

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 JAMES J. KOPECKY,) CASE NO. BK87-2833
)
 DEBTOR) A88-70
)
 ROBERT J. & DOROTHY KOPECKY,) Ch. 7
)
 Plaintiff)
)
 vs.)
)
 JAMES J. KOPECKY, et al.,)
)
 Defendant)

MEMORANDUM

On June 13, 1988, a hearing on the motions to dismiss or abstain filed by Douglas County Bank and Trust Company and by Interior Construction, Inc., was held. Appearing on behalf of Douglas County Bank and Trust Co. were William Switzer and Eric Kruger of Rickerson, Welch & Kruger, Omaha, Nebraska; Robert Yates of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, Nebraska, appeared for Interior Construction, Inc., and Douglas Quinn of McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska, appeared for plaintiffs, Robert and Dorothy Kopecky. At the hearing, the Court ordered the parties to submit legal arguments which the Court has received and reviewed. This memorandum comprises the findings of fact and conclusions of law required pursuant to Bankr. R. 7052.

Statement of Facts

In 1983, Mr. and Mrs. Kopecky became obligors with their son, James J. Kopecky, on a \$60,000 promissory note in favor of American Charter Federal Savings and Loan Association. The note was secured by deed of trust in which Mr. and Mrs. Kopecky conveyed their home in Douglas County and James Kopecky conveyed property in Saunders County to American Charter Federal Savings and Loan Association as trustee and beneficiary. Mr. and Mrs. Kopecky and James Kopecky were the trustors. The loan proceeds were paid to James Kopecky, not to Mr. and Mrs. Kopecky.

FILED
DISTRICT OF NEBRASKA
AT _____
AUG 26 1988
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By _____ Deputy

In 1984, Jimko Construction, Inc., a corporation in which James Kopecky had an interest, executed a \$50,000 note to Douglas County Bank and Trust Company secured by a second mortgage on James Kopecky's property in Saunders County. In 1986, James Kopecky executed a promissory note for \$11,766 in favor of Interior Construction, Inc., (Interior), again conveying a deed of trust in the Saunders property for the benefit of Interior Construction, Inc.

Thereafter, in April, 1987, American Charter Federal Savings and Loan Association assigned to Douglas County Bank and Trust Co., (Bank), the note and deed of trust secured with Mr. and Mrs. Kopecky's home and the Saunders County property. As a result, Bank now held both a first and second position on the property in Saunders County with Interior having third priority.

On September 16, 1987, James Kopecky filed his petition for Chapter 7 relief. His schedules listed Bank's secured claim on the Saunders County property as \$115,000 and listed the value of the property as \$115,000. Interior's claim was scheduled as unsecured, evidenced by a judgment. Mr. and Mrs. Kopecky were not listed as creditors on his schedules nor were they included on the matrix accompanying the petition. On October 21, 1987, the Chapter 7 trustee filed a notice of intent to abandon the Saunders County property. This notice was not approved by the Court nor served on James Kopecky's creditors. In late 1987 Bank declared a default on the promissory note it had received from American Charter Federal Savings and Loan Association and initiated a transfer of Mr. and Mrs. Kopecky's Douglas County home as provided by the deed of trust. Bank did not include the Saunders County property in this action.

At that point Mr. and Mrs. Kopecky initiated an adversary action before this Court requesting that the Court enjoin the conveyance of their home on a marshaling of assets theory. Mr. and Mrs. Kopecky wanted the Court to order Bank to transfer the Saunders County property - in lieu of their home - as satisfaction for the debt. The Court denied this request, Kopecky v. Douglas County Bank & Trust Co., No. A87-443, slip op. (Bankr. D. Neb. Jan. 26, 1988), but did find that Mr. and Mrs. Kopecky were creditors of James Kopecky as they possessed a contingent claim against him. Id. at 3.

To prevent the transfer of their home, on or about March 15, 1988, Mr. and Mrs. Kopecky paid to Bank the debt owed. Upon receipt of payment, rather than assigning its interest as first position lienholder on the Saunders County property to Mr. and Mrs. Kopecky, which Mr. and Mrs. Kopecky requested, Bank conveyed the deed of trust covering the Saunders County property to the trustor, James Kopecky. If Bank had assigned its interest on the Saunders County property to Mr. and Mrs. Kopecky, Mr. and Mrs. Kopecky would now hold first position on the property. Instead, Bank's conveyance of the deed to James Kopecky extinguished Bank's

first position. However, because Bank also stood in second position on the Saunders County property, Bank's second position advanced to first, and Interior's third position advanced to second.

On April 19, 1988, James Kopecky consented to relief from the automatic stay on the Saunders County property in favor of Bank and any other creditor having an interest in the property. The consent was not served on trustee or on Mr. and Mrs. Kopecky. On April 22, 1988, the Court ordered the relief requested. The Order was not served on Mr. and Mrs. Kopecky.

On March 28, 1988, Mr. and Mrs. Kopecky filed the present adversary proceeding, asserting that the Court has jurisdiction pursuant to 28 U.S.C. § 157(c)(1). For their first cause of action, Mr. and Mrs. Kopecky request a judgment of \$65,762.71 plus costs against James and Jeanette Kopecky and James Stumpf, Trustee, and request that their first priority deed of trust lien be foreclosed and adjudged a first lien on the Saunders County property. They further request that, if payment is not made to them within twenty days, the Court order the property sold.

As a second cause of action, Mr. and Mrs. Kopecky contend that Bank wrongfully conveyed the Saunders County property to the trustors rather than assigning Bank's interest to Mr. and Mrs. Kopecky pursuant to 11 U.S.C. § 509. They claim that Bank's unreasonable conduct justifies equitable subordination of Bank's claim to that of Mr. and Mrs. Kopecky's claim pursuant to 11 U.S.C. § 510.

Both Bank and Interior filed motions to dismiss or abstain, suggesting that the Bankruptcy Court does not have jurisdiction over issues which are not substantially and directly related to the bankruptcy estate or its administration. Because the trustee has abandoned the Saunders County property, it is not part of the bankruptcy estate. They also argue that, if the Court does not dismiss for lack of jurisdiction, the Court should abstain as the District Court of Saunders County is the proper forum to determine priority of liens and to foreclose these liens.

Mr. and Mrs. Kopecky argue that the Court does have jurisdiction to determine the validity and priority of a lien. They point out that jurisdiction was not contested in the Court's earlier decision, Kopecky v. Douglas County Bank & Trust Co., and that the present complaint relies in some part on the effect of that decision. Notwithstanding other bases for jurisdiction, they claim that the Court has jurisdiction to enforce or implement its prior decision pursuant to 11 U.S.C. § 105.

Discussion

The motions to dismiss Mr. and Mrs. Kopecky's first cause of action, to the extent it requests the Court to initiate foreclosure, are sustained. Foreclosure is a state law action which this Court will not entertain.

The motions to dismiss or abstain are overruled in both causes of action as they relate to ascertainment of lien priority, to the applicability of 11 U.S.C. §§ 509 and 510 and to interpretation of the Court's earlier memorandum.

Mr. and Mrs. Kopecky were creditors of James Kopecky at the time he filed his petition but did not have notice of the abandonment by the trustee of the Saunders County property. Without notice, they were denied the right to object. Bankr. R. 6007. Thus, with regard to Mr. and Mrs. Kopecky, the abandonment is not effective, and the Saunders County property remains in the bankruptcy estate. Moreover, if the payment by Mr. and Mrs. Kopecky extinguished Bank's \$60,000 first lien on the Saunders County property, as Bank purports, then the value of the remaining liens totals approximately \$62,000. This amount is less than the \$115,000 value of the property, and James Kopecky would retain equity in the property which could benefit the estate. Therefore, abandonment is not appropriate until this proceeding is resolved.

Mr. and Mrs. Kopecky's complaint arises under 11 U.S.C. § 509 and 510 and affects property of the estate. It is, thus, a core proceeding arising under Title 11. 28 U.S.C. § 157(b)(1). Even though the complaint did not allege jurisdiction under 28 U.S.C. § 157(b)(1), the Court may, on its own motion, determine whether a proceeding is a core proceeding. 28 U.S.C. § 157(b)(3).

The Saunders County property remains property of the estate; accordingly, Mr. and Mrs. Kopecky's complaint affects the administration of the estate. 28 U.S.C. § 157(b)(2)(A). Further, the complaint requests the Court to determine whether Mr. and Mrs. Kopecky's lien is valid, and, if so, its priority. 28 U.S.C. § 157(b)(2)(K). Because the Court has found jurisdiction based on 11 U.S.C. § 157(b)(2), the Court will not address 11 U.S.C. § 105.

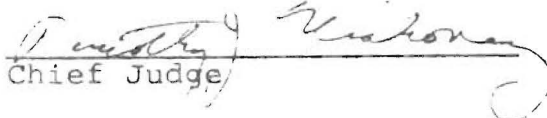
The Court recognizes that neither the absence of notice nor the propriety of the abandonment was raised in the legal arguments. Nevertheless, in order to reach a correct resolution of the instant motions, Mr. and Mrs. Kopecky's rights in James Kopecky's bankruptcy case are relevant and must be considered. The Court's Order for Relief on the Saunders County property in James Kopecky's bankruptcy case is stayed pending the outcome of this proceeding. In his consent to relief James Kopecky states that he "does not have any equity in the [Saunders County] Property." Again, pending the outcome of this proceeding, James Kopecky's statement may not be correct. After a hearing on the merits, either by evidentiary presentation or legal argument, the

Court will reconsider the grant of relief from the automatic stay.

Defendants have ten days from the filing of this memorandum to serve an answer. A separate journal entry will be entered this date.

DATED: August 25, 1988.

BY THE COURT:


Chief Judge

cc: James J. Stumpf