

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

In Re:

THOMAS BERNARD KANE,

Debtor.

BK. NO. 89-22332

DOUGLAS J. LUSTIG, TRUSTEE,

Plaintiff,

vs.

A.P. NO. 93-2175

ITT RESIDENTIAL CAPITAL CORPORATION,

Defendant.

DECISION & ORDER

BACKGROUND

On December 13, 1989, the debtor, Thomas Bernard Kane (the "Debtor"), filed a petition initiating a Chapter 7 case. On his schedules, the Debtor listed his ownership of 145 Rauber Street, Rochester, New York ("Rauber Street") which he valued at \$15,500.00.¹ The schedules also indicated that New York Guardian Mortgage Corporation ("New York Guardian") held a mortgage on Rauber Street (the "Rauber Street Mortgage") on which there was due an approximate balance of \$23,500.00.

A Section 341 meeting notice dated December 29, 1989 indicated to creditors, including New York Guardian, that the Debtor's case was a no asset case. However, a minute report filed by the Chapter 7 Trustee (the "Trustee") after the Section 341 hearing held on January 23, 1990 indicated that there were possible assets which the Trustee was checking into.

On April 21, 1990, a motion (the "Stay Motion") was filed with the Court by Bowest Corporation ("Bowest"), as the servicing agent for New York Guardian, to vacate the stay provided

¹ The Statement of Financial Affairs filed by the Debtor indicated that individually or with others he had owned a number of parcels of investment real estate including Rauber Street.

by Section 362 to allow New York Guardian to foreclose the Rauber Street Mortgage. The Motion alleged that the Debtor had no non-exempt equity in Rauber Street. The Trustee did not file opposition to the Motion or request any other relief in connection with either the Motion or Rauber Street. On May 31, 1990, an Order was entered vacating the automatic stay to allow New York Guardian to foreclose the Rauber Street Mortgage.

On November 23, 1990, an order was entered approving the employment of attorneys for the Trustee. The supporting application by the Trustee indicated that services in the nature of an investigation of real estate interests and possible insurance claims and the preservation and liquidation of assets were required.

On January 18, 1991, a notice of appearance and demand for the service of a copy of all papers was filed on behalf of Bowest by its attorneys. The notice of appearance indicated that a copy was sent to the Trustee.

By letter dated August 16, 1993, the Trustee advised the Court that he had recovered assets for a potential distribution to unsecured creditors. As a result, on August 20, 1993, an Order and Notice Regarding Filing of Proofs of Claim was forwarded to all creditors which fixed November 18, 1993 as the last day for filing claims.

On September 27, 1993, National Fire Adjustment Co., Inc. ("National Fire") filed a claim for \$2,360.95 for services it rendered pursuant to an August 26, 1989 agreement entered into with the Debtor to pay National Fire a ten percent (10%) service fee in connection with the adjustment of a fire loss to Rauber Street which occurred on July 21, 1989. The claim, which included a copy of the agreement, alleged that National Fire had worked out a settlement with the insurance company of \$23,609.53 but that the matter went into bankruptcy before it received its fee.²

² The Debtor's schedules listed National Fire for \$2000 for an August, 1989 settlement of a fire claim.

On August 4, 1993, the Trustee commenced an adversary proceeding against ITT Residential Capital Corporation ("ITT"), the servicing agent for Government National Mortgage Association ("GNMA") which now holds the Rauber Street Mortgage, to determine the validity and extent of a security interest in property of the estate. The Trustee's Complaint alleged that: (1) he had actively negotiated with the insurance company in connection with the fire loss to Rauber Street and on November 9, 1991 had received the sum of \$23,359.53 in liquidation of the fire loss claim; and (2) although New York Guardian was on notice, it never asserted any interest in the insurance proceeds or responded to the Trustee's numerous inquiries, and it was not until October, 1992 that the Trustee learned that there had never been a foreclosure sale of Rauber Street in the pending state court proceeding. The Trustee's Complaint then asserted that the holder of the Rauber Street Mortgage should be denied any claim to the insurance proceeds being held by him on theories of election of remedies, waiver, estoppel and failure to mitigate damages because: (1) there had been an election of remedies to foreclose on Rauber Street; (2) New York Guardian, Bowest, ITT and GNMA had failed to mitigate their damages by obtaining a deficiency judgment in the foreclosure proceeding; (3) neither New York Guardian, Bowest, ITT or GNMA had asserted a claim against the insurance proceeds or filed a proof of claim in the Debtor's bankruptcy; (4) ITT and GNMA should be estopped from asserting a claim against the insurance proceeds for being negligent in pursuing and mitigating GNMA's mortgage claim by not taking the necessary steps in the pending state court foreclosure proceeding to have Rauber Street sold and the mortgage balance reduced; and (5) the Trustee should be compensated out of the insurance proceeds for his time and effort expended in connection with the insurance claim.

The Answer of ITT indicated that on February 13, 1992 a judgment of foreclosure and sale was entered in the foreclosure proceeding in the amount of \$32,652.97 and that even at the time of the commencement of the Debtor's Chapter 7 case in December 1989 the unpaid principal and interest alone due on the Rauber Street Mortgage was \$23,584.11, an amount in excess of the

insurance proceeds received by the Trustee. The ITT Answer then asserted that because at no time since the Trustee obtained the insurance proceeds was the Rauber Street Mortgage balance less than the amount of the proceeds, the Rauber Street Mortgage holder was entitled to the proceeds.

The Court conducted pretrial conferences in connection with this adversary proceeding on October 19, 1993, November 23, 1993 and December 21, 1993. At these pretrial conferences, the attorney for ITT indicated that ITT was attempting to reconstruct the history of this matter which was difficult because of the various changes in the holders and servicers of the Rauber Street Mortgage and their respective attorneys. During this pretrial period, the parties continued to discuss a number of possible settlements of this matter. During this same pretrial period, the Trustee provided no further documents regarding the insurance claim or copies of notices or communications given by him to New York Guardian or its attorneys regarding the fire loss, insurance coverage or mortgage holders' rights under the policy.

A trial was scheduled for February 18, 1994. At the trial, neither party elected to present the testimony of witnesses or further documentary evidence, but the attorneys for the parties did present oral argument to the Court. The Court reserved on the matter and provided the parties with additional time to attempt to again arrive at a settlement of the matter before the Court rendered a decision. However, no settlement was achieved by the parties.

An Affidavit was filed on February 24, 1994 on behalf of ITT (the "ITT Affidavit") which conformed to allegations covered by its attorney at the oral argument on February 18, 1994. The ITT Affidavit alleged that because of changes in the holders and servicing agents for the Rauber Street Mortgage, it was not until October, 1991 that the then servicing agent, Bowest, learned of the fire damage to Rauber Street and that it was not until the Spring of 1992 that it learned that a State Farm Insurance policy was in effect at the time of the 1989 loss, the Trustee had made a claim on the policy on behalf of the Debtor and the Trustee had received a settlement. The ITT Affidavit further alleged that the foreclosure proceeding had not been completed in part because of the unresolved

insurance issues.

DISCUSSION

An insurance declarations page in connection with Rauber Street, submitted as an exhibit to the ITT Affidavit, indicated that the State Farm Insurance policy in effect for Rauber Street for the period from December 29, 1988 through December 29, 1989 listed New York Guardian as a mortgagee.³

It does not appear that the Trustee is contesting that New York Guardian or its successor holder have a legal right to the insurance proceeds in accordance with the terms and provisions of the policy and the Rauber Street Mortgage. He does assert, however, that because of the conduct of New York Guardian, its successors, servicing agents or their respective attorneys, the current holder of the Rauber Street Mortgage, GNMA, should not be entitled to all or a portion of the insurance proceeds being held by him.

At the trial on February 18, 1994, the parties confirmed to the Court that it should make its decision based only on the pleadings submitted in the adversary proceeding and the oral argument presented on February 18, 1994.

Based on the pleadings and proceedings in this adversary proceeding, the Court does not believe that the Trustee has presented sufficient facts and circumstances upon which the Court could determine that New York Guardian or its successor has or should be deemed to have waived its rights under the applicable insurance policy or the Rauber Street Mortgage to the insurance proceeds being held by the Trustee in connection with the 1989 fire loss at Rauber Street, or that GNMA should now be estopped from claiming the proceeds.

³ In view of this, it is not clear how the Trustee was able to obtain the loss proceeds without New York Guardian's involvement.

Although the Trustee asserts that the insurance claim would have been lost but for his efforts, it appears from the National Fire proof of claim that at least an informal loss claim was made on the insurance policy in the Summer of 1989 and that National Fire at that time had negotiated a settlement of the claim. Therefore, the Court does not understand why the insurance claim could not have been expeditiously finalized and paid to New York Guardian post-petition if National Fire and New York Guardian had been properly and effectively notified by the Debtor, the Trustee or the insurance company that the claim needed immediate attention and that the proceeds were available upon receipt of the proper authorizations.

Further, although the Trustee claims to have notified New York Guardian or its representatives or attorneys of the insurance claim and its potential lapse, New York Guardian indicates that it was not until after the Trustee had obtained the insurance proceeds that it actually became fully aware of the fire loss. The Trustee has not provided the Court with the details of or copies of the notifications or demands which he or the insurance company or the Debtor allegedly gave to New York Guardian so that the Court could determine the actual or constructive notice which New York Guardian or Bowest may have had and upon which it may knowingly have failed to act to the prejudice of the Debtor's estate.

In addition, the Trustee has not provided the Court with any statutory or case law which indicates that New York Guardian or its successors had an obligation to complete its foreclosure proceeding by a sale within a specific time frame or that as Trustee he could not have requested the state court or this Court, since Rauber Street remained property of the estate, to require the completion of the foreclosure by a sale within a specific time frame if he believed the estate's interests were being prejudiced. The Court does not understand why New York Guardian or its successor would have believed that there was any urgency in completing the foreclosure of Rauber Street prior to the Spring of 1992 when it learned of the insurance proceeds being held by the Trustee, or that the Trustee or the estate would care about its completion, since: (1) the Debtor's case

was noticed as a no asset case until after the Trustee commenced this adversary proceeding; (2) Rauber Street was not the Debtor's residence but was investment property; and (3) in its Stay Motion, Bowest had alleged that there was no non-exempt equity in Rauber Street and the Trustee had not opposed the Motion. After the Spring of 1992 ITT alleges that the unresolved insurance issues further delayed the foreclosure.

Furthermore, since the Trustee has not shown that National Fire or New York Guardian, if put on proper notice, could not have obtained the insurance proceeds without his efforts, other than a possible minor administrative involvement, the Court is unable to award any amounts to the Trustee for his efforts under Section 506(c).

The Court has no doubt that the Trustee was working in what he believed were the best interests of the unsecured creditors and the estate in his attempts to realize value from the liquidations of Rauber Street and the fire loss insurance claim after the payment of the balance due on the Rauber Street Mortgage. In retrospect, there may have been a number of different ways that such a result could have been achieved, and it is even possible that the Court, if asked, could have assisted the parties in achieving such a result.

However, the Court does not believe that the Trustee has demonstrated such facts and circumstances, especially regarding the knowledge of New York Guardian or its successors of the relevant facts and circumstances of the fire, the insurance policy and the Trustee's intentions that would warrant the Court exercising its equitable discretion based on theories of election of remedies, waiver⁴, estoppel⁵ or failure to mitigate damages, to find that New York Guardian or its successor,

⁴ There is nothing arcane or recondite about a waiver. It is defined simply as the voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed. It occurs where a person dispenses with the performance of something which he has a right to exact or could have demanded or insisted upon if he chose to do so.

