collect these lease payments, but that the estate would not be required to pay Mrs. Gowen anything for the use of the land, pay taxes or any other expense of maintaining the premises. I disagree. Pursuant to Judge Crawford's order of April of 1985, the Trustee now holds the interest of the debtor in the installment contract. If the Trustee desires to obtain the benefits of such ownership interests, it must comply with 11 U.S.C. §365 which states in part:

(a) . . .the trustee, subject to the court's approval, may assume or reject any executory contract. . .

(b)(1) If there has been a default in an executory contract. . .the trustee may not assume such a contract. . .unless, at the time of the assumption . . .the trustee--

(A) cures or provides adequate assurance that the trustee will cure such default

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract. . . , for any actual pecuniary loss to such party resulting from such defaults; and

(C) provides adequate assurance of future performance under such contract or lease.

The contract between debtor and Mrs. Gowen has many years to run. It is in default and was in default at the time of filing the petition. The land is worth less than the amount due on the contract. In order to obtain the benefit of lease payments, the Trustee must comply with 11 U.S.C. §365 and cure the default and provide adequate assurance of future performance.

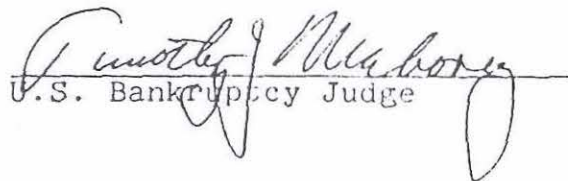
The Trustee further argues that having only obtained the right to sell the land in April, 1985, it has not had sufficient time to obtain a buyer and, therefore, should be permitted to hold the land until it does obtain a buyer. However, the Trustee does not dispute the land value or the amount due on the installment contract. The balance is \$242,000. The land value is \$159,000. The Trustee provided no evidence that there are buyers in the market willing to assume a \$242,000 land contract for the privilege of owning land worth \$159,000.

The burden is on the moving party to show that the property it desires the Trustee to abandon is burdensome to the estate or that it is of inconsequential value and benefit to the estate. 11 U.S.C. §554(b). In this case, the moving party has met the burden. The contract balance far exceeds the value of the land. To obtain the benefits of the farm lease, the Trustee would be required to cure the default and assure the seller that the contract terms would be fulfilled. From the evidence it does not appear likely that the Trustee could or would do so. In addition, it appears that the contract assumption would not be in the best interests of the estate.

For the above reasons, the Motion to Abandon Property is sustained.

DATED: September 6, 1985.

BY THE COURT:


U.S. Bankruptcy Judge

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