

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
CYNTHIA FITZGERALD,) CASE NO. BK94-80172
)
DEBTOR) CH. 13

MEMORANDUM

Hearing was held on August 15, 1994, on confirmation of the plan. Appearing on behalf of debtor was Marion Pruss of Omaha, Nebraska. Appearing on behalf of the Land Reutilization Commission of Douglas County was William Ginsburg of Zuber & Ginsburg, Omaha, Nebraska. Appearing on behalf of Jeffrey Gaillard was David Jarecke of Sherrets, Smith & Gardner, P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

Background

The debtor, Cynthia Rose Fitzgerald, is requesting an Order to confirm her proposed Chapter 13 Plan of Reorganization. Two parties, the Land Reutilization Commission of Douglas County (LRC) and Jeffrey Gaillard, have objected to the debtor's proposed plan.

On September 27, 1991, the sheriff of Douglas County, Nebraska sold debtor's real property at a tax foreclosure sale. Such property served and still serves as the debtor's only residence. There were no qualifying bids at the sale, and therefore, pursuant to Nebraska law, the LRC was deemed to have bid the amount of the tax delinquency and said bid was accepted. NEB. REV. STAT. § 77-3211 (1990). The LRC held the property for two years, which is the period of time that the debtor had to redeem the property under Nebraska law. NEB. REV. STAT. § 77-1903 (1990). After the debtor's statutory period of redemption expired, the Douglas County Attorney moved the District Court of Douglas County, Nebraska to enter an Order Confirming the Sale of said property to the LRC on January 13, 1994. NEB. REV. STAT. § 77-1901. The LRC took the property in fee simple and was deemed to hold the property in trust for Douglas County taxing authorities, who extinguished the debtor's tax debt upon confirmation of the tax sale. NEB. REV. STAT. §§ 77-3212, 77-3211(2).

The LRC subsequently conveyed the property by special property deed to Jeffrey Gaillard on February 1, 1994. The debtor filed bankruptcy on February 4, 1994. Mr. Gaillard was not included on

the debtor's mailing matrix, and some dispute exists as to whether he had other notice of the bankruptcy. Mr. Gaillard recorded the deed to the real property on February 7, 1994. Mr. Gaillard took subsequent action in the Douglas County Court to evict the debtor from the premises, but the action was stayed due to the bankruptcy.

Even though the debtor had no legal or equitable interest in the property on the petition date, the debtor listed in her schedules that she has a right to recover ownership of the property and filed an adversary proceeding in this Court alleging that the tax sale was a fraudulent transfer pursuant to 11 U.S.C. § 548. The trial in the adversary proceeding has not yet taken place.

The debtor's Chapter 13 plan (filing no. 40) proposes to pay the Chapter 13 trustee \$360.00 per month in two bimonthly installments of \$180.00 each for a period of sixty (60) months. The plan proposes two different payouts, based upon the outcome of the adversary proceeding. If the debtor wins the adversary proceeding, she proposes to treat Mr. Gaillard's interest in the real property as a secured lien on the property, and the debtor proposes to pay off the lien over the life of the plan. If the debtor is not successful in the adversary proceeding, she concedes that Mr. Gaillard owns the property free and clear and that she has no interest in the property. In this instance, the portion of the plan payments earmarked for Mr. Gaillard will be treated as rental payments.

Mr. Gaillard and the LRC object to the plan on the following grounds: (1) the plan does not provide Mr. Gaillard with equivalent value because the debtor is not attempting to pay in full the allowed secured claim of Mr. Gaillard or surrender the property; (2) the plan does not provide that the debtor will redeem her interest in one lump sum redemption payment, pursuant to Nebraska law, and therefore, the debtor is attempting to toll the redemption period for sixty more months; (3) the LRC and Mr. Gaillard are not liable for fraudulently conveying the property because they are good faith purchasers pursuant to 11 U.S.C. § 550(b); and (4) if Mr. Gaillard retains his ownership in the property, the proposed rental payments made by the debtor to Mr. Gaillard do not reflect the fair market value for rent on the house.

Decision

The objections of the LRC and Jeffrey Gaillard are overruled. A fair rental market value for the property, taking into consideration the condition and location of the house, is \$197.21 per month.

The plan may not be confirmed at this time, however, because the clause in the plan requiring the Internal Revenue Service and the State of Nebraska to turn over all income tax refunds to the

debtor may cause the taxing authorities to lose rights that they possess to set off the debtor's tax refunds. Therefore, the debtor shall give notice of the bankruptcy plan to the Internal Revenue Service and the State of Nebraska, and if no objections are made within twenty days, the debtor may submit an order to the Court, and the Court will confirm the debtor's plan.

Discussion

1. Objections by the LRC and Jeffrey Gaillard

The objections by Mr. Gaillard and the LRC are overruled. The debtor's plan will pay Mr. Gaillard's interest in the property in full. If the debtor is successful in the adversary proceeding and if the Court orders the property returned to the debtor, 11 U.S.C. § 548(c) may cause Mr. Gaillard's interest to be treated as a secured lien on the property and grant the debtor absolute ownership. If this occurs, Mr. Gaillard will be paid back the full amount he paid to the LRC for the property plus interest. Therefore, he will receive the full amount of the allowed secured claim.

Mr. Gaillard's position would be stronger if the debtor assumed success in the adversary proceeding and only treated his interest as a fully secured claim. However, the plan provides that if debtor loses the fraudulent conveyance action, she will have no interest in the property and will vacate the premises within thirty (30) days after the order. The plan also provides that when the property of the estate reverts in the debtor upon confirmation, the residence of the debtor will not revert. Since the success of the plan is not dependent on one specific remedy, the plan is feasible because it can function no matter what the result of the adversary proceeding is.

The objection that the debtor has failed to redeem the property with a lump sum payment is overruled because it is not relevant. Her statutory right of redemption expired in September of 1993. If the Court finds that the LRC is not liable or that Mr. Gaillard is a good faith purchaser for value, the debtor concedes that Mr. Gaillard is entitled to full ownership of the property and that she will vacate the premises. Therefore, the issue of a statutory redemption right is moot.

The defenses available to the LRC and Mr. Gaillard in the adversary proceeding are relevant to that proceeding and are not relevant on confirmation issues. Therefore, the third objection is overruled. The assertions that the LRC paid a "reasonably equivalent value" for the property pursuant to 11 U.S.C. § 548 or took the property in good faith, for value and without knowledge of the voidability of the transfer pursuant to 11 U.S.C. § 550(b)(1) and that Mr. Gaillard is a good faith purchaser for value pursuant to 11 U.S.C. § 550(b)(2) are questions of fact. The adversary

proceeding will address these issues, and this Court will consider these arguments and evidence in support of them in that adversary proceeding.

Finally, Mr. Gaillard argues that the proposed payment of \$197.21 per month does not adequately represent the fair market rental value of the home. The plan provides that if the debtor loses the adversary proceeding all payments received by Mr. Gaillard will be treated as rent. Mr. Gaillard asserts that the fair market rental value for a two bedroom home in the Omaha area is \$491.00 per month. Exhibit 1, Attachment Exhibit 1. His estimation is based on the United States Department of Housing and Urban Development's Section 8 Fair Market Rent Schedules.

The debtor disagrees with this fair market value determination. The debtor asserts that the Section 8 rental estimations for Omaha are not accurate for the debtor's location in the city. In support of this position, the debtor points out that Section 8 three and four bedroom houses in her neighborhood rent between \$400 and \$450, which is below Mr. Gaillard's projection for a two bedroom house. Exhibit 2, ¶ 5. She notes that although she could not find any two bedroom Section 8 houses, a two bedroom house in or near her neighborhood and in similar condition, except for a garage and a fenced yard which the debtor does not have, is rented for \$340, not including utilities. The debtor also noted that the only two bedroom residence that she could find which rented near the fair rental market value cited by Mr. Gaillard rented for \$495.00. However, that house was completely remodeled and redecorated with newly refinished floors, natural woodwork, and a garage, and the house was located in a neighborhood which was more safe and desirable than the debtor's neighborhood.

In addition, the debtor states that she pays the following expenses on the house: \$14.00 per month (\$166.00 per year) for insurance, \$52.00 per month (\$617.56 per year) for property taxes, and \$130.00 per month for utilities (excluding telephone). The debtor also cited several problems with the house which would make the house unqualified for Section 8 housing and likewise, less marketable. See Exhibit 2, ¶ 7.

The debtor's net fair market rental value of \$197.21 per month is more accurate than Mr. Gaillard's estimation. The debtor's investigation of rental rates is more thorough and appears to take into consideration the diversity of quality of housing and of neighborhoods that Omaha, Nebraska possesses. Meanwhile, Mr. Gaillard's figure is a generic rental rate for all of Omaha, Nebraska. Also, the debtor has properly taken into consideration that a tenant does not normally pay insurance, real estate taxes and other costs. Therefore, she properly deducted these figures from the rental rates applicable to her neighborhood, and her proposed rental rate of \$197.21 is a fair rental value for the property in question.

2. Refund Provision

The plan may not be confirmed at this time because a provision in the plan may be unfair to the Internal Revenue Service (IRS) and the State of Nebraska. Paragraph 3 states:

Confirmation of the Plan shall constitute an Order of the Court to the Internal Revenue Service and the State of Nebraska to pay any and all income tax refunds to which the Debtor may become entitled at any time during the term of her Plan to the Debtor.

Filing no. 40, ¶ 3 at 2.

Even though the debtor does not list the IRS or the State of Nebraska as a creditor, the Court has no knowledge of the debtor's post petition tax situation, and it is reluctant to confirm a plan which may be used to deny the taxing authorities any set off rights or other rights that they may assert against the debtor's tax refund. Of course, the clause may very well be harmless to the interests of the taxing authorities. Therefore, the taxing authorities should have the opportunity to address this clause.

Because neither taxing authority received notice of the plan, they were not able to object to the plan. Therefore, the debtor shall give notice of the plan to the Internal Revenue Service and the State of Nebraska and provide them with twenty days to object to the plan. If neither party objects, the debtor may submit an order to the Court for confirmation.

Separate journal entry to be entered.

DATED: October 5, 1994

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
PRUSS, MARION 551-0466
JARECKE, DAVID 390-2668

Copies mailed by the Court to:
William Ginsburg, 646 Commercial Federal Tower, Omaha, NE 68124
Kathleen Laughlin, Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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CYNTHIA FITZGERALD,)	CASE NO. BK94-80172
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: October 5, 1994
<u>Defendant(s)</u>)	HEARING DATE: August 15,
)	1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding confirmation of the plan.

APPEARANCES

Marion Pruss, Attorney for debtor
William Ginsburg, Attorney for LRC
David Jarecke, Attorney for Jeffrey Gaillard

IT IS ORDERED:

The objection by Jeffrey Gaillard and Land Reutilization Commission of Douglas County, Nebraska, are denied. The plan will be confirmed if the IRS and Nebraska Department of Revenue do not object. This is not a final order. The confirmation order, if any, will be the final order.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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