

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

| | | |
|---|---|-----------------------------|
| In Re | : | Case No. 98-04849-CH |
| | : | |
| MARLIN R. AND DEEDRA J. JOHNSON, | : | Chapter 13 |
| | : | |
| | : | |
| Debtors. | : | |
| ----- | : | |
| MARLIN R. AND DEEDRA J. JOHNSON, | : | Adv. No. 98-98223 |
| | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| JOHN DAVIS, PLAZA ASSOCIATES, | : | |
| DONNA REINECCIUS, DAVID D. | : | |
| JAMISON | : | |
| And | : | |
| J&J PARTNERSHIP, | : | |
| | : | |
| Defendants. | : | |

ORDER—MOTION FOR SUMMARY JUDGMENT
AND MOTION FOR RELIEF FROM STAY

On March 12, 1999, telephonic hearing was held on J&J Partnership's Motion to Join J&J Partnership as a Necessary Party, Motion for Relief from Stay, and Motion for Summary Judgment. Debtor/Plaintiffs were represented by attorney Jane Kopp Morris; Defendants John Davis and J&J Partnership were represented by attorney Dallas J. Janssen; Defendant David D. Jamison, Story County Treasurer, was represented by Charles R. Reynolds. At the conclusion of the trial, the Court granted J&J Partnership's Motion to Join as a Necessary Party. The Court took the Motion for Relief from Stay and the Motion for Summary Judgment under advisement

upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matters fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(H). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Marlin R. and Deedra J. Johnson ("Debtors") filed their Chapter 13 petition on November 3, 1998.

2. Debtors purchased the following described real estate in Story County, Iowa from the Waunet Thompson Estate by means of a land contract dated January 30, 1987: Lots Six (6) and Seven (7) and the West three fourths (W $\frac{3}{4}$) of Lot Eight (8) in Block Eleven (11) in the Original Town of Sheldahl, Iowa. The real estate is locally known as 307 Hubbell Street, Sheldahl, Iowa.

3. The final payment on the contract for the above described real estate was made in July of 1991.

4. Debtors failed to pay their 1994-1995 property taxes, and on June 19, 1995, the above described real estate was sold at tax sale by the County Treasurer of Story County, Iowa and a Certificate of Purchase was duly issued to Plaza Associates.

5. A Notice to Redeem From Tax Sale by Plaza Associates, dated April 23, 1998, regarding the above described real estate, was properly served upon the Debtors.

6. The Debtors failed to redeem during the redemption period. A Treasurer's Tax Deed was issued on October 19, 1998 by the Story County Treasurer to Plaza Associates, which was recorded on October 20, 1998.

7. On or about October 22, 1998, Plaza Associates executed a quitclaim deed transferring to J&J Partnership its interest in the above described real estate. The quitclaim deed was filed in the Story County Recorder's Office on November 17, 1998.

8. On or about October 27, 1998, John Davis, as agent for J&J Partnership/Plaza Associates, filed in the Iowa District Court for Story County (Small Claims Division) an Action for Forcible Entry and Detainer, Small Claim No. SCSC029611.

9. On November 3, 1998, Debtors filed a Notice of Bankruptcy Filing in the Iowa District Court just prior to a scheduled hearing on the Action for Forcible Entry and Detainer.

10. Debtors filed a Complaint for Avoidance of Fraudulent Transfer on or about November 5, 1998. Said complaint seeks to avoid the transfer of the above described real estate by the issuance of the Treasurer's Tax Deed to Plaza Associates.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056, provides that summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden to show the absence of a genuine issue of material fact. Once the moving party has met this burden, the non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ.

P. 56(e); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party does not meet this burden when some "metaphysical doubt as to the material facts" exists. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also Hogan v. 50 Sutton Place South Owners, Inc., 919 F. Supp. 738, 742 (S.D.N.Y. 1996) ("Speculative and conclusory allegations are insufficient to meet this burden." (quoting Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995))). In this case, there is no dispute as to the underlying facts. It must be determined whether the moving party is entitled to judgment as a matter of law.

Under 11 U.S.C. § 522(h), a debtor may seek to avoid a transfer of otherwise exempt assets if the trustee has not pursued such recovery, provided that the debtor has not voluntarily conveyed or concealed the property. The transfer must have been avoidable by the trustee under one of the enumerated sections listed in 11 U.S.C. § 522(h)(1), including section 548 dealing with fraudulent transfers. Property recovered from an avoided transfer under this section may be claimed as exempt by the debtor. 11 U.S.C. § 522(i).

A transaction may be avoided by the trustee under section 548 of the Bankruptcy Code as a constructively fraudulent transfer if it is proved (1) that the debtor had an interest in the property transferred; (2) that the transfer occurred within one year of the petition date; (3) that the debtor was insolvent at the time of the transfer or became insolvent as result of it; and (4) that the debtor received less than reasonably equivalent value in exchange for the transfer. 11 U.S.C. § 548(a)(1)(B).

What constitutes a transfer and when it is complete is a question of federal law. Barnhill v. Johnson, 503 U.S. 393, 112 S.Ct. 1386 (1992). "But that definition in turn includes references to parting with property and interests in property," which are concepts defined according to state law. Id.

A "transfer," as defined by the Bankruptcy Code, includes "foreclosure of the debtor's equity of redemption." 11 U.S.C. § 101(54). The bankruptcy estate under 11 U.S.C. § 541 is comprised of all the debtor's legal or equitable interests in property as of the commencement of the case. Under § 541(a)(3), the estate also includes any interest in property that the trustee recovers under section 550, which includes property fraudulently transferred under section 548.

In this case, the Debtors' right of redemption was foreclosed by the issuance of the treasurer's deed, and this foreclosure constitutes a transfer within the meaning of § 548. See Butler v. Lejcar (In re Butler), 171 B.R. 321, 325 (Bankr. N.D. Ill. 1994). There is no dispute that this transfer occurred within one year of the bankruptcy filing, and that the debtors were insolvent at the time of the transfer or were made insolvent by it. If the debtors received "less than equivalent value," the transfer would be avoidable under § 548.

In BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S.Ct. 1757 (1994), the Supreme Court held the price received from a noncollusive real estate mortgage foreclosure sale held in accordance with state law conclusively satisfies the requirement in Bankruptcy Code § 548 that transfers of property be in exchange for "reasonably equivalent value." This holding was limited to mortgage foreclosure sales, and the Court stated: "The consideration bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." Id. at 537 n. 3, 114 S.Ct. at 1761 n. 3.

Following BFP, bankruptcy courts have held that its reasoning extends to tax sales, so that a regularly conducted tax foreclosure sale of the debtor's property conclusively establishes the sale price as one for "reasonably equivalent value," even if the price received is far below fair market value. See, e.g., In re Russell-Polk, 200 B.R. 218 (Bankr. E.D. Mo. 1996); In re Hollar, 184 B.R. 243 (Bankr. M.D. N.C. 1995); In re Comis, 181 B.R. 145 (Bankr. N.D. N.Y. 1994);

Lord v. Neumann (In re Lord), 179 B.R. 429 (Bankr. E.D. Penn. 1995); In re McGrath, 170 B.R. 78 (Bankr. D. N.J. 1994). See also In re T.F. Stone Co., Inc., 170 B.R. 884 (Bankr. N.D. Tex. 1994) (postpetition tax foreclosure could not be set aside for price inadequacy under 11 U.S.C. § 549), aff'd, 72 F.3d 466 (5th Cir. 1995). But see In re Butler, 171 B.R. 321 (Bankr. N.D. Ill. 1994) (questioning in dicta whether BFP should apply to tax sales since, unlike a foreclosure sale, bids at a tax sale are "in no way based on the value of the subject property.").

Mortgage foreclosure sales typically require published notice and a public sale, with an opportunity for redemption. The procedures for the foreclosure of a tax lien are normally sufficiently similar to mortgage foreclosures as far as the protections afforded a delinquent taxpayer that there is no reason why the analysis of BFP should not apply to a regularly conducted tax sale. A comparison of Iowa's tax sale and mortgage foreclosure procedures reveals that they provide similar protections.

I. Mortgage Foreclosure Procedures under Iowa Law

A borrower is given 30 days to cure after notice of default. I.C.A. § 654.2D. When a mortgage is foreclosed, the court renders judgment for the amount due and must direct that the property be sold to satisfy the judgment, with interest and costs. I.C.A. § 654.5. "A special execution shall issue accordingly, and the sale under the special execution is subject to redemption as in cases of sale under general execution unless the plaintiff has elected foreclosure without redemption under section 654.20." Id. Four weeks' notice of the sale is required, I.C.A. § 626.74, posted in at least 3 public places in the county, one of which being the county courthouse. I.C.A. § 626.75. Notice is also published in a local newspaper, both four and two weeks prior to the sale. Id. Additionally, if the debtor is in actual occupation and possession of the land, written

notice must be provided to the debtor at least 20 days prior to the sale. I.C.A. § 626.78. The sale must be at public auction, with sealed written bids to be submitted before the sale. I.C.A. § 626.80.

Prior to entry of judgment, the mortgagor may file a demand for delay of sale. I.C.A. § 654.21. If the demand is filed, the sale shall be held promptly after the expiration of two months from entry of judgment. Id. The debtor may redeem the property at any time within 1 year from the day of sale, and will, in the meantime, be entitled to possession thereof. I.C.A. § 628.3.

II. Tax Sales under Iowa Law

The county treasurer shall offer at public sale all parcels on which taxes are delinquent. I.C.A. § 446.7. The sale shall be made for the total amount of taxes, interest, fees and costs due. Id. Notice of sale is sent by regular mail within 15 days from the date of the annual tax sale or any adjourned tax sale. I.C.A. § 446.2. Notice of the time and place of the annual tax sale shall be served upon the person in whose name the parcel subject to sale is taxed. I.C.A. § 446.9. The notice must contain a description of the parcel to be sold, the amount of delinquent taxes, the amount of interest, fees, and actual cost of the publication of the notice, and a statement that if the parcel is not redeemed a deed may be issued. Id. Publication of the time and place of the annual tax sale shall be made once by the treasurer in an official newspaper in the county at least one week, but not more than 3 weeks before the day of the sale. Id.

The county treasurer shall offer for sale, on the day of the sale, each parcel separately for the total amount due against each parcel advertised for sale. I.C.A. § 446.15. The person who offers to pay the total amount due, which is a lien on any parcel, for the smallest percentage of the parcel is the purchaser, and when the purchaser designates the percentage of any parcel for which

the purchaser will pay the total amount due, the percentage thus designated shall give the person an undivided interest upon the issuance of a treasurer's deed. I.C.A. § 446.16.

A parcel may be redeemed at any time before the right of redemption expires by payment to the county treasurer the amount for which the parcel was sold, including the fee for the certificate of purchase, and interest of 2% per month from the month of sale, and the total amount paid by the purchaser for any subsequent year. I.C.A. § 447.1. After one year and nine months from the date of sale, or after 9 months from the date of a sale made under a "public bidder sale," the holder of the certificate of purchase may have cause to serve upon the person in possession of the parcel, and also upon the person in whose name the parcel is taxed, a notice . . . which states that the right of redemption will expire and a deed for the parcel will be made unless redemption is made within 90 days from the completed service of the notice. I.C.A. § 447.9. Service is complete only after an affidavit has been filed with the county treasurer, showing the making, the manner, time and place of the service, and costs incurred. The right of redemption shall not expire until 90 days after service is complete. I.C.A. § 447.12.

This Court finds that the protections, rights and remedies afforded a delinquent taxpayer under Iowa's tax foreclosure sale procedures are similar to those given a mortgagor under Iowa's mortgage foreclosure laws. Both procedures provide for public notice, competitive bidding, and a period of redemption. This Court will follow the majority of jurisdictions and hold that the reasoning of BFP applies to tax sales conducted in accordance with Iowa law. The cases cited by the Debtors' brief for the proposition that BFP should *not* apply to tax sales, Sherman v. Rose (In re Sherman), 223 B.R. 555 (10th Cir. BAP 1998) and Wentworth v. Town of Action (In re Wentworth), 221 B.R. 316 (Bankr. D. Conn. 1998), are inapposite. Neither of these cases

involves state tax sale schemes providing for public sale with competitive bidding. The attributes of mortgage foreclosure sale procedures which protect the debtor: public notice, public sale, competitive bidding, and an opportunity for redemption, also exist under Iowa's tax sale procedures.

No claim has been made that the tax sale at issue in this case was not conducted according to the statutory scheme as set out by the Iowa Code. The Court finds that the transfer of the subject property for the price paid by the movants at the tax sale was an exchange for "reasonably equivalent value," and therefore, the transfer was not fraudulent under Bankruptcy Code § 548, and cannot be avoided under that section.

ORDER

IT IS THEREFORE ORDERED that the Defendants' Motion for Summary Judgment is GRANTED, and Defendants shall have judgment dismissing the complaint.

IT IS FURTHER ORDERED that the Defendants' Motion for Relief from Stay is GRANTED. The Defendant J&J Partnership may proceed with its action for forcible entry and detainer in the Iowa District Court for Story County.

Dated this _____ day of August, 1999.

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT