

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In re:)
)
ORVILLE EARL HABECK and) Bankr. No. 91-10113-INH
LOUISE MARGARET HABECK,)
) Chapter 7
Debtors.)
) MEMORANDUM OF DECISION RE:
) TRUSTEE'S PROPOSED ACTION TO
) SELL REAL PROPERTY

The matter before the Court is the Notice of Proposed Action to Sell Real Property filed by the Chapter 7 Trustee and the objection thereto filed by Debtors. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by F.R.Bankr.P. 7052.

I.

Orville E. and Louise M. Habeck (Debtors) filed a Chapter 7 petition on June 11, 1991. Scheduled property includes 280 acres of real property valued at \$53,675.00 that secures Farmers Home Administration's claim of \$50,500.00. Wilmot State Bank also has a mortgage on the real property and on some personalty to secure its claim of \$289,529.00. Debtors claimed exempt their homestead described as: S $\frac{1}{2}$ NE $\frac{1}{4}$ of 24-121-50, Grant County, SD. Debtors valued their homestead at \$24,700.00.

By Notice filed July 30, 1991, Chapter 7 Trustee Peter J. Buttaro (Trustee) sought court approval to sell real property

described as:

South Half (S $\frac{1}{2}$), Northeast Quarter (NE $\frac{1}{4}$) of Section 24, Township 121, Range 50, Grant County, South Dakota; and the West Half (W $\frac{1}{2}$), Northwest Quarter (NW $\frac{1}{4}$), and the East Half (E $\frac{1}{2}$), Southeast Quarter (SE $\frac{1}{4}$), and the Northwest Quarter (NW $\frac{1}{4}$), Southeast Quarter (SE $\frac{1}{4}$) of Section 36, Township 121, Range 50, Grant County, South Dakota.

Trustee proposes to conduct a public sale of the land free and clear of liens with the sale costs deducted before any proceeds are distributed to the lien holders.

Debtors filed an Objection to the Trustee's Notice of proposed sale on August 19, 1991. Therein, Debtors argue that their homestead was erroneously included in Trustee's proposed sale. Debtors also assert that they want their homestead portion sold separately so that they may bid on it. Next, Debtors state:

When the Debtors filed for bankruptcy, Farmers Home Administration (FmHA) was required to send them notice of their rights for primary loan servicing and preservation loan servicing pursuant to the 1987 Agricultural Credit Act, and pursuant to 7 C.F.R. § 1962.

Finally, Debtors argue Trustee cannot sell their homestead because no one timely objected to their homestead exemption claim.¹

A hearing was held September 24, 1991. Appearances included Trustee; Thomas A. Lloyd, Assistant U.S. Attorney, for FmHA; James C. Cremer for Wilmot State Bank; and William J. Pfeiffer for

¹ By Notice filed July 24, 1991, Trustee objected to Debtors' declaration that 150 acres of growing crops were exempt under South Dakota's homestead exemption laws, S.D.C.L. §§ 43-45-3 and 43-31-1. A hearing on the objection was held August 13, 1991. The parties reached an agreement wherein Trustee would withdraw his objection. An Order memorializing Trustee's withdrawal of the Objection was entered August 22, 1991.

Debtors. FmHA's mortgage and Wilmot State Bank's mortgage were put in evidence. Both mortgages include a waiver of homestead rights by Debtors. Trustee argued that the District of South Dakota's decision in United States v. Nelson (In re David E. and Marsha R. Nelson), Civ. 91-4039, slip op. (D.S.D. July 26, 1991), which overruled a decision of this Court², quells Debtors' objections.³ Wilmot State Bank supported Trustee's position. Debtors stood on their Objection and did not present any witnesses or introduce any exhibits.

In his Notice, Trustee states that Debtors value the property at \$53,675.00 and that FmHA values the property at \$70,000.00. At the hearing, Trustee did not present independent evidence on the value of Debtors' homestead or the property as a whole nor establish whether there was any equity in the property. In their Objection, Debtors argue that the value of their homestead is less than the statutory homestead value limit of \$30,000.00. At the hearing, they did not present other evidence of the value of their homestead or the property as a whole.

The matter was taken under advisement. Both parties declined the opportunity to file a brief in support of their pleading.

Discharge was entered October 9, 1991.

While Debtors' bare objections challenge the Court's

² The Hon. Peder K. Ecker, presiding.

³ Since the District Court decision in Nelson was not published, it is not authoritative precedent. See 8th Cir. R.8(i). This Court does not, however, adopt wholesale the rationale of the decision in In re Nelson, 123 B.R. 993 (Bankr. D.S.D. 1991).

deciphering ability, it appears that Debtors oppose Trustee's proposed sale on three alternative grounds: 1) that Trustee does not have authority to sell their homestead with the other secured real property because no one timely objected to their homestead exemption claim; 2) that the sale does not protect Debtors' entitlement to primary loan servicing programs and preservation loan servicing programs under the 1987 Agricultural Credit Act and 7 C.F.R. § 1962; and 3) that Trustee should separately sell Debtors' homestead portion so that Debtors may bid on it.⁴

II.

South Dakota law defines a homestead as a person's dwelling and appurtenant buildings situated on contiguous lots not exceeding one acre of land within a town plat or 160 acres if not within a town plat. S.D.C.L. §§ 43-31-2, 43-31-3, and 43-31-4. In the event that the homestead is sold voluntarily or under S.D.C.L. ch. 21-19, then the homestead exemption is defined as "proceeds of such sale, not exceeding the sum of thirty thousand dollars" for one year. S.D.C.L. § 43-45-3. A South Dakota bankruptcy debtor may claim this homestead exemption under 11 U.S.C. § 522(b)(2). If no one timely objects, the claimed property is deemed exempt. 11 U.S.C. § 522(1); F.R.Bankr.P. 4003. The exempt property is no longer property of the estate. 11 U.S.C. § 522(b).

⁴ No one has raised the issue of whether Trustee should abandon all of the oversecured real property under 11 U.S.C. § 554 rather than sell it, since there is apparently no equity for the estate. Consequently, that issue is not addressed herein.

The Bankruptcy Code provides:

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, **property of the estate.**

11 U.S.C. § 363(b)(1) (emphasis added). Further, a trustee may sell property under subsection § 363(b) free and clear of a lien on the property if the secured creditor consents. 11 U.S.C. § 363(f)(2). FmHA and Wilmot State Bank consent to the sale of the property free and clear of their liens, so that criteria of § 363(f) is not at issue here.

Courts generally acknowledge that a trustee's authority to sell, use, or lease property under 11 U.S.C. § 363 applies only to **property of the estate.** See, e.g., Sumy v. Schlossberg (In re Schlossberg), 777 F.2d 921, 923-24 (4th Cir. 1985). The exception to that rule is set forth at § 363(h). That subsection states that a trustee may sell both the estate's interest "and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety"

III.

A.

Trustee has not shown how this homestead property remains estate property. He has not identified any "strong arm", lien avoidance, or preference avoidance provision under 11 U.S.C. §§ 544, 545, 546, or 547 that allows the estate to retain an

interest in the homestead. Therefore, under §§ 522(b) and 522(1) the homestead that Debtors claimed exempt is no longer property of the estate. Consequently, the sole question presented by Debtors' first objection is whether any provision of § 363 nonetheless authorizes Trustee to sell the homestead.

Having failed to show the estate has any interest in this homestead, Trustee has no authority to sell the homestead under subdivision(b). In re Duncan, 107 B.R. 754, 757-58 (Bankr. W.D.Okla. 1988).⁵ A trustee's authority to sell property under § 363(b) § 363(b) is expressly limited to property of the estate.⁶

This Court acknowledges that other courts have had little trouble allowing a trustee to sell overencumbered property in which the debtor claimed an exemption. Those courts looked directly at the value of a debtor's homestead exemption and reasoned that if there was no equity to support the claimed exemption, the property remained estate property and the trustee could dispose of it. See,

⁵ The Court of Appeals for the Eighth Circuit declined to follow the holding in Duncan that there can be no subsequent examination of the merits of an exemption if an objection is not timely filed. Halverson v. Peterson (In re Peterson), 920 F.2d 1389, 1392 (8th Cir. 1990). The Court did not comment on other provisions of the Duncan decision, including the one cited herein.

⁶ The Supreme Court's discussion of "property of the estate" in United States v. Whiting Pools, Inc., 103 S.Ct. 2309 (1983), does not answer the question presented here. In Whiting Pools, the Court was asked to decide whether property seized by the Internal Revenue Service was property of the estate subject to turnover. The Court held that property of the estate includes property in which a creditor has a secured interest. Id. at 2313. The decision did not address whether otherwise exempt property could be brought back into the estate because a creditor had a secured interest in it.

e.g., In re Bovay, 112 B.R. 503 (Bankr. N.D.N.Y. 1989); see also In re Crabtree, 112 B.R. 420, 424 (Bankr. W.D.Okla. 1989). South Dakota's homestead law may not be read so narrowly since a homestead is limited in value only upon sale. See S.D.C.L. § 43-45-3. If there is no equity in the homestead property in excess of the mortgages and homestead claim, there is no estate property for Trustee to administer by selling the homestead.

There are additional considerations that influence this Court's conclusion that § 363(b) does not authorize a trustee to sell non estate property. First, whatever protection a debtor retains under state law is still intact when the secured creditor returns to state court to enforce his claim secured by the homestead. See, e.g., S.D.C.L. ch. 21-19. Second, this conclusion recognizes that a general creditor with an execution may not force a sale of a homestead unless there is equity in excess of the exemption value and any mortgage against the homestead. See S.D.C.L. ch. 21-19; First National Bank v. Anderson, 332 N.W.2d 723 (S.D. 1983); Keim v. Rand, 158 N.W. 904 (S.D. 1916). When the trustee steps into the shoes of that type of creditor under 11 U.S.C. § 544(a), the trustee is limited to the same rights and powers such a creditor has under South Dakota's homestead laws.

Trustee also has no authority to sell the homestead under § 363(f). Although the secured creditors have consented to a sale free and clear of their liens, subsection (f) incorporates the limitation in subsection (b) which restricts a sale by the trustee to property of the estate. Since the homestead was not property of

the estate which could be sold under § 363(b), it may not be sold under § 363(f). A secured creditor with a lien on exempt property must resort to state law to recover his interest. A trustee does not have authority under §§ 363(b) or 363(f) to circumvent that process by selling non estate property.

Finally, the Court also concludes that § 363(h) does not apply. Debtors' homestead is not property in which Debtors had an undivided interest as a tenant in common, joint tenant, or tenant by the entirety at the time they commenced this case. See Community National Bank and Trust Co. v. Persky (In re Persky), 893 F.2d 15, 18-19 (2nd Cir. 1989); Waldrop v. Phillos (In re Phillos), 14 B.R. 781, 783-84 (Bankr. W.D. Va. 1981). Consequently, Trustee may not sell the Debtors' homestead property in conjunction with the creditors' interest in that property.

B.

Debtors' two other objections are less troublesome. Debtors did **not** allege that FmHA failed to send them the required notice of their rights for primary loan servicing and preservation loan servicing pursuant to the 1987 Agricultural Credit Act and 7 C.F.R. § 1962. If that were the purpose of paragraph 3 of their objection, it is not clear. Even if that argument was Debtors' intent, it is extraneous at this juncture because Debtors currently do not have rights under that Act.

The 1987 Agricultural Credit Act established two types of programs: primary loan service programs and preservation loan

service programs. Lee v. Yeutter, 917 F.2d 1104, 1105 (8th Cir. 1990). The primary loan service programs apply only to non discharged debtors. Id. at 1106-08. Since Debtors have received their discharge, the issue of Debtors' rights under the primary loan service programs is now moot. Id.; Duncan, 107 B.R. at 756-57.

Under the preservation loan service programs, a debtor is not eligible to participate unless FmHA acquires the debtor's property. See 7 C.F.R. § 1951.911(a)(1)(ii)(1991). Since FmHA presently does not have title to the real property, Debtors do not have any rights under the preservation loan service programs at this time. Any rights under the preservation loan service programs that will mature if FmHA acquires Debtors' property should still be available to Debtors. There is no evidence before the Court that FmHA's failure to give Debtors timely notice will defeat Debtors' rights under those programs.

C.

Debtors' third objection asks the Court to condition Trustee's sale so that the homestead portion is sold separately. Since the Court has concluded that Trustee may not sell the homestead property under § 363, the objection is moot.

An order will be entered approving the proposed sale of the real property as described on Trustee's Notice but excluding the homestead claimed exempt by Debtors. Notwithstanding this Memorandum and accompanying Order, Debtors, to foster utilization

of some of FmHA's preservation loan service programs, may consent to a sale of the homestead property by Trustee. The Court finds no state or Bankruptcy Code provision forbidding that action if the estate bears none of the sale costs.

Dated this 13th day of November, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By _____
Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In re:)
)
ORVILLE EARL HABECK and) Bankr. No. 91-10113-INH
LOUISE MARGARET HABECK,)
) Chapter 7
Debtors.)
) ORDER APPROVING SALE BY
) TRUSTEE OF ESTATE REAL
) PROPERTY FREE AND CLEAR
) OF LIENS

In recognition of and compliance with the Memorandum of Decision Re: Trustee's Proposed Action to Sell Real Property entered this day,

IT IS HEREBY ORDERED that Trustee Peter J. Buttaro may sell the following described real property EXCLUSIVE OF THAT PORTION CLAIMED EXEMPT BY DEBTORS AS THEIR HOMESTEAD:

South Half (S½), Northeast Quarter (NE¼) of Section 24, Township 121, Range 50, Grant County, South Dakota; and the West Half (W½), Northwest Quarter (NW¼), and the East Half (E½), Southeast Quarter (SE¼), and the Northwest Quarter (NW¼), Southeast Quarter (SE¼) of Section 36, Township 121, Range 50, Grant County, South Dakota.

and;

IT IS FURTHER ORDERED that the conditions of said sale shall otherwise comport with those set forth in Trustee's Notice of Proposed Action to Sell Real Property filed July 30, 1991.

So ordered this ____ day of November, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)