Marquette Law Review

Volume 22
Issue 3 *April 1938*

Article 8

1938

Bankruptcy: Proceedings Under Section 74: Property of Debtor in Custody of an Officer of the Court

Kearney W. Hemp

Bank, 221 Pa. 599, 70 Atl. 876 (1908). A different rule prevails where the wrongful agent is a government official having authority under the treasury rules to draw instruments payable to the order of real persons only because if he draws it payable to a fictitious person and indorses the payee's name the depository bank will be charged with notice that the agent's authority is limited. *Nat. Bank of Commerce* v. *United State,* 224 Fed. 679 (C.C.A. 9th, 1915). Banks have also been allowed to recover in cases where the payee has himself been negligent. *Critten* v. *Chemical Nat. Bank,* 171 N.Y. 220, 63 N.E. 969 (1902); *California Vegetable U. Co.* v. *Crocker Nat. Bank,* 37 Cal. App. 743, 174 Pac. 920 (1918). Where monthly statements were furnished by the bank, together with the original checks, and no errors were reported therein for three years, the evidence is held sufficient to show neglignce on the part of the bank and to preclude a recovery by the drawee. *C. E. Erickson Company* v. *Iowa Nat. Bank,* 211 Iowa 495, 230 N.W. 342 (1930); *General Cigar Co.* v. *First Nat. Bank,* 290 Fed. 143 (C.C.A. 9th, 1923). The rule is not the same if the bank was itself negligent. *Wussow* v. *Badger State Bank,* 204 Wis. 467, 234 N.W. 720 (1930). In the cases holding the bank exempt from liability because of the plaintiff's negligence, it affirmatively appears that the bank was not negligent or the question of its negligence was not raised. In the instant case although the issue of negligence on the part of the drawer was raised, the court brushed it aside because there was no evidence that the board had any knowledge that the payees named were fictitious and therefore they could not have been put upon notice.

RICHARD M. RICE.

BANKRUPTCY—PROCEEDINGS UNDER SECTION 74—PROPERTY OF DEBTOR IN CUSTODY OF AN OFFICER OF THE COURT.—In 1932 the debtor executed a bond and mortgage for $2700. After default judgment by confession was entered on the bond as prescribed by the local statutes. Thereafter a writ of execution was issued. The property was seized and advertised for sale. Prior to the sale the debtor filed a petition for an extension under Section 74 of the Bankruptcy Act. The mortgagee-creditor claimed under the seizure and contended that the court had no power to interfere with the seizure on behalf of the debtor because the property was not in the constructive possession of the debtor and bacause a final decree had been entered in the creditor's action. The court, in dismissing a petition for review of a report of the special master recommending that an order restraining the mortgagee from selling be made permanent, *held* that a state court's custody of the *res* cannot affect the bankruptcy court's jurisdiction and that since no sale had been confirmed no final decree had been entered within the meaning of Section 74. The court directed that the order to show cause why an injunction against the mortgagee should not issue be made absolute. *In re Krull,* 21 F. Supp. 377 (M.D. Pa. 1937).

Under the older provisions of the Bankruptcy Act, where the debtor is adjudged a bankrupt and his estate is to be liquidated, the bankruptcy court cannot interfere with foreclosure process begun by secured creditors outside the bankruptcy court and before the filing of any petition in bankruptcy by or against the debtor. *Straton* v. *New,* 283 U.S. 318, 51 Sup. Ct. 465, 75 L.ed. 1060 (1930). After a petition is filed by or against a debtor to have him adjudged a bankrupt then the bankruptcy court only has jurisdiction and no foreclosure suits may be started unless with the consent of the bankruptcy court. *Isaacs* v. *Hobbs T. & T. Co.,* 282 U.S. 738, 51 Sup. Ct. 270, 75 L.ed. 645 (1930). Section 74 was drawn apparently to afford jurisdiction to the bankruptcy court over the

debtor's property already affected by foreclosures as long as the property was still in the "constructive" possession of the debtor. The section provided originally that, "The filing of a debtor's petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer . . . is filed." Section 74(*m*), 47 STAT. 1470 (1933). The courts held immediately that mortgaged property in the possession of foreclosure receivers was no longer within the constructive possession of the debtor unless the actions had been started within four months of the filing of the debtor's petition. *In re Landquist,* 70 F. (2d) 929 (C.C.A. 7th, 1934); *Molina* v. *Murphy,* 71 F. (2d) 605 (C.C.A. 1st, 1934). Section 74 (*m*) was amended to include specifically as property of the debtor within the jurisdiction of the bankruptcy court any property in the possession of a trustee under a trust deed or a mortgage, or a receiver, custodian or other officer of any court in a pending cause, "irrespective of the date of the appointment of such receiver or other officer, or the date of the institution of such proceedings: Provided, that it shall not affect any proceeding in any court in which a final decree has been entered." 48 STAT. 923 (1934), 11 U.S.C.A. § 202 (*m*) (1937). See *In re Monsen,* 74 F. (2d) 411 (C.C.A. 7th, 1935). In the instant case the court pointed out that seizure on process after judgment by confession put the mortgagee into a position similar to that where a receiver is appointed in ordinary foreclosures. The court held that judgment by confession was not a final decree. A final decree within the meaning of Section 74(*m*) under the law of the particular local jurisdiction is a decree confirming a sale. In Wisconsin the equities of the mortgagor-debtor are not cut off in foreclosure proceedings until the sale has been confirmed. *Gerhardt* v. *Ellis,* 134 Wis. 191, 114 N.W. 495 (1908). If the sale is by advertisement, as was proposed in the instant case according to the local statutes, and if there is to be no decree of confirmation ever entered, the property is probably within the "constructive" possession of the debtor until the debtor's statutory period of redemption has expired.

BANKS AND BANKING—SUBROGATION—RIGHT OF FDIC TO SHARE IN ASSETS OF INSURED INSOLVENT BANK.—The bank was insolvent. Liquidation was begun under the direction of the Commissioner of Banking. Each of the bank's depositors was insured by the Federal Deposit Insurance Corporation to the extent of $5,000. There were some depositors whose deposits exceeded that amount. In accordance with the Act of Congress creating the FDIC [48 STAT. 168 (1934), 12 U.S.C.A. § 264 (*l*) (7) (1937)] upon payment by the FDIC each depositor executed an assignment to the corporation that it might be subrograted to all the claimant's rights against the closed bank. The claim of the FDIC based upon the assignments was recognized by the Commissioner. The present proceeding before the Court of Chancery was upon a petition by the Commissioner to determine the method of distribution to be used in making the first cash dividend. Three methods of distribution were possible: (1) The FDIC might be paid in full before the "excess" depositors could be paid upon their "excess" deposits; (2) the "excess" depositors and the FDIC might share *pro rata* on the respective amounts of their claims for the amount up to and the amount in excess of $5,000; (3) the "excess" depositors might receive full payment for the amount of the excess prior to any payment being made to the FDIC. The provision of the Act providing for sugrogation includes the right to receive the same dividends from the proceeds of the assets of the closed bank as would be pay-