

Sale free and clear of liens  
Benefit to estate

In re Archie and Pamela Walter

697-60419-fra7

9/2/97

FRA

Unpublished

The Debtors' personal residence is encumbered by a first mortgage and by a federal tax lien. A sale of the residence would provide no benefit to the estate or unsecured creditors because the \$4,000 to \$7,000 in remaining equity would go to the Debtors pursuant to their homestead exemption. The Chapter 7 Trustee stated that there are virtually no other assets of the estate. The Trustee filed a motion for authority to sell the property with the proceeds to be distributed pursuant to § 724(b) in the following order: 1) Mortgage holder, 2) Trustee's fee and administrative expenses associated with liquidation of the property (there are no other administrative or priority claims), and 3) to the Debtors for their homestead exemption. The Debtors objected on the grounds that § 724(b) is designed to subordinate a tax lien to the priority claims listed in § 507(a)(1)-(7); since there are no priority claims, other than administrative claims created by the actual sale of the property, the Debtors argue that this is an improper use of § 724(b).

The court phrased the issue as whether it is proper to allow the Trustee to sell estate property free and clear of liens when the benefit of the sale will inure only to a fully secured creditor who has the eventual right to foreclose on the property itself if it were to so choose. Under the circumstances of this case, the court held that a sale would not be proper.

E97-16(5)

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF OREGON

IN RE )  
ARCHIE AND PAMELA WALTER, ) Case No. 697-60419-fra7  
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Debtors. ) AMENDED MEMORANDUM OPINION

The Chapter 7 Trustee filed a motion to settle and compromise a claim held by the Internal Revenue Service (IRS) whereby the Debtors' residence would be sold and the IRS would be compensated from the proceeds. The Debtors objected to the motion and a hearing was held. For the reasons that follow, the Trustee's motion will be denied.

FACTS

The Debtors' residence consists of a mobile home and land on which the Debtors have been living since 1980. It is subject to a federal tax lien which was filed in the original amount of \$27,400 and which Debtors estimate, and the Trustee does not dispute, currently secures a federal tax liability of

1 approximately \$34,000. In addition to the federal tax lien, there  
2 is a mortgage on the property securing an unpaid balance of  
3 \$40,400. The property is valued by the Debtors in their schedules  
4 at \$85,520. Per the Bankruptcy Code and Oregon law, the Debtors  
5 are entitled to a homestead exemption in the amount of \$30,000.  
6 O.R.S. 23.164. According to the Trustee, there is essentially no  
7 other property of the estate.

8 The Trustee filed a motion to settle and compromise the  
9 claim of the IRS<sup>1</sup> whereby the Trustee would sell the residence  
10 free and clear of liens under 11 U.S.C. § 363(f) with the  
11 proceeds being distributed pursuant to 11 U.S.C. § 724(b). The  
12 IRS has agreed to the Trustee's sale.

#### 13 ANALYSIS

14 11 U.S.C. § 724(b) reads as follows:

15 (b) Property in which the estate has an interest and  
16 that is subject to a lien that is not avoidable under  
17 this title and that secures an allowed claim for a tax,  
or proceeds of such property, shall be distributed—

18 (1) first, to any holder of an allowed claim secured  
19 by a lien on such property that is not avoidable under  
this title and that is senior to such tax lien;

20 (2) second, to any holder of a claim of a kind  
21 specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4),  
22 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent  
of the amount of such allowed tax claim that is secured by such  
tax lien;

23 (3) third, to the holder of such tax lien, to any  
24 extent that such holder's allowed tax claim that is  
secured by such tax lien exceeds any amount distributed

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25 <sup>1</sup>The Trustee stated in court that the motion was filed as a mechanism  
26 to get the matter before the court and allow the Debtors the opportunity to  
object; that it is not, in reality, a compromise of the IRS's claim.

1 under paragraph (2) of this subsection;

2 (4) fourth, to any holder of an allowed claim secured  
3 by a lien on such property that is not avoidable under  
this title and is junior to such tax lien;

4 (5) fifth, to the holder of such tax lien, to the  
5 extent that such holder's allowed claim secured by such  
tax lien is not paid under paragraph (3) of this  
6 subsection; and

7 (6) sixth, to the estate.

8 § 724(b), in effect, subordinates tax liens against property  
9 of the estate to the priority claims enumerated in § 507(a)(1) to  
10 (7) and, in some cases, to unavoidable junior liens. The  
11 proceeds from the sale of the Debtors' residence would thus be  
12 used to pay the following claims in the order presented: 1)  
13 mortgage balance, 2) any priority claims, 3) the federal tax lien,  
14 and 4) the remainder to be applied toward the Debtors' homestead  
15 exemption.<sup>2</sup> Debtors object to this scheme primarily because  
16 there are no priority claims to pay from the proceeds of the sale  
17 other than the administrative claim of the Trustee, created by  
18 the actual liquidation of the property itself. This is not,  
19 claim the Debtors, an acceptable use of § 724(b).

20 In essence, as the court sees it, the question is whether  
21 the Trustee should be allowed to sell property free and clear of  
22 liens under § 363(f) when the only party to benefit is a fully  
23 secured creditor; there would be no benefit to the estate or  
24 unsecured creditors. Debtors cite to opinions from the Seventh  
25 Circuit which hold that property should not be sold free and

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26 <sup>2</sup>Which amount would be \$4,000 to \$7,000 according to Debtors.

1 clear of liens unless some equity remains, after the payment of  
2 liens, for the benefit of the bankruptcy estate. In re Riverside  
3 Investment Partnership, 674 F.2d 634, 640 (7th Cir. 1982);  
4 Standard Brass Corporation v. Farmers National Bank, 388 F.2d 86,  
5 89 (7th Cir. 1967). The court in Riverside, however, states this  
6 as a "general rule." There may be special circumstances allowing  
7 for the sale of property even when the sale would produce  
8 insufficient proceeds to provide a benefit to the estate. See In  
9 the Matter of WPRV-TV, Inc., 143 B.R. 315, 321 (D. Puerto Rico  
10 1991) (sale of asset furthers the sale of other assets); In re  
11 Beker Industries Corp., 63 B.R. 474 (Bankr. S.D.N.Y.  
12 1986) (general discussion of special circumstances allowing for  
13 sale of property). In the instant case, however, this court can  
14 find no "special circumstances" to allow the sale of the property  
15 at issue.

16 As the case now stands, there is a creditor who is fully  
17 secured with respect to the property and the only creditor who  
18 would benefit from the Trustee's sale of the property is that  
19 secured creditor. The IRS need only wait until the automatic  
20 stay is no longer in effect to foreclose its lien against the  
21 property if it so chooses.<sup>3</sup> While a Trustee's business judgment

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23 <sup>3</sup>The IRS is under some constraint when levying on a taxpayer's personal  
24 residence. Under 26 U.S.C. §§ 6334(a)(13) and 6334(e), a taxpayer's principal  
25 residence is exempt from levy except when personally approved in writing by a  
26 district or assistant district director of the IRS or when the collection of  
tax is determined to be in jeopardy. Perhaps in part due to this, the Debtors  
state that a repayment plan between them and the IRS was entered into by which  
they have made payments (and continue to make payments) for approximately two  
years. It appears that the only benefit of a Trustee's sale of this property

1 is subject to great judicial deference,<sup>4</sup> he should not be allowed  
2 to sell the property in question in these circumstances.

3 CONCLUSION

4 Because there would be no benefit whatever to the estate and  
5 unsecured creditors from a Trustee's sale of the property, the  
6 Trustee's motion is denied. An order consistent with this  
7 opinion will be entered.

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11 FRANK R. ALLEY, III  
12 Bankruptcy Judge  
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24 would be to the IRS in allowing it to circumvent the clearly stated procedures  
25 adopted by Congress for the levy and sale of a personal residence. This by  
26 itself is not an appropriate purpose for use of the Trustee's power to sell  
estate property.

<sup>4</sup> Matter of WPRV-TV, Inc., 143 B.R. at 319 (citing to references).