

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

EUGENE F. WHITE, JR., d/b/a
Proprietors Restaurant, and
MARY E. WHITE

IN BANKRUPTCY

No. 79-00594
79-00595

Bankrupts

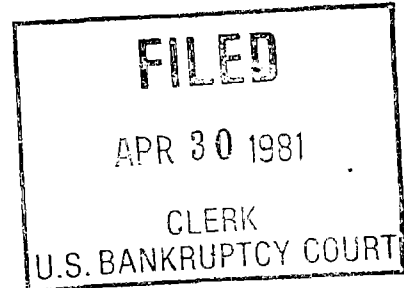
PETER F. HERRELL, Trustee
of Eugene F. White, Jr.
and Mary E. White

Plaintiffs

vs.

DENNIS B. GRAY and
DONALD G. SMITH

Defendants.



ORDER DISMISSING COMPLAINT

The Trustee having duly filed a complaint in the above entitled action praying that a judgment be entered declaring invalid and unenforceable a certain land contract and assignment of contract; and the defendants having filed their answer denying the allegations of plaintiff's complaint and contending that the land contract and assignment thereof are valid and first liens; and a pre-trial conference having been held, and counsel having made their oral arguments and having filed briefs relative to the issues and contentions of the respective parties; and the parties having agreed that no further evidence would be necessary for the determination of the matter; and the Court having duly considered the facts, the record and the arguments of counsel, and being fully advised in the premises, FINDS:

1. That the plaintiff is the duly appointed, qualified and acting Trustee in the matter of the bankruptcy of Eugene F. White, Jr. and Mary E. White, and that said bankruptcy was filed on the 18th day of May, 1979.

2. That the bankruptcy schedules show the defendant, Donald G. Smith, to be listed as a secured creditor holding a land contract showing no recording information thereto.

3. That the real estate involved herein was originally owned by the defendant, Dennis B. Gray, who sold on land contract to Richard P. Humphrey and Shirley A. Humphrey, dated October 1, 1975, and recorded October 6, 1975, in Volume 253 of Records on Page 400-401, Document No. 310704 in the Office of the Register of Deeds for Dunn County, Wisconsin.

4. That thereafter Richard P. Humphrey and Shirley A. Humphrey executed an assignment to Mary E. White and Eugene F. White dated May 7, 1977, and recorded August 19, 1980, in Volume 279 of Records on Page 591 in the Office of the Register of Deeds for Dunn County, Wisconsin, which filing was after the date of the filing of the bankruptcy herein.

5. That the interest of Dennis B. Gray, as the vendor under the land contract, was assigned on June 16, 1978, to Donald G. Smith, and that the assignment thereof has not been recorded.

6. That the plaintiff's interest arises out of whatever interest the Whites obtained by virtue of their assignment to them.

7. That the interest of the vendor became personal property under the Wisconsin law, and that the interest of the vendees under the contract and assignments, and especially of the bankrupts through whom plaintiff obtains his interest, if any at all, remains as real estate.

8. That it has been well established under Wisconsin law and decisions that the vendors do not need to record their contract and, in fact, there is no reason for them to do so.

9. That it likewise follows that there was no need for the assignee to record his assignment of the contract, and that he took over the full rights of the contract by virtue of the assignment to him.

10. That the bankrupts recognized the interest of the said Donald G. Smith as having the outstanding land contract and to whom the balance of the original purchase price was payable.

11. That the record shows that the vendor received one payment on the contract in the sum of \$3,500.00 on October 25, 1976,

and that thereafter the vendees made one payment of \$300.00.

12. That as of March 9, 1981, there was due on the land contract, after crediting the payments above referred to, the sum of \$53,320.20, plus interest at the rate of \$7.8757 per day.

13. That said contract also provided for the allowance of reasonable attorney's fees and expenses in the event of legal proceedings in the enforcement of any remedy under the terms of the contract.

14. That the defendants claim attorneys' fees, as follows:

Attorney Dale E. Jurgensen	\$ 783.29
Attorney Stuart J. Krueger	\$1,000.00
Attorney Claude R. Davis	\$ 500.00

the reasonableness of which amounts will have to be subsequently determined if not agreed upon between the parties.

15. The Trustee contends that he has a superior interest over the defendant, Donald G. Smith, the assignee of the vendor's interest herein, and that the interest of the defendant, Dennis B. Gray, was entirely wiped out by virtue of the assignment to Mr. Smith.

16. The contention of the Trustee is neither supported by the evidence and facts or under the law of priorities by virtue of real estate titles in Wisconsin.

17. That the defendant, Donald G. Smith, has a first lien on the premises in the sum of \$53,320.20 plus interest of \$7.8757 per day from March 9, 1981, plus reasonable attorney's fees to be agreed upon or determined by the Court.

18. That the question of interest raised by the plaintiff cannot be sustained, and like a mortgage lien the land contract interest continues even in the bankruptcy proceedings; it is not cut off at the time of the filing of the proceedings. From part of the record information it appears that the interest of Mr. Gray and Mr. Smith is not subject to a mortgage to the National Bank of Boyceville in the sum of \$3,000.00 which was given to the bank by the bankrupts, Eugene F. White and Mary E. White, by document recorded in Volume 270 of Records on Page 751 on October 13, 1977,

in the Office of the Register of Deeds for Dunn County, Wisconsin.

19. That the judgment of Link Electric against the said bankrupts has been lifted by a separate order of the Court.

20. That said property is subject to the unpaid taxes for the years 1977, 1978, 1979 and 1980, and that said taxes are in addition to the amount due the defendant, Donald G. Smith.

CONCLUSIONS OF LAW

That an order be entered determining that the liens of said land contract of the defendants are valid first liens and fully enforceable against the property, plus the taxes, and that any interest of the Trustee, and his expenses of administration, would be subsequent to said land contract and tax interest.

O R D E R

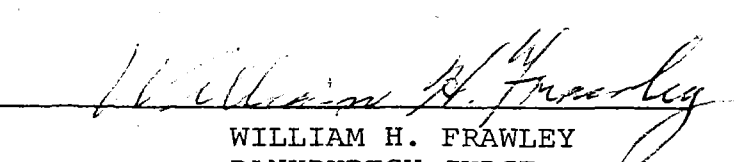
NOW, THEREFORE, IT IS ORDERED:

1. That the land contract balance in the sum of \$53,320.20 plus interest from March 9, 1981, at the daily rate of \$7.8757, plus reasonable attorneys' fees and expenses, is prior to any interest of the Trustee herein, and that said land contract is in addition to the back taxes in the sum of \$4,663.26 to June 1, 1981.

2. That any claim of the realtor herein and the National Bank of Boyceville and the Trustee are subsequent to said land contract interest.

Dated: April 30, 1981.

BY THE COURT:


WILLIAM H. FRAWLEY
BANKRUPTCY JUDGE