United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re David P. Schildman, Debtor
Bankruptcy Case No. LM13-90-01255

United States Bankruptcy Court
W.D. Wisconsin

December 14, 1990

Galen W. Pittman, La Crosse, WI, for debtor.
Richard Thompson, La Crosse, WI, for State Bank of La Crosse.
William A. Chatterton, for trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

At the final hearing on confirmation of the debtor's plan which was held in La Crosse on October 15, 1990, some interim findings were announced from the bench and some issues were taken under advisement pending issuance of additional findings and conclusions. Before reciting those specific findings and conclusions, some background facts should be established to make them more understandable.

On October 12, 1978 the debtor gave the State Bank of La Crosse ("the Bank") a continuing guarantee for the debts of Schildman Trucking, Inc. Although the debtor was a corporate officer and shareholder of Schildman Trucking, Inc., his spouse, Lorna M. Schildman, had no connection with the business. At all relevant times, Schildman Trucking, Inc. had some debt to the Bank outstanding.

On July 18, 1986 the debtor and his spouse signed a consumer real estate security agreement ("RESA") in favor of Bank to secure a mortgage note in the amount of $9,737.48; the agreement was duly recorded on July 21, 1986. Included in the agreement was a "dragnet clause," pursuant to which the debtor and his wife granted Lender a continuing lien on the Property to secure all debts, obligations and liabilities of any Customer to Lender arising out of credit previously granted, credit contemporaneously granted or credit granted in the future by Lender to any Customer, to any Customer and another, or to another guaranteed or endorsed by any Customer, except in an original amount of less than $1000.00, the granting of which is subject to the Wisconsin Consumer Act ("Obligations").

The mortgage note has been paid in full, but the Bank has not filed a satisfaction of the RESA. The parties stipulated for purposes of the hearing that the value of the real property subject to the RESA is $67,900.00.

On April 7, 1988 the debtor signed his name, including the designation "Sec treas.," to a specific guaranty of a Schildman Trucking, Inc. business note dated April 15, 1988 in the amount of $23,421.02. The "marital purpose" portion of the guarantee, stating that

"Each guarantor who signs above and is married represents that this obligation is incurred in the interest of his or her marriage or family," was not signed by the debtor.

Schildman Trucking, Inc. went out of business in 1988, and as of May 3, 1990, $24,881.62 was due on the business note. The debtor, individually or as an officer, is obligated to pay the debt of the corporation by the two guarantees he has given. That obligation is claimed by the Bank to be secured by the RESA which remains of record against the debtor's house. The Bank therefore claims that it is entitled to be treated as a secured creditor in the Chapter 13 plan, to be paid in full, and to receive interest on its claim at the rate of $7.49 per day. The Bank also seeks a determination of the priorities of the encumbrances on the real estate.

In addition to the RESA, the real estate is encumbered by two mortgages and a judgment lien. The City of La Crosse Housing Rehabilitation Program (the "City") has a mortgage recorded October 22, 1987 securing a loan in the principal amount of $2,655.75. The terms of the loan state that the interest accrues on the unpaid balance at the rate of three percent (3%) simple interest per year, and the debtor has scheduled the City's claim as secured in the amount of $2,800.00. The City has neither filed a proof of claim nor objected to the scheduled amount. The Bank acknowledges that it was aware of the City's mortgage at the time it procured the 1988 business note and guarantee, and does not object to the City's position as a first mortgage on the property.

On November 12, 1987 a judgment in the amount of $2,953.60 was entered in favor of First Federal Savings & Loan ("First Federal") and against Schildman Freight Systems, Inc., John Schildman, and the debtor. The judgment was not docketed until August 23, 1988. The debtor has scheduled First Federal's claim as secured in the amount of $2,953.60, and First Federal has neither filed a proof of claim nor objected to the scheduled amount.

On March 3, 1989 Janet E. Schwartz recorded a mortgage which was signed only by the debtor, ostensibly securing a mortgage note, (again signed only by the debtor), in the amount of $10,000.00. The debtor has scheduled the claim as secured in the amount of $10,000.00, and Ms. Schwartz has filed a proof of claim for that amount.

At the end of the October 15, 1990 hearing, I made the following preliminary findings of fact and conclusions of law:

1. The debtor is an experienced businessman and it was his obligation to read the RESA. (As this finding implies, the Bank had no fiduciary duty to disclose the presence of the dragnet clause to the debtor.)

2. The April 7, 1988 guarantee is not secured by the property securing the RESA, because that guarantee was signed in a corporate capacity, rather than a personal capacity.

3. Because the April 7, 1988 guarantee is not a subsequent guarantee by the same guarantor, it has no impact on the first (October 12, 1978) guarantee.

4. The October 12, 1978 guarantee is secured by the RESA.

5. The Bank's claim is secured via the October 12, 1978 guarantee by the debtor's undivided one-half (1/2) interest in the real property securing the RESA, subject to outstanding liens and mortgages having priority over that of the Bank.

After considering the issues taken under advisement, I make the following additional conclusions of law:

1. The City has a first priority secured claim in the amount of $2,800.00. Colonial Bank v Marine Bank N.A., 152 Wis 2d 444, 446, 448 NW2d 659 (1989) ("although mortgages to secure future advances are valid, optional advances made by a first mortgagee with actual knowledge of a second mortgage do not have priority over the second mortgage.")

2. The Bank has a second priority secured claim in the amount of $24,881.62. See Colonial Bank v Marine Bank, 152 Wis 2d at 446.

3. The Bank is entitled to interest on its secured claim in the amount of $7.49 per day. 11 USC § 506(b).

4. Because the debtor's undivided one-half (1/2) interest in the real property, $33,950.00, is sufficient to secure both the claim of the City and that of the Bank, I need not determine whether the Bank's claim is also secured by Lorna Schildman's undivided one-half (1/2) interest in the real property securing the RESA.

5. Because the Bank is not treated as a fully secured creditor, the Bank's objection to confirmation of the debtor's plan must be sustained.

6. The debtor may have 15 days from the date of entry of this memorandum decision within which to amend his Chapter 13 plan. If no amendment which can be recommended for confirmation by the standing Chapter 13 trustee is timely filed hereunder, this case may be dismissed without further hearing.