

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

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In re)	Bankruptcy Case No. 81C-02131
LAFAYETTE B. BROWN, aka)	
LAFE B. BROWN,)	Civil Proceeding No. 83PC-0100
Debtor.)	
RICHARD A. CHRISTENSON,)	
TRUSTEE FOR CAPE TRUST,)	
Plaintiff.)	
-vs-)	
LAFAYETTE B. BROWN, aka)	
LAFE B. BROWN and AGNES M.)	
BROWN, his wife,)	
Defendants.)	MEMORANDUM OPINION

Plaintiff initiated the above-entitled civil proceeding by a complaint seeking relief from the automatic stay in order to foreclose upon debtors' residence. The pertinent facts are as follows:

On November 30, 1979, the debtors and Agla Development Corporation (Agla), by its president Lafe B. Brown, executed a promissory note in favor of plaintiff in the amount of \$351,191. The note was secured by two trust deeds. Agla executed a first trust deed, in favor of plaintiff, on real property located at approximately 600 South 2165 West. The debtors individually executed a second deed of trust, in favor of plaintiff, on real

property located at 2590 Cyprus Way, which property is the debtors' residence.

After debtors' default under the note, plaintiff filed a notice of default against the Cyprus Way property on January 14, 1981, and against the 600 South property on March 2, 1981. Prior to the time of the scheduled trustee's sales, debtors filed for relief under Chapter 11. This stayed plaintiff from any further action to foreclose on the Cypress property, as it was property of the estate. However, plaintiff proceeded with the sale of the 600 South property which was owned by Agla. On September 1, 1981, said property was sold to plaintiff, the only bidder, for \$200,000.

Plaintiff applied the \$200,000 to the indebtedness of \$426,121.92, leaving a balance of \$226,121.92, plus interest at the per diem rate of \$75.37 since September 1, 1981. Plaintiff now seeks relief from the automatic stay so that it may sell the Cyprus property at a trustee's sale to satisfy the remainder of the debt.

Debtor alleges that the Cyprus property is necessary for an effective reorganization and also raises various defenses. First, debtor asserts that the value of the 600 South property, at the time of the trustee's sale, was approximately \$429,500 and, therefore, the entire debt was extinguished by the sale of the property, even though plaintiff bid only \$200,000. Second, even if the Court finds that there was still some amount owing to

plaintiff after the trustee's sale, plaintiff has waived its right to any deficiency by failing to commence an action within three months of the sale of the 600 South property, pursuant to U.C.A. § 57-1-32.¹ Debtor further claims that plaintiff's failure to commence an action against Agla within the three month period discharges Agla's obligation and also the debtor's, pursuant to U.C.A. § 15-4-4.²

There was conflicting evidence presented as to the fair market value of the 600 South property. Plaintiff's witness, Ralph Wright, appraised the property on January 2, 1980. The amount of land included in this appraisal was the same 7.94 acres which were encumbered by the trust deed of November 30, 1979. Wright placed the fair market value of the land at \$209,500. He testified further that, in his opinion, there was no increase in the value of the property between the date of his appraisal and the trustee's sale of September 1981.

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U.C.A. § 57-1-32 provides in part: "At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security"

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Subject to the provisions of section 15-4-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge co-obligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section 15-4-5.

Another appraiser, Gerald Higgs, was also called as plaintiff's witness to testify as to the fair market value of the Cyprus Way property. However, on cross-examination, Mr. Higgs stated that he had appraised the 600 South property, at the request of Agla, in May of 1979. The Court received this appraisal report into evidence, which showed the fair market value of the property to be \$429,500. The total acreage included in the Higgs' appraisal was 8.59. There was also a discrepancy between the two reports as to value per acre. Mr. Wright estimated the per acre value to be \$30,000, while Mr. Higgs' figure was \$50,000 per acre.

The defendant offered other evidence tending to show the value of the property to be \$429,500. Mr. Brown testified that prior to the trustee's sale of September 1, 1981, he had received an offer to purchase the 600 South property, the sale price being \$429,500. The Earnest Money Receipt and Offer to Purchase memorializing this transaction was received into evidence, showing a down payment of \$10,000. However, Mr. Brown testified that the sale was never consummated.

On the other hand, plaintiff's testimony and exhibits showed that Cape Trust has attempted to market the property since purchasing it at the trustee's sale. The listing agreement between Cape Trust and the realtor state a sale price of \$268,125. Mr. Christenson testified that he had received no bona fide offer on the property.

After consideration of all of the evidence, the Court finds the fair market value of the property, as of September 1, 1981, to be \$250,000. This finding requires an adjustment in the amount of the debt owed to plaintiff. The balance due as of September 1, 1981, before the sale, was \$426,121.95. Plaintiff must deduct the fair market value from this figure, rather than the \$200,000 which was bid, leaving a deficiency of \$176,121.95. The interest accrued since September 1, 1981, must also be recomputed.

The determination of plaintiff's right, if any, to recover this deficiency requires an analysis of two Utah statutes. U.C.A. § 57-1-32 states that "within three months after any sale of property under a trust deed . . . an action may be commenced to recover the balance due upon the obligation" The parties agree that no such action was ever commenced against either Agla or debtors. Defendant argues that this lack of prosecution waives plaintiff's right to recover any deficiency.

Plaintiff, however, cites the so-called "one action rule," U.C.A. § 78-371-1,³ for the proposition that only when all

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There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

property which constitutes security is sold and the proceeds applied to the debt, can a creditor commence a deficiency action. The juxtaposition of these two statutes creates an ostensible conflict.

The purpose of the one action rule is to eliminate harassment of debtors and avoid the multiplicity of lawsuits which occurred under the common-law rule which allowed a creditor to foreclose upon the real property or to sue upon the note. Utah Mortgage and Loan Co. v. Black, 618 P2d 43 (Utah, 1980). The statute allows a creditor only one action upon a debt secured by real property; the creditor may not enforce the personal liability of the debtor by suing on the note until the security has been exhausted. Cache Valley Banking Co. v. Logan Lodge No. 1453, 56 P2d 1046 (Utah, 1936). The Utah Supreme Court has further held that failure to comply with the statute in not applying the security to the debtor's obligation precludes recovery of any deficiency against the debtor. Utah Mortgage and Loan Co. v. Black, supra at 45.

The language of § 57-1-32 requires the commencement of a deficiency action "within three months after any sale of property under a trust deed." (emphasis added). Defendant's proposed interpretation of this statute would necessitate plaintiff's choosing between two options. One, sue the signatories of the note personally within three months, in which case plaintiff would waive its security in the second parcel of property. Or,

two, wait to foreclose upon the second parcel, which would result in plaintiff's losing its right to a deficiency action, assuming said foreclosure exceeds the three month time limit.

Such an interpretation would result in the creditor being forced to exercise only one remedy while losing its right to the other. Both state statutes clearly entitle a creditor to two remedies, an action against the property and an action against the debtor personally, if both are necessary to satisfy the debt. To require a contrary result because the security consists of two parcels of property ignores the intent of the law. Because of the bankruptcy filing, plaintiff was stayed from foreclosing upon both properties at the same time. There may well be situations in which sale of collateral at different times will benefit the debtor. In this case, the debtors may have reasonably desired the corporate property sold before their own.

The Utah Supreme Court specifically addressed the application of the one action rule to multiple parcels of property in Salt Lake Valley Loan and Trust Co. v. Millspaugh, 54 P. 893 (Utah, 1898). "[T]he security must be exhausted as to quantity and value before other property of the debtor can be resorted to for the payment of the debt." (emphasis added).

Based upon the above analysis, the Court holds that the plaintiff is entitled to foreclose upon both parcels of real property, and in fact must do so before initiating an action for any deficiency which may remain. Accordingly, the three month

time period of § 57-1-32 will not begin to run until plaintiff has exhausted all of the security. It is possible that different facts would dictate a different result. For instance, if the creditor, of its own volition, delayed the sale of a second parcel of property, arguments of waiver or estoppel may apply. But where, as in this case, the creditor is stayed from proceeding against the property by operation of federal law, such arguments are inapplicable.

Because plaintiff's right to commence a deficiency action is preserved, there is no discharge of personal liability on the part of Agla. Accordingly, the Court need not consider defendant's claim under § 15-4-4.

As to plaintiff's request for relief from the automatic stay, the evidence is clear that debtors have no equity in the Cyprus Way property. The parties stipulated that the property has a fair market value of \$111,000. The loan officer from Prudential Federal Savings & Loan, the holder of a first trust deed on the property, testified that the amount due on its debt was \$54,619.54. The balance of plaintiff's debt, \$176,121.95, plus interest, far exceeds the stipulated value of the property. In addition, numerous judgments have attached to the property, subsequent to the first and second trust deeds.

The plaintiff having met its burden on the issue of debtors equity in the property, the defendants must prove that the property is necessary to an effective reorganization. There was

no evidence presented upon which the Court could base such a finding; the defendants have failed to meet the burden of proof imposed by § 362(g).

Accordingly, IT IS HEREBY ORDERED that the automatic stay is terminated, as to the Cyprus Way property, and plaintiff may proceed with the foreclosure of its trust deed. Plaintiff's counsel is directed to prepare an order consistent with this opinion.

DATED this 9 day of May, 1983.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE