

In the United States Bankruptcy Court
for the Northern District of Iowa

RICKY LEE BOOHER aka Richard
Booher aka Rick Booher
Debtor(s).

Bankruptcy No. 94-10520KC
Chapter 7

ORDER

On October 6, 1994, the above-captioned matter came on for hearing pursuant to assignment. Hearing was held to determine the distribution of proceeds to lien creditors from the sale of Debtor's real estate. Debtor appeared by Attorney Joe Peiffer. The Chapter 13 Trustee Carol Dunbar was present. Joe Schmall represented Farmers State Bank (the "Bank"). Gary Jarvis, Assistant County Attorney, was present representing Linn County. Charles Nadler represented creditor Andrea Paige Hess-Booher. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A, K, N, O).

STATEMENT OF THE CASE

The record establishes that Debtor Ricky Lee Booher owned property described as Lot 1 of "Westland Addition to the City of Cedar Rapids, Iowa". This property was part of Debtor's Chapter 13 bankruptcy estate which Debtor proposed to sell in a Motion to Sell Property Free and Clear of Liens. A substantial number of creditors held claims against this real estate. An Order filed May 24, 1994 provided that the property could be sold free and clear of liens. However, after the payment of the underlying real estate contract and property taxes, the residue was to be held by the Chapter 13 Trustee until this Court determined the priorities of the claims of the lien creditors against this fund.

The sale of the real estate occurred prior to mid-September, 1994. The Chapter 13 Trustee indicated at the present hearing that she has received a total of \$7,933.19 as proceeds of the sale. Additionally, she advised the Court that the realtor retained the purchaser's \$6,000 down payment as a realtor's fee. The Trustee stated that this is in violation of a Court Order and she is attempting to recapture that amount from the realtor. According to the Court's Order entered May 24, 1994, the realtor was not entitled to a fee because the listing contract had expired before the bankruptcy case was filed. Therefore, when the additional \$6,000 is collected, the total proceeds of the sale available for distribution will be approximately \$14,000.

Several claims are made against this fund which constitute liens on the property. The Court has been informed that the following constitute liens on the property which remain unsatisfied. They are as follows, in order by date:

1. Judgment for child support dated 5/2/88 against Debtor and in favor of Iowa Department of Human Services ex rel Kimberly Fritz in EQ11624; \$32.56 per week, \$1,000 past due and \$60.00 costs. The Court has not been informed of the exact amount remaining due on this judgment although Debtor's Chapter 13 plan indicates the amount due to be \$2,644.24. (Linn County, Iowa)
2. Judgment dated 12/31/91 against Debtor and in favor of Andrea Hess-Booher for \$70.00 costs in DM17783. (Linn County, Iowa)
3. Judgment for temporary child support dated 10/21/92 against Debtor and in favor of Andrea Hess-Booher for \$200 per month with \$600 remaining due in DM20456. (Linn County, Iowa)
4. Judgment dated 2/3/93 against Debtor and in favor of Andrea Hess-Booher for \$114.00 costs in DA243. (Linn

County, Iowa)

5. Assignment and Mortgage of Purchaser's Equity in Contract for Sale of Real Estate dated March 31, 1993 and filed for record 4/8/93, executed by Debtor in favor of Farmers State Bank.

6. Judgment dated 7/8/93 against Debtor and in favor of State of Iowa for \$77.00 costs in SR34292. (Linn County, Iowa)

7. Judgment dated 8/18/93 against Debtor and in favor of Andrea Hess-Booher in DM20456; \$7,300 property settlement and \$200 per month permanent child support with \$368.52 remaining due. (Linn County, Iowa)

8. Judgment filed in Linn County on 12/21/93 against Debtor and in favor of Melinda Weedn arising from child support judgment in divorce proceedings in Oklahoma with \$9,580 remaining due plus \$5.00 costs.

Only the relative priorities of the liens listed at numbers 3, 5, 7 and 8 above were discussed at the hearing. It is important to also address the relative priorities of the liens listed at numbers 1, 2, 4 and 6 even though not presented at the hearing. Further hearing will be held in the event any of the parties wish to dispute the priority or validity of these liens.

The relative priority of the liens between the Bank's Assignment and Mortgage and Andrea Hess-Booher's property settlement lien of \$7,300 constitutes the primary dispute. On March 31, 1993, Debtor executed an Assignment and Mortgage of Purchaser's Equity in Contract for the Sale of Real Estate in favor of the Bank. This was recorded on April 8, 1993 and constitutes a lien against the property. This Assignment and Mortgage originally secured credit of \$8,591.82. The Bank's proof of claim indicates that the current balance is \$9,010.42, which includes accrued interest, plus interest from the date of the petition and attorney fees.

At the time that the Bank received the Assignment and Mortgage, Debtor and Ms. Hess-Booher were married and held title to the real estate as joint tenants with rights of survivorship. They entered into a real estate contract to purchase the property on April 20, 1992. Debtor executed the Assignment and Mortgage on March 31, 1993. Ms. Hess-Booher did not sign the Assignment and Mortgage.

Ms. Hess-Booher's conflicting claim arises from the dissolution of marriage between herself and Debtor entered in DM-20456-0992 in Linn County, Iowa. The dissolution decree was filed of record August 18, 1993. It ordered continuing child support as well as a property settlement. The dissolution decree provided that Ms. Hess-Booher would have a lien of \$7,300 on the previously discussed real estate and would execute a Quit Claim deed in favor of Debtor. The Quit Claim Deed was filed for record on August 26, 1993. Ms. Hess-Booher claims that the property settlement lien has priority over Farmers State Bank's lien. She also asserts a judgment lien of \$368.52 for continuing child support dating from 8/18/93 which she concedes is subordinate to the Bank's Assignment and Mortgage lien.

There is also of record a foreign support judgment held by Melinda Weedn, another of Debtor's former wives, which was filed in the Iowa District Court in Linn County on December 21, 1993. The judgment arose from a divorce decree entered in Oklahoma on November 30, 1987 and Agreed Journal Entry of Judgment filed in Oklahoma on February 15, 1990. It is uncontested that this judgment was transcribed in Linn County District Court after the Bank's Assignment and Mortgage and Ms. Hess-Booher's \$7,300 dissolution decree property lien.

Assistant County Attorney Jarvis indicated that the records of his office show that the property taxes were paid on closing and that, to the best of his knowledge, the property taxes which are payable have been paid. He indicated that any future taxes which become due will be the responsibility of the buyer. Therefore, the County does not make any lien claim against this property or this fund because of delinquent property taxes.

Farmers State Bank agrees that Ms. Hess-Booher's judgment for temporary child support of October 21, 1992 in the amount of \$600 has priority to the sale proceeds over its Assignment and Mortgage. It is also agreed that the child support judgment from Oklahoma in favor of Melinda Weedn which was filed in Linn County, Iowa in December of 1993 has the lowest priority. Thus, the fighting issue is the priority between Ms. Hess-Booher's property settlement lien arising from the dissolution decree filed August 18, 1993 and Farmers State Bank's Assignment and Mortgage recorded

April 8, 1993. As stated, none of the parties addressed the existence of the 1988 support judgment in favor of DHS ex rel Kimberly Fritz, the December 1991 judgment in DM17783, the February 1993 judgment in DA243 and the July 1993 judgment in SR34292. Absent any record to the contrary, the Court concludes that these judgments are valid and have priority according to the dates they were entered.

The Bank argues that its Assignment and Mortgage has priority because it was recorded prior in time to the entry of Ms. Hess-Booher's judgment lien. Ms. Hess-Booher claims that her lien has priority based on her property interest in the real estate which predated the Bank's Assignment and Mortgage.

CONCLUSIONS OF LAW

At the time Debtor executed the Assignment and Mortgage in favor of the Bank, he held an interest in the property in joint tenancy with Ms. Hess-Booher. The estate of joint tenancy is described under Iowa law as:

an estate held by two or more persons jointly with equal rights to share in its enjoyment during their lives and having as its distinguishing feature the right of survivorship.

Brown v. Vonnahme, 343 N.W.2d 445, 451 (Iowa 1984). "Thus, a joint tenant owns an undivided interest in the entire estate to which is attached the right of survivorship." Id.; Anderson v. Iowa Dep't of Human Serv., 368 N.W.2d 104, 109 (Iowa 1985). The precise share of each tenant may be determined from the agreement of the parties. Anderson, 368 N.W.2d at 109. However, a rebuttable presumption exists that the cotenants hold equal shares in the property. Id. (applying presumption to joint bank account); Frederick v. Shorman, 147 N.W.2d 478, 484 (Iowa 1966) (applying presumption to real estate).

The undivided interest of a joint tenant may be made the subject of a mortgage by that person without the consent of the other cotenants. 48A C.J.S. Joint Tenancy § 34, p. 374 (1981). Under those circumstances, the mortgage is not binding on the cotenants who do not join in its execution. Id. This rule has been consistently followed in Iowa since Frans v. Young, 24 Iowa 375 (1868), which involved the pledge of a jointly owned mare to secure one of the joint owner's debts. The Iowa Supreme Court determined that a joint owner can pledge his or her own interest but the pledgee acquires no right to the other owner's interest. Id. at 378. Though this case involves personalty, the same principles apply to real estate.

This rule continues to be followed by courts in other jurisdictions. The court in Cadle Co. II v. Stauffenberg, 581 N.E.2d 882, 883 (Ill. App. Ct. 1991), held that a joint tenant may mortgage its interest in jointly held property and the mortgage is valid as to the actual interest of the joint tenant who signed the mortgage. Similarly, County of Keith v. Fuller, 452 N.W.2d 25, 31 (Neb. 1990), held that where the note is signed solely by one joint tenant, the bank does not have a lien against the other joint tenant's interest. Texas Am. Bank v. Morgan, 733 P.2d 864, 865 (N.M. 1987), also held that a mortgage by one joint tenant does not encumber the other joint tenant's interest. The mortgage encumbers only the interest the signing joint tenant had at the time of the mortgage. Id.

These cases concur that a mortgagee only receives a property interest equal to that of its mortgagor. Id.; see Young v. Hamilton, 240 N.W. 705, 708 (Iowa 1932) (holding that mortgage only encumbered the interest which mortgagor had as heir of intestate decedent); Crawford County State Bank v. Butler, 208 N.W. 284 (Iowa 1926). This is based on the rule of law that a seller cannot confer greater title than he or she possesses. Frans, 24 Iowa at 378. A mortgage lien creditor may seek satisfaction of the lien only from that portion of the property that belonged to the mortgagor at the time the mortgage was executed. General Credit Co. v. Cleck, 609 A.2d 553, 557 (Pa. Super. Ct. 1992). This is true even though the mortgagor later receives a larger portion of the property. Texas Am. Bank, 733 P.2d at 866; Cook v. Prindle, 66 N.W. 781, 783 (Iowa 1896).

Similarly, judgment liens are limited to the extent of the judgment debtor's interest in the real property. Brown, 343 N.W.2d at 449.

The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the property, and only on such interest; the lien cannot be made effectual to bind or to convey

any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated.

Id., quoting 49 C.J.S. Judgments § 478(a) (1947). The right of a judgment creditor can rise no higher than that of the judgment debtor. Schuling v. Tilley, 454 N.W.2d 899, 901 (Iowa App. 1990).

Accordingly, the Bank's Assignment and Mortgage could encumber only Debtor's interest in the property which he owned as joint tenant with Ms. Hess-Booher. The Assignment and Mortgage is not binding on the interest of Ms. Hess-Booher. As no evidence was presented to rebut the presumption that Debtor and Ms. Hess-Booher held the property in equal shares, the presumption mandates the conclusion that Debtor and Ms. Hess-Booher each held a one-half interest. The Assignment and Mortgage encumbered only Debtor's one-half interest in the property and Ms. Hess-Booher's one-half interest remained unencumbered.

Likewise, judgments entered against Debtor attached only to Debtor's interest in the real estate. They have priority in accordance with the dates they were filed pursuant to Iowa Code sec. 624.24. The judgments dated prior to the recording of the Bank's Assignment and Mortgage have priority over the Bank. The judgments dated subsequent to the Assignment and Mortgage are subordinate to the Bank's interest. The priority of Ms. Weedn's Oklahoma judgment is determined by the date it was filed in Linn County, Iowa. See Iowa Code § 626A.2.

As a result of the parties' dissolution proceedings, Debtor received the property and Ms. Hess-Booher received a lien on the property. The effect of the dissolution decree on the parties' respective property interests in the real estate must be considered to determine when and to what interest Ms. Hess-Booher's lien attached in relation to the Bank's lien.

The U.S. Supreme Court, in Farrey v. Sanderfoot, 500 U.S. 291, 111 S. Ct. 1825, 1830 (1991), assumed that a party's characterization of Wisconsin law, that the decree extinguished the previous property interests, was correct in determining when a lien attached for lien avoidance purposes. It concluded that the lien encumbers the debtor spouse's wholly new fee simple interest. Id. The Court proceeded to further analyze the issue finding the same result even if the decree did not extinguish the couple's pre-existing interests but instead merely reordered them. Id. at 1831. In a concurring opinion, Justice Kennedy discussed an interpretation of Wisconsin law contrary to that presented by the debtor spouse but in line with the majority's alternative analysis. Id. at 1832. He concluded that the debtor spouse obtained the creditor spouse's one-half interest in the decree while always retaining his one-half interest as well and thus was never divested of his own interest. Id. Both

the majority opinion and the concurrence conclude that under this analysis, a debtor spouse could use § 522(f)(1) to undo an ex-spouse's encumbrance to the extent the lien fastened to any portion of his previous surviving interest. Id. at 1831, 1832.

The Court in In re Brockman, 143 B.R. 703, 707 (Bankr. S.D. Iowa 1992) (considering lien avoidance issues), recognized that the Iowa courts have not specifically addressed the issue of the effect a dissolution decree has on the parties' respective property rights. Brockman concluded that the dissolution decree reordered the parties' interests so that both parties received their property and lien interests in the pre-decree property at the same time. Id. In Sieren v. Bauman, 436 N.W.2d 43, 45 (Iowa 1989), the Iowa Supreme Court cited the Restatement (Second) of Judgments with approval in the context of determining the effect of a dissolution decree on property rights of the parties. The Restatement provides:

The effect of the determination is to delimit, as between such parties, what each has by way of an ownership interest in the object. It is therefore an involuntary realignment of their interests in the property and in effect a conveyance from the losing party to the winning party.

Sieren, 436 N.W.2d at 45, quoting Restatement (Second) of Judgments § 43 cmt. a (1982). The court concluded that this rule of law provides that property division in a dissolution decree is self-executing with respect to the creation of new title or ownership interests. Sieren, 436 N.W.2d at 45.

In In re Steffen (Steffen v. Steffen), No. L-91-02167D, Adv. No. L-92-0009D (Bankr. N.D. Iowa May 12, 1992), Judge Melloy considered Sanderfoot in determining a lien avoidance issue. He followed the two-pronged analysis of

Sanderfoot considering the issue on the basis that the decree either 1) extinguished pre-existing property interests or 2) merely reordered the property interests of the parties. Id. slip op. at 6. The Court concluded that if the dissolution decree is construed to have transferred the wife's interest to the husband, it also simultaneously created a lien on that interest. Id. Therefore, the husband never held the interest without the lien already having been affixed to it. Id. Judge Melloy further recognized the validity of Boyd v. Robinson, 741 F.2d 1112, 1115 (8th Cir. 1984), as consistent with Sanderfoot. The 8th Circuit reasoned that a lien in a dissolution decree recognizes and provides a remedy to enforce the lienholder's pre-existing property right in the real estate. Boyd, 741 F.2d at 1114. Thus, the lien attaches to the interest in the property that the creditor-spouse held pursuant to state law prior to the dissolution. Steffen, slip op. at 7.

In both Steffen and Boyd, the creditor spouse's property interest was limited to a dower interest under state law. In Sanderfoot, the creditor spouse and the debtor spouse held equal shares in the marital property under Wisconsin law. Steffen noted this distinction but reasoned that the conclusions regarding lien avoidance should be identical. In Iowa, the dower right does not attach to a property interest held by a spouse in joint tenancy. Perez v. Pogge, 303 N.W.2d 145, 147 (Iowa 1981). Where husband and wife are joint tenants, rights of dower are merged in the right of survivorship. 25 Am.Jur.2d Dower & Curtesy § 18, p. 143 (1966). Under this law, the Court concludes that Ms. Hess-Booher's interest in the property was limited to her interest as a joint tenant with no dower rights.

An Iowa dissolution decree does not totally extinguish the property rights of the parties. To do so would significantly alter the relative interests of third parties as evidenced by the facts of this case. To avoid such a conclusion, the Iowa Supreme Court in Sieren held that an Iowa dissolution decree reorders the parties' property interests. The decree, therefore, transferred Ms. Hess-Booher's one-half interest as joint tenant to Debtor encumbered by her lien. The lien recognizes and provides a remedy for Ms. Hess-Booher to enforce her preexisting property right in the real estate. At no time did Debtor hold title to Ms. Hess-Booher's prior one-half interest unencumbered by her lien to which the Bank's lien or the judgment liens against Debtor could attach. Thus, Ms. Hess-Booher's lien attached to her prior one-half interest with priority over the Bank's lien and all the judgment liens against Debtor. The Bank's lien and the judgment liens did not attach to this one-half interest until Debtor acquired it in the dissolution decree.

Ms. Hess-Booher is entitled to one-half of the proceeds of the sale of the real estate to the extent of her lien of \$7,300. As discussed, based on the un rebutted presumption, her interest as joint tenant is equal to one-half the value of the property. It does not appear that one-half of the proceeds will exceed the amount of her lien. If one-half of the proceeds does equal more than the amount of Ms. Hess-Booher's lien, those proceeds shall be available to the other lien holders along with Debtor's remaining one-half of the proceeds.

To the extent a portion of Ms. Hess-Booher's lien remains unsatisfied, it shall have priority according to the date it was entered along with the other liens against Debtor. Under the Sanderfoot rationale, to the extent Ms. Hess-Booher's lien attaches to Debtor's predecree surviving one-half interest, it is subject to such preexisting interests.

As to the remaining one-half of the proceeds, the Bank and the judgment lienholders must share in accordance with the dates the liens were created. The liens are previously set out in chronological order. It appears that the liens listed as numbers 1 through 4 will be satisfied and the remainder will go to the Bank but will be insufficient to totally satisfy the Bank's lien. Therefore, the liens listed as numbers 6 through 8 (excluding Ms. Hess-Booher's property settlement lien to the extent it is satisfied as discussed above) will remain unsatisfied.

These calculations are based on a somewhat incomplete record. It is unclear to what extent the 1988 judgment lien for child support remains owing. The exact amount of the proceeds of the sale also remains unclear because of the realtor's retention of the purchaser's down payment. Since several of the judgment liens were not discussed in the hearing, any objections to their validity and priority may possibly be addressed if raised. Because of these unresolved matters, it is appropriate to have a report of the distribution of proceeds by the Chapter 13 Trustee when all proceeds are available for distribution and the exact amounts of all liens are determined. The Court will address any additional objections to the unresolved liens as necessary.

The Court's Order of May 24, 1994 specifically stated that no realtor's fees were to be paid from the sale proceeds for the reason that the listing contract had expired prior to the filing of this bankruptcy case. As such, the Chapter 13 Trustee shall be directed to proceed immediately to take any steps necessary to collect all proceeds of this sale for

ultimate distribution.

WHEREFORE, Andrea Paige Hess-Booher's lien of \$7,300 from the parties' dissolution decree shall have priority to one-half of the proceeds of the sale of real estate. To the extent a portion of this lien remains unsatisfied, it shall have priority to the remainder of the proceeds according to the date the dissolution decree was entered.

FURTHER, Farmers State Bank's Assignment and Mortgage and the several judgment liens against Debtor shall attach to the other one-half of the proceeds of the sale and shall have priority according to the dates they were entered.

FURTHER, the Chapter 13 Trustee is directed to take any steps necessary to collect any remaining proceeds of this sale, including the realtor's retention of proceeds, as rapidly as possible.

FURTHER, the parties shall have until November 28, 1994 to raise any objections to the validity and priority of judgment liens listed herein which were not previously discussed at the hearing on these matters.

SO ORDERED this 15th day of November, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge