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see 87:17

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

ROY NUTTELMAN,

DEBTOR

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CASE NO. BK85-1062
Chapter 7

MEMORANDUM OPINION RE MOTION FOR ORDER
CITING STROMSBURG BANK IN CONTEMPT

Trial was held in Lincoln, Nebraska, on February 5, 1986, on motion by debtor to cite Stromsburg Bank for contempt of court for violation of 11 U.S.C. §362(a). The debtor, Roy Nuttelman, appeared pro se. The Stromsburg Bank was represented by James Papik of Osceola, Nebraska.

Facts

In May of 1982 the Stromsburg Bank obtained a judgment on a promissory note against Roy Nuttelman in the District Court of York County, Nebraska.

In October of 1983 the Stromsburg Bank obtained a judgment against Roy Nuttelman and his wife, Cecilia, and others setting aside a real estate conveyance on the grounds that it was made with intent to defraud the Bank.

On February 4, 1985, the Sheriff of York County acting pursuant to a Writ of Execution sold real estate owned by the debtor.

The sale was confirmed on March 18, 1985, and no appeal was taken from the confirmation order.

On May 7, 1985, the Sheriff of York County, Nebraska, issued his Deed to the purchaser and the Deed was filed for record in the York County, Nebraska, Register of Deeds Office on May 7, 1985.

On May 7, 1985, the purchaser conveyed its interest to Mr. Dennis Julch by Warranty Deed filed for record in the Register of Deed of York County, Nebraska, on May 7, 1985. Apparently in anticipation of the transfer and conveyance of the real estate, Dennis Julch filed his application for Writ of Assistance to be

put into possession of the real estate on May 6, 1985. That application was set for hearing on May 10, 1985, and Roy Nuttelman was given notice of the hearing.

On May 9, 1985, Roy Nuttelman filed a voluntary bankruptcy petition in Bankruptcy Court for the District of Nebraska.

On May 10, 1985, the Stromsburg Bank appeared in the District Court of York County in support of its Demurrer filed in response to a lawsuit instituted by L & M Enterprise Trust, plaintiff, in Case No. 13420 against the Stromsburg Bank, Bryce Bartu, McClure Land Unlimited, and Roy Nuttelman, defendants. This case is a separate case from that in which Stromsburg Bank obtained a judgment against Roy Nuttelman.

On May 10, 1985, the District Court of York County, Nebraska, proceeded with the hearing on the application for Writ of Assistance to put Mr. Dennis Julch in possession of the real estate. Stromsburg Bank, by counsel, appeared at said hearing. The debtor, after filing his bankruptcy petition, gave notice to the Bank and to Mr. Julch and to the Judge of the State District Court and alleged that the hearing on the Writ of Assistance scheduled for May 10, 1985, was stayed by the filing of the bankruptcy petition. The Court went forward with the hearing on the Writ of Assistance and on May 30 the Clerk of the District Court issued a Writ of Assistance which was executed by removal of the debtor from possession of the land on July 10, 1985.

On or about May 30, 1985, the Stromsburg Bank filed an application to distribute the proceeds of the Sheriff's sale held by the Clerk of the District Court of York County, Nebraska, pursuant to the prior confirmation order of the Court.

On or about June 4, 1985, the Stromsburg Bank and Dennis Julch jointly filed a motion for relief from the automatic stay provisions of §362(a) of the Bankruptcy Code in the debtor's bankruptcy action. On June 24, 1985, after notice and a hearing, the Bankruptcy Court sustained the motion for relief from the stay filed by the Stromsburg Bank and Dennis Julch.

The debtor appealed the granting of the order authorizing relief from the stay but did not obtain an order of the Court staying the order being appealed.

On July 10, 1985, the Sheriff of York County, Nebraska, proceeded to remove the debtor from possession of the real estate pursuant to the Writ of Assistance issued by the Clerk of the District Court of York County, Nebraska.

On July 12, 1985, the District Court of York County, Nebraska, pursuant to the motion of the Stromsburg Bank for a distribution of the sale proceeds ordered the Clerk of the District Court to distribute the share of the sale proceeds belonging to the Stromsburg Bank.

The debtor filed this motion alleging that the acts of the Stromsburg Bank and others from May 10 forward were in violation of the automatic stay of §362 and that the Bank and others should be found in contempt of Court. The debtors did not properly serve any of the parties accused except for the Stromsburg Bank and trial went forward on the claim against Stromsburg Bank alone.

The debtor alleges that the State Court proceedings, specifically the confirmation hearing and an order purportedly amending the confirmation of sale order and changing the name of the purchaser of the land were irregular. As a result of this irregularity, debtor has alleged that the confirmation of the sale was void and that the debtor continued to have an ownership interest and a possessory interest in the real property on the day the bankruptcy petition was filed on May 9, 1985.

Issues

1. Did the debtor have any ownership or possessory interest in the real estate subject to the judgment and sale on the date the bankruptcy was filed or on May 10, 1985, the date the State Court proceeded with hearing on the request for Writ of Assistance?

2. If the debtor did have some interest in the real estate on May 10, 1985, were the actions of the Bank in violation of the automatic stay of §362?

Decision

On the date that the debtor filed his bankruptcy petition, May 9, 1985, and thereafter, the debtor had no interest in the real estate which had been sold pursuant to judgment and execution. The only interest he had was in the \$6,500 homestead exemption. He, therefore, only had a right to proceeds to the extent of \$6,500.

The Stromsburg Bank did participate in the hearing on May 10, 1985, but its participation in such hearing and in later court proceedings were not in violation of §362, the automatic stay.

Conclusions of Law and Discussion

The Bank obtained a judgment against the debtor in 1982. Under Nebraska law, land within the county where the judgment is entered is bound for the satisfaction of such judgment. Nebraska Revised Statutes §25-1504 (Reissue 1979). If there are not

sufficient goods and chattels of the debtor to satisfy said judgment, the Sheriff may levy upon real estate. R.R.S. §25-1518 (Reissue 1979). All execution sales must be confirmed by the District Court before the sale becomes final. R.R.S. §25-1531 (1985 Supp.). At any time prior to the confirmation of the sale, the debtor has the right to redeem the real estate from the judgment lien and levy by paying the amount of the judgment, plus costs and interest. R.R.S. §25-1530 (Reissue 1979). This right expires upon confirmation of the sale. Legal title passes to the purchaser upon execution and delivery of the sheriff's deed. R.R.S. §25-1533 (Reissue 1979). Pursuant to R.R.S. §25-1533 (Reissue 1979), all interest of the debtor passes to the purchaser upon confirmation and delivery of the sheriff's deed. See Orr v. Broad, 52 Neb. 490, 72 N.W. 850 (1897).

Upon confirmation of an execution sale, the purchaser is entitled to immediate possession of the real estate. Clark and Leonard Investment Company v. Lindgren, 76 Neb. 59, 107, N.W. 116 (1906); Metropolitan Life Insurance Company v. Heany, 122 Neb. 747, 241 N.W. 525 (Neb. 1932); Erwin v. Burke, 133 Neb. 745, 277 N.W. 48 (1938).

The debtor has a claim to the proceeds of the sale of the property if he has the right to a homestead exemption and that claim is limited to the amount of the homestead exemption. R.R.S. §25-1540 and §40-101 (Reissue 1979). The confirmation order establishes the entitlement of the parties to the proceeds of the execution sale. See Fire Association of Philadelphia v. Ruby, 49 Neb. 584, 68 N.W. 939 (1896); Craw v. Abrams, 68 Neb. 546, 94 N.W. 639 (1903).

The applicable portion of 11 U.S.C. §362(a) which is at issue in this case reads as follows:

"...a petition...operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of the property of the estate or of property from the estate or to exercise control over property of the estate;

Under Nebraska law as discussed above, the confirmation of an execution sale vests all title and interest in the real estate sold in the purchaser, leaving the debtor with no interest in the real estate. The debtor is not left with a possessory interest and if the debtor holds over, it is without any legal right to do so. The debtor did not appeal the confirmation of the sale or the purported amendment of the confirmation order. Therefore, on May 9, 1985, when the debtor filed the bankruptcy petition, neither the debtor nor the estate had any interest in the real property and the purchaser or the transferee of the purchaser had the right to request a Writ of Assistance from the District Court. A Writ of Assistance is incidental to the confirmation of the sale and the order for execution of the deed and such Writ of Assistance gives effect to the decree and the judgment. Ervin v. Brunke, 133 Neb. 745, 748; 277 N.W. 48 (1938); Metropolitan Life Insurance Company v. Heany, 122 Neb. 747, 241 N.W. 525 (1932).

Therefore, since neither the debtor nor the estate had any interest in the property, the proceeding concerning the Writ of Assistance is not in violation of the automatic stay.

Further proceedings to request the distribution of the proceeds of sale are also not in violation of the automatic stay. The request by the Bank for an order authorizing distribution of the proceeds of the sale actually could be construed to benefit the debtor because the debtor had a right to \$6,500 of those proceeds, subject to the lien rights of any other creditor.

The debtor has no right to use the bankruptcy laws to attempt to stop State Court proceedings which are directed against property which is not property of the debtor or property of the estate. Actions by a creditor to obtain possession of real property or the proceeds of the sale of real property, neither of which are property of the debtor or the estate, cannot be the basis for a finding of a violation of §362(a) or a finding of contempt of court.

Motion of the debtor is overruled.

Journal entry to follow.

DATED: May 22, 1986.

BY THE COURT:

Ernest J. McDevitt
U.S. Bankruptcy Judge

Copy to:

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