FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 24, 1999
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RANDA C. BRIGGS, Debtor.	BAP No. UT-99-003
GARY E. JUBBER, Plaintiff – Appellee. v. RONALD HATFIELD, Defendant – Appellant.	Bankr. No. 98-20462 Adv. No. 98-2140 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before BOHANON, ROBINSON, and CORNISH, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

This appeal is from a summary judgment in favor of the appellee-trustee to avoid the transfer of two parcels of real property, pursuant to 11 U.S.C. § 544. For the reasons stated in this decision, the judgment of the bankruptcy court is AFFIRMED.

BACKGROUND

The debtor and appellant jointly owned two parcels of residential real property in Arizona. One property was located in Phoenix and the other in

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Glendale. In May of 1993 the debtor transferred her half interest in both properties to the appellant. The deeds were delivered approximately a year before the debtor filed her bankruptcy petition, but they were not recorded at that time. The appellant continued to live in the Glendale property and rented the Phoenix property. He paid the utility and insurance bills.

The debtor filed her bankruptcy petition on January 14, 1998 and one week later the appellant recorded the deeds. Subsequently, the trustee-appellee filed his complaint, pursuant to 11 U.S.C. § 544, to avoid the transfers. The appellant defended under a theory of constructive notice and also argued he had the right to the Glendale property pursuant to the Arizona homestead statutes.

The bankruptcy court rejected these arguments and, by summary judgment, permitted the trustee-appellee to take possession of and sell the properties, with appropriate compensation to the appellant for his remaining interest in them as co-tenant with the debtor. With regard to the first issue, the essential element in the analysis performed by the bankruptcy court was that the trustee has the rights of a bona fide purchaser of real property and that because the deeds were not recorded until after the petition, the trustee had no notice. Concerning the second issue, the bankruptcy court essentially held that the primary purpose of the Arizona homestead statutes was to preserve the value in the property and not the property itself, and further, because the appellant was receiving his share of the value from the sale, the sale of the Glendale property would not be prevented.

APPELLATE JURISDICTION

The Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear appeals from "final judgments, orders, and decrees" of the bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158; Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1(a). The parties have consented to this Court's jurisdiction by failing to opt to have the appeal heard by the United States District

Court. 28 U.S.C. § 158; Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1(a) & (d). Further, the order of the trial court is final. Therefore, this Court has jurisdiction to hear this appeal.[1]

ISSUES

The fundamental issues are two-fold:

1) Did the trustee have notice, constructive or actual, of the transfer of the properties as of the date the debtor filed her bankruptcy petition; and

2) Do the Arizona homestead laws provide a legal basis upon which the appellant would be permitted to exempt the Glendale property from being taken by the trustee?

STANDARD OF REVIEW

Conclusions of law by the trial court are reviewed by the appellate court de novo. Hollytex Carpet Mills, Inc. v. Oklahoma Employment Sec. Comm'n (In re Hollytex Carpet Mills, Inc.), 73 F.3d 1516, 1518 (10th Cir. 1996).

In this case there are no factual issues. Thus, the standard of review that will be applied will be de novo.

DISCUSSION

11 U.S.C. § 544(a)(3) endows the trustee with the status of a bona fide purchaser of real property from the debtor at the time of the commencement of the bankruptcy case. State law governs who is a bona fide purchaser and the rights of such purchasers under 11 U.S.C. § 544(a)(3). 5 Collier on Bankruptcy, ¶ 544.08

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[1] The court, sua sponte, has raised the question of whether or not the appeal may be moot since appellant did not stay effectiveness of the judgment. See 11 U.S.C. § 363(m); Golfland Entertainment Ctrs., Inc., v. Peak Inv., Inc. (In re BCD Corp.), 119 F.3d 852, 856 (10th Cir. 1997); Tompkins v. Frey (In re Bel Air Assocs., Ltd.), 706 F.2d 301, 304-305 (10th Cir. 1983); Egbert Dev., LLC v. Community First National Bank (In re Egbert Dev., LLC), 219 B.R. 903 (10th Cir. BAP 1998). Since, however, it remains unclear whether or not the proceeds of the sales have been distributed and appellant could have a claim to the funds if they are still in the hands of the trustee we have elected to address the merits of the appeal.

(Lawrence P. King ed., 15th ed. rev. 1999). Arizona statutes provide that, without notice, unrecorded documents are void as to bona fide purchasers. Ariz. Rev. Stat. §§ 33-411 & 412.

The appellant argues that his open, obvious, and notorious occupancy of the Glendale property and the rental tenant in the Phoenix property imparted notice to the trustee sufficient to require further inquiry as to the true owners. In response, the trustee argues that where the occupancy is consistent with the recorded title, additional inquiry is not required. See Valley Nat'l Bank v. Avco Dev. Co., 480 P.2d 671, 676 (Ariz. Ct. App. 1971). The trustee also cites to several Arizona cases and treatises which support the posture that occupation of the whole property by one co-tenant is never presumed to be adverse to the other co-tenant and, thus, is not inconsistent with the recorded titles. See, e.g., Morga v. Friedlander, 680 P.2d 1267, 1269 (Ariz. Ct. App. 1984); Compton v. Compton, 624 P.2d 345, 346 (Ariz. Ct. App. 1981). See also 6A R. Powell & P. Rohan, Powell on Real Property, § 905[1] (1994); 8 Thompson on Real Property, § 4330 (1963).

The appellant's argument rests upon the proposition that his residency at the Glendale property, and the occupancy of the Phoenix property by the tenant, were inconsistent with the recorded titles to the properties which listed both he and the debtor. This position is simply not supported by the facts or the law. It is undisputed that he, as a co-tenant with the debtor, had the right to occupy the entire property. Nor is it disputed that as sole owner or co-tenant, he acted as the landlord over the Phoenix property. Thus, his occupancy, and the occupancy of the tenant, was not inconsistent with his alleged sole ownership and, thus, was not sufficient to place the trustee on notice to perform additional inquiries.

The appellant claims that the decisions of Roy & Titcomb, Inc. v. Villa, 296 P. 260 (Ariz. 1931), and Keck v. Brookfield, 409 P.2d 583 (Ariz. Ct. App.

1966), were improperly ignored by the bankruptcy court and that these cases stand for the proposition that possession of property by third parties requires additional inquiry as to true ownership. Although these cases do support this general rule, they do not recognize the well-established exception to the rule that occupancy which is consistent with recorded title does not require additional inquiry. See supra. Moreover, the bankruptcy court specifically cited to Roy & Titcomb, Inc. in its decision. Thus, the appellant's argument is without merit.

It is apparent that, as a matter of law, the trustee did not have notice at the commencement of the bankruptcy case, actual or constructive, and the transfers of property from the debtor to the appellant were properly avoided.

The appellant also argues that, pursuant to Ariz. Rev. Stat. § 33-1101(A), the Glendale property is his homestead and, thus, immune from forced sale. The bankruptcy court held that the primary purpose of the Arizona homestead statute was to preserve the value in the property and not to preserve the actual homestead itself and that because the appellant was receiving the proceeds for his interest in the property from the sale, it was proper. Further, the bankruptcy court held that because the appellant did not contest the elements of 11 U.S.C. § 363(h), the forced sale was permissible. See Schwaber v. Reed (In re Reed), 940 F.2d 1317 (9th Cir. 1991).

Under Arizona case law, homesteads can be claimed in joint tenancy property. Wuicich v. Solomon-Wickersham Co., 157 P. 972 (Ariz. 1916). Arizona statute expressly states that homesteads are protected from forced sale up to $100,000. Ariz. Rev. Stat. § 33-1101(A). Thus, it would appear that the appellant had a legitimate homestead claim for the Glendale property.

Concerning the purpose of the Arizona homestead statutes, although there is legal authority supporting the bankruptcy court's conclusion, see, e.g., Winter v. Glaze (In re Glaze), 169 B.R. 956 (Bankr. D. Ariz. 1994), it appears to be

erroneous. Glaze cites four cases in support of this position: Union Oil Company v. Norton Morgan Commercial Company, 202 P. 1077 (Ariz. 1922); Ferguson v. Roberts, 170 P.2d 855 (Ariz. 1946); McFarland v. Pruitt, 210 P.2d 963 (Ariz. 1949); and Stanger v. Stanger (In re Stanger), 257 P.2d 593 (Ariz. 1953).

In Union Oil, the statement that the money was the primary focus of the homestead statutes was stated in the context of the sale of homestead property which did not contain the dwelling. Indeed, later in the paragraph the Union Oil court specifically stated that the purpose was to protect the real estate itself. Union Oil, at 242-43. This is very important as another case quotes this language and notes that there are limits on it.

In Ferguson, the court stated that the purpose was to shelter the family and provide stability to the state. Ferguson, at 857-58. A forced sale does not necessarily accomplish this purpose.

In McFarland, the court did state that saving the money from the homestead exemption was the dominant idea of the Arizona statues, quoting Union Oil, but then it went on the limit the statement. McFarland, at 136. Thus, McFarland implicitly noticed the distinction raised by Union Oil (i.e., there is a difference between land claimed as a homestead without a dwelling and homestead land which contains a dwelling). Thus, McFarland does not support the position of the bankruptcy court or the Glaze decision.

Finally, in Stanger, the court held that the purpose of the statutes is to ensure a home for the family and that the term homestead included all the buildings and appurtenances. Stanger, at 596-97. Further, the court held that other attached property, which did not contain the actual dwelling, was not part of the homestead. Id. at 595. The court did not even mention money in context with the homestead. Thus, it would seem that the actual property itself is the primary focus when a dwelling is involved -- not merely the preservation of the value as

the bankruptcy court stated.

As a last note, the plain language of the Arizona homestead laws mandates that a homestead shall be exempt from forced sale. Ariz. Rev. Stat. § 33-1101(A). In this case, it is apparent that the appellant had a legitimate homestead claim and a forced sale of that homestead occurred.

However, the bankruptcy court correctly relied on 11 U.S.C. § 363(h), which provides for forced sales free and clear of the interests of others if certain statutory criteria are met. Schwaber v. Reed (In re Reed), 940 F.2d 1317 (9th Cir. 1991). Reed, and the bankruptcy court in this case, held that, under 11 U.S.C. § 363(h), a forced sale of even a protected homestead interest was proper. The bankruptcy court noted that the appellant failed to object to the sale by raising any of the statutory criteria and, thus, held for the trustee who sold the property subject to the appellant's interest. The appellant cannot now, for the first time on appeal, attempt to argue an issue which was not raised before the trial court. See Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721-22 (10th Cir. 1993).

The appellant also argues that his homestead exemption under Arizona law should not be overridden by the trustee's right to sell property under 11 U.S.C. § 363(h). However, Reed and 11 U.S.C. § 363(h) allow a trustee to sell property free and clear of interests of others unless valid objections are raised, which was not done.

Accordingly, the judgment of the bankruptcy court is affirmed.