

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

In re:	)	
	)	
Larry Gene Hagedorn,	)	Case No. 02-40505
Susan Kay Hagedorn	)	Chapter 7
	)	
Debtors,	)	
_____	)	
United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02-7033
	)	
Larry Gene Hagedorn,	)	
Susan Kay Hagedorn,	)	
Citizens State Bank of Marysville	)	
Robert L. Baer, Trustee,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM AND ORDER**

This matter is before the Court on the Trustee’s timely Motion to Alter or Amend Judgment<sup>1</sup>, which seeks reconsideration of the Court’s Memorandum and Order filed May 20, 2004.<sup>2</sup> The Court has reviewed the briefs by the Trustee and the United States and is prepared to rule. The Court has jurisdiction to decide this matter<sup>3</sup>, and it is a core proceeding.<sup>4</sup>

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<sup>1</sup>Doc. 29

<sup>2</sup>Doc. 27.

<sup>3</sup>28 U.S.C. § 1334

<sup>4</sup>28 U.S.C. § 157(b)(2)(B)



## **I. NATURE OF THE CASE**

On May 20, 2004, the Court issued a Memorandum and Order granting the United States' Motion for Summary Judgment and denying the Trustee's Motion for Summary Judgment. In that Order, the Court held that the United States retained a valid and actionable security interest in certain personal property held by Debtor, and that the security interest was not barred by *res judicata* as a result of the government's answer in a prior real estate foreclosure action brought by another lender. In making this ruling, the Court not only relied upon existing Kansas law, but also determined that the Kansas courts would extend the current exceptions to Kansas *res judicata* law to cover the facts of the current case.

## **II. STANDARD FOR MOTION TO ALTER OR AMEND JUDGMENT**

Motions to alter or amend a judgment in bankruptcy adversary proceedings are governed by Fed. R. Bankr. P. 9023, which incorporates Fed. R. Civ. P. 59. A motion to alter or amend is intended to correct manifest errors of law or fact, or to present newly discovered evidence under certain circumstances.<sup>5</sup> A motion to alter or amend should not be used as a vehicle for the losing party to rehash arguments previously considered and rejected by the Court.<sup>6</sup>

## **III. ANALYSIS**

The Trustee claims that the Court made a manifest error of law in interpreting Kansas law and its application to this case. In support of this contention, the Trustee states that the Court misinterpreted existing Kansas case law and failed to distinguish the facts of this case from the Kansas cases upon which

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<sup>5</sup>*American Freight Systems, Inc. v. Point Sporting Goods*, 168 B.R. 245 (D. Kan. 1994).

<sup>6</sup>*Id.*

the Court relied to find that *res judicata* is not applicable. It appears to the Court that the Trustee misinterprets the Court's prior ruling.

In ruling that *res judicata* would not apply under Kansas law, the Court relied extensively on *Kearney County Bank v. Nunn*.<sup>7</sup> Although the Court recognized that *Kearney* contained important factual distinctions from this case, including that the plaintiff therein had prosecuted, as plaintiff, two separate actions against the borrower/owner of the property (the first *in rem*, and the second *in personam*), it nonetheless held that the Kansas courts would extend the exception to *res judicata* reaffirmed by the Kansas Supreme Court in *Kearney* to cover the facts of this case. All the arguments and factual distinctions raised by the Trustee in his motion for reconsideration were considered by the Court when issuing its prior ruling. The Court did not find that this case fit squarely within the holding of *Kearney*, or any other existing Kansas caselaw, but instead found the Kansas courts would likely hold that the exception contained in *Kearney* would be extended to cover the facts of this case, if presented with similar facts.

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<sup>7</sup>156 Kan. 563 (1943) (holding *Federal Farm Mortgage Corp. v. Bolinger*, 152 Kan. 700 (1940) “is authority for the further rule that the holder of a note, secured by a second real estate mortgage, cannot be compelled, even where made a party and served with summons, to file answer and accelerate against his desire his right of action against the mortgagor, simply because the holder of the first mortgage has elected to institute foreclosure proceedings to secure judgment on his debt, sell the property and bar inferior lien holders. The second mortgagee may, under such circumstances, if he desires, permit judgment to be rendered by default against him, thereby raising no issue as to his rights under his note and mortgage except insofar as they pertain to the status of his lien as against the first mortgagee. Under such conditions his claim does not become *res judicata* in a future action. To so hold does not defeat the purpose of the rule for he is protecting the mortgagor from, not subjecting him to, additional litigation.”) (Emphasis added).

The Trustee then claims that the Court has substituted its policy judgment for that of the Kansas Supreme Court. This is not the case. The Court found no cases squarely on point, and thus had to predict how Kansas courts would rule, based on existing precedent, mainly relying on language in *Kearney* and *Bolinger*. The Court then noted that such an interpretation of existing precedent was strongly supported by various sound policy grounds. In other words, this Court first found that based on existing law, FSA's present claim to personal property is not barred by res judicata. The Court then noted how such a finding promoted sound policy. Interestingly enough, this Court's stated policy grounds were merely a restatement of the policy grounds cited by the Kansas Supreme Court, itself, in deciding *Kearney*, to-wit: "that the mortgagor is protected from, not subjected to, additional litigation." Thus, this Court has not substituted its judgment for that of the Kansas courts, it has merely adopted it.

Finally, the Trustee takes exception to the Court's use of a hypothetical to explain why policy considerations support its finding that Kansas courts would extend the exception to *res judicata* principles found in *Kearney* to the facts of this case. As the Trustee correctly notes, the facts contained in the Court's hypothetical are not the facts currently before the Court. However, this Court, as well as the Kansas courts, must look to the potential consequences of its rulings before rendering decisions. The hypothetical used by the Court shows one clear example of how the rule proposed by the Trustee would create an extremely unjust result and create bad precedent for future cases. The Court used this hypothetical not based upon a material misunderstanding of the facts of this case, as suggested by the Trustee, but rather to further demonstrate why sound policy considerations require a rejection of the Trustee's position in this case, and an extension of the *Kearney* exception to *res judicata* to cover the facts of this case.

#### **IV. CONCLUSION**

The Court finds no basis to alter or amend its prior ruling in this case. The Trustee has presented no arguments or authorities that were not previously considered by this Court. The Court recognizes the factual and procedural differences between the *Kearney* and *Bolinger* cases decided by the Kansas Supreme Court and this case, but finds that the Kansas courts, if faced with the facts in this case, would extend the exception to the rules of *res judicata* to cover these facts. The Court finds there were no manifest errors of law or fact in its May 20, 2004 Memorandum and Order, and that the Trustee's Motion to Alter or Amend Judgment must be denied.

**IT IS, THEREFORE, BY THIS COURT ORDERED** that the Trustee's Motion to Alter or Amend Judgment (Doc. 29) is denied.

**IT IS SO ORDERED** this \_\_\_\_\_ day of July, 2004.

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JANICE MILLER KARLIN  
United States Bankruptcy Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Memorandum and Order was deposited in the United States mail, postage prepaid on this \_\_\_\_\_ day of July, 2004, to the following:

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Judicial Assistant to:  
The Honorable Janice Miller Karlin  
Bankruptcy Judge