

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION

AUG 15 1996

In re:

ALAN D. KLEIN and	)	Chapter 13
KHRISTINA H. KLEIN,	)	
	)	Bankruptcy No. 95-50173XS
Debtors.	)	
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ALAN D. KLEIN and	)	
KHRISTINA H. KLEIN,	)	
	)	
Plaintiffs,	)	Adversary No. 95-5102XS
	)	
vs.	)	
	)	
UNITED MORTGAGE CORPORATION	)	
and JACK D. HARRISON,	)	
	)	
Defendants.	)	

JUDGMENT

The issues of this proceeding having come on for trial before the court, the Honorable William L. Edmonds, United States Bankruptcy Judge, presiding, and the issues having been duly tried and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that the complaint of Alan D. Klein and Khristina H. Klein against *United Mortgage Corporation and Jack D. Harrison* is dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that Jack D. Harrison shall recover from Alan D. Klein and Khristina H. Klein, jointly and severally, the sum of \$10,750.00.

IT IS FURTHER ORDERED AND ADJUDGED that writ of possession shall issue that Jack D. Harrison shall have possession of the following property: 2913 South Cornelia Street, Sioux City, Iowa, legally described as:

Lot 21 except the North 30 feet thereof and the North 40 feet of Lot 20 in Block 4, Lincoln Park Addition to Sioux City, in the County of Woodbury and State of

Iowa, and the East half of the North-South alley  
abutting on said part of said lots.

Clerk of Bankruptcy Court

By: *Larris Slagle*  
Deputy Clerk



[Seal of the U.S. Bankruptcy Court]  
Date of Issuance: August 15, 1996

I certify that on 8-15-96 copies of the order and this judgment  
were mailed by U.S. mail to: Don Molstad, Steven Jensen, Jeffrey  
Johnson, Carol Dunbar and U.S. Trustee. *JS*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION

U.S. BANKRUPTCY COURT X  
NORTHERN DISTRICT OF IOWA

AUG 15 1996

IN RE:

ALAN D. KLEIN and  
KHRISTINA H. KLEIN,  
  
Debtors.

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Chapter 13  
  
Bankruptcy No. 95-50173XS

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ALAN D. KLEIN and  
KHRISTINA H. KLEIN,  
  
Plaintiffs,

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Adversary No. 95-5102XS

vs.

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UNITED MORTGAGE CORPORATION  
and JACK D. HARRISON,  
  
Defendants.

)  
)  
)  
)

DECISION

This is a proceeding to set aside the sheriff's sale which followed the foreclosure of a mortgage on the debtors' home. Plaintiffs claim they did not receive statutory notice of the sale. This proceeding relates to debtors' chapter 13 case, but it is not a core proceeding (28 U.S.C. § § 1334(b), 1157(b)). The parties have consented to the bankruptcy court's hearing and determining this matter and to its entering appropriate orders and judgments (28 U.S.C. § 157(c)(2)).

Trial was held on April 24, 1996 in Sioux City. Donald H. Molstad, Esq. appeared for Alan and Khristina Klein, the plaintiffs and debtors. Steven R. Jensen, Esq. appeared for United Mortgage Corp. (UNITED), the foreclosing mortgagee.

Jeffrey A. Johnson, Esq. appeared for Jack D. Harrison, the purchaser at the sheriff's sale. Harrison has filed a counterclaim seeking damages for debtors' wrongful possession since the sale and for possession of the property. The court now issues this decision which includes findings and conclusions as required by Fed.R.Bankr.P. 7052.

#### FINDINGS

Khristina H. Klein, formerly known as Khristina Tietsort, is 36 years old. She lives at 2913 South Cornelia Street in Sioux City with her husband Alan and her three children: a toddler, a teenage son, and Jennifer Schneiders, her teenage daughter. Mrs. Klein owned the home. She fell behind on the note and mortgage payments, and the mortgagee, United, foreclosed. She and her husband were served with the petition and original notice (Exhibit B). The Kleins did not answer or appear, but they did contact a lawyer who recommended that they see their present counsel, Donald H. Molstad, about filing bankruptcy.

The Iowa District Court entered its decree against the debtors on April 3, 1995 (Exhibit B). The decree provided for judgment in rem against the property in the amount of \$53,031.53 plus interest, costs and attorneys' fees (Exhibit B). Sheriff's sale on the special execution was scheduled for May 30, 1995. The property was purchased at the sale by Jack D. Harrison for

\$55,493.86. Harrison immediately had the sheriff's deed recorded because United had elected, pursuant to Iowa Code § 654.20, to foreclose without redemption. Klein did not demand delay of the sheriff's sale. The deed was recorded on May 30, 1995 (Exhibit C). A second sheriff's deed was recorded on June 5, 1995 to correct an error in the first deed's legal description of the property. The property is legally described as follows:

Lot 21 except the North 30 feet thereof and the North 40 feet of Lot 20 in Block 4, Lincoln Park Addition to Sioux City, in the County of Woodbury and State of Iowa, and the East half of the North-South alley abutting on said part of said lots.

Rick Arnold was Harrison's "silent" partner in the purchase. They buy properties in foreclosure or tax sales, fix them up and sell them. Neither Arnold nor Harrison has been inside the house. They obtained information on it from the city assessor's office. It has three bedrooms on the main floor, a single car garage and a partially finished basement. Arnold believes they paid less than fair market value for the property. They borrowed the purchase price from the Sloan State Bank and are paying 10 per cent per annum interest on the loan. They have not obtained access to the property, and they have received no compensation from Kleins for the possession since sale. Under their confirmed chapter 13 plan, Kleins pay \$557 per month to their attorney as regular payments on the mortgage and \$500 per month to the trustee to cure the default. The regular payments are made to their attorney's trust

account pending determination of this proceeding. Arnold testified that he believes the fair rental value of the property to be low but fair at \$750 per month.

On April 10, 1995, Woodbury County Deputy Sheriff Catherine Wurth went to debtors' home to serve notice of the sale. At about 12:30 P.M., she knocked on the Kleins' door and rang the bell. She testified that a lady came to the door whom she recognized as Kris Klein. She said "Kris?" and the person responded, "Yes." Wurth said she told her that she had more papers for her, she explained that they related to the sheriff's sale, and she gave her the papers. Wurth had served Khristina Klein with papers three times before. She testified that the person she served on April 10 was the person she had served previously. She had spent only minutes at the house, but she does not remember exactly how long. In most instances, she spends no longer than five minutes on service. She was not wearing a uniform.

Wurth filled out her proof of service later that day (Exhibit A). At trial, Wurth identified Khristina Klein as the person she had served. She was "positive" that it was Klein she had served on April 10.

Wurth has been a sheriff's deputy for 14 years. She is a full time process server and serves numerous people each day. She admits that she cannot remember every service she has made and that she does not have independent recollection of every

transaction--the documents served or the dates--but that she does remember faces. Her practice is to ask if the person she is addressing is the person she seeks. She asks for identification if she does not know the person.

Khristina Klein testified that although she was home at the time, she was not served with the notice of sale. Klein has been employed for the past 8-1/2 years as a mail sorter at the U.S. postal facility in Sergeant Bluff. Her regular shift is 11:00 P.M. to 7:30 A.M. Mondays through Fridays. Generally, she arrives home and sleeps until she picks up her younger daughter about 3:00 P.M. In order to sleep, she draws heavy shades, turns off the phone and wears ear plugs. Her bedroom is located in the opposite part of the house from the front door. She cannot hear the doorbell under such circumstances. She says she was never served with notice of sale on April 10 and that she had not seen the notice until the day of trial.

Klein says that she and her husband contacted attorney Molstad on May 19, 1995 about filing bankruptcy so that they could try to deal with their financial problems. They filed chapter 13 to save the home. At the time they contracted Molstad, Klein says they were unaware of the pending sale and that they learned of it from their attorney after it had taken place.

Klein says that she began to suspect that her daughter Jennifer might have been served with the notice. She asked

Jennifer about it in late summer or early fall 1995, but her daughter was vague, said she did not know what her mother was talking about and that she did not want to talk about it.

Kleins were having problems with 16-year old Jennifer. She was regularly truant at East High School where she was a sophomore. She often lied to them. They placed her in the Sioux City Boys and Girls Home where she was a resident from October 1995 to March 1996.

Jennifer Schneiders says she skipped school frequently that year and was truant that day without her mother's knowledge. She said she was home when a lady rang the front door bell. The lady asked if she were Khristina Teitsort Klein. Jennifer said she answered "yes" because she wanted to intercept any mail from East High that might alert the Kleins to Jennifer's truancy. The woman said she was a deputy and had papers on the lawsuit. Jennifer said she took the papers and hid them or got rid of them so her mother would not find out about her truancy or perhaps that she was home. Previously, she said she had gotten rid of mail so her mother would not know she was truant.

Jennifer said she and her mother began talking about the matter again recently. Khristina Klein says as trial approached, she pinned Jennifer down on what happened. She asked her if a lady came with papers on the sale. She said she explained why it was so important that Jennifer tell the truth. About two or three

weeks ago, Jennifer admitted she got the papers. Despite the recent admission, Khristina says that the service on Jennifer was raised much earlier in the proceeding because she and her husband suspected the daughter as according to the proof of service, a woman was served, and Jennifer is the only other woman at the home.

Kleins filed their chapter 13 bankruptcy petition on June 8, 1995. They filed a plan which was confirmed July 31, 1995. It treats United as having a claim secured by the homestead, and it provides for regular mortgage payments to United and a cure of the arrearages through the standing trustee. The debtors' schedules did not list Harrison, and the plan did not treat his interest in the property. The court bases this finding on judicial notice of the petition, schedules, plan and confirmation judgment.

Kleins filed this adversary proceeding on June 21, 1995. Their claim is based solely on state law. They seek under Iowa Code § 626.79 to set aside the sheriff's sale for the reason that the sale was made without the notice to the debtor required by Iowa Code § 626.78. These Code sections state:

If the debtor is in actual occupation and possession of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve the debtor with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale, which notice shall be served in the manner provided by rule 56.1"a" of the rules of civil procedure.

Iowa Code § 626.78.

Sales made without the notice required in section 626.78 may be set aside on motion made within ninety days thereafter.

Iowa Code § 626.79.

#### DISCUSSION

Khristina Klein contends that the sheriff's sale must be set aside for lack of service upon her of the notice of the sale. She says that it was her daughter who was served and that service upon Jennifer was not effective substitute service upon Khristina Klein because Jennifer at the time was not 18 years old as is required by Iowa Rule of Civil Procedure 56.1(a). Although the complaint appears to allege in general terms that Alan Klein also was not satisfactorily served, neither his legal entitlement to service of the notice nor any alleged failure of such notice was pursued by him at trial. I focus solely on Khristina Klein's claim.

Klein argues that the issue is one of credibility and that the testimony of Klein and her daughter regarding the circumstances of improper service is stronger and more credible than the testimony of Deputy Wurth. Klein points out that Wurth's version of service is based on notes rather than clear memory of the event and that Wurth has served so many papers over time that it calls into question her ability to remember this one. As further evidence of Wurth's errant service, Klein points out that she and Jennifer look much alike. She argues too that it would

have made no sense for her to be served and yet fail to tell her attorney because it was to her advantage to file bankruptcy before the sale.

Resolution of this dispute involves credibility but not merely so. The burden and standard of proof are crucial to a determination of this matter. There is a strong presumption of the validity of a sheriff's return of service, especially when the return is supported by the server's testimony. Swift v. Swift, 239 Iowa 62, 29 N.W.2d 535, 539 (1947). Public policy fosters the presumption. Wyland v. Frost, 75 Iowa 209, 39 N.W. 241, 242 (1888).

Long ago, the Iowa Supreme Court noted circumstances favoring presumption:

The return of the officer was made at the time of the transaction, and the strong presumption is that it correctly states what has been done. It was the act of a public officer who had no interest in the matter except to perform the duties of his office. It is presumed that he knew what was requisite to the service of the writ, and, having undertaken to make the service, the presumption is equally strong that he performed the duty in the manner prescribed by law. And he clearly had no object in making a false return.

Ketchum v. White, 72 Iowa 193, 33 N.W. 627, 628 (1887). The presumption is rebuttable only by clear and satisfactory evidence. Strong v. Jarvis, 524 N.W.2d 675, 677 (Iowa App. 1994) (citing Chader v. Wilkins, 226 Iowa 417, 284 N.W. 183, 185 (1939)). The burden is on the challenger, and it is a heavy one. Goodale v. Bray, 546 N.W.2d 212, 213 n. 1 (Iowa 1996). Moreover, the focus

is on the return, supported by the deputy's testimony, not merely on the trial testimony of the deputy some time later with the inevitable impediments to clear recollection. Kleins' counsel points out rightly that Wurth has made numerous services, and it is unrealistic to believe that she can recall the details of each. The Iowa Supreme Court has recognized such circumstances in *discussing the strength of the presumption.*

We are not disposed to, in any wise, relax the force of this presumption [in favor of the officer's return]. During the terms of their office, sheriffs and other process serving officers serve many notices. In many cases, the service is upon persons little known to them. Memory is at best frail, and the official return of service is by far the most trustworthy evidence.

Chader v. Wilkins, 226 Iowa 417, 284 N.W. 183, 185 (1939). Wurth was disinterested. Kleins are not, and that affects their credibility. See Pyle v. Stone, 185 Iowa 785, 171 N.W. 156, 158 (1919).

There is evidence favoring Kleins' position. Kleins had taken the foreclosure papers to a lawyer and had gotten a recommendation for a bankruptcy attorney. They saw him before the sale. They were not ignoring the problem, and it does not make sense, if she had been served, for Khristina Klein not to tell attorney Molstad of the sale. It was to her legal benefit to file bankruptcy before the sale. However, Khristina Klein's testimony revealed that she did not fully understand the proceedings.

Jennifer does strongly resemble her mother. The testimony regarding her problems at home and school is supported by her subsequent institutionalization at the Boys and Girls Home.

The evidence surrounding the Kleins' discovery of Jennifer's alleged part in the service matter is somewhat controversial. Khristina Klein says her daughter admitted only two or three weeks ago that she had been served. Yet as defendants point out, documents filed in this adversary proceeding indicate that the Kleins knew of this issue at least as early as February 1996. Kleins say they suspected the problem, and it is only that Jennifer did not admit it until recently. Khristina points out that service on Jennifer was suspected because the return of service was made upon a woman, and Jennifer was the only other woman at the house. But how would Khristina know as early as February that a woman was purportedly served if she had seen the return of service only on the day of trial? Similarly, Khristina testified that she sat down with her daughter two or three weeks ago to discuss the importance of the incident and asked her if she remembered a lady coming to the house with papers. But why would she ask if a "lady" had come? Why would she assume that only female deputies serve process? It calls into question the veracity of the story.

Corroboration of Jennifer's truancy on April 10 would have been helpful to the Kleins. One would think that there would have

been a record of her missing school or a class on that day and regularly. Kleins introduced none. So the court is left with only her word that she was truant and was served at home that day.

Considering all of the evidence, I conclude that plaintiffs have failed to rebut by clear and satisfactory evidence the presumption of proper service. That is not to say that the issue of upon whom service was made is easily decided. Indeed, counsel for Kleins say it is a close call. Because it is, plaintiffs fail. I cannot decide in their favor on a close call. I can find in their favor only on clear and satisfactory evidence. Plaintiffs have not presented proof necessary to set aside the sale. I find that notice of the sale was properly served on Khristina Klein. Thus the sheriff's sale will not be set aside. Kleins' complaint against defendants will be dismissed.

#### HARRISON'S COUNTERCLAIM

Harrison, the purchaser at the sale, seeks a writ of possession and judgment for damages for Kleins' wrongful possession since the sale. The claims are brought under Iowa Code Chapter 646.

Iowa Code Chapter 646 permits the court to award possession of the property to the party having the right to immediate possession and to award damages for the use and occupation of the premises. Iowa Code §§ 646.2, 646.19, and 646.24.

Harrison was and has been entitled to possession of the property since the recording of the corrective deed on June 5, 1995 through August 15, 1996, a period of 14 months and 10 days. The fair rental value of the property is \$750.00 per month. Harrison is entitled to damages of \$10,750.00. Harrison is entitled also to possession of the property.

ORDER

IT IS ORDERED that judgment shall enter that the complaint of Alan D. Klein and Khristina H. Klein against United Mortgage Corporation and Jack D. Harrison is dismissed.

IT IS FURTHER ORDERED that judgment shall enter that Jack D. Harrison shall recover from Alan D. Klein and Khristina H. Klein, jointly and severally, the sum of \$10,750.00.

IT IS FURTHER ORDERED that judgment shall provide that writ of possession shall issue that Jack D. Harrison shall have possession of the following property: 2913 South Cornelia Street, Sioux City, Iowa, legally described as:

Lot 21 except the North 30 feet thereof and the North 40 feet of Lot 20 in Block 4, Lincoln Park Addition to Sioux City, in the County of Woodbury and State of Iowa, and the East half of the North-South alley abutting on said part of said lots.

SO ORDERED THIS 15<sup>th</sup> DAY OF AUGUST 1996.

  
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William L. Edmonds, Chief Bankruptcy Judge