



UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )

ROY NUTTELMAN, )

CASE NO. BK85-1062

DEBTOR )

A85-307

ROY NUTTELMAN; )  
CECILIA NUTTELMAN, )  
Trustee of L & M Enterprise Trust, )

Plaintiff )

vs. )

MEMORANDUM OPINION  
AND ORDER

STROMSBURG BANK of STROMSBURG, )  
DENNIS R. JULCH, JEANNE HUFF, )  
JOHN M. BROWER, and )  
ROBERT MILLER, )

Defendant )

MEMORANDUM OPINION

These matters came before the Court on various motions on February 3, 1986. Roy Nuttelman appeared on his own behalf; Cecilia Nuttelman appeared as Trustee of L & M Enterprise Trust; James Papik appeared on behalf of Stromsburg Bank; Thomas Penke appeared on behalf of defendant Julch; Vincent Valentino, County Attorney of York County, Nebraska, appeared on behalf of defendants Miller and Huff; Sharon Lindgren of the Office of the Nebraska Attorney General appeared on behalf of defendant, the Honorable John Brower, Nebraska District Court Judge.

Set for hearing on February 3 were motions to dismiss filed by Stromsburg Bank, motion to dismiss by defendant Julch and motion for summary judgment filed by the plaintiffs. Although not set for hearing on February 3 and not actually heard on that date, two other motions will be considered and ruled upon in this order. Those motions are the motion for judgment on the pleadings filed on behalf of defendants Miller and Huff, Sheriff and Clerk in York County, respectively, and motion to dismiss filed by defendant Judge Brower. These motions will be considered and ruled upon

because they are basically the same as the motions which were heard on February 3 and the ruling entered by this order will determine this case with regard to all of the defendants.

Plaintiff Roy Nuttelman is an individual Chapter 7 debtor. Cecilia Nuttelman is Roy Nuttelman's wife and is the trustee of an entity identified as L & M Enterprise Trust. The plaintiffs filed this adversary proceeding on October 17, 1985, alleging among other things that plaintiff Nuttelman filed his bankruptcy petition on May 9, 1985, and on that date and for many years prior to that date he had resided upon certain real property located in York County, Nebraska.

Plaintiffs allege that since November of 1978 the real estate had been owned by L & M Enterprise Trust with Cecilia Nuttelman as Trustee.

The complaint further states that "the defendant's without having obtained from this Court a modification of the automatic stay afforded by 11 U.S.C. §362, proceeded to request for a writ of assistance to oust plaintiff Roy Nuttelman from said property on May 29, 1985, and the defendant Judge John M. Brower of the District Court of York County, Nebraska, signed and filed on May 30, 1985, an Order for Clerk of York County, Neb., District Court to issue Writ of Assistance to York County Sheriff."

The complaint goes on to state that the property was sold for \$115,000 by judgment without benefit of a foreclosure action in the State Court by defendant Miller through an order to execute by defendant Huff.

Defendant Julch had filed a warranty deed as grantee of said property on May 7, 1985, two days prior to the petition in bankruptcy.

Plaintiffs allege that the Writ of Assistance referred to above was issued even though the Judge and the Clerk and the Sheriff and the Bank and Julch were aware of the bankruptcy filing. The plaintiffs allege that because of the issuance of the Writ of Assistance the automatic stay of §362 of the Bankruptcy Court was violated and as a result of the violation the Writ of Assistance, the previously filed Warranty Deed, and the Sheriff's Deed should be set aside and that the plaintiffs should be placed in possession of the real estate they occupied on the date of the filing of the petition in bankruptcy.

The answer filed by defendants Huff and Miller denies that Cecilia Nuttelman as Trustee has the legal capacity to sue and alleges that the plaintiffs' complaint fails to state a claim upon which relief can be granted. In addition, it alleges that the Bankruptcy Court lacks jurisdiction over the subject matter of plaintiff's complaint.

The motion to dismiss filed by the Stromsburg Bank alleges that the plaintiff's complaint does not state a cause of action and that there is an improper joinder of parties in that Cecilia Nuttelman has no standing to bring an action in this Court and finally, that this Court does not have subject matter jurisdiction.

The motion to dismiss filed by Dennis Julch alleges that the complaint does not state a cause of action, there is an improper joinder of parties in that Cecilia Nuttelman has no standing to bring the action and the Court does not have subject matter jurisdiction.

The motion to dismiss filed by John M. Brower alleges that the complaint does not state a cause of action.

The motion for judgment on the pleadings filed by defendants Huff and Miller requests that the case be dismissed for the reason set forth in their answer.

In other words, all of the motions urge the Court to rule that the complaint does not state a cause of action upon which relief can be granted, that there is a misjoinder of parties and that this Court does not have subject matter jurisdiction.

The motion for summary judgment filed by plaintiffs alleges that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

The following will constitute findings of fact, conclusions of law and order.

#### Order

This case is dismissed as to all defendants and the motion for summary judgment by the plaintiff is overruled.

#### Findings of Fact and Conclusions of Law

Cecilia Nuttelman, individually, or as Trustee of the L & M Enterprise Trust is not a debtor and is not a proper party plaintiff in the Bankruptcy Court. Roy Nuttelman is a debtor and does have a right to bring an action in this Court. The complaint alleges that certain actions were taken by all of the defendants, but specifically outlines actions taken by the District Court Judge, the Sheriff and the Clerk concerning the issuance of a Writ of Assistance. The plaintiffs desire that the Court give them possession of property that they once owned because of the actions by the defendants in obtaining a Writ of Assistance.

It is apparent from the complaint that some type of State Court proceeding took place prior to the filing of the petition in bankruptcy by Roy Nuttelman. The result of that State Court

action apparently was a judgment, an execution upon the judgment, a Sheriff's sale, the confirmation of a Sheriff's sale, the issuance of a Sheriff's Deed, the refusal by the debtor to leave the property, the recording of a deed by the eventual purchaser and then the filing of the bankruptcy petition, the issuance of the Writ of Assistance, and eventually the filing of a motion for the relief from the automatic stay in the Bankruptcy Court and the sustaining of that motion by the Bankruptcy Judge.

At the hearing the Court heard arguments by the parties concerning the facts and the law and the Court has reviewed the briefs, affidavits and pleadings in the file.

The plaintiffs want this Court to retry one or more cases that have been previously tried in State Court and resulted in the entry of a judgment against Roy Nuttelman. The plaintiffs also want this Court to set aside a Sheriff's sale, the order confirming the Sheriff's sale and the recorded deed which was recorded prior to the filing of the bankruptcy petition. This Court has no subject matter jurisdiction to do so. State Court proceedings that took place prior to the filing of the bankruptcy petition are not usually the subject of review by the Bankruptcy Court. In this case the confirmation of the sale according to the information obtained at the hearing, took place in March of 1985, less than 90 days prior to the filing of the bankruptcy petition. The Chapter 7 trustee, had he been notified by the debtor through a review of the debtor's schedules, that the debtor claimed any interest in the real property, might have made a determination under 11 U.S.C. §547 that a preference had taken place by the sale and subsequent confirmation. The Trustee might also have determined that the sale was a fraudulent conveyance under 11 U.S.C. §548. However, the debtor did not list any interest in the property on his bankruptcy schedules and the trustee, therefore, had no reason to believe there was any property interest or that any preference or fraudulent conveyance had occurred.

Even if this Court had subject matter jurisdiction which would enable it to review and perhaps set aside a judgment of the State Court, the complaint still must be dismissed. The plaintiffs request relief that they are not entitled to by virtue of the allegations in the complaint. Perhaps the actions taken by the District Court Judge, the Clerk and the Sheriff as well as the other defendants after the filing of the petition in bankruptcy were in violation of the automatic stay of §362 of the Bankruptcy Code. Even assuming they were in violation (and this Court is not making a determination of that at this time) the remedy could be some type of injunction or some type of financial penalty but the remedy would not be and this Court believes could not be to put the plaintiffs in possession of property which they had lost by virtue of a State Court Judgment and Sheriff's sale which was duly confirmed in the State Court.

Therefore, since this Court does not have jurisdiction to review the State Court proceedings under the pleadings as they now exist and since this Court does not have the authority to put debtors into possession of property they resided upon prior to May 9, 1985, simply because certain defendants may have violated the automatic stay of §362 of the Bankruptcy Code, the complaint does not state a cause of action upon which relief can be granted by this Court. The complaint is dismissed.

DATED: February 12, 1986.

BY THE COURT:

  
U.S. Bankruptcy Judge

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