

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RESOLUTION TRUST CORP., IN : CIVIL ACTION
ITS CAPACITY AS CONSERVATOR :
FOR ABRAHAM LINCOLN SAVINGS :
ASSOCIATION :

v. :

MARK COSGROVE and LISA : NO. 92-2809
COSGROVE :

RESOLUTION TRUST CORP., IN : CIVIL ACTION
ITS CAPACITY AS CONSERVATOR :
FOR ABRAHAM LINCOLN SAVINGS :
ASSOCIATION :

v. :

THOMAS COSGROVE and DELORES : NO. 92-2811
COSGROVE :

MEMORANDUM

Giles, C. J.

January __, 2001

Findings of Fact and Conclusions of Law

A. Loan, Default, and Sale

1. On September 27, 1988, Abraham Lincoln Savings and Loan issued a loan to Deb-Mar corporation for the purpose of building 22 single family detached residences in a subdivision known as "Homes at Magnolia" in Bensalem, Pennsylvania. The loan was personally guaranteed by each of the Cosgrove defendants. Thomas and Delores Cosgrove were the parents of Mark Cosgrove, who is married to Lisa Cosgrove. The father and son, Thomas and Mark

Cosgrove, were Deb-Mar's president and secretary, respectively.

2. The loan agreement was signed by Thomas Cosgrove and Mark Cosgrove, as President and Secretary of Deb-Mar.

3. The loan agreement included a clause after Thomas and Mark Cosgrove's signatures that stated:

This note contains a confession of judgment. A judgment may be obtained against the maker without notice and an opportunity to be heard. The undersigned hereby certifies that it has consulted with an attorney regarding the implications of a confession of judgment and has knowingly and voluntarily waived any rights to prior notice and opportunity to be heard in connection therewith.

At the end of the clause, Thomas and Mark Cosgrove signed their names again as president and secretary of Deb-Mar.

4. On March 26, 1990, Deb-Mar defaulted on the loan.

5. On September 19, 1991, the Resolution Trust Corporation ("RTC") was appointed conservator for Abraham Lincoln Federal Savings Association thereby becoming successor in interest to Abraham Lincoln for purposes of collecting on the loan. RTC is an instrumentality of the United States government that took control of Abraham Lincoln's assets and liabilities after Abraham Lincoln became insolvent.

6. On April 13, 1992, RTC filed a complaint for judgment in its favor against RTC for the outstanding balance of the loan, interest, and attorneys fees. The requested amount of judgment conformed with the remedy for default agreed to in the loan note.

7. Pursuant to the confession of judgment clause

specifically approved by Thomas and Mark Cosgrove in the loan note, Mark Levy, the attorney for RTC, appeared on behalf of Deb-Mar and confessed judgment against Deb-Mar.(See Docket 92-cv-2162, #1).

8. Judgment was entered in favor of RTC and against Deb-Mar on April 16, 1992 in the amount of \$994, 551.32.(See Docket 92-cv-2162, #2).

9. On May 14, 1992, RTC filed two complaints for confession of judgment arising from the Deb-Mar default, one against Thomas and Delores Cosgrove, and one against Mark and Lisa Cosgrove. Each complaint was premised upon a separate contract, one in which Thomas and Delores Cosgrove agreed to guarantee the Deb-Mar loan, and one in which Mark and Lisa Cosgrove also agreed to guarantee the same loan. Each contract also included a confession clause after the original signature line which stated:

This note contains a confession of judgment. A judgment may be obtained against the guarantor without notice and an opportunity to be heard. The undersigned hereby certifies that it has consulted with an attorney regarding the implications of a confession of judgment and has knowingly and voluntarily waived any rights to prior notice and opportunity to be heard in connection therewith.

In each of the contracts, Thomas and Delores Cosgrove and Mark and Lisa Cosgrove entered their signatures after the above clause. (See Docket 92-cv-2811, #1 and 92-cv-2809, #1). On May 29, 1992, separate judgments by confession were entered pursuant to the two complaints, each for \$994,551.32. (See Docket 92-cv-

2811, #2 and 98-cv-2809, #2)

10. On June 25, 1992, a writ of execution was requested by RTC against Deb-Mar's property. Specifically, RTC requested a writ of execution against the development known as "Homes of Magnolia." (See Docket 92-cv-2162, #3).

11. The clerk of the court issued a writ of execution directing the United States Marshal to levy upon and sell Deb-Mar's interest in "Homes at Magnolia" in Bensalem, Pennsylvania. (See Docket 92-cv-2162, #3).

12. On August 21, 1992, this court appointed Allan Passen as special process server to provide notice of the imminent marshal's sale to Thomas and Mark Cosgrove. (See Docket 92-cv-2162, #9-10).

13. On August 22, 1992, Allan Passen made personal service upon Thomas and Mark Cosgrove of the notice of the marshal's sale. (See Docket 92-cv-2162, #11).

14. On August 27, 1992, the United States Marshal posted notice of the imminent sale on the door of lot #2 in the "Homes at Magnolia" development. (See Docket 92-cv-2162, #14).

15. On September 30, 1992, the property was sold by the U.S. Marshal at a public auction. RTC was the highest bidder and purchased the property for \$38,110.29. At the time of purchase, \$10,925 in state corporate taxes was still owed on the property. Subsequently, RTC sold all of the lots on the property for

\$499,400. The amount RTC received for selling the property after subtracting the amount RTC paid at the auction and the amount it had to pay in outstanding taxes was \$450,364.71. (See 92-cv-2162, #16).

B. The Fair Market Value Petition

16. Whenever the property of a debtor is sold to a creditor in execution proceedings, and the purchase of the property by the creditor does not satisfy the entire debt, Pennsylvania law requires the creditor to file a petition in court fixing the fair market value of the property sold. See 42 Pa. Const. Stat. Ann. § 8103(a) (West. Supp. 1999). The purpose of such a petition is to enable a court to determine how much of a debtor's debt should be discharged when some property has passed from the debtor to the creditor.

17. On March 24, 1993, RTC filed a fair market value petition, naming Deb-Mar and the Cosgroves as respondents. The certificate of service attached to the petition indicated that it was served upon Robert Nemeroff as "Attorney for Defendant Deb-Mar, Inc. and Respondents Thomas H. Cosgrove, Delores Cosgrove, Mark Cosgrove, and Lisa Cosgrove." (Docket 92-cv-2162, #16). On March 31, 1993, this court determined the fair market value of the property sold was \$499,400. After adjustments for the price paid at the auction and the taxes owed on the property, the court

discharged the Cosgroves from the judgments, but only to the extent of \$450,364.71.

18. There was no significant activity in this case until over five years later when two separate petitions were filed, one by Thomas and Delores Cosgrove and the other by Mark and Lisa Cosgrove. Each petition sought to have the judgment against the petitioning Cosgrove couple marked satisfied. The Cosgroves argued that they never received notice of the fair market value petition that was filed by RTC on March 24, 1993. The Cosgroves pointed out that the statutory provision outlining the requirement of the fair market petition provides that anyone liable to the creditor for the relevant debt "who is neither named in the petition nor served with a copy thereof or notice of the filing thereof as prescribed by general rule, shall be discharged from all personal liability to the judgment creditor on the debt...." 42 Pa.C.S.A. § 8103 (b). The Cosgroves claimed that they never received a copy or notice of the fair market value petition and should have all liability to RTC discharged.

19. This court denied their petition on February 18, 1999. This court concluded the statute recommending discharge only applied if the debtor was not named, served, or given notice. Since the Cosgroves were named in the petition, this court denied the petition without reaching the issue of whether the Cosgroves were served or given notice. The third circuit vacated this

court's order in an unreported opinion that stated:

We are satisfied in finding that the Pennsylvania Legislature never could have contemplated that a determination in a proceeding to fix fair market value would bind a named party without notice of the proceedings at least, as apparently was the case here, if the party could be served with the petition. Furthermore, we believe that procedural due process requires some type of notice to an available party before the party can be bound by a fair market value determination in a proceeding under section 8103.

The third circuit remanded, requiring this court to determine if the Cosgroves received appropriate service or notice of the fair market value petition proceedings¹.

C. Receipt of Service of the Fair Market Value Petition

20. This court held a hearing about notice of the fair market value petition on November 7, 2000.

21. The fair market value petition was served upon Mr. Nemeroff, who represented that he was the attorney for Deb-Mar, and each of the Cosgroves.

22. Mr. Nemeroff implicitly represented to RTC's attorneys that he was authorized to accept process on behalf of all of the Cosgroves. In a letter dated July 13, 1992, Mr. Nemeroff wrote a letter to Mark Levy, RTC's attorney, that stated, "Please be advised that I represent Mark and Lisa Cosgrove as individuals in

¹ Delores Cosgrove is deceased and the Cadle Company is the successor in interest of RTC. As such, the relevant parties in this proceeding are the Cadle Company and Thomas, Mark, and Lisa Cosgrove.

the above captioned matter." (Exhibit P1). Nemeroff's letter went on to state "I wish to discuss with you the status of any foreclosure proceedings which have been or will be initiated by the Resolution Trust Corporation upon the lots comprising the 'Homes at Magnolia' in Bensalem, Pennsylvania." Mr. Nemeroff sent a carbon copy of this letter to Mark and Lisa Cosgrove.(Id.). The "Homes at Magnolia" referenced in the letter were the subject matter of the fair market value petition filed on March 31, 1993. (Exhibit P7).

23. Mr. Nemeroff sent a second letter to Mr. Levy on October 16, 1992, requesting that Mr. Levy contact him about the subject matter of the July, 13, 1992 letter. He sent a carbon copy of this letter to Mark and Lisa Cosgrove. (Exhibit P8).

24. The court credits the testimony of Mr. Levy, who testified that Mr. Nemeroff had several telephone conversations with him about filing corporate tax returns for Deb-Mar, as well as about the effects of the deficiency judgments against Deb-Mar on all of the Cosgroves. (Hearing transcript 19-21). Mr. Levy and Mr. Nemeroff discussed how Deb-Mar's failure to file its corporate tax forms led to tax liens on Deb-Mar's property, which in turn made it difficult to sell Deb-Mar's assets and would lead to greater deficiency judgments against each of the Cosgroves. (Id.).

25. Mr. Levy sent a letter to Mr. Nemeroff on January 12,

1993 that evidences an understanding between Mr. Nemeroff and Mr. Levy that Mr. Nemeroff represented Deb-Mar and all of the Cosgroves. The letter stated:

...[T]he Cosgroves had previously agreed to file and resolve Deb-Mar's corporate tax return some time ago. However, given the current status of the lien, it is apparent they have not done so...Any loss of sale occasioned by your clients' failure to complete its commitment to file and pay all of its corporate taxes will result in an accordingly larger deficiency judgment against your clients. This is a result which you have indicated that you do not desire. With the expectation that you will facilitate immediate filing and payment of all outstanding corporate tax liens against Deb-Mar, I have submitted the enclosed documentation which you requested."

(Exhibit P3).

26. It is beyond dispute that Mr. Levy and Mr. Nemeroff discussed Nemeroff filing corporate tax returns on behalf of Deb-Mar in order to decrease the deficiency judgment against each of the Cosgroves.

27. On March 24, 1993, Enid Stebbins, who was an associate of Mr. Levy and also an attorney for RTC at the time, mailed the fair market value petition to Mr. Nemeroff by first class mail, postage pre-paid. At the hearing, Stebbins produced a copy of a cover letter she sent with the petition showing that the petition was mailed to Mr. Nemeroff at the proper address. (Exhibit P2).

28. The 1993 petition also included a certificate of service with a signed statement by Ms. Stebbins which stated that it was her understanding based on conversations with Mr. Nemeroff that

Mr. Nemeroff was Attorney for "Defendant Deb-Mar, Inc. and Respondents Thomas H. Cosgrove, Delores Cosgrove, Mark Cosgrove, and Lisa Cosgrove." (Exhibit P7).

28. The notes made by Ms. Stebbins following a conversation with Mr. Nemeroff show that Mr. Nemeroff was in the practice of accepting service on behalf of the Cosgroves. Following a telephone conversation with Mr. Nemeroff shortly after he received the fair market value petition, Ms. Stebbins wrote the following on a form entitled "memorandum of conference": "talked w/ Bob Nemeroff re: acceptance of service on behalf of Cosgroves and Deb-Mar, Inc. [H]e will call again after he speaks with Cosgroves...[H]e asked whether tax return issue was still relevant since all properties were sold. I told him yes, because state can attach properties (or our proceeds from the sale of properties) to satisfy tax liability." (Exhibit P11a)². Ms. Stebbins testified that the notes referred to acceptance of service on behalf of each of the Cosgroves for subpoenas for depositions. (Hearing transcript 79).

29. Ms. Stebbins testified that, if Mr. Nemeroff had commented that he did not represent the Cosgroves or was not authorized to receive service, she would have included this statement in her notes. (Hearing transcript 80). Mr. Nemeroff's

² According to the hearing transcript, Plaintiff's counsel marked both Enid Stebbins' notes and Thomas Cosgrove's asset deposition as P11. For purposes of this memorandum, the former will be called exhibit P11a and the latter will be called Exhibit P11b.

question about the tax return issue further shows that Mr. Nemeroff represented Deb-Mar and the Cosgroves.

30. The testimony at the hearing, the letters exchanged between Nemeroff and RTC's attorneys, the certificate of service on the fair market value petition, and the notes of Ms. Stebbins all evidence that Mr. Nemeroff represented all of the Cosgroves with their consent and that he was authorized to accept service of the fair market value petition. The court finds, by a preponderance of the evidence, that Mr. Nemeroff represented to Ms. Stebbins that he represented each of the Cosgroves for purposes of service of the petition. The court also finds Mr. Nemeroff communicated his representations of authorization and receipt of the petition to the Cosgroves.

31. During the hearing, Mr. Nemeroff, Mark Cosgrove, and Thomas Cosgrove all claimed that Mr. Nemeroff only represented the Cosgroves in a limited fashion and that he was not authorized to receive service. The court does not credit this testimony. The Cosgroves and Mr. Nemeroff never told RTC's attorneys anything other than that Mr. Nemeroff represented the Cosgroves with respect to the status of any foreclosure proceedings affecting the subject properties and the guarantors. Mr. Levy would not have discussed the corporate taxes and the effects of the corporate taxes on the individual guarantors with Mr. Nemeroff if Mr. Nemeroff did not state that he represented the Cosgroves in

this matter. When asked what he meant when he wrote to Mr. Levy that he represented Mark and Lisa Cosgrove, Mr. Nemeroff stated that, "That meant, your Honor, that I could prompt Mr. Levy to talk to me about this matter. If I simply wrote to him saying I was a friend of Mr. Cosgrove, I doubt he would have talked to me about it." (Hearing transcript 54). This testimony is not credible. Being an experienced attorney, Mr. Nemeroff would not have stated, in a written correspondence to a collections attorney, that he represented a party in litigation unless he meant it and was authorized to make that representation on behalf of his clients. This court does not accept the implicit proposition that Mr. Nemeroff knowingly misrepresented his authority to Mr. Levy. The continued telephone conversations and written exchanges about the relationship between the corporate taxes and the amount of the deficiency judgment against each of the Cosgroves show that Mr. Nemeroff's representation of the Cosgrove's interests was continual.

32. Further, the evidence shows that the Cosgroves were aware of all the activities of Mr. Nemeroff on their behalf. Mark and Lisa Cosgroves were sent carbon copies of two of Nemeroff's letters. The notes of Ms. Stebbins show that Mr. Nemeroff told her that he would call her back after speaking with the Cosgroves, showing that Mr. Nemeroff informed the Cosgroves of conversations with RTC's attorneys.

33. The record shows that Mr. Nemeroff was involved in filing the corporate tax returns of Deb-Mar, which is a corporation owned by the Cosgroves and in which Thomas Cosgrove is President and Mark Cosgrove is Secretary. Mr. Levy urged the filing. The purpose of the filing was to decrease the deficiency judgment against each of the Cosgroves, individually. It defies logic that Mr. Nemeroff's conversations with Mr. Levy about the corporate tax returns, and their effect on the each of the individual Cosgroves, occurred without the knowledge and consent of Thomas and Mark Cosgrove, as officers of Deb-Mar.

34. During an asset deposition on August 6, 1993, Thomas Cosgrove stated that he mailed Deb-Mar's corporate tax returns to Mr. Nemeroff. (Exhibit P11b)³.

35. The record shows that Mr. Nemeroff has been a longtime friend of the Cosgroves and had no reason to represent that he was authorized to accept service when he was not actually authorized to do so. At the hearing, Mark Cosgrove indicated that he had been friends with Mr. Nemeroff since childhood. (Hearing transcript 36). Mr. Nemeroff stated at the hearing that he would inform Mark Cosgrove of any imminent legal action because he considered Mark Cosgrove a friend. (Hearing transcript 52). Thomas Cosgrove also indicated that he was a friend of Mr. Nemeroff. (Hearing transcript 67).

³See Footnote 2.

36. Mr. Nemeroff also claims that he never received the copy of the fair market value petition that was mailed to him. The court does not credit this testimony. At the hearing, Mr. Nemeroff agreed that the cover letter and certificate of service that were mailed with the petition reflected his correct address. (Hearing transcript 57). He also stated that he does not usually have trouble receiving his mail at that address. (Id.). Further, the court credits Ms. Stebbins testimony that the petition was not returned undeliverable. (Hearing transcript 80).

D. Conclusion

37. The Cosgroves bring this petition pursuant to 42 Pa.C.S.A. § 8103 (b), which allows a debt to be discharged as to parties who were not "named in the [fair market value] petition or served with a copy thereof or notice of a copy thereof as prescribed by general rule." Based on the activities of Mr. Nemeroff, and the Cosgroves' participation and acquiescence in those activities, this court finds that the Cosgroves implicitly authorized Mr. Nemeroff to act as their attorney for all purposes including receiving service of process. This court further finds that Mr. Nemeroff was served with the fair market value petition and alerted the Cosgroves of its existence and legal implications. As such, the Cosgroves were properly served and were on notice of the fair market value petition. Their petition

to have their entire debt discharged must be denied.

An appropriate order follows.

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ORDER

AND NOW, this ___ of January, 2001, upon consideration of
the Petition of Defendants Mark and Lisa Cosgrove to Mark

Judgment Satisfied, and the Petition of Defendants Thomas and Delores Cosgrove to Mark Judgment Satisfied, it is hereby ORDERED that the petitions are DENIED.

BY THE COURT:

JAMES T. GILES C.J.

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