

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-5094  
Summary Calendar

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IN THE MATTER OF: CARL A. and DOROTHY  
S. SUMRALL, Joint Debtors.

CADLE COMPANY,

Appellant,

versus

CARL SUMRALL and DOROTHY  
S. SUMRALL,  
Appellees.

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Appeal from the United States District Court  
for the Western District of Louisiana  
(93-CV-826)

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(November 26, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:\*

The Cadle Company (Cadle) filed a secured proof of claim in Carl and Dorothy Sumrall's (debtors) Chapter 13 bankruptcy proceeding. The debtors filed an objection to Cadle's proof of claim. The bankruptcy court determined that Cadle's claim was

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

only partially secured. The district court affirmed the bankruptcy court's decision. We affirm the district court.

#### I. FACTS AND PROCEDURAL HISTORY

Cadle is the holder of a collateral real estate mortgage note signed by the debtors and dated February 17, 1982. The note was originally recorded on February 17, 1982, and it was reinscribed on November 25, 1992.

On December 15, 1992, the debtors filed for bankruptcy under Chapter 13 of the Bankruptcy Code. On January 5, 1993, Cadle filed a secured proof of claim in the amount of \$50,341.33. The proof of claim stated that it was secured by two automobiles and one piece of real estate. The debtors filed an objection to the proof of claim asserting that the creation of Cadle's security interest in the real estate amounted to a preference under the Bankruptcy Code.

The bankruptcy court held a hearing on March 17, 1993 concerning Cadle's proof of claim. At the hearing, the debtors agreed to surrender to Cadle two automobiles in satisfaction of any security interest in the vehicles for \$500 each. However, the debtors argued that the creation of Cadle's security interest in the real estate constituted a voidable preference. The bankruptcy court agreed with the debtors and held that the balance of Cadle's claim should be treated as an unsecured claim. The bankruptcy court also ordered that the inscription of the real estate mortgage be erased from the records of East Carroll

Parish, Louisiana. The district court affirmed the decision of the bankruptcy court. This appeal ensued.

## II. STANDARD OF REVIEW

This court reviews findings of fact by the bankruptcy court under the clearly erroneous standard, Killebrew v. Brewer (In re Killebrew), 888 F.2d 1516, 1519 (5th Cir. 1989), and decides issues of law de novo. Id. "A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." In re Missionary Baptist Found. of Am., 712 F.2d 206, 209 (5th Cir. 1983) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

## III. DISCUSSION

### A. Preference

Louisiana Civil Code art. 3328 provides: "Except as otherwise expressly provided by legislation, the effect of recordation of a document creating a mortgage or evidencing a privilege ceases ten years after the date of the document." LA. CIV. CODE ANN. art. 3328 (West Supp. 1993). The Louisiana Civil Code also provides that the period of recordation may be extended if a notice of reinscription is timely filed. Specifically, the Louisiana Civil Code provides that "[a] notice of reinscription that is filed before the effect of recordation ceases continues that effect for ten years from the day the notice is filed." Id. art. 3334. However, if the notice of reinscription is not timely

filed the Louisiana Civil Code provides that "[a] notice of reinscription that is filed after the effect of recordation ceases produces the effects of recordation, but only from the day the notice is filed." Id. art. 3335.

In this case, Cadle filed its notice of reinscription after "the effect of recordation" ceased. Therefore, Cadle's interest in the property was newly secured on November 25, 1992. The debtor filed for bankruptcy on December 15, 1992.

The debtors successfully argued before the bankruptcy court that Cadle's security interest in the real estate was a preferential transfer under § 547(b) of the Bankruptcy Code. On appeal, Cadle argues that under § 547(b)(5) of the Bankruptcy Code Cadle's security interest is not a preferential transfer. Specifically, Cadle argues that "[t]he mortgage continues to exist but is not a preference over any other creditor since it takes rank only from date of recordation (reinscription)."

We conclude that Cadle's argument that § 547(b)(5) is not satisfied here is meritless. Section 547(b)(5) provides that:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-

- · · · · (5) that enables such creditor to receive more than such creditor would receive if-
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The transaction in the present case clearly satisfies this provision. The transfer will allow the creditor to receive more than he would receive in a Chapter 7 proceeding. In this case,

Cadle would have received a "negligible" amount on a liquidation basis. However, with a secured claim it would be able to receive the full value of its security in the real estate. Because the other requirements of a preference are also met in this case,<sup>1</sup> we uphold the district court's determination that Cadle's security interest in the real estate was a preferential transfer.

*B. Adversary Proceeding*

Cadle also argues that the bankruptcy court erred in determining that its security interest in the real estate was a preference without the protections of an adversary proceeding. According to Cadle, the bankruptcy court could determine the validity of its lien against the real estate only in the context of an adversary proceeding. However, compliance with the requisites of an adversary proceeding may be waived by the parties. Village Mobile Homes, Inc. v. First Gibraltar Bank (In re Village Mobile Homes), 947 F.2d 1282, 1283 (5th Cir. 1991). The record demonstrates that the parties agreed to waive the

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<sup>1</sup> The other requirements that a transfer must satisfy in order to be considered a preference under the Bankruptcy Code are as follows:

- (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-
- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made-
- (A) on or within 90 days before the date of the filing of the petition; or
- (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider[.]

requisites of an adversary proceeding. The bankruptcy judge stated that "[t]he parties have by agreement waived the necessity to bring an adversary proceeding." There was no objection by Cadle to the judge's statement. Therefore, we hold that even if the proceeding before the bankruptcy court should have been held as an adversary proceeding, the parties waived compliance with the requisites of an adversary proceeding.

#### IV.

For the foregoing reasons, we AFFIRM the order of the district court.