

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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**In re:**

**THOMAS A. GIARDINA,**

**Debtor.**

**CASE NO. 96-20421**

**DECISION & ORDER**

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**BACKGROUND**

On February 22, 1996, Thomas A. Giardina (the “Debtor”) filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) he was the owner of a single-family dwelling located at 4629 Tucker Road, Campbell, New York (“Tucker Road”); (2) the Debtor’s interest in Tucker Road had a current market value of \$45,000.00; and (3) Tucker Road was subject to a \$38,000.00 first mortgage (the “Corning Mortgage”) in favor of Corning Credit Union.

On March 12, 1999, after the Debtor’s Chapter 7 case had been reopened, Tammy Jo Scott (“Scott”) filed a proceeding to obtain a declaratory judgment (the “Declaratory Judgment Request”) in connection with the state of the title to Tucker Road. The Declaratory Judgment Request alleged that: (1) at the time of the filing of his petition, the Debtor was not the sole owner of Tucker Road, because he and his spouse, Donna Giardina, held title as tenants by the entirety; (2) at the time of the filing of the Debtor’s petition, Tucker Road actually consisted of a dwelling and thirty-five acres of surrounding land; (3) at the time of the filing of the Debtor’s petition, the Corning Mortgage was a lien on only the dwelling and a surrounding five-acre parcel (the “Homestead”); (4) although the Corning Mortgage when it was originally recorded in July 1989 encumbered the dwelling and forty acres of surrounding land, in November 1989 a correction mortgage was recorded which provided for a lien on only the Homestead; (5) after 1989 and prior to the filing of the Debtor’s petition, the

Debtor and Donna Giardina sold a five-acre parcel of Tucker Road; (6) in connection with the sale of the five-acre parcel, it was confirmed that the Corning Mortgage was a lien on only the Homestead; (7) in November 1997, after an Order of Discharge had been entered on March 5, 1996 and the Debtor's Chapter 7 case had been closed, Donna Giardina, as part of a State Court divorce proceeding, had conveyed her interest in Tucker Road to the Debtor; (8) on or about June 26, 1998, the Debtor refinanced the Corning Mortgage and executed and delivered a mortgage to PCFS ("Provident") which provided for a lien on all of the Tucker Road property (the "Provident Mortgage"); (9) after he executed and delivered the Provident Mortgage, the Debtor conveyed the thirty acres, exclusive of the Homestead, to his three daughters, including Scott, who herself received a deed to an approximately 2.44 acre parcel (the "Scott Parcel"); (10) when Scott went to obtain a mortgage on the Scott Parcel, a question was raised as to whether the Provident Mortgage was a first lien on the Scott Parcel, or whether, because the Tucker Road property may not have been fully and accurately scheduled in the Debtor's bankruptcy, it remained an unadministered asset of the bankruptcy estate which had not been abandoned by the Trustee by operation of Section 554<sup>1</sup>, and the interest of the estate was superior to the lien of the Provident Mortgage; and (11) Scott and her

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<sup>1</sup> Sections 554(c) and (d) provide that:

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

11 U. S. C. §554(c) & (d) (1999).

sisters contacted the Trustee who, after: (a) reopening the case; (b) serving the creditors with a Notice of Intent to Sell; and (c) receiving an agreed consideration, executed and delivered Trustee deeds to the Debtor's daughters, including a deed for the Scott Parcel.

In the Declaratory Judgment Request, Scott sought a determination that: (1) at the time of the filing of the Debtor's petition, he had an unencumbered tenancy by the entirety interest in the non-Homestead thirty-acre parcel at Tucker Road; and (2) the Trustee had authority to administer and sell that thirty-acre parcel, unencumbered by any lien or security interest, including the Provident Mortgage.

## DISCUSSION

### **I. Section 554.**

In this Court's view, because the Debtor knew from the prior pre-petition sale of the five-acre parcel that the Corning Mortgage was not a lien on the thirty acres which were not part of the Homestead, the Debtor's description of his interest in the Tucker Road property on his Schedule "A" was not a sufficient description to be considered "scheduled" for purposes of Section 521(1) or Section 554 (c).<sup>2</sup> As a result, the Debtor's interest in the thirty-acre parcel was not abandoned or administered under Section 554(c), and remained property of the bankruptcy estate pursuant to

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<sup>2</sup> As this Court has often stated, the benefits received by an honest debtor in a bankruptcy case, including a discharge of all dischargeable debts, and a "fresh start," are extraordinarily disproportionate to the few demands and expectations placed upon a debtor by the Bankruptcy Code and Rules. One of these few, but very important duties, which is seemingly easy for any debtor, even a consumer or typical individual debtor to perform, is to ensure that all of their assets are properly scheduled.

Further, as this Court has clearly stated on numerous occasions to debtors and their attorneys, notwithstanding all of the financial and perhaps personal difficulties that a debtor may be experiencing, the Bankruptcy Code expects that when debtors and their attorneys are finalizing and signing their schedules, they will devote their full attention to them in order to ensure that they are complete and accurate to the best of the debtors' knowledge and information.

Section 544(d). Therefore, the Debtor's Chapter 7 bankruptcy case could always be reopened if the inadequate scheduling of Tucker Road was discovered, and, pursuant to Section 542(a)<sup>3</sup>, the Debtor could be required to turnover his interest in Tucker Road or to account for the value of that interest.

This is exactly what happened. The Trustee was made aware of the unadministered and unabandoned asset which remained property of the estate, the value of the asset was accounted for, and the Trustee administered the asset by providing deeds which conveyed the interest of the estate in the asset. It also appears that the Trustee conveyed the interest of the estate in the property for an amount which he believed, in his business judgment, was the fair value of the unadministered and unabandoned asset, in accordance with Section 542, Section 363 and Rule 6004(d).

## **II. The Trustee's Deeds.**

The Trustee deeds which conveyed the interest of the estate in the thirty acres to the Debtor's daughters, dated January 19, 1999 and attached as exhibits to the Declaratory Judgment Request, did not convey the interest of the estate in the property free and clear of liens. In fact, each of the deeds specifically provided that the conveyance was "subject to all covenants, easements and restrictions of record," which would include the previously recorded lien of the Provident Mortgage. Also attached to the Declaratory Judgment Request was a copy of a November 18, 1998 letter from Scott's

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<sup>3</sup> Section 542(a) provides that:

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U. S. C. §542(a) (1999).

attorney to the Trustee which advised him of the Provident Mortgage. Therefore, it is not surprising that the Trustee would only execute deeds which were subject to all covenants, easements and restrictions of record.

### **III. The Rights of a Bona Fide Purchaser for Value.**

Notwithstanding that in this Court's view the inadequate description of Tucker Road on the Debtor's Schedule "A" was not sufficient to result in it being abandoned and administered within the meaning and intent of Section 554(c), the Trustee, because he did not have a complete, accurate and adequate description of the Debtor's interest in Tucker Road, did not actively administer the thirty-acre parcel before the bankruptcy case was closed. Once the case was closed with Tucker Road having been generally scheduled, even if not in sufficient detail for purposes of Sections 554(c) and 554(d), it may, nevertheless, have been sufficiently scheduled to be thought to have been administered and deemed abandoned under Section 554 by an otherwise bona fide purchaser of real property for value,<sup>4</sup> including a good faith mortgagee.

The Declaratory Judgment Request, which Scott determined to bring by motion rather than by adversary proceeding pursuant to Rule 7001, does not allege that Provident did not have a bona fide purchaser for value status, nor does it allege any detailed facts or circumstances surrounding the refinance of the Corning Mortgage from which this Court could conclude that Provident had any

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<sup>4</sup> Under New York law, to be a bona fide purchaser for value, the purchaser must show that it paid valuable consideration without knowledge of facts that would lead a reasonably prudent purchaser to make inquiry. See McKinney's Real Property Law §290 et. seq.

A bona fide purchaser of real estate is one who purchases the property with an honest purpose and for a valuable consideration, without knowledge or notice of outstanding interests or of facts or circumstances from which his knowledge of outstanding interests should be implied. 91 NY Jur 2d, Real Property Sales and Exchanges, Bona Fide Purchaser §§130-136

knowledge, notice or reason to believe that Tucker Road had not been abandoned pursuant to Section 554(c).

As a result, the Court believes that, notwithstanding the fact that the thirty-acre parcel of real property remained property of the bankruptcy estate as between the Debtor, the estate and the Trustee who represented the estate, that did not affect the rights of any bona fide purchaser for value of Tucker Road, including a good faith mortgagee such as Provident.<sup>5</sup>

### CONCLUSION

After the Debtor's Chapter 7 case was closed, the thirty-acre parcel of real property at Tucker Road remained property of the estate pursuant to Section 554(d), because it was not sufficiently scheduled under Section 521(1) to be abandoned pursuant to Section 554(c) when the Trustee failed to administer it.

Even though the thirty-acre parcel remained property of the estate, since it was real property located in New York State, which is a title recording state, the interest of the estate in the property was subject to the rights of a bona fide purchaser for value, including a good faith mortgagee. Therefore, the lien of the Provident Mortgage was superior to the rights of the estate.

When the Debtor conveyed the thirty-acre parcel to Scott and his other daughters who were not bona fide purchasers for value, the conveyances were subject to the rights and interests of both Provident and the bankruptcy estate.

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<sup>5</sup> Bankruptcy Courts are required to look to State Law for the definition and powers of a bona fide purchaser. *In re Mosello*, 193 B.R. 147 (Bankr. S.D.N.Y. 1996).

A bona fide purchaser is one who would have checked the appropriate recording office for real estate transfers and who would not have learned of any impairment in the transferor's title. *Mosello* at 170.

The conveyances to Scott and the others of the interest of the bankruptcy estate in the thirty-acre parcel by the Trustee for an agreed consideration was necessary to fully clear the title to the thirty-acre parcel and to satisfy the Trustee's rights under Section 542, including the rights to have the interest delivered to him or to have the Debtor account for the value of the interest of the estate in the thirty-acre parcel.<sup>6</sup>

**IT IS SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
**HON. JOHN C. NINFO, II**  
**U.S. BANKRUPTCY JUDGE**

**Dated: June 10, 1999**

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<sup>6</sup> This Decision & Order does not address any criminal liability the Debtor may have for his actions.