

In the United States Bankruptcy Court

for the Northern District of Iowa

TIMOTHY D. RODEMEYER and
PATRICIA RODEMEYER

Bankruptcy No. X88-00069M

Debtor(s).

Chapter 7

HAMPTON STATE BANK

Adversary No. X88-0069M

Plaintiff(s)

vs.

TIMOTHY D. RODEMEYER
PATRICIA RODEMEYER FARMERS
HOME ADMINISTRATION and
LARRY S. EIDE Trustee

Defendant(s)

ORDER RE MOTION TO DISMISS

The matter before the court is a motion to dismiss filed by the debtors. A telephonic hearing was held on December 8, 1988.

The court, having considered the arguments of the parties, now issues the following findings of fact and conclusions of law pursuant to Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

FINDINGS OF FACT

1. Debtors Timothy Rodemeyer and Patricia Rodemeyer, filed bankruptcy under Chapter 7 of the Bankruptcy Code on January 15, 1988.
2. On March 21, 1988, the Hampton State Bank filed this adversary proceeding. The adversary proceeding is an action for declaratory judgment that the bank's interest in certain real estate listed on the debtors' schedules is superior to the interest of the defendants, claiming that the debtors acquired the title by fraudulent conveyance.
3. Dean Rodemeyer and Ellen Rodemeyer filed a Chapter 7 bankruptcy petition in this court on May 4, 1987, Case No. 87-01087M. In 1985, Dean and Ellen Rodemeyer executed and delivered promissory notes to the bank which were payable in full on March 12, 1986. Payment was not made on these notes when due.
4. On April 7, 1986, Dean and Ellen Rodemeyer conveyed to debtors the following described real property in Franklin County,

Iowa: The Northeast Quarter (NE 1/4) of Section Twenty-six (26), Township Ninety-two (92) North, Range Twenty-one (21) West of the 5th P.M., Franklin County, Iowa, and

The North Half (N ½) of the North Half (N ½) of the Southeast Quarter (SE 1/4) of Section Twenty-six (26), Township Ninety-two (92) North, Range Twenty-one (21) West of the 5th P.M., Franklin County, Iowa.

5. The bank claims that the above-described property was fraudulently conveyed by Dean and Ellen Rodemeyer to Timothy and Patricia Rodemeyer and therefore is a fraudulent conveyance.

6. Defendants Timothy and Patricia Rodemeyer filed a motion to dismiss the adversary proceeding on April 12, 1988. A hearing was held on the motion to dismiss. The court entered an order denying the defendants' motion to dismiss on June 21, 1988. Defendants Timothy and Patricia Rodemeyer filed an answer to bank's complaint on September 2, 1988.

7. Defendants Timothy and Patricia Rodemeyer filed a second motion to dismiss on November 22, 1988.

8. Defendants claim in their motion to dismiss that the bank is not the real party in interest and therefore this adversary proceeding should be dismissed. Defendants claim that Larry Eide, bankruptcy trustee of the Dean and Ellen Rodemeyer bankruptcy, is the only party with standing to bring the present proceeding since the complaint involves a fraudulent transfer from Dean and Ellen Rodemeyer to Timothy and Patricia Rodemeyer.

9. The bank filed a resistance to the motion to dismiss on November 25, 1988. The bank claims that the defendants did not raise the real party in interest as a defense in their answer of September 22, 1988.

DISCUSSION

Defendants Timothy and Patricia Rodemeyer argue that trustee of the Dean and Ellen Rodemeyer bankruptcy is the only party with standing to bring this adversary proceeding. The complaint filed by Hampton State Bank on March 21, 1988 asks the court to issue a declaratory judgment regarding the extent of the bankruptcy estate's interest in real property claimed to be owned by the defendants Timothy and Patricia Rodemeyer. The bank contends that the conveyance was made for inadequate consideration and for the purpose of hindering, delaying, and defrauding their creditors. Therefore, the bank requests the court to declare that the property is not included in the bankruptcy estate and that the rights and interest of the bank in the property are superior and paramount to any interest of the defendants. The bank also requests that it be given a lien against the property for the amount of the unpaid balance on the notes of Dean and Ellen Rodemeyer. In essence, this complaint is a fraudulent conveyance action.

The transfer of the real property from Dean and Ellen Rodemeyer to Timothy and Patricia Rodemeyer took place more than one year before the date of the filing of both the Dean and Ellen Rodemeyer bankruptcy and the Timothy and Patricia Rodemeyer bankruptcy. Therefore, any fraudulent conveyance that occurred under Iowa law could only be set aside under 11 U.S.C. § 544(b). Section 544(b) provides:

"The trustee may avoid any transfer of an interest of a debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor

holding an unsecured claim that is allowable under § 502 of this title or that is not allowable only under § 502(e) of this title."

This section specifically provides that the trustee is the party who must avoid the transfer. (Emphasis added.) "An action to set aside a fraudulent transfer must be brought in the name of the bankruptcy estate as a real party in interest." In re Curry & Sorensen, Inc., 57 B.R. 824, 828-29 (Bankr. 9th Cir. 1986); In re Toledo Equipment Co., Inc., 35 B.R. 315, 317 (Bankr. N.D. Ohio 1983).

Plaintiff characterizes its complaint as one seeking a determination that the transferred real estate is not property of the bankruptcy estate of Timothy and Patricia Rodemeyer. It also seeks a declaration that its interest in the property is prior to any other defendants and the imposition of a lien in its favor against the property.

The Timothy and Patricia Rodemeyer estate includes an interest in this property until the trustee of the Dean and Ellen Rodemeyer bankruptcy estate seeks to and is successful in setting aside the real estate transfer from Dean and Ellen to Timothy and Patricia as fraudulent.

Bank begs the question in seeking a determination that the real estate is not property of the estate of Timothy and Patricia Rodemeyer because of the fraudulent conveyance.

Rule 17 of the F.R.C.P. applies in adversary proceedings. Bankr. R. 7017. Rule 17(a) provides in part:

"Every action shall be prosecuted in the name of the real party in interest No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution, of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

This court agrees that the Hampton State Bank is not the "real party in interest" to bring this adversary proceeding to the extent it is a fraudulent conveyance action.

The bank argues that the defendants have waived their right to assert that the action was not brought by the "real party in interest" since the issue was not brought up until the motion to dismiss was filed on November 21, 1988. The bank argues that objections regarding the "real party in interest" must be made at a very early stage in the proceeding, or in the defendants' responsive pleading to the petition.

There is no specific procedure under the federal rules for raising an objection that a plaintiff is not the real party in interest. Shank v. Naes, 102 F.R.D. 14, 17 (D. Kan. 1983). Most courts have determined that an objection must be done with reasonable promptness. See Chicago & Northwestern Transportation Co. v. Negus-Sweenie, Inc., 549 F.2d 47 (8th Cir. 1977); Audio-Visual Marketing Corp. v. Omni Corporation, 545 F.2d 715 (10th Cir. 1976); Hefley v. Jones, 687 F.2d 1383 (10th Cir. 1982).

This court does not believe that the defendants' objection to plaintiff's status as a real party in interest has been unreasonably delayed. The adversary proceeding was filed on March 23, 1988. However, the defendants filed a motion to dismiss the complaint prior to filing an answer on April 12, 1988. An order overruling the motion to dismiss was entered by this court on August 19, 1988. An answer to the complaint was filed on September 2, 1988. Since an answer was not filed until September, this court does not believe that the defendants have waived their right to object to the plaintiff's status as a

real party in interest. The provisions of 11 U.S.C. § 544(b) clearly indicate that the trustee is the only party who may avoid a transfer. The bank has no standing to bring a fraudulent conveyance action under 11 U.S.C. § 544.

Despite the Bank's lack of standing to bring a fraudulent conveyance action, the court should closely examine plaintiff's complaint to determine if it would be entitled to any relief. Bank's claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 78 S.Ct. 99, 102, 355 U.S. 41, 45-46 (1957).

Bank's complaint seeks a determination that its rights in interest in the property are superior and paramount to those of the debtor-defendants and the trustee in their bankruptcy case.

In seeking a determination of this issue, Bank states a claim for relief. Its complaint, therefore, should not be dismissed.

ORDER

IT IS THEREFORE ORDERED that the defendants Timothy and Patricia Rodemeyer's motion to dismiss is denied.

SO ORDERED ON THIS 25th DAY OF JANUARY, 1989.

William L. Edmonds
Chief Bankruptcy Judge