

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>97-10581</u>
RUBY JEAN POSTELL BAKER, _____	)	
Debtor. _____	)	
	)	
EDWARD J. COLEMAN, III, Trustee, _____	)	FILED at 3 O'clock & 20 min. P.M. Date: 9-30-99
Plaintiff, _____	)	
	)	
vs.	)	Adversary Proceeding Number <u>98-01114A</u>
	)	
RUBY JEAN POSTELL BAKER, _____	)	
First Defendant, _____	)	
	)	
ARTHUR H. BAKER, SR., _____	)	
Second Defendant. _____	)	

**ORDER**

The Plaintiff, Edward J. Coleman, III, Trustee, ("Trustee") seeks to sell the former marital residence of Debtor/First Defendant, Ruby Jean Postell Baker ("Wife") and Second Defendant, Arthur H. Baker, Sr. ("Husband"), pursuant to 11 U.S.C. § 363(h). Husband brings a motion for summary judgment contending

that Wife had no ownership interest in this real estate at the time she filed her bankruptcy case and therefore the property is not subject to liquidation by the Trustee. According to Husband, when Husband and Wife were divorced, the divorce decree extinguished Wife's interest in the marital residence. At issue are the interests of the Defendants in the marital residence following issuance of the divorce decree.

The relevant facts are as follows. On March 3, 1997, Wife filed for bankruptcy relief under Chapter 13. The plan was confirmed on October 6, 1997. The case was converted to Chapter 7 on September 14, 1998. Wife's Schedule A, Real Property, declared an interest in the property at issue, the house and lot located at 1506 Hilda Court, Augusta, Georgia ("Property"), which she valued at \$110,000.

On December 3, 1997, but retroactively effective to November 7, 1996, Husband and Wife were divorced by the Final Judgment and Decree of Total Divorce, Civil Action File No. RCD-79-96, issued in the Superior Court of Richmond County, Georgia. Wife was the plaintiff in the suit. The judgment disposed of the Property as follows:

As an equitable division of the marital property, the house and lot known as 1506 Hilda Court, Augusta, Georgia shall be appraised, in letter form, by Ashby R. Krouse, III, Appraiser. The cost of said appraisal shall

be shared 50-50 by [Wife] and [Husband]. [Husband] is required to pay [Wife] one-half of the equity in said house within twelve months from the date of the appraisal. Although [Husband] is awarded the marital home, description of which is attached hereto and marked as "Exhibit A," [Wife] is allowed to remain there until she receives the equity payment from [Husband] and she is to then vacate said property within thirty (30) days from the date of payment. As long as [Wife] remains in the house, she shall keep it in good repair, reasonable wear and tear excepted, and be responsible for and pay all utilities.

The [Husband] is responsible for all mortgage payments, taxes and insurance relating to the house and lot.

... Entered this 3<sup>rd</sup> day of December, 1997, Nunc Pro Tunc to November 7, 1996.

Husband subsequently failed to pay Wife one half of the appraised equity in the Property, and failed to make the mortgage payments.

Trustee claims that Wife and Husband continue to be co-owners of the Property. Trustee interprets the judgment as awarding Husband title to the Property *contingent upon* payment of half the equity to Wife. Husband has failed to pay Wife her half of the equity, and therefore, claims Trustee, title remains with "Husband and Wife." Bankruptcy Code § 363(h)<sup>1</sup> and Bankruptcy Rule 7001 allow

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(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

the sale of jointly owned property in order to liquidate the interests of the bankruptcy estate in such property. Trustee argues that all requirements of 11 U.S.C. § 363(h) are met, and that sale of this Property is in the best interests of both the bankruptcy estate and Husband. In the alternative, Trustee claims that the Decree of Divorce gave Wife a lien on the Property, and that Trustee can foreclose on that interest. Trustee seeks a determination of the nature of Wife's interest in the Property and authority to liquidate that interest for the benefit of the bankruptcy estate.

Husband argues that Wife held no undivided interest in the Property at the commencement of her bankruptcy case. He claims that the Final Judgment and Decree of Divorce vested absolute legal title to the Property in him alone. Therefore, Wife could not be a tenant in common, joint tenant, or tenant by the entirety as required by 11 U.S.C. § 363(h). Husband seeks a declaration that he alone holds absolute legal title to the Property, that at the commencement of

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(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

Wife's bankruptcy case she held no undivided interest in the Property, and that the Property is not subject to liquidation in Wife's bankruptcy case.

Federal Rule of Bankruptcy Procedure 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, this Court will grant summary judgment only if "...there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11<sup>th</sup> Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H.Kress & Co., 398 U.S. 144, 57, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. § 157(b) (2) (A) & (O) and 28 U.S.C. § 1334 (1994). Here, no facts are disputed and the matter before me is purely legal, to determine the effect of the Final Judgment and Decree of Total Divorce on ownership of the Property.

When Wife filed for bankruptcy on March 3, 1997, she had an interest in the Property, which she declared on her Schedule A. Nine months later the Final Judgment and Decree of Divorce was "[e]ntered this 3<sup>rd</sup> day of December, 1997, Nunc Pro Tunc to November

7, 1996." Nunc pro tunc ("now for then") gives the judgment retroactive effect to November 1996, as if the judgment had actually been rendered before Wife filed for bankruptcy. Black's Law Dictionary 964 (5th ed. 1979). The divorce decree was, in effect, backdated to before Wife filed for bankruptcy. Therefore, according to Husband any statement of ownership Wife made in March, 1997, is superceded by the divorce decree's division of property.

Even without the nunc pro tunc effect, the divorce decree's disposition of marital property posed no conflict with the bankruptcy automatic stay. Wife, the debtor, brought the divorce action. The automatic stay does not apply to legal proceedings brought by the debtor against another party. Thompson v. I.R.S. (In re Thompson) Ch. 13 No. 96-60676 (Bankr.S.D.Ga. Sept. 3, 1999) (§ 362 automatic stay applies against entities attempting to collect a debt or obtain property from the debtor or the debtor's estate. Neither bankruptcy policy nor the statute read as a whole call for staying the debtor from pursuing litigation outside the bankruptcy forum.). Furthermore, Wife's Chapter 13 plan had been confirmed prior to the actual date of the divorce decree. Upon confirmation of a Chapter 13 plan, only that property dedicated to plan payments remains property of the estate. American Gen. Fin., Inc., v. McKnight (In re McKnight), 136 B.R. 891 (Bankr.S.D.Ga. 1992). All

other property reverts in the debtor. Id. Wife's share of her marital property, therefore, was not property of the bankruptcy estate at the actual date of the divorce decree. Id. Upon conversion to Chapter 7, property of the bankruptcy estate consists "of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. §348(f)(1)(A). The controlling language here is "that remains in the possession of or is under the control of the debtor." A divorce decree transfers title to real property as if deeded by the owner. Richardson v. Park Avenue Bank, 325 S.E.2d 455, 457 (Ga.Ct.App. 1984); Elrod v. Elrod, 200 S.E.2d 885, 886 (Ga. 1973). The divorce decree stated, "...[Husband] is awarded the marital home." These words vested title to the Property to Husband, just as if the Property had been transferred by deed from "Husband and Wife" to "Husband" alone. Id. All that remained in possession of or under the control of Wife at conversion was a right of possession pending payment of her one-half equity in the Property. Therefore, the Property was not property of the bankruptcy estate as required by 11 U.S.C. § 363(h).

Although the decree made other awards related to the Property, those awards do not affect title to the Property. Husband was required to pay Wife one half of the equity in the Property, to

pay the mortgage, tax and insurance payments on the Property, and to allow Wife to reside at the Property until he paid her the equity. Wife was required to keep the Property in good repair and to pay for all utilities while she resided there. Although these awards are related to the Property, they do not affect the award of title to Husband. See Elrod, 200 S.E.2d at 886 (award to wife of title to house was not affected by requirement that husband pay mortgage and maintenance). In addition, none of the Property-related awards in the judgment are incompatible with vesting of title. See Elrod 200 S.E.2d at 886 (judgment granting a fee simple estate without right to convey was stricken as to the limited right to convey because fee simple cannot be so restricted); see also LeBlanc v. Easterwood, 249 S.E.2d 567, 568-69 (Ga. 1978) (decree purporting to grant title to house for two years could not be interpreted as awarding fee simple absolute because fee simple absolute is not limited in time). The judgment itself does not state that award of title to Husband was conditioned on any other award in the judgment, nor does it show any intent or reason not to transfer title. Therefore, the decree vests title to the property in Husband.

The divorce judgment was effective prior to the conversion, served to transfer title, and called for no conditions to be met prior to the transfer of title. I find that title to the

Property vested in Husband prior to the conversion of Wife's bankruptcy case to Chapter 7. Therefore, the Property is not property of Wife's bankruptcy estate, and Trustee cannot be authorized to sell it.

Nonetheless, Husband was required to pay Wife one half of the appraised equity in the Property, and he has not done so. Wife's interest in the equity existed prior to the bankruptcy filing. In Georgia, a husband and wife hold title to real property as tenants in common. OCGA § 44-6-120; see Straughair v. Palmieri (In re Palmieri), 31 B.R. 111, 112 (Bankr.N.D.Ga. 1983), Parrott v. Edmondson, 64 Ga. 333 (1879). As tenants in common, the interest of Husband may be separated from that of Wife, and each holds that interest in his or her own name and right. See Palmieri, 31 B.R. at 113. The bankruptcy estate created by Wife's filing included her separable interest in the Property. Id., 11 U.S.C. § 541(a)(1). Although the divorce decree divested her of title to the Property, the decree retained her right to her one-half interest in the equity. Consequently, the right to receive payment of half the equity became property of her bankruptcy estate. 11 U.S.C. § 541(a)(1) & §348(f)(1)(A). Trustee, like all bankruptcy trustees, must convert property of the estate into cash. 11 U.S.C. § 704(1). Trustee is therefore authorized to enforce payment by Husband of one

half of the equity in the Property according to the Final Judgment and Decree of Total Divorce.

Arthur R. Baker, Sr. holds title to the house and lot known as 1506 Hilda Court, Augusta, Georgia, according to the Final Judgment and Decree of Total Divorce, Civil Action File No. RCD-79-96. Ruby Jean Postell Baker, by that same judgment, retained one half of the appraised equity in that property to be paid by Arthur R. Baker, Sr., which award became property of the bankruptcy estate in her Chapter 7 case. Edward J. Coleman, III, as trustee in the Chapter 7 bankruptcy of Ruby Jean Postell Baker, is authorized to enforce the judgment, and recover the bankruptcy estate's one-half equity in the Property.

It is therefore ORDERED that summary judgment is granted in part to defendant Arthur H. Baker, Sr. determining that the Plaintiff, Edward J. Coleman, III, Chapter 7 trustee may not force the sale pursuant to 11 U.S.C. § 363(h) of the Property, 1506 Hilda Court, Augusta, Georgia. This order does not determine the extent of debtor's interest in the equity in the Property, nor the extent of the trustee's rights to enforce the bankruptcy estate's interest.

JOHN S. DALIS  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 30th Day of September, 1999.