

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
THURSTON CORPORATION,)	CASE NO. BK77-0-356
BANKRUPT)	
MARK L. LAUGHLIN, TRUSTEE,)	
Plaintiff)	
vs.)	
COMMUNITY HOUSING, INC.,)	
d/b/a BECHER CURRY CO.,)	
Defendant)	

Appearances: Steven C. Turner, Attorney
1400 One First Nat'l. Center
Omaha, Nebraska 68102
and
Mark L. Laughlin, Attorney
1400 One First Nat'l. Center
Omaha, Ne. 68102
for the plaintiff

Paul Festersen, Attorney
10250 Regency Circle
Omaha, Nebraska
and
Mark M. Rhodes, Attorney
1130 First Nat'l. Bank Bldg.
Omaha, Nebraska 68102
for the defendant

James B. Gessford, Attorney
1806 First Nat'l. Bank Bldg.
Lincoln, Nebr. 68508
for other claimants

MEMORANDUM OPINION

Mark L. Laughlin, the Trustee in Bankruptcy for Thurston Corporation, in this proceeding objects to the claim filed by Community Housing, Inc., and also counterclaims against Community Housing, Inc., for a judgment of \$44,609.00. By the order on pretrial conference, the parties agreed that the following may be accepted as established facts for the purpose of this case only:

"1. That Thurston Corporation, the bankrupt in these proceedings, on the 15th day of June, 1960 was the owner of the following described property (hereinafter referred to as the "Penney Building"):

Lot Five (5) and the West Fourteen (14) feet of Lot Six (6), Block Fifty-Nine (59), Original City of Columbus, Platte County, Nebraska, as surveyed, platted and recorded.

"2. On or about June 15th, 1960 Thurston Corporation executed its promissory note in the amount of \$250,000.00 to Becher Hockenberger Chambers Company and executed a Real Estate Mortgage covering the Penney Building, a true and correct copy of which note is Exhibit 1 and a true and correct copy of which mortgage is Exhibit 2. That the consideration for such note and mortgage was fully disbursed to Thurston Corporation by the mortgagee. That the promissory note and mortgage was assigned by the mortgagee to Community Housing Inc., d/b/a Becher Curry Company.

"3. On July 10, 1975 Community Housing, Inc. d/b/a Becher Curry Co. instituted a mortgage foreclosure action in the District Court of Platte County, Nebraska, against Thurston Corporation, the Bankrupt to foreclose the mortgage referred to in paragraph 2 hereof, a true and correct copy of the petition in foreclosure being Exhibit 3. Such foreclosure proceeding appears at Doc. 12, Page 261 of the records of the District Court of Platte County, Nebraska and is hereinafter referred to as 'the foreclosure proceeding'.

"4. On December 19, 1975 a Decree of Foreclosure was entered in the foreclosure proceeding, a true and correct copy of which is Exhibit 4.

"5. That on or about March 23, 1976 the District Court of Platte County, Nebraska entered its Order in the foreclosure proceeding, a true copy of which is Exhibit 5, appointing the First National Bank and Trust Company of Columbus, Nebraska as receiver for the Thurston Company to hold and receive the rents and profits of the Penney Building.

"6. On March 16, 1977, the Sheriff of Platte County, Nebraska conducted a sale of the Penney Building pursuant to the Decree of Foreclosure referred to above.

"7. There was only one bid at the foreclosure sale, that being the bid of Community Housing, Inc. in the amount of One Hundred Fifty Seven Thousand Dollars (\$157,000.00). That Exhibit 6 is a true and correct copy of the Return to Order of Sale made by the Sheriff of Platte County, Nebraska.

"8. On March 29, 1977 Thurston Corporation filed a voluntary petition in bankruptcy in the United States District Court for the District of Nebraska which proceeding (hereinafter referred to as 'the bankruptcy proceeding') appears at BK. NO. 77-0-356 of the records of this court, a true and correct copy of such petition being Exhibit 7.

"9. On March 30, 1977 a 'Suggestion of Bankruptcy' was filed in the foreclosure proceeding, a true and correct copy of such document being Exhibit 8.

"10. On March 30, 1977 a pretrial conference was held in such foreclosure proceeding in the District Court of Platte County, Nebraska and was attended by counsel for the bankrupt and counsel for Community Housing, Inc. The Platte County District Court in the Pretrial Order noted the 'Suggestion of Bankruptcy' and continued the

pretrial. Exhibit 9 is a true and correct copy of the Order continuing the pretrial conference.

"11. On April 1, 1977 a hearing was held in such foreclosure proceeding in the District Court of Platte County, Nebraska. That Exhibit 10 is a true and correct copy of the Order that was entered as a result of such hearing, the same being dated April 1, 1977 and having been filed April 4, 1977.

"12. That on or about April 8, 1977 the District Court of Platte County, Nebraska entered an Order in the foreclosure proceeding, a true and correct copy of which is Exhibit 11, and, pursuant to such Order the receiver, First National Bank and Trust Company, paid over to Community Housing Inc. d/b/a Becher Curry Company the sum of Forty-Four Thousand Six Hundred Nine Dollars (\$44,609.00).

"13. That on or about April 12, 1977, by Order entered in the bankruptcy proceeding, Mark L. Laughlin was appointed Trustee for Thurston Corporation, Bankrupt, and thereafter qualified as such by accepting such office and posting the bond fixed by the Court. The Trustee had neither actual knowledge nor notice of the hearings or orders described in paragraphs 11 and 12.

"14. That Exhibit 12 is a true and correct copy of the Sheriff's deed executed and delivered by the Sheriff of Platte County, Nebraska in the foreclosure proceeding.

"15. That Blacker Printing Company is a wholly owned subsidiary of Community Housing Inc. and William A. Curry, III. is an officer of both Community Housing, Inc. and Blacker Printing Co.

"16. On November 2, 1977 William A. Curry, III. prepared and executed a financial statement on behalf of Blacker Printing Co. which indicated the Penney Building had a value of Three Hundred Sixteen Thousand Dollars (\$316,000.00), a true and correct copy of the financial statement is Exhibit 13.

"17. William A. Curry, III. on behalf of Blacker Printing Co., Inc. presented said financial statement to Equitable Savings & Loan Association for the purpose of securing a loan.

"18. The rent derived from the Penney Building did not significantly increase between March 29, 1977 and November 2, 1977 and no significant improvements were made to the premises between March 29, 1977, the time of the mortgage foreclosure sale and November 2, 1977."

In summary, prior to bankruptcy, Community Housing, Inc., instituted a foreclosure action against real estate owned by Thurston Corporation. While that proceeding was pending, a receiver was appointed pursuant to authority contained in the mortgage to collect the rents and profits from the building involved. The building involved was located in Columbus, Nebraska, and was known as the "Penney Building" because it was under lease to the J. C. Penney Company. On December 19, 1975, a decree of foreclosure was entered in the foreclosure proceeding. Pursuant to that decree, the sheriff conducted a sale of the Penney Building on March 16, 1977. Community Housing, Inc., submitted the only bid at the foreclosure sale, which bid was in the amount of \$157,000.00.

On March 29, 1977, Thurston Corporation filed its voluntary petition in bankruptcy. Thereafter, without making the trustee in bankruptcy a party to the foreclosure proceeding, the District

Court of Platte County, Nebraska, entered an order confirming the sale and thereafter entered an order directing the receiver to pay over to Community Housing, Inc., the sum of \$44,609.00 which had been collected by the receiver as rents.

At the time of the foreclosure decree, there was due Community Housing, Inc., the sum of \$292,741.00. Community Housing, Inc., applied the \$157,000.00 which it bid at the foreclosure sale and the \$44,609.00 in rents which it received on the indebtedness and filed a proof of claim in this proceeding for \$91,132.00, the same being the amount of the deficiency which it claims. The trustee objected to the claim on the basis that the actual value of the property which Community Housing obtained by reason of its purchase at the sheriff's sale was in excess of the indebtedness due it and counterclaimed for a return of the \$44,609.00 in rents.

A threshold question is whether or not this Court is bound by determination by the State foreclosure court that the bid price at the foreclosure sale represented a fair value under the circumstances and conditions of the sale, and that a subsequent sale would not realize a greater amount. Earlier in this proceeding, Community Housing, Inc., filed a motion for summary judgment on the basis that, as a matter of law, the state court's determination of the foregoing was binding on this Court. In a prior memorandum opinion and accompanying order, (filings 56 and 57), this Court concluded that it was not bound in this case by the state court's prior determination and was under a statutory duty to reexamine the amount of the claimed deficiency. Because the reasons for that conclusion are set forth in the prior memorandum opinion, they will not be set forth again here.

As a result, the main issue in dispute concerning the present litigation is the fair market value of the Penney Building on the date of the sheriff's sale, that being March 16, 1977. Having heard the evidence and observed the witnesses, this Court's conclusion is that the fair market value of the Penney Building on March 16, 1977, was \$170,000.00. Factors which enter that conclusion are the lease which provided a 2.7% of gross sales as the rental with a minimum rental of only \$18,000.00 a year, the fact that the lease contained no tax or utility escalation clauses, the fact that the Penney Company had the option under the lease to require the landlord to complete a second story on the building at the landlord's expense, the possibility that a large shopping center might be built in an outlying area which might attract Penneys to the shopping center with the result that its downtown operation in the present premises would be terminated (which would leave the landlord with only the minimum annual rental income) and the general condition of commercial property in the downtown Columbus area at the time which indicated there were generally vacancies in commercial property available.

The last argument by the trustee in bankruptcy concerns the trustee's counterclaim for the \$44,609.00 in rents which were paid by the receiver to Community Housing, Inc. The trustee's position is that there is nothing in the mortgage which gives an assignment to the mortgagee of the right to receive the rental income to apply on the indebtedness due it. There is included in the mortgage a provision expressly providing that if a foreclosure is commenced, the plaintiff shall be entitled to the appointment of a receiver to take possession of the premises, to protect the premises and collect rents, issues and profits.

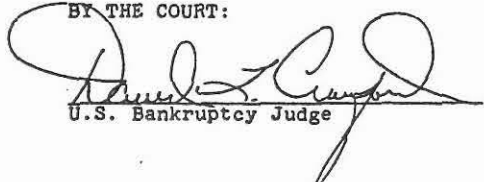
In Jacobs vs. Gibson, 9 Neb. 380, the Nebraska Supreme Court held that when there is a breach of a mortgage which gives rise to the right of foreclosure, if the property is of inadequate security the mortgagee has an equitable lien upon the rents and profits to the extent necessary to satisfy the debt. Jacobs was a case in which the Nebraska Supreme Court assumed there was no express provision in the mortgage regarding the right to possession of the property. Jacobs was cited with approval in Federal Farm Mortgage Corporation vs. Ganser, 146 Neb. 635, 20 N.W.2d 689 (1945). Accordingly, this Court concludes that Community Housing, Inc., having inadequate security in the real estate, had an equitable lien on the rents and profits held by the receiver pursuant to §25-1531, R.R.S. 1943, reissue of 1975. In addition, this Court concludes that labeling the mortgagee's right as an equitable lien does not make it vulnerable under §60a(6)[11 U.S.C. §96a(6)] because the mortgage itself was filed of record on June 28, 1960, long before the bankruptcy occurred.

Resulting from the foregoing is the conclusion that the total indebtedness due Community Housing, Inc., at the date of the sheriff's sale was \$292,741.00 and that Community Housing, Inc., received the real estate with a value of \$170,000.00 together with rentals in the amount of \$44,609.00 and that there is due it an unsecured claim in the amount of \$78,132.00.

A separate order is entered in accordance with the foregoing.

DATED: December 27, 1979.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to all attorneys who entered appearances.