

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
SAM and KRISTINE DIBAISE, ) CASE NO. BK98-80435  
)  
DEBTOR. ) A98-8047  
\_\_\_\_\_)  
SAM and KRISTINE DIBAISE, )  
) CH. 13  
Plaintiff, )  
vs. )  
)  
MID-AMERICA FINANCIAL CORPORATION,) )  
)  
Defendant. )

MEMORANDUM

Hearing was held on January 15, 1999, on Motion for Summary Judgment. Appearances: Howard Duncan as attorney for debtors/plaintiffs and Thomas Ostdiek as attorney for defendant. 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)(H).

Undisputed Facts

Debtor-Plaintiffs Sam and Kristine DiBaise executed a Deed of Trust in favor of First National Bank of Omaha (hereinafter "Trustee"). First National Bank of Omaha was simultaneously the beneficiary of the Deed of Trust. After Debtors failed to make the payments due in August, September, and October, 1997, the balance was declared immediately due and payable. The Trustee authorized Hansen, Engles & Locher, P.C., to prepare all documents and to take all action necessary to exercise the power of sale clause in the Deed of Trust on behalf of the Trustee. The property subject to the Deed of Trust was subsequently sold at public auction on January 20, 1998, for the sum of \$5,815 to the highest bidder, Defendant, Mid-America Financial Investment Corporation (hereinafter "Mid-America"). Debtor-Plaintiffs seek to have the court set aside the Trustee's sale as a fraudulent transfer.

Debtor-Plaintiffs' Allegations

Debtor-Plaintiffs contend that the transfer was a fraudulent transfer pursuant to Nebraska Revised Statute Section 36-704 (Reissue 1993) and 11 U.S.C. 548 because the property was sold for a sum approximately one tenth of its alleged appraised value.

Debtor-Plaintiffs further contend that the Deed of Trust sale was not conducted in compliance with the Nebraska Trust Deeds Act Neb. Rev. Stat. 76-1001 et seq. because the Trustee employed an attorney to prepare all documents and to take all action necessary to exercise the power of sale clause in the Deed of Trust on behalf of the Trustee, rather than performing these acts through an employee of the Trustee. In particular, Debtor-Plaintiffs focus on the "failure" of the Trustee to execute and acknowledge the Notice of Default. The attorney for the Trustee executed and acknowledged the Notice of Default instead of the Trustee.

Defendant has moved for summary judgment.

#### Decision

Summary judgment is granted.

#### Discussion and Legal Conclusions

##### A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Bankr. R. 7056(c); Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The burden is on the moving party to establish both that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. United States Gypsum Co. v. Greif Bros. Cooperage Corp., 389 F.2d 252 (8th Cir. 1968). The materials submitted on a motion for summary judgment are viewed in a light most favorable to the non-moving party, and the non-moving party is given the benefit of all inferences reasonably deducible from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

B. Alleged Fraudulent Transfer

Debtor-Plaintiffs' argument that the sale was a fraudulent transfer under 11 U.S.C. §548, because it was sold for less than what they assert was its appraised value, fails as a matter of law. The property was sold at public auction to the highest bidder. The United State Supreme Court expressly addressed this issue in BFP v. Resolution Trust Corp., 511 U.S. 531, 545, 114 S.Ct. 1757, 1765 (1994), stating that a properly conducted foreclosure sale may not be avoided under §548 of the Bankruptcy Code. As long as the sale was conducted in compliance with state law, the "reasonably equivalent value" of foreclosed property is the price in fact received at the foreclosure sale. In light of BFP, unless the sale was not conducted in accordance with state laws, Debtor-Plaintiffs cannot challenge the price as inadequate, because the price it brought necessarily established the "reasonably equivalent value."

Debtor-Plaintiffs' argument that the transfer was a fraudulent transfer under Nebraska Revised Statute § 36-704 likewise fails. Section 36-704 mirrors the essence of BFP, providing in relevant part:

a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

Neb. Rev. Stat. §36-704(b) (Reissue 1993).

C. Compliance with the Nebraska Trust Deeds Act

Debtor-Plaintiffs' assertion that the Nebraska Trust Deeds Act requires the Trustee to personally execute and acknowledge the Notice of Default, rather than directing an attorney to do so on the Trustee's behalf, is not supported by a plain reading of the statute.

In construing a statute, the language used by the Legislature should be considered to determine its intent. Mitchell v. County of Douglas, 213 Neb. 355, 329 N.W.2d 112 (1983). The court will, if possible, give effect to every

word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. Iske v. Papio Nat. Resources Dist., 218 Neb. 39, 352 N.W.2d 172 (1984). However, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. State ex rel. Douglas v. Herrington, 206 Neb. 516, 294 N.W.2d 330 (1980).

Section 76-1006, pertaining to notices of default, provides in relevant part:

The power of sale herein conferred upon the trustee shall not be exercised until:

(1) The trustee shall first file for record in the office of the register of deeds of each county wherein the trust property or some part or parcel thereof is situated a notice of default identifying the trust deed by stating the name of the trustor named therein and giving the book and page or computer system reference where the same is recorded and a description of the trust property, containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of such breach and of his or her election to sell or cause to be sold such property to satisfy the obligation; .  
. . .

Neb. Rev. Stat. § 76-1006 (Reissue 1996)

Section 76-1006 makes no reference to execution or acknowledgment. Despite the lack of any express requirement of execution or acknowledgment by the Trustee, Debtor-Plaintiffs contend that the statute read as a whole necessarily implies that the Trustee perform these acts him or herself, or if the Trustee is not a natural person, that the Trustee acts through its employees, not through its attorney.

Section 76-1017, a general provision with broad application, requires acknowledgment for recording purposes; however, the section makes no express provision regarding by whom a given document must be acknowledged. Instead, the section merely states that a given document may be recorded

"when acknowledged as provided by law." Section 76-1017 provides in relevant part that:

Any trust deed, substitution of trustee, assignment of a beneficial interest under a trust deed, notice of default, trustee's deed, reconveyance of the trust property and any instrument by which any trust deed is subordinated or waived as to priority, when acknowledged as provided by law, shall be entitled to be recorded . . . .

Neb. Rev. Stat. § 76-1017 (Reissue 1996).

This section requires acknowledgment of a document before the document is eligible for recording. It does so only to the extent as is "provided by law." Section 76-1006, pertaining to a Notice of Default, contains no provision requiring acknowledgment and does not identify the party that must execute the Notice. An examination of the various sections of the Act reveals that the legislature has the ability to specifically articulate who must execute or acknowledge a given document, when the legislature so intends.

Section 76-1004, pertaining in part to substitution of trustees, states that:

(2) The substitution . . . shall be executed and acknowledged by all of the beneficiaries under the trust deed or their successors in interest.

Neb. Rev. Stat. § 76-1004 (Cum. Supp. 1998).

Section 76-1008, pertaining in part to requests for copies of notices of default, states that:

Any person desiring a copy of any notice of default and of any notice of sale under any trust deed may . . . file for record in the office of the register of deeds . . . a duly acknowledged request for a copy of any such notice of default and notice of sale.

Neb. Rev. Stat. § 76-1008 (Reissue 1996).

Section 76-1012, pertaining in part to reinstatement, states that:

If the default is cured and the trust deed reinstated . . . the beneficiary, or his or her assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him or her a request to the trustee that the trustee execute, acknowledge, and deliver a cancellation of the recorded notice of default under such trust deed . . . .

Neb. Rev. Stat. § 76-1012 (Reissue 1996).

Section 76-1014.01 pertaining in part to reconveyances, states that:

When the obligation secured by any trust deed has been satisfied, the beneficiary shall . . . deliver to the trustor or trustor's successor in interest or designated representative a reconveyance in recordable form duly executed by the trustee.

Neb. Rev. Stat. § 76-1014.01 (Reissue 1996).

Conclusion

Considering the Nebraska Trust Deeds Act as a whole and giving effect to every word, or lack thereof, it is apparent that nothing in the statute precludes a Trustee from authorizing an attorney to prepare and file a Notice of Default on behalf of the Trustee without execution or acknowledgment by the Trustee. In view of the fact that the sale, therefore, was conducted in compliance with Nebraska law, the value which the property brought at public auction is deemed "reasonably equivalent value" by the authority of BFP. The sale cannot be avoided as a fraudulent transfer and the Defendant's motion should be and is hereby granted.

Separate Judgment to be filed.

DATED: January 20, 1999

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

20 DUNCAN, HOWARD T.

7 OSTDIEK, THOMAS

Copies mailed by the Court to:

United States Trustee

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.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
SAM and KRISTINE DIBAISE, ) CASE NO. BK98-80435  
)  
DEBTORS. ) A98-8047  
\_\_\_\_\_)  
SAM and KRISTINE DIBAISE, )  
) CH. 13  
Plaintiffs, )  
)  
vs. )  
)  
MID-AMERICA FINANCIAL CORPORATION,) )  
)  
Defendant. )

JUDGMENT

Summary judgment is granted in favor of the Defendant.  
This Adversary Proceeding is dismissed. See separate  
Memorandum entered this date.

DATED: January 20, 1999

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

20 DUNCAN, HOWARD T.  
7 OSTDIEK, THOMAS

Copies mailed by the Court to:

Kathleen Laughlin, Trustee  
United States 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.