

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
FEB 22 2007
DOCKET

IN RE:)	CHAPTER 11
)	
CINDY L. SIMPUKAS,)	CASE NO. 05-66438-MHM
)	
Debtor.)	
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CINDY L. SIMPUKAS,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 05-6440
BUSINESS LOAN CENTER, INC.;)	
BAYVIEW LOAN SERVICING, LLC, as)	
Agent for Wachovia Bank, N.A. as Trustee)	
(f/k/a First Union National Bank);)	
WACHOVIA BANK, N.A., successor by)	
merger with First Union National Bank;)	
THORNHILL HOMEOWNERS)	
ASSOCIATION; ABC COMPOUNDING,)	
INC.; CITIMORTGAGE, INC.;)	
ACQUISITIONS PLUS, LLC; and)	
FULTON COUNTY TAX COMMISSIONER,)	

ORDER REGARDING CHOICE OF LAW

Debtor filed her Chapter 11 case April 4, 2005. Pursuant to an order entered November 18, 2005, on January 30, 2006, Debtor's sale of certain commercial real property located at 1380 W. Marietta Street, Atlanta, Georgia (the "Property") was closed. Debtor received net proceeds of \$2,456,523.04 (the "Proceeds"). By order entered July 10, 2006, Debtor was allowed to make disbursements from the proceeds (the "Disbursement Order"), including a disbursement to Bayview Loan Servicing, LLC, as agent for Wachovia Bank, N.A. ("Wachovia").

Wachovia is a primary secured creditor of Debtor.¹ The original principal amount of the loan to Debtor was \$1 million. At the time of the disbursement of the Proceeds, Wachovia asserted a claim totaling \$1,168,198.10, including \$57,407.23 as post-default interest, \$7,414.03 as Default Prepayment Consideration, \$51.00 as appraisal fees and costs, and \$63,506.84 as attorneys fees and costs. At the time of entry of the Disbursement Order, Debtor and Wachovia agreed that the amount of Wachovia's undisputed secured claim was \$1,039,819.10; accordingly, that amount was disbursed to Wachovia from the Proceeds. Debtor disputed the remaining amount of Wachovia's claim, specifically, the amounts for post-default interest, Default Prepayment Consideration, appraisal fees and costs, and attorneys fees and costs (collectively, the "Disputed Claim"). The portion of the Proceeds remaining after the disbursements that were allowed by the Disbursement Order are held in an escrow account pending a determination of whether and to what extent the Disputed Claim will be allowed. A threshold issue in determining the validity of Wachovia's Disputed Claim is whether the law of the state of California or the state of Georgia applies to the determination of the disputed amounts.

The loan documents, which include a promissory note, a security deed and a business loan agreement, recite that they are governed by California law. Wachovia asserts that the choice of law provisions in the loan documents are enforceable. Debtor asserts that Georgia law must be applied because the loan documents relate to the title and disposition of real property located in Georgia.

¹ The originator of the loan was Imperial Bank, located in California. The promissory note and other loan documents were subsequently assigned to Wachovia.

The determination of whether Georgia law or California law applies to the dispute between the parties is governed by Georgia conflicts law. *Orix Credit Alliance, Inc. v. CIT Group/Equipment Financing, Inc. (In re Hughes)*, 230 B.R. 213 (Bankr. M.D. Ga. 1998), citing *Bryan v. Hall Chemical Company*, 993 F.2d 831, 834 (11th Cir.1993). As a general rule, Georgia will recognize and enforce a choice of law provision in a contract unless no reasonable basis exists for doing so or application of the chosen state's law is contrary to a fundamental policy of Georgia which has a materially greater interest in the issue than the chosen state. *Id.*

Debtor asserts that because the contracts between the parties concerns real estate located in Georgia, the fundamental policy of territorial sovereignty requires the application of Georgia law to the parties' contracts. Debtor interprets the law of Georgia on this issue too broadly.

Georgia law governs the acquisition, ownership, disposition and evolution of real estate located in Georgia. *Sims v. Jones*, 158 Ga 384, 123 S.E. 614 (1924); *King v. King*, 203 Ga. 811, 48 S.E.2d 465 (1948). The laws of other states, however, may be employed to determine parties' contractual rights even though those contract rights may incidentally affect or relate to title to real estate in Georgia. *Midland Guardian Co. v. Varnadore*, 148 Ga.App. 742, 252 S.E.2d 685 (1979); *Folsom v. Continental Adjustment Corp.*, 48 Ga.App. 435, 172 S.E. 833 (1934); *Clark v. Transouth Financial Corp.*, 142 Ga.App. 389, 236 S.E.2d 135 (1977).

In the instant case, Debtor's real property has been sold. The dispute between the parties concerns the amount Debtor owes to the creditor whose claim was secured by that property. The calculation of the amount owed is determined by the parties' contract.

Debtor asserts that the amounts claimed by Wachovia would create an encumbrance against real estate located in Georgia, which would impact title to real property located in Georgia. Debtor's argument, however, ignores the simple premise set forth in *Sims v. Jones*:

Jones:

[T]he *lex situs* determines whether the security creates a lien or passes the absolute title to property, whilst the *lex loci contractus* controls the contract, the performance of which is thus secured.

The terms of repayment of the loan secured by the Property is governed by the parties' contractual agreement. That agreement provides that the law of California applies. The parties' choice of law is valid and enforceable. Accordingly, it is hereby

ORDERED that, within 20 days of the date of entry of this order, the parties shall confer and file a joint statement regarding whether any issues regarding the disbursement of the Proceeds remain to be determined by the court, and, if so, the parties shall describe such issues and establish, if necessary, a briefing schedule.

IT IS SO ORDERED, this 21st day of February, 2007.


MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE