

FEB 23 1996

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

J. BARON GROSHON

BY: JRA
Deputy Clerk

In Re:

HARRY D. WELLS,
Debtor.

Case No. 94-10516
Chapter 7

DAVID HILLIER, TRUSTEE IN
BANKRUPTCY,

Plaintiff,

Adversary Proceeding
No. 95-1115

v.

HARRY D. WELLS, AND WIFE,
ALTA BALLARD WELLS,

Defendants.

JUDGEMENT ENTERED ON FEB 23 1996

ORDER GRANTING JUDGMENT ON THE PLEADINGS

This matter came before the court on the Trustee's Motion for Judgment on the Pleadings filed August 14, 1995. Hearings were held on the matter on November 15 and January 18, 1995. After review of the record, the evidence tendered by the parties, and the arguments of counsel, along with the applicable statutory and case law, the court finds that the Trustee's motion should be granted. The court makes the following Findings of Fact and Conclusions of Law:

1. The debtor initiated this Chapter 7 proceeding on November 24, 1994. In the Petition and Schedules, the debtor indicated that he owned as tenants by the entirety certain real estate located in Henderson County, North Carolina.

2. Nine months prior to filing his bankruptcy petition, the debtor and his wife had caused a deed to be recorded which transferred to him the wife's interest in the real property. Specifically, on February 16, 1994, a warranty deed was registered in the Henderson County Register of Deeds which showed that Alta Ballard Wells conveyed her interest in the parties' marital residence to Harry D. Wells as part of a separation agreement. Therefore, on the date of the debtor's bankruptcy petition, the title to the real property was recorded in the name of the debtor alone.

3. The evidence shows that after executing both the separation agreement and the deed the debtor and his wife reconciled and in fact did not separate.

4. On April 20, 1995, the Defendants secured an order from the District Court for Henderson County, North Carolina, that provides that the February 16, 1994 deed had "no legal effect" and stated that the legal title reverted back to its previous owners, ownership as tenants by the entirety. Though the debtor had filed bankruptcy some 5 months earlier, the Trustee was not brought into the proceeding.

5. The Trustee seeks an order declaring that the title is vested solely in the debtor, and that the order of the Henderson County District Court is not binding.

6. The general rule governing separation agreements in North Carolina is that the resumption of marital relations after the execution of a marital agreement terminates the executory

provisions of the separation agreement. In Re Estate of Adamee, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976). However, the resumption of marital relations after the execution of a marital agreement does not terminate or void any fully executed provisions. In a North Carolina Court of Appeals case, the Court held that

[w]here a husband and wife enter into a separation agreement and thereafter become reconciled . . . the agreement is terminated for every purpose insofar as it remains executory Even so, a reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties.

Whitt v. Whitt, 230 S.E.2d 793, 795-96 (1977); see also Schultz v. Schultz, 420 N.C. App. 186, 191 (1992).

7. The court finds the case cited by the debtor unpersuasive. In Morrison v. Morrison, 102 N.C. App. 514, 402 S.E.2d 855 (1991), the Court held that where the parties to a separation agreement reconcile, whether the executory provisions of a property settlement agreement are rescinded depends on whether the property settlement is negotiated in "reciprocal consideration" for the separation agreement. The Morrison Court's holding only interpreted the effect of marital reconciliation on the executory provisions of the agreement, not the executed portions, and is therefore inapplicable to the present case.

8. Under Schultz v. Shultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), an executory contract is defined as "one in which a party binds himself to do or not do a particular thing in the future. When all future performances have occurred and there is no outstanding promise calling for fulfillment by either party, the contract is no longer 'executory,' but is 'executed.' "

9. The court finds that the February 16, 1994 deed transferring the property from ownership in the entirety to the debtor as his sole property is a fully executed contract. The parties completed the contract as required by law. There is no evidence before the court that there are any discrepancies on the document itself, nor are there any allegations of fraud, duress, mutual mistake or the like.

10. The court finds that the Henderson County District Court proceeding is without legal effect. The court further finds that since the District Court proceeding is without legal effect, it does not carry any preclusive effect in the present proceeding.

a) Section 362 of the Bankruptcy Code, the automatic stay provision, protects against "the pursuit of actions by any party of any character," Williford v. Armstrong World Industries, Inc., 715 F.2d 124, 126 (4th Cir. 1983). This includes both government entities, In Re Pearson, 917 F.2d 1215, 1216 (9th Cir. 1990), cert. denied, 503 U.S. 918 (1992), and the debtor himself. See, e.g., In Re Shapiro, 124 B.R. 974, 981 (Bankr. E.D.Pa. 1991).

b) The general rule is that any act that violates the stay is void *ab initio*. The rule means that any act taken, including an act by a government entity, In Re Knightsbridge Development Co., 884 F.2d 145, 148 (4th Cir. 1989), is without legal effect against both the debtor and all other parties to the bankruptcy proceeding, as if the act never happened.

11. While the court is sympathetic to the situation of the debtor and his wife, the law governing this transaction is clear and the result is a consequence of the debtor's own actions. It may appear harsh to give effect to the conveyance when, in fact, the parties did not actually separate and did not intend to make the transfer of title. However, the parties caused the deed to be executed and filed. If a judgment creditor had tried to collect against the property at that time, it could have done so. Since the trustee in bankruptcy is granted the powers of both a hypothetical lien creditor and a bona fide purchaser under §544 of the Bankruptcy Code, the Trustee as representative of the creditors has rights in the property also. The debtor had over 9 months to correct the title. Through his own inadvertence, he lost the opportunity to reconvey the property back to his wife to hold as tenants in the entirety. When the bankruptcy intervened in November, 1994, the creditors of the debtor became entitled to be paid out of the property of the estate.

12. For the foregoing reasons, the court holds that the property is held as the sole property of Harry D. Wells, the debtor in this case.

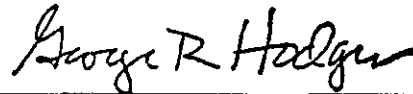
NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Trustee's Motion for Judgment on the Pleadings is hereby GRANTED.

2. The Henderson County District Court Order dated April 20, 1995 is void *ab initio*.

3. The property in issue is hereby held to be the sole property of the debtor.

This the 2nd day of FEBRUARY, 1996.



George R. Hodges
United States Bankruptcy Court