

ORDERED in the Southern District of Florida on 11-08-10.




Raymond B. Ray, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
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Broward Division

In re:

HEINRICH F. BUETTNER,

Debtor.

Case No. 05-29426-RBR

Chapter 7

**ORDER GRANTING TRUSTEE'S MOTION TO DISTRIBUTE SALE PROCEEDS
OF JOINTLY OWNED PROPERTY TO CO-OWNER**

THIS MATTER came before the Court for a hearing on October 12, 2010, on the Trustee's Motion to Distribute Proceeds of Sale of Jointly Owned Property to Co-Owner (the "Motion") [D.E. 77]. After hearing argument of the parties, the matter was taken under advisement and the Court directed each party to submit proposed orders. Having considered the argument of counsel, and having received and reviewed the Motion [D.E. 77], Documents in Support of the Motion [D.E. 81], Documents in Opposition to the Motion [D.E. 88], the case file, and the parties' proposed orders, the Court will grant the Trustee's Motion [D.E. 77] for the reasons that follow.

Susan Cerny and the Debtor had three children together. In 1999, Cerny commenced a lawsuit against the Debtor and his mother, Luise Buettner ("Luise"), to pursue alleged fraudulent transfers made by the Debtor to defeat Cerny's child support claims. On January 30, 2001,

Luise and Cerny entered into a settlement agreement [D.E. 81, #1] by which Luise agreed to voluntarily pay \$650,000 to Cerny in settlement of all child support claims. Cerny agreed to cease existing child support collection efforts against the Debtor. In accord with the settlement agreement, the state court entered a judgment against Luise on December 31, 2001. The Debtor was not a party to this agreement or the judgment. Neither the 2001 agreement nor the 2001 judgment indicated an intention to encumber any property, and did not grant a consensual lien on Luise's property. However, a certified copy of the 2001 judgment was recorded in the Public Records of Broward County on December 14, 2001. [D.E. 81, #2]. As a result, Cerny obtained a lien on the real property of Luise located in Broward County, Florida.^{1 2}

The Debtor commenced the instant bankruptcy case, pro se, by filing of a voluntary petition for relief under chapter 7 on October 14, 2005 [D.E. 1]. One month later, Luise passed away, devising all of her assets to the Debtor. At the time of her death, Luise's assets consisted of: (1) a 16-unit apartment building (Auramar Apartments), of which two units were determined to be the homestead of Luise; and (2) a single family residence (Pompano Beach property), both located in Broward County.

Under Florida law, Luise's homestead passed to the Debtor outside of the probate proceeding and free of her judgment creditor's claims, as the Debtor was Luise's heir-at-law. Art. X, § 4(b), Fla. Const.; § 731.201(33), Fla. Stat.; *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997). Accordingly, the 2/16 homestead interest of the Auramar Apartments was not subject to Cerny's judgment lien. *Buettner v. Fass*, 21 So. 3d 114 (Fla. 4th DCA 2009). However, because the debtor became entitled to Luise's property as the result of Luise's death within 180 days after the filing of his bankruptcy petition, the 2/16 of Luise's homestead property passed directly into to the Debtor's bankruptcy estate. See 11 U.S.C. § 541(a)(5)(A) (property debtor

¹ The Court is unaware of what occurred regarding the 1999 action with respect to the Debtor.

² On July 23, 2003, after mediation, Luise executed another settlement agreement [DE 81, #3] however Luise failed to comply with a covenant in the 2003 agreement. On December 4, 2003 the circuit court permitted execution on the 2001 judgment [DE 81, #6] in place of the 2003 agreement.

becomes entitled to receive as the result of the death of another person within 180 days after filing bankruptcy is property of the bankruptcy estate). Luise's probate estate was comprised of 14/16 of the Auramar Apartments and the entire Pompano Beach property. Thus, the bankruptcy trustee, Sonya Salkin ("Salkin"), became a joint (2/16) owner in the Auramar Apartments with the personal representative of Luise's probate estate, Joel Fass ("Fass") (14/16).

In 2007, Fass entered into a probate settlement agreement with Cerny which satisfied Cerny's claim against Luisa's estate and provided for the satisfaction and release of both liens on Luisa's Broward County properties upon full payment [D.E. 81, #7]. The specifics of the 2007 probate agreement provided that Fass pay Cerny \$350,000 plus interest from the closing proceeds of the Pompano Beach property with the balance of the \$350,000 to be paid from the proceeds of the sale of the Auramar Apartments [D.E. 81, #7]. This agreement was approved by the probate court. See *Heinrich Buettner v. Estate of Buettner*, 993 So. 2d 640 (Fla. 4th DCA 2008). Salkin and the Debtor did not join in with Cerny and Fass on the 2007 probate settlement.

On February 10, 2010, this Court entered an Order Approving the Sale of the Auramar Apartments [D.E. 43] under 11 U.S.C. § 363(h). The Sale Order recognized the ratio of ownership between the bankruptcy estate and the probate estate, and authorized the payment of certain liens from the gross proceeds. However, the Sale Order deferred the division of the net proceeds between the two estates to a "further order of the court."

Salkin closed the sale of the Auramar Apartments on March 2, 2010. From the \$960,000 sale price, the trustee disbursed \$287,872.37 plus \$7,760.68 interest, for a total of \$295,633.05, to Cerny in accordance with the terms of the 2007 probate settlement. Other proceeds were also distributed.³

³ From the \$960,000 sale price, the seller granted the buyer a credit in accordance with the sale contract approved by this Court for the prorated real estate taxes for the first two months of 2010 (\$6,388.54).

The parties now dispute which estate should bear the burden of the \$295,633.05 payment to Cerny pursuant to the 2007 probate settlement. Salkin contends that the payment should be allocated entirely to the non-homestead portion of the sale proceeds (14/16). This would result in a 2/16 allocation of \$36,954.13 to the Debtor's bankruptcy estate since the entire payment was already disbursed to Cerny from the undifferentiated proceeds. The \$36,954.13 would be set off against the amount that Salkin would otherwise distribute to Fass. This Court agrees.

Section 363(j) of the Bankruptcy Code, 11 U.S.C. § 363(j), provides that the trustee must distribute the net proceeds of the sale of jointly owned property to co-owners according to each co-owner's interest in the property. Here, Salkin distributed the \$295,633.05 to Cerny pursuant to the 2007 probate settlement. The 2007 probate settlement relieved Luise's probate estate of a \$650,000 plus interest liability that was a valid and perfected 2001 judgment lien against both the Pompano Beach property and 14/16 of the Auramar Apartments. The 2007 settlement did not relieve the Debtor's bankruptcy estate from any lien because Cerny's claim was never a secured claim against this bankruptcy estate's only asset: the proceeds of the sale from the

Salkin made the following payments in accordance with the Sale Order:

- a. \$48,000.00 in brokerage fees to the two real estate brokers;
- b. \$287,872.37 plus \$7,760.68 interest to Cerny in accordance with the terms of the 2007 probate settlement with Fass;
- c. all real estate (\$207,428.91) and other ad valorem (\$7,087.49) taxes;
- d. all priority assessments by municipalities and special districts (\$2,702.09);
- e. all tourist development tax liens (which the county released without payment);
- f. recording fees, documentary stamps on the deed, title company copy fees, and courier charges (\$6,949.00); and
- g. other customary closing costs not to exceed \$1,000 (a wire transfer fee of \$29.50).

Salkin made the following payments from the sale proceeds in accordance with later orders, to settle lien claims against the Auramar Apartments:

- a. To mortgage holder Heidi Palumbo Melzer (\$30,000) [approved by D.E. 76]; and
- b. To the City of Fort Lauderdale, to settle code violation liens (\$9,631.25) [approved by D.E. 65].

Salkin paid \$38,681.69 from the sale proceeds as a fee for sale-related services to GrayRobinson, P.A. allocable on a 7-to-1 ratio pursuant to 11 U.S.C. § 363(j) [approved by D.E. 66].

The buyer of the property recently returned to Fass \$8,232.80 which represents a refund resulting from the buyer's successful completion of a 2009 real estate tax challenge which Fass had commenced before the Broward County Value Adjustment Board. Fass has agreed that 1/8 (\$1,029.10) of that sum properly belongs to this bankruptcy estate, and it should be so credited in determining the net amount which Salkin should pay to Fass.

homestead portion of the Auramar Apartments.

Therefore, it is

ORDERED that the Motion [D.E. 77] is **GRANTED**, as follows:

1. The \$295,633.05 portion of the Cerny claim which was paid from the proceeds of the sale of the Auramar Apartments pursuant to the 2007 probate agreement must be allocated entirely to the non-homestead portion of the proceeds. This results in a credit of 2/16 (\$36,954.13) against the sum that Salkin must pay to Fass.

2. Two-Sixteenths of the real estate tax refund (\$1,029.10) which Fass rightfully owes to Salkin also should be credited against the sum that the Salkin must pay to Fass.

4. All of the other expenses and lien settlements already paid, detailed in Exhibit A to the Motion [D.E. 77] and separately approved and allocated by [D.E. 43, D.E. 65, D.E. 66, and D.E. 76], shall be borne on a 7-to-1 ratio by Luise's probate estate and the bankruptcy estate. From the \$307,497.98 balance remaining in Salkin's account after the payment of those expenses, Luise Buettner's probate estate's share is 14/16, or \$269,060.73.

5. After application of the credits described above, Salkin shall pay Fass \$231,077.50.

6. Luise's probate estate will not be responsible for any professional fees or other administrative expenses of this bankruptcy estate not already allocated by this court to Luise's probate estate.

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The clerk shall serve copies to:

Patrick S. Scott, Esq. (Patrick S. Scott, Esq. is directed to serve this Order upon all parties listed and to file a certificate of service)