In the United States Bankruptcy Court

for the Northern District of Iowa

LEON F. FUNKE
KAREN FUNKE
Debtor(s).

Bankruptcy No. L-89-00327-D

Chapter 11

ORDER ON MOTION FOR ENFORCEMENT OF REMEDY

On June 23, 1993, the above-captioned matter came on for hearing pursuant to assignment. The Debtors appeared in person with Attorney Brian Peters. Connecticut General Life Insurance Co. appeared by Attorney Clifton R. Jessup, Jr. The matter before the Court is a Motion for Enforcement of Remedy Under a Confirmed Plan of Reorganization. The Motion was filed by Connecticut General Life Insurance Co. with a resistance and objection filed by Debtors Leon F. and Karen Funke. No evidence was presented; however, the parties stipulated that for the purposes of this record, Debtors are in default on the original stipulation. Counsel presented briefs and arguments after which the Court took the matter under advisement.

STATEMENT OF THE CASE

Connecticut General is the holder of a promissory note dated March 14, 1980. This note is in the amount of $265,000 and was executed by the Debtors. The note is secured by a first mortgage lien on farm real estate which is located in Dubuque County, Iowa. A foreclosure proceeding was commenced by Connecticut General in October of 1988. The Debtors filed a Chapter 11 proceeding on March 8, 1989. On August 31, 1989, the Debtors and Connecticut General entered into a stipulation for adequate protection and satisfaction of secured claims under the plan. This was tendered to the Court and approved by the Court's Order confirming this Plan on February 7, 1990.

The Order approving the Plan specifically incorporated the "Stipulation and Agreement for adequate protection and satisfaction of secured claim" into the Plan. The Debtors have defaulted under the terms of this Stipulation. Specifically, the Debtors have failed to make monthly payments for more than three months and have failed to pay real estate taxes for several years. These defaults are not cured as of the time of hearing.

The August 31, 1989 Stipulation provides a specific remedy to Connecticut General in the event of a default by Debtors:

> "If the default is not cured within three (3) months after the due date of the payment, the Funkes hereby consent to Connecticut General's use of the Alternative Non-judicial Voluntary Foreclosure Procedure pursuant to Iowa Code sec. 654.18 which permits an expedited fore- closure procedure and acquisition of title by Connecticut General."

The Stipulation also contains, in paragraph 4, a release by the Funkes of any claims and demands that they may have against Connecticut General including the loan relationship between them. The text of sec. 654.18 of the Iowa Code is not fully set out herein but is attached to this ruling as Court's Exhibit "A".

After default, Connecticut General requested of the Debtors that they execute the documents necessary to accomplish the non-judicial foreclosure under the Stipulation and sec. 654.18(1)(f). The Debtors refused to execute the Agreement, Warranty Deed and Waiver of Mediation. The present Motion seeks an order compelling the Debtors to execute those documents in order to carry out what Connecticut General states is the purpose and intent of the original Stipulation.

The Debtors resist any Court order mandating execution of these documents. Debtors interpose three specific objections. They argue that; (1) Sec. 654.18 of the Code contemplates an agreement which is voluntary at the time of execution, (2) they retain the right to cancel the voluntary foreclosure within 5 days of the date of signing and will indeed do so if they are ordered to sign this document because the right of cancellation under sec. 654.18 was not, and cannot be, waived, and renders the requested enforcement a nullity, and (3) nothing in the Statute and nothing in the Confirmed Plan contemplates waiver of the right to mediation.

CONCLUSIONS OF LAW AND RULING

The Bankruptcy Court retains post-confirmation jurisdiction to interpret and enforce its own orders in aid of their proper execution. In re Doty, 129 B.R. 571, 587 (Bankr. N.D. Ind. 1991). The Court may direct the debtor to execute any instrument required to effect a transfer of property dealt with by a confirmed plan. 11 U.S.C. § 1142(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

The provisions of a confirmed plan bind the debtor and all creditors. 11 U.S.C. § 1141(a). The confirmed plan is a binding contract and res judicata as to all issues decided. In re Laing, 146 B.R. 482, 484 (Bankr. N.D. Okla. 1992). In discerning the meaning of a plan, general rules of contract interpretation apply. United States v. Cook, 147 B.R. 513, 516 (D.S.D. 1992). The Court's goal is to ascertain and give effect to the parties' intent by looking to the language used and examining the contract in its entirety. Id. Only when the language of the Plan is ambiguous may the court turn to other aids of construction and parol evidence. In re Doty, 129 B.R. at 590. The same rules of interpretation apply to stipulations between parties. In re Royster Co., 132 B.R. 684, 688 (Bankr. S.D.N.Y. 1991). A confirmed Plan is binding even if it is later determined to be inconsistent with bankruptcy law or outside the authority of the Bankruptcy Court. Laing, 146 B.R. at 485.

As indicated, the parties entered into a Stipulation and Agreement in August of 1989. This Stipulation contained the provision allowing use of the alternative non-judicial voluntary foreclosure procedure under sec. 654.18. Connecticut General now seeks to utilize that procedure and the Debtors ask the Court to deny use of that procedure for three stated reasons.

First, Debtors allege that sec. 654.18 "contemplates an agreement which is voluntary at the time of execution." By implication, Debtors are asserting that the original agreement was not voluntary in nature. However, no evidence was presented which would indicate that the Debtors' execution of the Stipulation was other than voluntary. Counsel, in oral arguments, did not explore what was intended by this allegation. An examination of the file, the stipulated record, as well as the statements of counsel, establish that, throughout this entire process, the Debtors were represented by counsel. It is obvious from the face of the documents that considerable discussion was held prior to the execution of the Stipulation in question. All parties and all counsel of record actually executed the Stipulation

prior to its presentation to the Bankruptcy Judge for consideration. There was active Court involvement to the extent that the Stipulation was eventually presented to the Bankruptcy Judge for incorporation into the Plan which was ultimately approved in 1990. Since approval of the Plan, the parties have operated under its terms for 3 1/2 years without any Motion being filed to set aside the Stipulation as being other than a voluntary document. Based upon the record presented, it is the conclusion of this Court that any allegation that the original execution of the Stipulation was other than voluntary is not warranted.

Second, Debtors assert that sec. 654.18(1)(f) allows the Debtors to cancel the voluntary procedure within five days of the date of signing. They assert they will in fact do so if required to sign. Connecticut General, in turn, argues that if the Debtors are given the right to cancel under this Code section, the same would violate the Supremacy Clause of the United States Constitution. Under the Supremacy Clause, Bankruptcy provisions prevail where there is conflicting state law. Ocasek v. Manville Corp. Asbestos Disease Compensation Fund, 956 F.2d 152, 154 (7th Cir. 1992). Connecticut General argues that plan provisions control over State or Federal Statutes and that state law may not be allowed to pervert or override distributive portions of bankruptcy laws. In re Active Steel Erectors, Inc., 53 B.R. 851, 853 (Bankr. D. Alaska 1985).

Prior to a discussion of the merits, some explanation of the procedures established under sec. 654.18 may be helpful. The procedure authorized under this subsection is an alternative to involuntary foreclosure. As is reflected in the caption to this subsection, this is a voluntary procedure whereby title is transferred from the mortgagee to the mortgagor. As a part of this procedure, formal title and title documents are transferred utilizing the mechanical procedures set forth in sec. 654.18(1). The entire procedure contains six steps with the final subsection being designated as sec. 654.18(1)(f).

This subsection requires that, at the time the written agreement is executed, the mortgagee shall furnish the mortgagor a disclosure and notice of cancellation form. The Debtors assert that this disclosure and notice of cancellation form was not provided at the time of the execution of the agreement and so they retain the option to rescind within five days of signing any documents which the Court would direct them to sign. Connecticut General claims that allowing the Debtors to cancel would totally undermine the intent of the Stipulation in the Confirmed Plan which was designed to avoid the necessity of going through a formal foreclosure proceeding on this property.

It is apparent from the language of the Stipulation that Debtors and Connecticut General intended that the Stipulation be a complete and binding contract. They unambiguously agreed to proceed with the non-judicial procedures set forth in Iowa Code sec. 654.18, in the event of default. It is also clear that the affect of accepting the Debtors' interpretation would be to force Connecticut General into commencing a full blown foreclosure proceeding.

Connecticut General argues that the Supremacy Clause mandates that the cited language of the Stipulation must be given full effect even if it is in conflict with state law. More specifically, Connecticut General argues that the Stipulation language is sufficiently specific to establish that the Debtors have waived the right, not only to mediation, but also the protection provided by sec. 654.18 (1)(f) of the Iowa Code. Connecticut General argues that the Debtors' rights, which may exist under sec. 654.18, are preempted by the intent of the Stipulation and the Plan for the specific purpose of avoiding a formal foreclosure proceeding.

The impact of the Supremacy Clause is not in serious dispute in this proceeding. It is clear that any state legislation which frustrates the full effectiveness of federal law is rendered invalid under the United States Constitution Supremacy Clause. Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704

(1971). The invocation of the Supremacy Clause would be correct if sec. 654.18 and the Stipulation and the Plan were in true conflict. The Court, however, does not read the respective documents as suggested by Connecticut General. A careful reading of the Stipulation establishes that, rather than being in conflict with sec. 654.18, the Stipulation adopts the procedures of that Statute for the purpose of regulating the conduct of the parties.

The Supremacy Clause is only implicated when the impact of federal law would be invalidated by conflicting state law. That is not the proposition which is being presented in this argument. There is no federal law which is being avoided by sec. 654.18 of the Iowa Code. Rather, the parties, by agreement, chose to use the procedures set forth in that Iowa Code Section in the Stipulation which became part of the Plan of Reorganization under federal law. This does not create a conflict or an invalidation of any Federal Statute. As such, it is the ultimate conclusion of this Court that, under this argument, the United States Supremacy Clause is not implicated. Rather, the Court must look to the Plan, as well as the Statute, to determine the intent of the parties under controlling statutory interpretation principles.

It is uncontested that Connecticut General did not provide the disclosure and notice of cancellation form contained in sec. 654.18(1)(f) at the time of the execution of the Stipulation. Compliance with that Code Section would have eliminated any present controversy. The question remains, however, as to the impact of the failure to attach the disclosure form to the Stipulation and its effect on enforcement of the Stipulation. Many State and Federal Statutes have procedures allowing rescission of contracts within various time periods after the execution of documents. Some of the Statutes have remedies provided for the failure to provide notices and some do not. For example, 15 U.S.C. § 1635 provides a specific remedy for failure to provide truth and lending disclosures. Iowa Code sec. 555A.5 provides that a failure to disclose voids all door-to-door sales contracts. Sec. 654.18, however, provides no remedies for a violation of this disclosure and notice of cancellation requirement. Where no remedy is provided, Courts ordinarily examine the Statute on a case-by-case basis to determine what impact a failure to provide the required notice has on the overall transaction. The purpose of notice is to provide Debtors sufficient information to understand their predicament and to encourage them to take appropriate steps to alleviate it. Citizens First Nat'l Bank v. Hoyt, 297 N.W.2d 329 (Iowa 1984). Ordinarily, if the record amply demonstrates that the Debtors were sufficiently aware of the nature of the proceedings and were aware of their rights, then the failure to provide the statutory notice is not fatal to the transaction. However, if an evaluation of the record establishes that the failure to provide notice substantially impaired the rights of a debtor, the failure to provide notice may be fatal to the underlying agreement.

It is the conclusion of this Court that under the present circumstances, the failure to provide the disclosure form is not fatal to the Stipulation. The Statute's requirement of an attached disclosure is obviously intended to protect unwary (borrowers) mortgagees from overreaching (lenders) mortgagors. Jackson v. Grant, 890 F.2d 118, 120 (9th Cir. 1989). The Stipulation which incorporated the procedures of sec. 654.18 arose in the context of the bankruptcy "work-out" in which both parties were represented by able counsel. Both counsel actually signed the Stipulation. The Stipulation was approved by the Court and incorporated into the Confirmed Plan of Reorganization. Under these circumstances, it is clear that the Debtors understood the nature of their predicament. They understood the implications of sec. 654.18 and they were aware of the rights which were contained in this section. The parties executed this agreement in August of 1989. It would be unfair to Connecticut General to now deny them the benefit of their bargain almost four years after execution of this Agreement.

It is clear that the Debtors had full opportunity to execute or refuse to execute the Plan. Debtors did not take advantage of any opportunity they might have had to object at the confirmation hearing to

this failure to provide the disclosure and notice of cancellation statement. The Debtors have accepted the benefits derived from the Stipulation. Where the Debtors do not object to a Plan and derive the benefits from the Plan, they may be equitably estopped from denying the validity of the Plan at a later time. Riverside Nursing Home v. Northern Metro. Residential Health Care Facility, Inc., 977 F.2d 78, 80 (2d Cir. 1992).

This Court concludes that Connecticut General's failure to attach the statutorily mandated disclosure form to the Stipulation is insufficient reason to undo any agreement of the parties. It would be unfair at this late date to allow the Debtors to cancel their voluntary contractual agreement absent a showing of lack of understanding. The Debtors had the benefit of their bargain at all stages of these proceedings and were ably represented by counsel. No reason is established why Connecticut General should not be allowed to proceed with the non-judicial foreclosure procedures set forth in sec. 654.18 on this ground.

Finally, Debtors urge that "nothing in the Statute and nothing in the Confirmed Plan contemplate waiver of the right to mediation." Connecticut General has asked the Court, as part of these proceedings, to require the Debtors to execute a waiver of mediation. The issue presented here is whether Chapter 654A is applicable to these facts and if so, whether mediation is mandated. The Iowa Legislature passed the Farm Mediation Bill in part to address a financial crisis involving the farming industry. Farm Mediation was commenced in order to allow a voluntary restructuring of farm loans prior to foreclosure. This philosophy is incorporated into Chapter 654 and Chapter 654A. The Code Section involved in this Motion is sec. 654.18 which is designated as an "alternative procedure". The Iowa Supreme Court discussed this Code Section in Black v. First Interstate Bank, 439 N.W.2d 647 (Iowa 1989). The Iowa Supreme Court stated:

> "Chapter 654 was amended to create the "alternative non-judicial voluntary foreclosure procedure". S.F. 577, § 46 (now codified at Iowa Code § 654.18 (1987)). This alternative procedure included a means by which agricultural land could be voluntarily transferred to a mortgagee in lieu of foreclosure (citations deleted). This Section, dealing with agricultural land, authorized mortgage lenders and mortgagors to enter into an agreement whereby the voluntary transfer could, among other things, satisfy all or part of the mortgage, allow the mortgagor a right to purchase the land for a period up to five years, and entitle the mortgagor to lease the agricultural land."

Id. § 650.

The essence of Black is that the procedure set forth in the Stipulation of the parties in the present case is a voluntary procedure which is utilized in lieu of foreclosure. Mediation by definition is an intervention or interposition by a third person in mediating between two contending parties with a view to persuade them to adjust or settle their dispute. Black's Law Dictionary 981 (6th ed. 1990).

The parties entered into discussions and reached an agreement which was embodied in a Stipulation in 1989. This Stipulation was incorporated into the Plan. The purpose and function of the negotiations leading up to the Stipulation were similar, if not identical, to those which would arise out of forced mediation under Chapter 654A. The parties' discussion, as well as the Bankruptcy Court intervention, would be an equivalent substitution for the farm mediation service.

As this procedure is voluntary and is used in lieu of a foreclosure, no reason exists why mediation should be mandated under the earlier provisions of Chapter 654 or under Chapter 654A. The parties

have, in effect, reached a voluntary mediation whereby the terms of their resolution are controlled by the provisions in sec. 654.18.

Connecticut General also argues the applicability of the Supremacy Clause on the issue of mediation. As previously discussed, the Court felt that the Supremacy Clause was not implicated with the discussion of Iowa Code sec. 654.18. However, it is the feeling of this Court that a much closer question is presented on the existence of the Supremacy Clause issue in relation to whether mediation is mandated in this case. As discussed, mediation requires a series of meetings and discussions which requires a substantial period of time to complete under the Statute. The Stipulation, which was incorporated into the Plan, discusses an "expedited foreclosure procedure". A liberal application of the Supremacy Clause may force the conclusion that the expedited foreclosure procedure anticipated in the Stipulation would be in conflict with the mediation statute which anticipates a more lengthy procedure. However, as the Court has decided this issue on other grounds, it is the conclusion of this Court that no decision need be made on the obviously close question of whether the somewhat ambiguous language of the Stipulation is sufficient to invoke the Supremacy Clause on this issue.

It is the conclusion of this Court, therefore, that the parties, by entering into a Stipulation and agreeing to the terms of sec. 654.18, waived any right or need for mediation under Chapter 654 or Chapter 654A, particularly at this late date. It is ultimately, therefore, the conclusion of this Court, under the particular facts of this case, that no further mediation is mandated. However, in order to complete the foreclosure procedure, it will be the Order of this Court that the Debtors execute the Mediation Release which is part of the Motion in this case. No good reason is shown why the Debtors should not be required to execute these documents expediting the transfer.

In its final and most simple terms, the benefit which the Debtors would derive, if their position were sustained, is the right to make Connecticut General go to State Court for mediation and formal forfeiture proceedings. This would not allow a curing of the default, but would merely delay the proceedings. Elimination of this delay is the basis for Connecticut General's Agreement. The expedited voluntary foreclosure procedure should be mandated.

WHEREFORE, Connect General's Motion for Enforcement of Remedy Under the Confirmed Plan of Reorganization filed April 22, 1993 is granted.

FURTHER, the Debtors shall execute and deliver the originals of the Agreement, Warranty Deed, and Waiver of Mediation to Connecticut General no later than July 26, 1993.

FURTHER, the Debtors are not entitled to cancel the execution of these documents under sec. 654.18 (f) of the Iowa Code.

SO ORDERED this 12th day of July, 1993.

Paul J. Kilburg
U.S. Bankruptcy Judge