United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Joseph R. Miller and Lana G. Miller, Plaintiffs,
v.
Richard Chapek, Yvonne Chapek, State of Wisconsin, Department of Agriculture, Trade & Consumer Protection, Citizens State Bank of Cadott, State Bank of Arthur, and Chippewa County, Defendants
(In re Joseph R. Miller and Lana G. Miller, Debtors)
Bankruptcy Case No. 91-13928-12, Adv. Case. No. A92-1014-12

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

September 11, 1992

Terrence J. Byrne, for the debtors.
Reid W. Klopp, for the State of Wisconsin, Dept. of Agriculture, Trade and Consumer Protection.
Eugene J. La Fave, for the State Bank of Arthur.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter comes before the Court on an adversary proceeding pursuant to 11 U.S.C. § 506 filed by the debtors, Joseph R. and Lana G. Miller. Through their adversary, the debtors sought a judicial determination of the validity and extent of numerous secured claims against their farm property. The valuation issues were essentially resolved through two stipulations -- one between the debtors and Citizens State Bank of Cadott, and the other between the debtors and the State Bank of Arthur. The Court approved these stipulations on May 8, 1992, and May 19, 1992, respectively. The only remaining issue in this matter is the existence and priority of a lien of the State of Wisconsin, Department of Agriculture, Trade and Consumer Protection (State), against the debtors' real estate. The State Bank of Arthur and the State agreed to a determination on briefs of the remaining issue. The State Bank of Arthur is the creditor whose claim would be most affected by a determination adverse to it. Both parties have submitted briefs. In addition, the remaining issue was discussed at the debtors' confirmation hearing on June 29, 1992. At the conclusion of that hearing the Court confirmed the debtors' plan and took the aforementioned remaining issue under advisement. The State is represented by Reid W. Klopp, and Eugene J. La Fave is representing the State Bank of Arthur. The debtors are represented by Terrence J. Byrne.

The relevant facts are as follows. The debtors purchased the farm which is the subject of this adversary proceeding from Richard and Yvonne Chapek on March 8, 1990. The debtors took title to the property subject to a farmland preservation agreement, which they agreed to assume. The agreement was originally entered into

on November 1, 1985, by the Chapeks. By the terms of the agreement, it will expire on November 1, 1995.

The farmland preservation law is contained in Chapter 91 of the Wisconsin statutes. Its purpose is to assist local units of government in the preservation of agricultural lands. Farmers who participate in land preservation programs receive a tax credit against their state income tax. In order to qualify for the credit, the farmer's land must be covered by an agricultural preservation agreement or zoned for exclusive agricultural use. Preservation agreements restrict the owner from using the land for anything except "agricultural use" as defined under state law. See WIS. STAT. ANN. § 91.01(1) (West 1990). No structures or improvements are allowed on the land unless they are consistent with agricultural use. The agreement is in effect a charge against the real estate; owners of land subject to an agreement may be enjoined from violating it or sued for damages if they subject the land to a prohibited use.

In return for compliance with the agreement, the farmer receives the aforementioned tax credits. When the agreement expires, a lien is recorded against the property subject to the agreement. Generally, the amount of the lien is the total amount of tax credits received by all owners of the property during the last ten years the property was eligible for them. See WIS. STAT. ANN. § 91.19 (West 1990). Preservation agreements are recorded in the county register of deeds office; the agreement involved here was recorded in the Chippewa County office on November 13, 1985. The agreement thus runs with the land; any liabilities created by the receipt of tax credits by any owner are to be repaid to the state by the current title holder at the time of the agreement's expiration.

The State submitted to the Court an affidavit by Lucia Moore, an auditor with the State of Wisconsin, Department of Revenue. This affidavit contained the amount of tax credits received on the property at issue here pursuant to the preservation agreement. The prior owners -- Richard and Yvonne Chapek -- received a total of $14,445.00 in tax credits between 1985 and 1990. No tax credits were received by the Millers in 1990 or 1991. It is the $14,445.00 amount which the State is asserting as the value of its lien against the debtors' real estate. The other liens against the property are as follows: Chippewa County (real estate taxes) -- $7,300.00; Citizens State Bank of Cadott (1st mortgage) -- $184,673.00; State Bank of Arthur (2nd mortgage) -- $53,027.00 or $38,582.00 (depending on the Court's determination as to the validity and priority of the State's lien); Richard and Yvonne Chapek (3rd mortgage) -- $47,000.00.

The State Bank of Arthur stipulated with the debtors that the value of the subject property is $245,000.00. The amount of the bank's claim against the debtors is $115,000.00. Although the State was not a party to the aforementioned stipulation, it does concede that the value of the property is less than the total of its claim and the claims of Chippewa County and the three mortgage holders. There appears to be no dispute that the Chippewa County lien is prior to all other secured interests in the property. There is also no dispute that, among the three mortgages, the mortgage of Citizens State Bank of Cadott was recorded first and therefore has priority. Citizens State Bank and the Chapeks have apparently not disputed that the alleged lien of the farmland preservation agreement is prior to their interests.

Given the stipulated value of the property at issue, it is the State Bank of Arthur's secured claim which is subject to diminution as a result of the arguments posited by the State in this action. The State Bank of Arthur (Bank) argues that the farmland preservation agreement does not constitute a lien against the debtors' property and

its claim is thus secured to the extent of $58,027.00. The State asserts that the agreement does constitute a lien and that its lien has priority over the Bank's lien. If the State prevails, then the amount of the Bank's secured claim would be $38,582.00.

In their third amended plan, the debtors have provided for either alternative by computing the payments to be made to both the State and the Bank or the Bank alone depending on the Court's determination of priority.

The threshold issue before the Court, therefore, is whether the recording of the farmland preservation agreement created a lien against the debtors' real estate. If the Court rules affirmatively on that issue, then a second question would arise -- the priority of that lien as against the Bank's lien.

The Court has considered the briefs and exhibits submitted by the parties as well as the statutory and judicial precedent cited therein. Having done so, the Court concludes that the recording of the farmland preservation agreement did not create a lien against the debtors' real estate. The Court reaches this result for numerous reasons.

First, and foremost, as argued by the Bank, the statutory scheme of the farmland preservation law specifically provides a procedure by which a lien against the debtors' property arises. As further argued by the Bank, that procedure is specifically referenced in paragraph 13 of the original preservation agreement signed by the Chapeks. That paragraph states:

> 13. This agreement may only be relinquished, terminated, or withdrawn from by the owner or successor in title prior to its expiration date according to the procedure established in s. 91.19 Wis. Stats. If this Agreement is relinquished, terminated or withdrawn from by the owner or successor in title prior to the expiration date, a lien shall be recorded against the Subject Property in accordance with s. 91.19(7) Wis. Stats.

See Brief by State Bank of Arthur, Exhibit A.

§ 91.19(7) of the Wisconsin Statutes specifies that the amount of the lien will equal the "[t]otal amount of all credits received by all owners of such lands . . . during the last 10 years that the land was eligible for such credit, plus interest . . . ." See WIS. STAT. ANN. § 91.19(7) (West 1990).

Examining the facts presented here in light of this statutory scheme reveals that there has been no triggering event -- such as the relinquishment, termination of or withdrawal from the agreement. The agreement is still valid and it will continue in effect after the debtors' bankruptcy. Thus there has been no lien filed pursuant to § 91.19 of the Wisconsin statutes.

The State attempts to counter this argument of the Bank by alleging that the mere recording of the preservation agreement itself on November 13, 1985, created a lien on the property as of that date. The Court disagrees and notes that the recorded agreement is a covenant running with the land and not a lien against it.[(1)] As of the recording date of the agreement there was no liability of the landowners to the State. There was only potential indebtedness which could arise at some point in the future. The State seems to argue that merely because the agreement was recorded means that it constitutes a lien. The Court finds this argument meritless. The likely reason that the State requires such agreements to be recorded is to ensure that potential

subsequent purchasers have notice that the property is subject to use restrictions. As noted, the agreement by its terms applies to successors in title -- it runs with the land.

A second reason supporting the Court's result is the contingent nature of the purported lien. As noted by the State in its reply brief, there are numerous ways through which the debtors could avoid any indebtedness whatsoever arising from the agreement. If they extend the agreement beyond its ten-year term, no lien under WIS. STAT. § 91.19 will be filed. The debtors could sell the land and the obligations under the agreement and any ultimate lien would apply to the successors in title. If the land becomes subject to exclusive agricultural zoning, then no lien will result. See WIS. STAT. ANN. § 91.19(12) (West 1990). Finally, since liens under § 91.19 are only filed for tax credits received during the last ten years that the agreement is in effect, the debtors could extend the agreement and not claim any credits for ten years. This too would result in no lien being filed. It is thus very possible that no lien would ever be filed against the debtors' property on the basis of the agreement. Given this fact, the Court finds it would be manifestly unfair to the Bank to prematurely and without statutory authority fix the value of the State's contingent lien and thereby "cram down" the amount of the Bank's secured claim. The State seeks to value its lien on the basis of the total amount of tax credits ($14,445.00) claimed under the agreement on the debtors' property thus far. This amount was arbitrarily "set" by the State solely on the basis of the timing of the debtors' bankruptcy filing. Filing bankruptcy, however, is not a triggering event which fixes the value of the State's contingent lien under the statutory scheme of the farmland preservation law. See WIS. STAT. ANN. § 91.19 (West 1990).

Third, accepting the State's assertion that the recording of the initial agreement constitutes a lien would render other portions of the statute meaningless. If the lien arises on the basis of the recording of the original agreement, then the aforementioned provisions providing for the recording of a lien at termination, relinquishment or withdrawal would be superfluous. Accepting the State's interpretation would mean that two liens could eventually be filed against the property based on the same debt -- one arising at the time of recording the original agreement and the other at termination or relinquishment pursuant to § 91.19 of the Wisconsin statutes. The only indebtedness under either "lien" would be the amount of tax credits claimed on the property for the last ten years the agreement was in effect. The $14,445.00 figure posited by the State would be included in any lien which would ultimately be filed under § 91.19. Holding that a lien already exists for that amount would render the aforementioned provision meaningless.

In addition, subsection 9 of § 91.19 provides that "[a] lien recorded under this section shall be effective upon recording and shall be subordinate to a lien of mortgage which is recorded prior to the recording of the lien under this section." See WIS. STAT. ANN. § 91.19(9) (West 1990). If, as the State asserts, priority is to be determined as of the recording date of the original agreement, then this provision would be rendered superfluous as well. Again, it is important to note that the debt underlying either "lien" (the "lien" allegedly created by recording the agreement and any ultimate lien under § 91.19) is the same debt -- the $14,445.00 in claimed tax credits.

Fourth, siding with the State in this matter would mean that $160.38 would be paid to it monthly, as provided in the debtor's third amended plan of reorganization. This leads to a relevant query in analyzing this matter: if any of the aforementioned contingencies occur so that no lien against the debtors' property under § 91.19 ever results, what happens to the funds which would have already been paid to the State? Would the State return them to the debtors? Such contingencies could arise if the

Court accepted the State's interpretation of the farmland preservation law's statutory scheme. The Court finds this interpretation to be in error; an examination of that scheme reveals that such contingencies were clearly not contemplated by the legislature.

Fifth, the Bank correctly notes the uncertainty in establishing the value and priority of liens which would result if the State's arguments were accepted. The lien would have priority as of the date of recording the preservation agreement, but the value of the lien would in most cases be indeterminable for many years and that value could even turn out to be zero. Such uncertainty is avoided by the result the Court reaches here -- the priority of any eventual lien is determined as of the date of its recording pursuant to § 91.19(9). See WIS. STAT. ANN. § 91.19(9) (West 1990).

Sixth and finally, the State's attempt to argue that the agreement constitutes a "lien" as defined in 11 U.S.C. S 101(37) is also unavailing. That provision defines a "lien" as a "[c]harge against or interest in property to secure payment of a debt or performance of an obligation." See 11 U.S.C. § 101(37) (West 1992). Although admittedly broad, whether a particular agreement constitutes a lien or security interest is to be determined under applicable state law -- not the federal law of the Bankruptcy Code. See In re Martin Grinding & Machine Works, Inc., 793 F.2d 592, 594 (7th Cir. 1986). As already shown, the overall statutory scheme of the farmland preservation law reveals that the recording of the original preservation agreement was not intended to create a lien against the property involved. Construing it to have such an effect would render other portions of that law superfluous. As noted, moreover, that law specifically provides that the agreement is a restrictive covenant running with the land. See WIS. STAT. ANN. § 91.01(7) (West 1990). Nor does the Court's construction of Wisconsin law frustrate or debilitate the operation of the Bankruptcy Code. Rather, this result lends certainty to the application of § 506 of the Code. Given the contingent nature of liability under the farmland preservation law, precise valuations of various claims would be impossible if the agreement itself constituted a lien as of the date of its recording.

For these reasons, then, the Court holds that the recording of the farmland preservation agreement on November 13, 1985, did not create a lien against the property at issue here. Accordingly, the Bank has a secured claim of $53,027.00 in the debtors' bankruptcy. The farm preservation agreement between the State and the debtors will continue in effect; the restrictive covenant will remain with the debtors' property.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTE:

1. The statute specifically defines "farmland preservation agreement" as "[a] restrictive covenant . . . running with the land, for a term of years . . . " See WIS. STAT. ANN. § 91.01(7) (West 1990).