

§ 541(d)
§ 544(a)

Thomas G. Marks v. Peter G. Bock, et al., Adversary No. 89-3185-ELP
In re Marvin W. Albaugh, Case No. 388-00198-ELP7

1/18/90

CEL

Unpublished

The trustee brought this action to determine whether proceeds from the sale of real property subject to a trust deed were property of the estate and to avoid a lien on the proceeds. The defendants were assignees of the trust deed beneficiaries but were not named as payees in the note associated with the trust deed. The defendants asserted a lien on the proceeds.

Although this case was somewhat factually different from Marks v. Hamberger, Adversary Proceeding No. 88-0202 (In re Albaugh, Case No. 388-00198-ELP7) (Bankr. D. Or. Jan. 26, 1989) (Perris, Bankr. J.), the court found the debtor, as a broker in the secondary mortgage market, arranged the sale of the trust deed to the defendants who had invested funds with the debtor as had the defendants in the Hamberger case. The fact that the defendants were not named as note payees was a technicality which would not deny the defendants the protection afforded by § 541(d) to investors in the secondary mortgage market. Relying on the legislative history of § 541(d), the court found that the proceeds were not property of the estate.

P90-1(8)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Case No. 388-00198-P7
)
MARVIN W. ALBAUGH, dba)
G/A Investments Co.,)
)
Debtor.)
_____)
)
THOMAS G. MARKS, as trustee in) Adversary No. 89-3185-P
bankruptcy of the estate of)
Marvin W. Albaugh, dba)
G/A Investments Co.,)
)
Plaintiff,)
)
v.) MEMORANDUM OPINION
)
PETER G. BOCK and SUSAN D.)
EBNER,)
)
Defendants.)

Trustee plaintiff has filed his complaint for lien avoidance and declaratory relief against the defendants. Defendants assert a lien on funds held by Columbia Title Company of Hood River, Oregon which are proceeds from the sale of real property subject to a trust deed

originally issued by grantors Robert and Diane Barkhimer to Albaugh, the debtor, for money loaned to Barkhimers which trust deed was assigned to Clifford and Betty Fredrickson, who in turn at the auspices of debtor assigned it to the defendants. The assignment to the defendants provided that the assignors had "the good right to sell, transfer and assign the same, and the note or other obligation secured thereby, and that there is now unpaid on the obligations secured by said trust deed the sum of not less than \$30,000.00 . . . ". The assignment was recorded.

Defendants assert that they obtained the trust deed as a result of a sale of the trust deed to them with Albaugh as broker who received the \$30,000 as a broker in a secondary mortgage transaction, and that pursuant to 11 U.S.C. § 541(d) the property is not part of the debtor's estate. The trustee contends that the "strong arm" powers of the trustee should entitle the trustee to invalidate the lien pursuant to 11 U.S.C. § 544(a). Albaugh retained possession of the promissory note from Barkhimers, and the trustee now has possession of the note, which was secured by the trust deed now assigned to the defendants.

The parties have submitted the proceedings to the bankruptcy court on cross motions for summary judgment. In open court both counsel agreed that they had no additional evidence to present. This is a core proceeding.

The debtor's operations were well summarized in another adversary proceeding by Judge Perris (Marks, Trustee, v. Hamberger, Adversary No. 88-0202, this court) the facts of which are a part of the record motions in this proceeding stemming from same main cases.

In the Hamberger proceedings the defendant investors, after having placed their money with the debtor, became the named beneficiaries in a trust deed and payees in a promissory note secured thereby. In both cases, the note and other documents were retained by

the debtor to service the loan, although the evidence is that the debtor would give the documents to the "investors" upon request.

The facts in this case differ from the Hamberger case in that the note was in the name of the debtor and not in investors, and there is no evidence that it was endorsed to the defendants, whether by inadvertence or design, although the assignment of the trust deed would imply transfer of the note obligation to the trust deed beneficiaries.

In the Hamberger case a sale and not a loan occurred. (See Memorandum Opinion of Judge Perris in the adversary number 88-0202 in the same main case.) The investor provided money under a receipt from the debtor which directed placing the funds with a trust deed under indicated conditions, which were met.

The placement of the money by Bock and Ebner in this proceeding was pursuant to the same type of receipt and instruction, but the paper trail of the placement of the money differs. The debtor loaned \$30,000 to the Barkhimers November 7, 1985 taking their note and trust deed in debtor's name. December 16, 1985, defendants transferred \$30,000 to debtor "to purchase trust deed, notes, contracts . . .". The record shows that on December 10, 1985, the debtor assigned his interest in the trust deed to Fredricksons and that Fredricksons assigned their interest to defendants on February 11, 1986. The debtor's bankruptcy did not occur until 1988.

The court finds that in these proceedings, although a sale and not a loan occurred, see In re Golden Plan of California, Inc., 829 F.2d 705 (9th Cir. 1986), the question presented in this proceeding is whether on the facts hereof the provisions of section 541(d) exclude the defendants' interest in the proceeds of the sale of the property subject to the trust deed from the debtor's estate as a brokered sale to them of the trust deed in the secondary mortgage market.

On the facts of this proceeding the court finds there was no different intent of the parties from that in the Hamberger proceeding. The same receipt form from the debtor was issued in each instance which indicated the investor's deposit with the debtor was by the terms of the debtor's receipt "to purchase trust deeds, notes, contracts in the amount of Thirty Thousand and no/100 Dollars . . .".

In Hamberger and herein the funds were matched with a trust deed. In each instance, the investor paid in full for the "mortgage" interest, and in each instance the "mortgage" was in existence, not having been paid or foreclosed.

Much is made by the plaintiff of the possession of the note, ordinarily necessary as the only means for perfection of a security interest in notes.

The strong policy of ratable distribution of a debtor's assets in bankruptcy giving rise to the trustee's "strong arm" powers is not stronger than the policy of promotion of the strong secondary mortgage financing market evidenced by the passage of section 541(d) as a new section after a "strong arm" clause long existed.

Hambergers were more careful than these defendants. They had themselves named as note payees and trust deed beneficiaries. Defendants herein did not apparently become note payees unless the trust deed terms be construed to incorporate the terms of a note, and by its form be equivalent thereto, although they were named assignees of the trust deed. However, the color of the creature does not change the body of the chameleon. The intent of the parties was the same - to invest in the secondary mortgage market in which investors are protected by 11 U.S.C. § 541(d).

The leading case cited in most later case reports dealing with the question

thereafter is In re Fidelity Standard Mortgage Co., 36 B.R. 496 (Bankr. S.D. Fla. 1983) cited with approval in In re Standard Mortgage Co., 839 F.2d 1517 (11 Cir. 1983).

To deny the defendants herein the same protection as the Hambergers is inappropriate based on the technical flyspecks in their paper trail.

The legislative history of 11 U.S.C. § 541(d) is persuasive. The remarks of Senator DeConcini at 124 Cong. Rec. S17413, daily ed. Oct. 6, 1978 advised his colleagues:

"Even if a mortgage seller retains for purposes of servicing legal title to mortgages or interests in mortgages sold in the secondary mortgage market, the trustee would be required by section 541(d) to turn over the mortgages or interests in mortgages to the purchaser of those mortgages.

"The seller of mortgages in the secondary mortgage market will often retain the original notes and related documents and the seller will not endorse the notes to reflect the sale to the purchaser. Similarly, the purchaser will often not record the purchaser's ownership of the mortgages or interest in mortgages under state recording statutes. These facts are irrelevant and the seller's retention of the mortgage documents and the purchaser's decision not to record do not change the trustee's obligation to turn the mortgages or interests in mortgages over to the purchaser. The application of section 541(d) to secondary mortgage transactions will not be affected by terms of the servicing agreement between the mortgage servicer and the purchaser of the mortgages. Under section 541(d) the trustee is required to recognize the purchaser's title to the mortgages or interests in mortgages and to turn this property over to the purchaser. It makes no difference whether the servicer and the purchaser characterize their relationship as one of trust, agency, or independent contractor.

"The purpose of 541(d) as applied to the secondary mortgage market is therefore to make certain that secondary mortgage market sales as they are currently structured are not subject to challenge by bankruptcy trustees and that purchasers of mortgages will be able to obtain the mortgages or interests in mortgages which they have purchased from trustees without the trustees asserting that a sale of mortgages is a loan from the purchaser to the seller"

The court in In re Mortgage Funding, 48 B.R. 152 (Bankr. Nev. 1985) at p-155 applies this standard and that of In re Fidelity Standard Mortgage Co., *supra*, in a like proceeding.

In this proceeding the debtor was in the business of brokering and servicing secondary mortgage financing. A part of his income was derived by placing financing with a borrower at a rate of interest greater than that offered to the investor.

In these proceedings the note linked to the trust deed of which the defendants are the assignees was 17% and the amount promised to them by the receipt of the debtor broker was 16%.

Therefore, from the funds in the possession of the title company, disbursement should be made to the trustee according to the terms of the note and trust deed and the trustee shall pay to the debtor's therefrom their interest, and retain the agreed 1% service charge differential. Each party shall bear his or her own costs and attorney fees.

The parties shall settle and submit a separate judgment consistent with this memorandum opinion.

This memorandum opinion contains the court's Findings of Fact and Conclusions of Law and pursuant to Bankruptcy Rule 7052 they will not be separately stated.

DATED this ____ day of January, 1990.

C. E. LUCKEY
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Case No. 388-00198-P7
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MARVIN W. ALBAUGH, dba)
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Debtor.)
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THOMAS G. MARKS, as trustee in) Adversary No. 89-3185-P
bankruptcy of the estate of)
Marvin W. Albaugh, dba)
G/A Investments Co.,)
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Plaintiff,)
)
v.) CORRECTION TO MEMORANDUM
) OPINION
PETER G. BOCK and SUSAN D. EBNER,)
)
Defendants.)

An erratum appears on page 7, line 9, of the Memorandum Opinion entered in the above-captioned case on January 18, 1990. The word "debtor's" should be stricken and the word "defendants" should be substituted.

DATED this ___ day of January, 1990.

C. E. LUCKEY
Bankruptcy Judge