

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

RONALD WAYNE FRITZ,

██████████ ██████████,

DEBTOR

LEROY ANDERSON, TRUSTEE,

Plaintiff

vs.

CAROL J. FRITZ,

Defendant

CASE NO. BK85-2053

A87-30

MEMORANDUM OPINION

This matter came on for hearing on joint motion of the plaintiff LeRoy Anderson, Trustee, and the defendant, Carol J. Fritz, for summary judgment. The matter was presented for decision on briefs and the pleadings. LeRoy Anderson of Roeder and Anderson, North Platte, Nebraska, represented the trustee, and William H. Sherwood of Sherwood Law Office, Oxford, Nebraska, represented the defendant, Carol J. Fritz.

Facts

There being no factual issue herein, the facts as alleged in the complaint and admitted by the defendant are as follows:

The debtor, Ronald Wayne Fritz, filed in this Court a voluntary petition for relief under 11 U.S.C. Chapter 7 on September 9, 1985. On September 9, 1985, the debtor owned an undivided one-fourth (1/4) interest as a tenant in common of the following-described property:

The East one-half of the Southeast quarter (E 1/2 SE 1/4) of Section 10; all of Section 15, all in township 2 North, Range 30 West of the 6th P.M. in Red Willow County, Nebraska, containing 520 acres more or less. (Hereinafter said property will be described as the "Real Estate").

Further, on September 9, 1985, the debtor was purchasing all other ownership interests in the Real Estate from the other owners pursuant to a Real Estate Installment Escrow Contract. The plaintiff has now sold and liquidated said Real Estate pursuant to 11 U.S.C. §363 for the total sum of \$352,000 and is now holding the net proceeds of such sale in his possession. Plaintiff incurred expenses of sale in the total sum of \$7,466.25 and has realized from said sale the sum of \$344,533.75.

On or about December 17, 1982, the District Court of Red Willow County, Nebraska, entered judgment in case No. 12090 entitled Ronald W. Fritz, Petitioner, vs. Carol J. Fritz, Respondent, dissolving and terminating the marriage of Ronald W. Fritz and Carol J. Fritz and further ordering the debtor to pay alimony in an amount agreed upon by the parties in an "Agreement in Contemplation of Dissolution of Marriage." Further, on the date of the commencement of the aforesaid bankruptcy proceeding, the Real Estate was subject to the control of a receiver appointed on July 22, 1985, by the District Court of Red Willow County, Nebraska, at the instance and request of the defendant pursuant to Nebraska Revised Statute §25-1081 (Reissue 1985).

On December 1, 1986, the undivided three-fourths (3/4) interest as a tenant in common in the real estate which the debtor Ronald W. Fritz was purchasing pursuant to the aforesaid "Real Estate Installment Contract" and the proceeds thereof was subject to the following liens in the following order of priority:

1. First lien in favor of Red Willow County, Nebraska, for real estate taxes. The amount of the lien is three-fourths of the sum of \$5,944.15 which has been fully paid and satisfied by the plaintiff from the proceeds of the sale.

2. Second lien in favor of Elaine Haussler, Marilyn Koch, and Janett France pursuant to the aforesaid "Real Estate Installment Contract" in the total sum of \$4,196.69, with interest thereafter at the rate of \$14.82 per day.

3. Third lien in favor of the United States of America acting through the Farmers Home Administration, U.S. Department of Agriculture, pursuant to a mortgage dated January 13, 1981, reported in Book 126 at page 23 in the Office of the Register of Deeds in Red Willow County, Nebraska. The amount of the lien is three-fourths (3/4) of the total sum of \$55,571.95, including interest thereafter at the rate of \$13.765 per day.

On December 1, 1986, the undivided one-fourth (1/4) interest as a tenant in common held by the debtor in the real estate and the proceeds thereof were the subject of the following liens in the following order of priority:

1. First lien in favor of Red Willow County, Nebraska, for real estate taxes. The amount of the lien is one-fourth (1/4) of the sum of \$5,944.15, which has been fully paid and satisfied from the proceeds of the sale.
2. Second lien in favor of the United States of America, acting through the Farmers Home Administration, U.S. Department of Agriculture, pursuant to a mortgage dated January 13, 1981, reported in Book 126 at page 123 in the Office of the Register of Deeds of Red Willow County, Nebraska. The amount of the lien is one-fourth (1/4) of the total sum of \$55,571.95 including interest thereafter at the rate of \$13.765 per day.
3. Third lien in favor of Carol J. Fritz pursuant to the aforesaid Judgment and Decree of the District Court of Red Willow County, Nebraska, for alimony and all other sums due under the aforesaid Judgment.

As a matter of Nebraska law, the defendant Carol J. Fritz has a third lien on the undivided one-fourth (1/4) interest of the debtor in the Real Estate. The plaintiff has brought this action, and the plaintiff and defendant have joined in a motion for summary judgment in order to determine the validity of any lien that may be held by the defendant on the subject Real Estate.

Issue

Does the defendant have a judgment lien on the remaining three-fourths (3/4) interest in the real estate which the debtor was purchasing pursuant to the aforesaid Real Estate Installment Contract, and if so, is the lien avoidable as a preference pursuant to 11 U.S.C. §547(b)?

Decision

Defendant does have a judgment lien by virtue of the order of the District Court of Red Willow County, Nebraska, dated July 22, 1985, appointing a receiver of the Real Estate. However, the lien is avoidable as a preference pursuant to 11 U.S.C. §547(b).

Conclusions of Law

11 U.S.C. §547(b) states in pertinent part as follows:

"Except as provided in sub-section (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

1. to or for the benefit of a creditor;
2. for or on account of an antecedent debt owed by the debtor before such transfer was made;
3. made while the debtor was insolvent;
4. made (A) on or within 90 days before the date of the filing of the petition;

It is established in Nebraska law that the lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past-due installments but also as security for installments to fall due in the future. Action Realty Company vs. Miller, 191 Neb. 381, 215 N.W.2d 629 (1974); Nygren vs. Nygren, 42 Neb. 408, 60 N.W. 885; Wharton vs. Jackson, 107 Neb. 288, 185 N.W. 428; Lynch vs. Rohan, 116 Neb. 820, 219 N.W. 239. It is also established that the interest of a vendee under the contract to purchase where no deed has been delivered is an equitable one which may be subjected to the judgment of a creditor of the vendee by appropriate proceedings. Action Realty Company vs. Miller, *supra*; 92 C.J.S., Vendor and Purchaser, Section 315, page 205; 49 C.J.S., Judgments, Section 480b, page 920; Rosenfield vs. Chada, 12 Neb. 25, 10 N.W. 465; Nessler vs. Neher, 18 Neb. 649, 26 N.W. 471; Nowka vs. Nowka, 157 Neb. 57, 58 N.W.2d 600. The debtor's interest in the three-fourths (3/4) interest in the real estate that he was purchasing pursuant to a real estate contract was an equitable one. Therefore, the defendant's judgment lien did not arise automatically but required some "appropriate proceedings" on her part. This she did by filing a motion on July 15, 1985, for the appointment of a receiver for the aforesaid real estate, which receiver was appointed on July 22, 1985. Defendant does have a lien, but it arose with the order appointing the receiver on July 22, 1985. Thus, the lien is avoidable because it falls under §547(b) in that the order creating the lien was for the benefit of the defendant, a creditor of the debtor; the order was for or on account of an antecedent debt owed by the debtor before the order was entered; the order was made while the debtor was insolvent; and the order was made and entered within 90 days before the date of the filing of the voluntary petition for relief by the debtor on September 9, 1985.

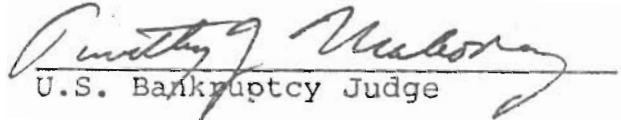
Therefore, the Court finds that the defendant has a third lien for all proceeds remaining from the sale of the undivided one-fourth (1/4) interest which the debtor owns in the real estate; that the defendant has a lien on the undivided three-fourths (3/4) interest in the real estate which the debtor was purchasing pursuant to the aforesaid real estate installment contract; and that the lien on the three-fourths (3/4) interest is avoidable pursuant to 11 U.S.C. §547(b).

This Court concludes that the third lien on debtor's one-fourth (1/4) interest is valid and must be recognized by the trustee in any distribution. However, the trustee has successfully avoided the defendant's lien on the three-fourths (3/4) interest of the debtor.

Separate Journal Entry to be entered.

DATED: February 12, 1987.

BY THE COURT:


U.S. Bankruptcy Judge