In re Petersen

Case No. 386-02013-H13 8-6-1991
Petersen v. Isaak et al #86-0601-H

The court held that a pre petition foreclosure sale was for less than a reasonably equivalent value under §548 where the bid at the foreclosure sale was about 1/3 of the fair market value of the property. The court set the sale aside and ordered the property re-sold for the benefit of the estate.

P91-29(7)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re RITA HELEN PETERSEN Debtor.	Case No. 386-02013-H13
RITA HELEN PETERSEN, Plaintiff, v. ROY NEWMAN, CHARLES N. ISAAK, FRANCIS ROBERT PETERSEN, ROBERT McSWEENEY, Defendants. AND RALPH BOLLIGER, Defendant and Third Party Plaintiff, v. ROBERT W. MYERS, TRUSTEE, Third Party Defendant.	Adversary Proceeding No. 86-0601-H MEMORANDUM OPINION

This adversary proceeding was filed by the debtor November 15, 1986. The complaint to set aside the sale was combined in

P91-29(7)

AO 72
(Rev.8/82)

one document containing motions to set aside liens on her homestead under 11 U.S.C. §522(f), for leave to borrow money to redeem the property from a sheriff's sale following a mortgage foreclosure on March 23, 1986, and other relief.

Her complaint sought to have the sale set aside for violation of the 11 U.S.C. §362 stay because the confirmation of sale order on May 1, 1986 by the state court was not issued until after her Chapter 13 filing, which filing was on April 22, 1986.

In her complaint, she also sought to have the foreclosure sale set aside under 11 U.S.C. §548 for the reason that the transfer was for less than a reasonably equivalent value to the defendant, Roy Newman.

At the hearing on the motions based on the facts presented at the hearing, the court entered its Memorandum Opinion on February 6, 1987 allowing the debtor to obtain credit under 11 U.S.C. §364(d) to redeem the residence, which had been sold at foreclosure sale to Newman for $19,850.

One Charles N. Isaak held a judicial lien based upon a judgment he had obtained for attorney fees due him from the debtor. He had assigned the judgment to Bonded Credit Co. operated by Newman. When the mortgage foreclosure sale came to Isaak's attention, he borrowed money and provided it to Newman to make the purchase at the sale. Isaak is an attorney. Bonded Credit and Newman were represented by an attorney, Brian W. O'Brien who had been identified in the state court

AO 72
(Rev.8/82)

foreclosure proceedings as also attorney of record for Isaak in a document filed March 26, 1986 signed by both Isaak and O'Brien.

O'Brien and Isaak later became antagonists as to their respective roles. Isaak appeared in the instant proceedings to assert his interest as a creditor of the debtor. He sought relief against Newman and O'Brien also, which the court rejected as not germane to the issues raised in plaintiff's complaint.

The court in the February 6, 1987 memorandum, again on the facts presented at the hearing, avoided the lien of Isaak under 11 U.S.C. §522(f). No appeal was taken from that order, and time for reconsideration has long since passed. It is the court's opinion that Judge Hess' order is therefore the law of the case and final. What relief Isaak may be entitled to, if any, against others outside bankruptcy is not before the court.

After the leave to obtain credit, an attorney, Ralph Bolliger, loaned $22,000 to the debtor to redeem the property and pay real estate taxes. This was pursuant to the Memorandum Opinion and a Declaratory Judgment and Order which provided that the lender should have priority over liens of the debtor's former spouse and one McSweeney.

Thereafter the case and proceedings became a procedural enigma. The State of Oregon Legislature had after the date of the mortgage reduced redemption rights from one year to 180 days.

AO 72
(Rev.8/82)

When the debtor sought to redeem the purchaser refused the redemption funds. The plaintiff debtor persuaded the state court to issue the certificate of redemption and that court ordered the $22,000 paid to the bankruptcy Chapter 13 trustee. Newman obtained relief from the stay of 11 U.S.C. §362 to appeal the state court order. The Oregon Court of Appeals overruled the trial court on the basis that the statutory time reduction was constitutionally applicable to this sale, and that therefore the redemption should fail. That ruling was appealed to the State Supreme Court which held that the Court of Appeals should not have reached the constitutional issue because the redemption procedure was otherwise flawed, causing the same result.

Thus it is the law of the case, again, that the debtor cannot redeem the property, and the borrowed funds are still in the hands of the trustee. The lender Bolliger has been allowed to, and has, intervened in these proceedings.

Trial of these proceedings was therefore held pursuant to a pre-trial order in which the parties joined, although Isaak is not a signatory.

The plaintiff and Bolliger urge that the property was worth at the time of the sale, the time of the debtor's Chapter 13 filing and presently approximately three times the price paid, and that the sale should be set aside, and the property sold to satisfy Bolliger's mortgage, provide $15,000 exemption proceeds to the debtor, and provide a dividend to creditors if

AO 72
(Rev.8/82)

after administrative costs, funds remain.

The court heard the testimony of expert witnesses, the debtor and other witnesses and is convinced that the sale was for less than reasonably equivalent value.

As noted in In re Lampkin, 116 BR 450 (Bktcy. D. Md. 1990), the cases are split on whether the violation of the stay of 11 U.S.C. §362 (the other thrust of the plaintiff) makes the stay void or voidable. Relief may be granted to the violator under §§ 11 U.S.C. §549(c) and §542(c) under appropriate circumstances. Also there exists power to annul the stay. 11 U.S.C.§362(d). See In re Albany Partners, Ltd., 749 F2d 670 (11 cir 1984).

While continuing to urge that the sale was in violation of the stay, the debtor proceeded with conduct indicating waiver of that position by seeking the certificate of redemption and leave to obtain credit to redeem and other conduct.

These treatments of the confirmation of sale order are consistent with waiver or de facto annulment of the stay.

However, the validity of the confirmation of sale after the Chapter 13 filing need not be determined because of this court's ruling on the plaintiff's alternate theory that the sale should be set aside as having been made for an unreasonable equivalent value and voidable under 11 U.S.C. §548.

This is an appropriate inquiry. See In re Taylor, 884 F2d 478 at 486 (9th Cir 1989).

AO 72
(Rev.8/82)

While there is some authority for the proposition that a non-collusive regularly conducted sale precludes consideration of other values and cannot ordinarily be challenged ((see In re Madrid, 21 BR 424 BAP 9th Cir 1982)), this court is persuaded that the thorough analysis by the court in In re Lindsay, 98 BR 983 (Bktcy. S.D. Cal. 1989) is appropriately applied to these proceedings.

There was testimony that the property was sold with no attempt to get the best price possible, but only to cover the mortgage to the State Department of Veterans' Affairs, and that only the minimum statutory notice requirements were met, and the price was far below the reasonably equivalent value of the property. The sale should be set aside.

Both the intervenor and the plaintiff agree that the property should be sold and that distribution of the proceeds should be ordered by the court.

After the foreclosure sale Newman received rent from the plaintiff during the Chapter 13. Plaintiff had to leave the property for medical reasons, and somehow Bolliger took over management and paid expenses and received rentals.

Until the sale proceeds are known, and an analysis of payments to Newman and to Bolliger is made, an order for distribution cannot be framed.

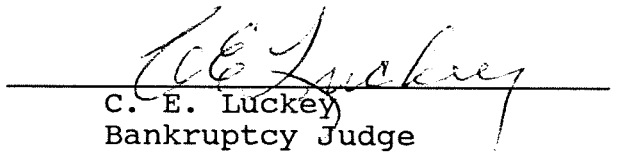
Therefore, consistent herewith a separate order will be entered that the sale be set aside, that the sale of the property be listed with a multiple listing agency, that sale be

AO 72
(Rev.8/82)

subject to confirmation by the court, and that the proceeds be tendered to the Chapter 13 trustee subject to further order of the court for distribution.

This 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 6 day of August, 1991.



C. E. Luckey
Bankruptcy Judge

cc: Ralph Bolliger
Bruce Orr
Magar Magar
Charles Isaak
Brian O'Brien
Robert W. Myers, Trustee

AO 72
(Rev.8/82)