

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

IN RE:) In Proceedings
) Under Chapter 12
LARRY E. STRANGE and)
SUSAN STRANGE,) No. BK 87-30185
)
Debtors,)
)
BOB G. KEARNEY, Trustee) Adv. No. 89-0187
)
Plaintiff,)
)
vs.)
)
FIRST NATIONAL BANK OF)
FLORA ILLINOIS, and)
UNITED STATES OF AMERICA))
acting through the Farmers)
Home Administration, United)
States Department of)
Agriculture,)
)
Defendants.)

MEMORANDUM

This matter is before the Court on the motion for relief from judgment filed by the debtors on January 30, 1991 pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure.¹ Debtors' motion

¹Rule 60(b)(3) is made applicable in this proceeding by Bankruptcy Rule 9024. Rule 60(b) states in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reason[]: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party The motion shall be made within a reasonable time, and for reason[] (3) not more than one year after the judgment, order, or proceeding was entered or taken.

asks the Court to vacate the judgment entered on September 11, 1990 distributing the proceeds of the sale of certain real estate on the basis that the trustee committed fraudulent acts in prosecuting this adversary proceeding. The Court has jurisdiction to decide this matter despite appeals now pending in the District Court of orders entered in debtors' bankruptcy case and in this adversary matter. E.g., Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir. 1989).

Debtors' motion is the latest in a long and arduous (at least for the Court) string of attempts by the debtors to undo the consequences of their decision to enter into a stipulation and agreed order approved and entered by the Court on July 19, 1988. By virtue of that stipulation and agreed order - which resolved the United States of America's motion to dismiss debtors' case and the chapter 12 trustee's motion for rule to show cause - debtors agreed to sell the real estate which is the subject of this adversary proceeding within a fixed period of time. Debtors further agreed that their failure to timely sell the real estate would result in its sale at public auction. When debtors subsequently failed to timely sell the real estate, the Court, on April 18, 1989, after notice to debtors and a hearing, ordered its sale at public auction to be held on May 26, 1989. Additionally, on April 18, 1989, the Court ordered that if debtors attempted to delay the public auction, the Court would remove them from possession of the real estate and place the trustee in possession to conduct the sale. By Order of May 30, 1989, the public auction having failed to occur on May

26, 1989, the Court removed debtors from possession and placed the trustee in possession to conduct the sale.

On September 11, 1989, the trustee filed a complaint to sell the real estate, initiating the instant adversary proceeding, and also filed, in debtors' bankruptcy case, an application to sell the real estate. Debtors were neither joined as defendants nor served with the summons and complaint in the adversary matter. However, debtors were served with a copy of the application to sell the real estate and, on October 12, 1989, debtors filed an objection to the application.

Thereafter, on October 19, 1989, the Court entered an order approving the sale on the trustee's complaint to sell the real estate. Then, on November 21, 1989, after debtors argued their objection to the trustee's application to sell in open court, the Court overruled their objection and allowed the application to sell the real estate.

Subsequently, debtors appealed three times to the District Court from the November 21, 1989 Order allowing the application to sell. The District Court dismissed the first two appeals on May 2, 1990 and May 14, 1990 respectively when debtors failed to perfect their appeal.² On May 17, 1991, after the District Court had dismissed debtors' first two appeals, the trustee filed his report of sale indicating that the sale of the real estate had taken place. On July 27, 1990, the District Court dismissed debtors' third effort to appeal from the November 21, 1989 Order allowing the application to sell the real estate. In each of its three Orders dismissing debtors' appeal from the November 21,

²The District Court treated debtors' second notice of appeal as a motion for reconsideration.

1989 Order, the District Court noted that the arguments raised by debtors on appeal were without merit.

Nonetheless, despite a trio of orders from the District Court upholding the Bankruptcy Court's decision to allow the sale, debtors have persisted in challenging the sale. There are still pending before the District Court debtors' appeal from the Court's July 3, 1990 Order entered in the bankruptcy case overruling debtors' objection to the May 29, 1990 Order confirming the trustee's report of sale as well as debtors' appeal from the August 29, 1990 Order entered in the adversary case allowing the trustee's motion to marshall the liens. And, now, after the Court denied debtors' motion for reconsideration of the final judgment entered on September 11, 1990 distributing the proceeds of sale, debtors filed the instant motion seeking relief from the final judgment on the basis of fraudulent conduct by the trustee in its procurement.

Before addressing the motion for relief from final judgment, the Court must dispose of several other motions filed by debtors. These are (1) a motion for non-dismissal of this adversary proceeding; (2) a motion for consolidation of pleadings; (3) a motion to dismiss the trustee's response to debtors' motion for relief from judgment; and (4) a motion for summary judgment and for default on debtors' motion for relief from judgment. The Court will discuss these motions in the order set forth above.

On April 18, 1991, the Court entered an Order dismissing debtors' bankruptcy case based on their default under the terms of their confirmed plan. Debtors then filed a motion on April 24, 1991 asking

that the Court refrain from dismissing this adversary case in order to adjudicate, among other things, their pending motion for relief from judgment. The Court finds that debtors' motion was filed in accordance with Rule 741(A) of the local rules of this Court and agrees that the adversary case should not be dismissed during the pendency of the motion for relief from judgment and the appeal from an Order entered in this case.

Debtors next ask the Court, in their motion for consolidation of pleadings, to consider the arguments they raise in their "Objection to Notice" in deciding the motion for relief from judgment. The "Objection to Notice" was filed in debtors' bankruptcy case on March 7, 1991. The Court will, of course, consider all of debtors' arguments in resolving the motion for relief from judgment, including those raised in the "Objection to Notice".

Debtors have also asked the Court to dismiss the trustee's response to their motion for relief from judgment, to grant summary judgment in their favor on the motion for relief from judgment, and to enter default against the trustee on the motion for relief from judgment. Of course, neither the Federal Rules of Civil Procedure nor the Bankruptcy Rules provide for the requested relief, which applies only to pleadings filed and not to motion practice.

Having disposed of these preliminary matters, the Court will now address the arguments that debtors raise in their motions for relief from judgment and for consolidation of pleadings. In these motions, debtors contend that they were not served with the summons and complaint which initiated this adversary proceeding nor with a copy of

the final judgment, that the chapter 12 trustee never paid the appropriate fee to file this adversary case and that the trustee fraudulently represented to the Court that the secured creditors would pay the costs of the sale of the real estate, which they failed to do. As relief for these alleged transgressions, debtors urge the Court to set aside the sale and to impose monetary sanctions on the trustee and his attorney equal to debtors' outstanding indebtedness plus the cost of planting and harvesting the 1991 crop. In essence then, debtors are not challenging the distribution of proceeds set forth in the final judgment but rather the allowing of the sale itself.

A bankruptcy court, as a court of equity, may set aside an order confirming a sale only when fraud, mistake or other like infirmity is present. E.g., Matter of Chung King, Inc., 753 F.2d 547, 549 - 50 (7th Cir. 1985). This standard is based on the rationale that the goal of a sale is to obtain the highest bid for the property. Moreover, to reach this goal "a time must come when a fair bid is accepted and the proceedings are ended." In re Webcor, Inc., 392 F.2d 893, 899 (7th Cir. 1968), cert. denied, 393 U.S. 837 (1968). Thus, a confirmed sale will not be vacated unless "compelling equities" outweigh the interest of reaching an end to the proceedings. Matter of Chung King, Inc., 753 F.2d at 549 - 50.

Debtors argue that they should have been joined as defendants and served with the summons and complaint initiating this proceeding and with a copy of the final judgment. Be that as it may, the failure to join them in this adversary action and to serve them with all pleadings and other papers are not indicia of fraud. Nor did any such failure

prevent the Court from making a proper decision allowing the sale. Id. at 552. The Court heard and considered all of debtors' objections to the trustees application to sell before the sale was approved in the bankruptcy case, and in any event, before the sale was closed. Moreover, the District Court has affirmed the propriety of the sale in three separate Orders. Consequently, any failure to join and serve debtors in this proceeding did not foreclose debtors from being fully heard on the merits and is not a "compelling equity" warranting the setting aside of the sale.

Next, debtors argue that the trustee never paid a filing fee to initiate this proceeding. However, this argument has no merit. Where a trustee files an adversary complaint, the filing fee is payable from the estate and only to the extent that there are assets realized. 28 U.S.C. §1930 Judicial Conference Schedule of Fees at ¶6.

Finally, debtors contend that the trustee committed fraud because he represented that the creditors would pay the costs of the sale and they failed to do so. Debtors' argument is not supported by the facts. The final judgment clearly shows that the proceeds recovered by the lienholders have been reduced by the costs of the sale.

See order entered even date.

____ /s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: June 10, 1991