IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,	)	
Appellant,	)	
vs.	)	CIVIL NO. 87-4406
EDWARD ELMO KING and JANE ANN KING,	)	BK 87-40501 & BK 86-40335
Defendants.	)	

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

This matter is before the Court on appeal from the decision of the bankruptcy court memorialized in its order of November 12, 1987, overruling appellant John Hancock Mutual Life Insurance Company's Motion to Dismiss and objections to Chapter Thirteen Plan.

Standard of Review

The Seventh Circuit has held that the factual findings of a bankruptcy judge are not to be reversed by a reviewing court unless they are clearly erroneous. In Re Martin, 698 P.2d 883,685 (7th Cir. 1983), Rule 8013, Bankruptcy Rules. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). However, this Court is not restricted to the "clearly erroneous" standard in reviewing the bankruptcy court's interpretations of law and, therefore, may conduct a de novo review

of those interpretations. Matter of Evanston Motor Co., Inc., 735 P.2d 1029, 1031 (7th Cir. 1984). Finally, the Court notes that Rule 61, P. R. Civ. p., as made applicable to bankruptcy proceedings by Rule 9005, Bankruptcy Rules, states that no error in any ruling or order done by the court is ground for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the [reviewing] court inconsistent with substantial justice.

Discussion

The record reveals that on June 23, 1986, the debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. Thereafter, on March 4, 1987, the bankruptcy judge lifted the automatic stay as to certain property of the debtors of which Hancock was mortgagee, on the unopposed motion of Hancock. On March 22, 1987, the court below approved the debtors' motion to convert the Chapter 11 case to a Chapter 7, and on March 27, 1987, the debtors filed their petition under the latter chapter. Approximately one month later, April 29, 1987, the debtors moved to voluntarily dismiss their Chapter 7 petition and thereafter were granted leave to dismiss and to file a petition under Chapter 13, which they subsequently did on August 11, 1987. Hancock failed to file a motion to lift stay in the 13 case, believing the lifting of stay in the Chapter 11 proceeding continued into the 13 case.

When the debtors filed their first plan, Hancock moved to dismiss the case pursuant to 11 U.S.C. § 109(g)(2) and filed its objections to the plan. The bankruptcy judge, after a hearing on the merits, overruled the motion and the objections but apparently did not confirm

the proposed plan at that time. In fact, the Court has learned from the bankruptcy clerk's office that an amended plan has been filed since the filing of this appeal, so it would appear that the appeal as to the plan is premature. However, the Court will treat the matter as an interlocutory appeal, allow it, and proceed to the merits.

Appellants raise several issues on appeal, but the only ones this Court finds meritorious are the following:

1. Whether lifting of the stay in the Chapter 11 case should preclude the debtors from including the subject property in their Chapter 13 plan.

2. Whether the filing of the Chapter 13 petition within 180 days of the voluntary dismissal of the Chapter 7 case, and subsequent to the lifting of stay in the Chapter 11 violates 11 U.S.C. § 109(g)(2).

3. Whether the proposed Chapter 13 plan fails to meet the "good faith" requirement of 11 U.S.C. § 1325 (a)(3).

4. Whether the bankruptcy court erred in denying Hancock's objections to the Chapter 13 plan.

5. Whether the bankruptcy court erred in denying Hancock's notion to dismiss the Chapter 13 case.

6. Whether the bankruptcy court erred in denying Hancock's notion for reconsideration.

As a threshold matter the Court notes that both sides, especially appellants, have done a woefully inadequate job of briefing the issues raised in this appeal. That fact notwith-standing, the Court has researched the issues and now addresses the merits of the appeal.

With respect to whether lifting of the stay precludes including the affected property in the Chapter 13 plan, the Court concludes it does not. Neither party offered any authority for or against the proposition, but it is clear that a mere possessory interest in real

property is sufficient to trigger the automatic stay provisions of 11 U.S.C. § 362. Matter of DePoy, 29 B.R. 471 (Bkrtcy. Ind. 1983), In Re 48th Street Steakhouse, Inc., 61 B.R. 182 (Bkrtcy. S.D.N.Y. 1986), In Re Gambogi, 20 B.R. 587 (Bkrtcy. R.I. 1982). The corollary of this rule is that a debtor must have a possessory interest in the property at the time the case is commenced to be subject to the protection of the automatic stay. In Re Brigalk, 75 P.R. 561 (Bkrtcy. D. Minn. 1987). Thus, if the debtor has a possessory interest in the property at the time of filing, it is properly included in the estate.

Here, although the stay had been lifted against the property in the Chapter 11 proceeding, John Hancock had not obtained judicial foreclosure on it at the time the debtors converted to Chapter 7 or later when they had refiled under Chapter 13. Thus, while John Hancock did have an equitable interest in the debtors property, the debtors still had legal title and, of course, possessory interest in it. Therefore, the debtors had sufficient
interest in the property to properly include it in their estate at the time they filed for relief under Chapter 13.

The next issue appellants raise is whether the filing of the Chapter 13 petition within 180 days of the voluntary dismissal of their Chapter 7 case, and subsequent to the lifting of the stay in the Chapter 11 case, violated 11 U.S.C. § 109(g)(2), thus mandating dismissal. The crucial issue here is whether the lifting of the stay in the Chapter 11 case continued into that proceeding's conversion into the Chapter 7 case. That issue had one sentence devoted to it in appellant's brief and is not even listed as an issue on appeal. For

these reasons the Court does not reach the issue and finds that applying the literal wording of 11 U.S.C. § 109(g)(2) to the facts before it, mandates a conclusion that the statute is inapplicable to the facts of this case because no motion to lift stay was filed by John Hancock in debtors' Chapter 7 case.

As to whether the debtors proposed Chapter 13 plan fails to meet the "good faith" requirement of 11 U.S.C. § 1325(a)(3), inasmuch as the bankruptcy judge found that debtors proposed treatment of John Hancock was in good faith, this Court is obliged to apply the "clearly erroneous" standard of review. Applying that standard, upon review of the entire evidence, the Court cannot conclude with definite and firm conviction that a mistake was made. For this reason, the Court finds this issue without merit.

Appellant's points of error as to the bankruptcy court's error in denying their objections to the debtors' Chapter 13 plan and whether that court erred in denying their motion to reconsider have been rendered moot by the bankruptcy judge's vacation of that part of his order and the fact that a new plan has been proposed and a hearing set on it on May 16, 1988. Thus, this Court finds these points without merit, at this time, as well.

Finally, John Hancock urges that this Court reverse the bankruptcy court for denying their motion to dismiss the debtors' Chapter 13 petition. This argument goes to the appellant's "good faith" objections previously discussed, and for the same reasons, the Court finds that the bankruptcy judge's decision not to dismiss was not clearly erroneous. The remainder of appellant's points not

specifically addressed herein shall be deemed rejected.

For the foregoing reasons, the order of the bankruptcy court is, in all things, AFFIRMED and this appeal is hereby DISMISSED.

IT IS SO ORDERED.

DATED: May 13, 1988

_____/s/ James L. Foreman
CHIEF JUDGE