

In the United States Bankruptcy Court

for the Northern District of Iowa

DENNIS L. TITUS and
MARSHA L. TITUS

Bankruptcy No. X87-01706F

Debtor(s).

Chapter 7

ORDER RE: OBJECTION TO CLAIMS

The matter before the Court is debtors' objection to certain claims. Brenton Bank of Palo Alto County has resisted the debtors' objection as to its claim. A hearing was held on July 21, 1988 in Fort Dodge, Iowa and the matter was submitted. The Court now states the following findings of fact and conclusions pursuant to Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FINDINGS OF FACT

The debtors, Dennis and Marsha Titus, filed their Chapter 7 bankruptcy petition on August 7, 1987. Several claims were filed against the estate. The debtors have objected to claims numbers 2, 3, 9, 10, 11 and 15 by filing an objection on April 6, 1988 and by an amendment to the objection filed June 22, 1988.

Claims 10 and 11 were settled prior to the hearing. Claims 6 and 9 were filed by T. L. Ellis, D.D.S. Claims 7 and 15 were filed by Wehrspanns, Inc.

The debtors contend that claims 6 and 9 are duplicative. Both claims are in the amount of \$51.06. Claim number 6 was filed February 16, 1988. Claim number 9 was filed February 25, 1988. The debtors also contend that claims 7 and 15 are duplicative. Both claims are in the amount of \$1,373.29. Claim number 7 was filed on February 16, 1988. Claim number 15 was filed on April 15, 1988.

Claims 2 and 3 were filed by Brenton Bank of Palo Alto County (hereinafter referred to as "BANK"). Claim number 2 is asserted as the unsecured portion of a mortgage debt owed by the debtors to Bank. Claim number 3 represents Bank's opinion-of the value of their secured claim.

The debtors contend that claim number 2, the unsecured portion of the debt owed to Bank, is unsubstantiated and too low. With regard to claim number 3, the secured portion of the mortgage, the debtors contend that this figure is erroneously low. Additionally, in their amendment to objections, the debtors contend that the underlying debt upon which claim number 2 is based has been extinguished pursuant to Iowa Code Ch. 655A (1987) and thus there is no unsecured claim.

There have not been any resistances to the debtors' objections to claims 9 and 15. Bank filed a resistance to the debtors' objections to claim numbers 2 and 3 on July 5, 1988. Bank contends that the valuations of their stated claims numbers 2 and 3 are accurate. Additionally, Bank contends that it has

a valid unsecured claim since it filed a notice of rescission of the nonjudicial foreclosure. Therefore, Bank argues that the unsecured portion of the debt has not been extinguished.

Bank filed a motion for relief from automatic stay on September 1, 1987 in order that it be permitted to foreclose on its mortgage with the debtors. The relief from automatic stay was ordered by this Court on October 2, 1987.

After obtaining relief from the stay, Bank proceeded with foreclosure by filing a notice of nonjudicial foreclosure of a nonagricultural mortgage pursuant to Iowa Code Ch. 655A (1987) with the Palo Alto County Recorder on March 29, 1988. An affidavit of compliance with Iowa Code Ch. 655A (1987) was filed with the county recorder on May 5, 1988.

The debtors did not cure their default in accordance with the terms or provisions of Iowa Code Ch. 655A (1987) and did not reject the notice of nonjudicial foreclosure. The debtors continue to live in their mortgaged property but have not paid any rent. Although the nonjudicial foreclosure was completed, Bank filed a notice of rescission of the nonjudicial foreclosure proceeding with the Palo Alto County Recorder on July 1, 1988.

DISCUSSION

A proof of claim is deemed allowed unless a party-in-interest objects. 11 U.S.C. § 502(a). Since it appears that there may be funds in this bankruptcy estate which might be distributed under 11 U.S.C. § 727(a)(6), both parties in this proceeding have agreed that the debtors are parties-in-interest who may object to proofs of claim.

If an objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim unless such claim is unenforceable against the debtor and property of the debtor under any agreement or applicable law for a reason other than because such claim is contingent or unmatured. 11 U.S.C. § 502(b)(1).

After reviewing the proof of claims filed by T. L. Ellis, D.D.S., the Court finds that claims 6 and 9 are identical. Both claims are in the amount of \$51.06 and are based on the same statement for dental services. Since claim number 9 is duplicative, it will be disallowed; claim 6 will be allowed.

The Court has also reviewed the proofs of claim filed by Wehrspans, Inc. and finds claims 7 and 15 to be identical. Both claims are in the amount of \$1,373.29 and are based on identical accounts. Claim number 15 will be disallowed; claim 7 will be allowed.

With regard to claim number 2, this Court does not believe that Bank has a valid unsecured claim for the unpaid mortgage debt. There was presented no valid basis for rescission of the nonjudicial foreclosure and the bringing of a regular foreclosure action under Iowa Code Ch. 654 (1987). Bank elected to bring the foreclosure action under the new nonjudicial statute and carried the procedure through to completion. Bank has elected its remedy.

Although it is strictly applied, the election of remedies doctrine is recognized in Iowa. In order to invoke the election of remedies doctrine, three elements must be established: (1) the existence of two or more remedies; (2) inconsistency between them, and (3) a choice of one of the remedies. Bolinger v. Kiburz, 270 N.W.2d 603, 605 (Iowa 1978); First Security Bank of Brookfield v. McClain, 403 N.W.2d 788, 790 (Iowa 1987).

In Iowa, a mortgagee now has at least two remedies when foreclosing upon nonagricultural property. The mortgagee can elect to proceed under Iowa Code Ch. 654 (1987) which provides for judicial foreclosure and statutory redemption or the mortgagee can proceed under the new nonjudicial foreclosure statute recently enacted by the Iowa legislature. Iowa Code § 654A (1987). Bank chose to use the new nonjudicial foreclosure statute.

Whether there is an inconsistency depends on whether the facts relied upon for one remedy contradict the facts relied upon for the other. Bolinger v. Kiburz, 270 N.W.2d 603, 606 (Iowa 1978). The court does not find the remedies in this case to be inconsistent.

When remedies are factually consistent, an election to pursue one does not necessarily preclude the pursuit of another. See First Security Bank v. McClain, 403 N.W.2d 788, 790 (Iowa 1987). However, if the first remedy is fully completed, the parties should not be allowed to pursue the other consistent remedy. See Gottschalk v. Simpson, 422 N.W.2d 181, 185 (Iowa 1988). Bolinger v. Kiburz, 270 N.W.2d 603, 606 (Iowa 1978).

In this case, Bank has chosen its remedy and carried the nonjudicial foreclosure proceeding through to completion. It appears that Bank was fully aware of the provisions and legal ramifications of using the nonjudicial foreclosure proceeding. By completion of the filings required by the Chapter, Bank acquired title to the real estate, and the Titus' debt was extinguished.

It would be inequitable to allow Bank to rescind the completed nonjudicial foreclosure and allow it to begin a new foreclosure proceeding, this time under Iowa Code Ch. 654. The debtors thought the foreclosure proceeding was completed. The debtors were under the belief that the debt underlying the mortgage was extinguished. Bank should not be allowed to collect any estate proceeds for its alleged unsecured debt. Claim number 2 is not a valid claim since the underlying debt was extinguished. Since the extinguished debt is unenforceable against the debtor under Iowa law, it cannot be a valid claim in a Chapter 7 bankruptcy case. See 11 U.S.C. § 502(b)(1).

Since this Court does not believe Bank has a valid unsecured claim for any unpaid mortgage debt, the Court does not need to address the issue regarding valuation of the secured and unsecured claims. Bank's secured claim has been satisfied through the foreclosure proceeding under Iowa Code Ch. 655A. This foreclosure proceeding, which has been completed, allows Bank to obtain possession of the real estate and thereby satisfy its secured claim.

ORDER

IT IS THEREFORE ORDERED that the debtors' objection to claim numbers 9 and 15 is sustained.

IT IS FURTHER ORDERED that the debtors' objection to claim number 2 is sustained.

IT IS FURTHER ORDERED that claim number 3 will be allowed to the extent of the value of the property.

SO ORDERED THIS 31st DAY OF AUGUST, 1988.

William L. Edmonds
Chief Bankruptcy Judge