



IT IS ORDERED as set forth below:

Date: October 04, 2008

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

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

IN RE:	:	
	:	Chapter 7
SOUTHSTAR FUNDING, LLC,	:	
	:	Case No. 07-65842-PWB
	:	
Debtor.	:	
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HSBC MORTGAGE SERVICES, INC.,	:	
	:	
Plaintiff,	:	
vs.	:	Adversary No. 07-06524
	:	
HARRY W. PETTIGREW, CHAPTER 7	:	
TRUSTEE OF SOUTHSTAR FUNDING, LLC,	:	
	:	
Defendant.	:	
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ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This adversary proceeding involves a home mortgage loan originated by the Chapter 7

Debtor, SouthStar Funding, LLC (“SouthStar”) that it sold to the plaintiff, HSBC Mortgage Services, Inc. (“HSBC”). Due to the borrower’s early payment default, SouthStar became obligated to repurchase the loan from HSBC, but apparently lacked the financial ability to do so.

In order to permit SouthStar to sell the home loan to another buyer, from which HSBC would be paid, HSBC agreed to deliver to SouthStar the loan documents, together with an allonge (an assignment of the loan executed in favor of SouthStar), under the terms of a “bailee letter.” The bailee letter provided for SouthStar to hold the loan documents and the allonge as “custodian, agent and bailee for and on behalf of HSBC” and either to return them or to pay HSBC the amount due within ten days. The ten days expired a few days before the bankruptcy filing, but SouthStar had neither paid the amount due nor returned the documents, which are now held by Harry W. Pettigrew, the Chapter 7 Trustee for SouthStar and defendant in this proceeding (the “Trustee”).

HSBC’s complaint [1] seeks the return of the loan documents and the allonge to HSBC on the ground that SouthStar had no equitable interest in the loan such that § 541(d) of the Bankruptcy Code, 11 U.S.C. § 541(d), excludes it from SouthStar’s bankruptcy estate.¹ The Trustee asserts that the estate owns the loan because the transfer of the original loan documents and allonge to SouthStar constituted a conditional sale of the loan to SouthStar that is equivalent to a sale with a reservation of a security interest. Because no financing statement was filed to perfect the security interest, the Trustee concludes, HSBC’s security interest is unperfected and

¹The complaint also asserts that the Court should impose a constructive trust on the loan. The argument is that the estate’s retention of it violates SouthStar’s fiduciary duties as a custodian, agent, and bailee with regard to the loan, that SouthStar paid no consideration for the loan, and that the estate’s retention constitutes an inequitable and undeserved enrichment at HSBC’s expense. HSBC has not advocated this theory in its motion for summary judgment.

avoidable under § 544(a)(1) of the Bankruptcy Code, 11 U.S.C. § 544(a)(1). The Trustee's counterclaim [6] seeks avoidance of HSBC's lien on the home loan and a determination that the estate owns it free and clear of any interest or lien of HSBC.

HSBC [27] and the Trustee [32] have filed motions for summary judgment. The undisputed material facts as shown in their statements of undisputed material facts and their responses² are set forth below.

HSBC, acting as servicer for the loan, has foreclosed on it and acknowledges that it holds it "for the benefit of the true owner" of the loan as determined by this Court.³ The Trustee contends that the estate is entitled to judgment against HSBC for the value of the note, which it contends is the repurchase price of \$151,173.30, plus interest at the rate of 7 percent per annum under O.C.G.A. § 7-4-2 from the date of filing of the bankruptcy petition, April 11, 2007.⁴

I. Facts

SouthStar and HSBC were parties to a "Bulk Continuing Loan Purchase Agreement" (the "Loan Purchase Agreement") pursuant to which HSBC purchased home mortgage loans originated by SouthStar.⁵ One such loan that HSBC purchased was a home loan SouthStar made

²HSBC's Statement of Material Facts In Support of Its Motion for Summary Judgment ("HSBC Statement") [29]; Trustee's Response to Statement of Material Facts Submitted by HSBC ("Trustee Response") [41]; Trustee's Statement of Material Facts Not In Dispute ("Trustee Statement") [33]; HSBC's Statement of Material Facts In Opposition to Trustee's Motion for Summary Judgment ("HSBC Response") [42].

³HSBC Statement [29] ¶¶ 36-37; Trustee Response [41] ¶¶ 36-37.

⁴Trustee's Brief in Support of Motion for Summary Judgment [34] at 17.

⁵A copy of the Loan Purchase Agreement is attached to the Affidavit of Blair R. Zanzig [30] as Exhibit "A" and is not disputed. HSBC Statement [29] ¶ 4; Trustee Response [41] ¶ 4.

to Justin Williams on September 21, 2006. The loan was evidenced by an Adjustable Rate Note and was secured by a deed to secure debt on the borrower's property that was duly recorded.⁶

One provision of the Loan Purchase Agreement obligated SouthStar to repurchase a loan from HSBC if an "early payment default" by the borrower occurred.⁷ In the ordinary course of the business relationship between SouthStar and HSBC, SouthStar would, within 30 days of notice from HSBC of an early payment default, remit to HSBC the repurchase price calculated in accordance with the Loan Purchase Agreement.⁸ Upon receipt of the funds, HSBC would return the original loan documents to SouthStar with an executed allonge (or endorsement) assigning the loan back to SouthStar.⁹ HSBC purchased thousands of loans from SouthStar and typically followed this practice with regard to the loans that SouthStar was required to repurchase.¹⁰

Because an early payment default under the loan occurred,¹¹ HSBC demanded that SouthStar repurchase it in accordance with the Loan Purchase Agreement.¹² Rather than pay the repurchase price when it was due, as it usually did, SouthStar requested that HSBC send the loan documents to SouthStar so that SouthStar could resell the loan and remit the proceeds to HSBC.

⁶HSBC Statement [29] ¶ 10-11; Trustee Response [41] ¶¶ 10-11.

⁷HSBC Statement [29] ¶¶ 4-5; Trustee Response [41] ¶¶ 4-5.

⁸HSBC Statement [29] ¶¶ 4,5; Trustee Response [41] ¶¶ 4,5.

⁹HSBC Statement [29] ¶ 6; Trustee Response [41] ¶ 6.

¹⁰HSBC Statement ¶[29] ¶ 7-9; Trustee Response [41] ¶¶ 7-9.

¹¹HSBC Statement [29] ¶ 12; Trustee Response [41] ¶ 12.

¹²HSBC Statement [29] ¶ 13; Trustee Response [41] ¶ 13.

Specifically, a SouthStar employee sent an email to HSBC that stated, “Can you please release the note to me on a bailee letter? We need to send this note to the new Investor (RMS – Residential Mortgage Services) before funding.”¹³ Apparently because HSBC recognized that SouthStar did not have the liquidity to repurchase the loan as required,¹⁴ HSBC agreed to SouthStar’s request, provided that SouthStar execute a “bailee letter.”¹⁵

SouthStar and HSBC both executed a bailee letter on March 27, 2007;¹⁶ its contents are set forth below. On the next day, HSBC delivered the loan documents and an allonge¹⁷ assigning the loan back to SouthStar.¹⁸ The bailee letter required SouthStar either to remit the amount due to HSBC or to return the loan documents and the allonge within ten days, or April 7, 2007.

SouthStar neither paid HSBC nor returned the documents by the time it filed its chapter 7 bankruptcy case on April 11, 2007. The Trustee thus has possession of the loan documents and the allonge.

Because the terms of the bailee letter are critical to the issues here, its contents are set out in full (underlining and capitalization in original):¹⁹

¹³Moulton Affidavit [31] ¶¶ 20-21, Exhibit E, page 5. HSBC Statement [29] ¶¶ 18-19; Trustee Response [41] ¶¶ 18-19.

¹⁴Trustee Statement [33] ¶¶ 23-24; HSBC Response [42] ¶¶ 23-24.

¹⁵Moulton Affidavit [31] ¶¶ 20-21, Exhibit E, page 4; HSBC Statement [29] ¶¶ 18-19; Trustee Response [41] ¶¶ 18-19.

¹⁶Moulton Affidavit [31] ¶ 27, Exhibit F; HSBC Statement [29] ¶¶ 19, 21; Trustee Response [41] ¶¶ 19, 21.

¹⁷Moulton Affidavit [31], Exhibit G.

¹⁸HSBC Statement [29] ¶¶ 23-24; Trustee Response [41] ¶¶ 23-24.

¹⁹Moulton Affidavit [31], Exhibit F.

Attached please find a schedule containing a list of certain mortgage loans (“Mortgage Loans”) which Mortgage Loans are owned by HSBC Mortgage Services, Inc. (“HSBC”). SouthStar Funding LLC has requested HSBC deliver the Mortgage Notes to you in connection with your purchase of the same.

Each of the Mortgage Loans is subject to a security interest in favor of HSBC, which security interest shall be automatically released upon your remittance of the full amount of the required Release Price of such Mortgage Loans (the “Release Price” as reference [sic] on the attached Schedule A) by wire transfer to the following account maintained for the benefit of the Borrower:

[Wire instructions for an HSBC bank account]

Pending your purchase of each Mortgage Loan and until the Release Price therefore [sic] is received, the aforesaid security interest therein will remain in full force and effect, and you shall hold possession of such Collateral and the documentation evidencing same as custodian, agent and bailee for and on behalf of HSBC. In the event any Mortgage Loan is unacceptable for purchase, return the rejected item directly to HSBC at the address set forth below. In no event shall any Mortgage Loan be returned, or any sales proceeds of any kind (whether on account of principal, interest, premium or otherwise) be remitted to SouthStar Funding LLC. The Mortgage Notes must be so returned or sales proceeds in an amount equal to the Release Price remitted in full, no later than ten (10) days from the date of delivery thereof to you.

NOTE: BY ACCEPTING THE MORTGAGE LOANS DELIVERED TO

YOU, YOU SHALL HAVE CONSENTED TO BE THE CUSTODIAN, AGENT AND BAILEE FOR HSBC ON THE TERMS DESCRIBED IN THIS LETTER. HSBC REQUESTS THAT YOU ACKNOWLEDGE YOUR AGREEMENT TO SUCH TERMS BY SIGNING AND RETURNING THE ENCLOSED COPY OF THIS LETTER TO HSBC. HOWEVER, YOUR FAILURE TO DO SO DOES NOT NULLIFY YOUR CONSENT.

Although the letter refers to “Mortgage Loans,” the attached Schedule A reflects only the Williams loan.

II. Discussion

Under § 541(a)(1) of the Bankruptcy Code, property of the estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Section 541(d), however, provides, “Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.” 11 U.S.C. § 541(d).²⁰ Under these provisions, property of the estate does not include property that a debtor

²⁰The complete text of section 541(d) (emphasis added) is:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, *such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section* only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.”

holds in trust for another, *e.g.*, *Begier v. Internal Revenue Service*, 496 U.S. 53, 59 (1990); *City National Bank of Miami v. General Coffee Corp. (In re General Coffee Corp.)*, 828 F.2d 699 (11th Cir. 1987), unless the equitable interest of the beneficiary is avoidable under another provision of the Bankruptcy Code. *E.g.*, *In re General Coffee Corp., supra.*²¹ The potentially applicable avoidance provision in this proceeding is § 544(a)(1), which gives a bankruptcy trustee the rights of a creditor obtaining a judicial lien on the debtor's property as of the time of commencement of the bankruptcy case.

Federal bankruptcy law determines what is property of the estate under § 541, but state law determines the extent, if any, of the debtor's legal or equitable interest in the property in question. *E.g.*, *City National Bank of Miami v. General Coffee Corp. (In re General Coffee Corp.)*, 828 F.2d 699 (11th Cir. 1987); *see Butner v. United States*, 440 U.S. 48, 54 (1979).²²

The dispositive legal question is whether, notwithstanding the transfer of legal title and delivery of possession of the loan documents to SouthStar, HSBC retained equitable ownership

The statute has been read and applied generally. *See, e.g.*, *Begier v. Internal Revenue Service*, 496 U.S. 53, 59 (1990); *City National Bank of Miami v. General Coffee Corp. (In re General Coffee Corp.)*, 828 F.2d 699 (11th Cir. 1987). Thus, the italicized language does not limit the operation of the section to a real estate mortgage or to a mortgage to which a debtor retains legal title for servicing purposes. *See Belisle v. Plunkett*, 877 F.2d 512 (7th Cir. 1989).

²¹The Eleventh Circuit in *In re General Coffee* did not decide the question of whether property that is not property of the estate under § 541(d) may come into the estate under the avoidance provisions of § 544(a). 828 F.2d 699, 705. The court in *Belisle v. Plunkett*, 877 F.2d 512 (7th Cir. 1989), reasoned that no conflict between the two sections exists. Like the *General Coffee* court, this Court need not address this issue in view of its ruling that HSBC's interest is not avoidable under § 544(a)(1).

²²*See also* *Old Republic National Title Ins. Co. v. Tyler (In re Dameron)*, 155 F.3d 718, 722 (4th Cir. 1998); *Marrs-Winn Co., Inc. v. Giberson Electric, Inc. (In re Marrs-Winn Co., Inc.)*, 103 F.3d 584, 591 (7th Cir. 1996).

of it. The Court concludes that it did.

As set forth above, the material facts are not in dispute. HSBC owned the loan and had the right under the Loan Purchase Agreement to require SouthStar to repurchase it because of an early payment default. Because SouthStar could not timely pay the amount due, SouthStar sought to satisfy its obligation by arranging for another buyer to purchase the loan. To do this, SouthStar needed to have possession of the loan documents and the ability to transfer the loan to the purchaser. SouthStar thus proposed to HSBC that HSBC “release” the loan documents under a “bailee letter.” HSBC agreed to do so, both parties executed the bailee letter, and HSBC delivered the loan documents and the allonge that transferred legal title to SouthStar.

Laying aside for the moment the import of the language of the bailee letter, discussed below, nothing in these circumstances indicates that anyone acting on behalf of SouthStar or HSBC intended to effect any change in HSBC’s ownership of the loan. To the contrary, the undisputed facts demonstrate an intent to maintain the status quo except for the change in legal title to permit SouthStar either to sell the loan to another and remit the proceeds to HSBC or return the documents.

The question is whether the language of the bailee letter establishes some other intent or overrides that intent. The bailee letter is less than a model of clarity. Indeed, its language is self-contradictory. In the first paragraph, the bailee letter states that HSBC is the owner of the “Mortgage Loans” on the attached schedule, of which there is only the single loan in question here. It then states that the loan documents are being delivered to SouthStar “in connection with your purchase of the same.” This contradicts the understanding of the parties that SouthStar would be selling the loan to a third party, not purchasing for its own account. Indeed, the very

problem that gave rise to the need for the bailee letter was SouthStar's inability to purchase the loan itself.

The next paragraph states that the loan is subject to a security interest in favor of HSBC, which contradicts the statement in the first paragraph that HSBC owns it. The concept of HSBC having a security interest, of course, makes no sense if HSBC owned the loan as the previous paragraph states.

Continuing the concept that SouthStar is purchasing the loan, the third paragraph instructs SouthStar: "In the event any Mortgage Loan is unacceptable for purchase, return the rejected item directly to HSBC at the address set forth below." That paragraph then directs SouthStar not to remit any sales proceeds to SouthStar and not to return any documents to SouthStar. But these instructions are nonsensical for two reasons. If SouthStar is purchasing the loan, SouthStar would obviously not be remitting proceeds to itself. And the prohibition on returning documents to SouthStar serves no purpose when the bailee letter itself permits SouthStar to take possession of them.

Quite plainly, the bailee letter at issue here stems from a form that HSBC could and would use in its warehouse lending business.²³ In a "warehouse lending" situation, the originator of a mortgage loan uses money from a warehouse lender to make a loan to the mortgage borrower. The loan documents are delivered to the warehouse lender to hold while the originator seeks another party to purchase the loan. The prospective purchaser must be able to examine the loan documents in the possession of the warehouse lender. To accommodate this need, the

²³The Trustee makes this point and elaborates on warehouse lending transactions in his Brief in Support of Trustee's Motion for Summary Judgment [34] at 7-10.

warehouse lender makes the loan documents available to the prospective purchaser provided that the purchaser agrees to hold the loan documents on behalf of the lender, remit the sales proceeds to the warehouse lender if it decides to purchase the loan, and promptly return the loan documents to the warehouse lender if it does not. By using a bailee letter, the warehouse lender temporarily relinquishes possession of the loan documents while maintaining its rights in the loan. As such, the bailee letter preserves the status quo in the event that the purchase does not occur; the loan documents are returned and the warehouse lender maintains its interest.

The conduct of HSBC and SouthStar demonstrates that they intended the bailee letter they executed to similarly maintain the status quo pending SouthStar's efforts to sell the loan to a third party. Its purpose and import were to permit SouthStar to take temporary possession of the loan documents and the allonge, without altering either SouthStar's or HSBC's rights, and either to remit proceeds from the sale of the loan to HSBC or to return the documents. Neither of the parties thought that the bailee letter would effect a transfer of ownership of the loan to SouthStar.

The overriding purpose was to document SouthStar's commitment to hold the loan documents as "custodian, agent, and bailee" on behalf of HSBC. The references in the bailee letter to SouthStar's purchase of the loan and to HSBC's security interest do not negate the intended effect of this critical language – stated twice in the document – or require a result contrary to the letter's obviously intended purpose. In any event, the bailee letter could not and did not effect a sale of the loan to SouthStar. It merely transferred possession of the loan documents and the allonge and thus permitted and enabled a sale to take place *if* SouthStar (in the letter's literal terms) elected to purchase and paid the purchase price.

Considering the conduct of the parties that preceded the bailee letter and the language of the bailee letter in that context,²⁴ the Court concludes that the transaction did not effect a transfer of anything more than bare legal title to SouthStar for the purpose of permitting SouthStar to sell the loan to another purchaser on behalf of HSBC and to remit the sales proceeds to HSBC and that it did not transform HSBC's ownership interest into a security interest.

The Trustee insists that this conclusion is not legally permissible. In this regard, the Trustee asserts that SouthStar became the owner of the loan as a matter of law because it acquired legal title upon execution and delivery of the allonge, obtained possession of the loan documents, and was unconditionally obligated to pay for it under the repurchase provisions of the Loan Purchase Agreement.²⁵ To support this proposition, the Trustee invokes the general rule that the assumption of an unconditional obligation to pay the purchase price of property in a transaction in which the owner delivers it makes the transaction a sale that transfers title to the transferee, notwithstanding the owner's reservation of title, and leaves the former owner with a security interest.²⁶ The principle is based on the fact that such a transaction in which the transferee is unconditionally obligated to pay the purchase price for the transferred property is

²⁴As the Trustee accurately observes, "Viewed in isolation, the [bailee letter] does not provide a basis for determining the true nature of the transaction, and this is so because it is a form that did not fit the circumstances, as illustrated by its many conflicting provisions." Brief in Support of Trustee's Motion for Summary Judgment [34] at 10.

²⁵Brief in Support of Trustee's Motion for Summary Judgment [34] at 11, 14; Trustee's Brief In Response to HSBC's Motion for Summary Judgment [40] at 11.

²⁶Brief in Support of Trustee's Motion for Summary Judgment [34] at 3-5, 11-14. The Trustee's authorities include: *Liebowitz v. Voiello*, 107 F.2d 914 (2d Cir. 1939); *Spiegel, Inc. v. Berve (In re Hoff)*, 101 F.2d 334 (7th Cir. 1939); *McKenzie v. Roper Wholesale Grocery Co.*, 9 Ga. App. 185, 70 S.E. 981, 982 (1911); 5 ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY* ¶541.06[1][a] (15th ed. rev. 2008).

indistinguishable from a sale.

But the principle does not apply here, where SouthStar's obligation to pay the purchase price predated the execution of the bailee letter and delivery of the allonge and loan documents and where its possession was temporary and restricted. SouthStar's obligation to repurchase the loan existed independently of the transaction that occurred pursuant to the bailee letter and accompanying conduct, and the transaction had no effect on that existing obligation. And as just noted, the bailee letter itself imposed no obligation on SouthStar to purchase the loan or to pay anything; Southstar could reject the loan and return the loan documents to their owner, HSBC. Of course, SouthStar upon return of the loan documents would still have the obligation to repurchase the loan under the Loan Purchase Agreement, subject to any defenses it might have, but the point is that the bailee letter did not impose any liability on SouthStar beyond remitting the purchase price in the event of a sale or returning the documents if a sale did not occur.

Moreover, SouthStar's possession was limited to ten days unless it remitted proceeds from a sale of the loan. Beyond the authorization to sell the loan and remit the proceeds to HSBC, SouthStar had no right to any of the benefits of ownership.

As between SouthStar and HSBC, therefore, SouthStar acquired bare legal title and HSBC retained equitable ownership of the loan. At least two legal doctrines provide a basis for enforcing HSBC's equitable ownership rights against SouthStar.

First, O.C.G.A. § 44-12-40 defines a bailment as the "delivery of goods or property upon a contract, express or implied, to carry out the execution of a special object beneficial either to the bailor or bailee or both and to dispose of the property in conformity with the purpose of the trust." HSBC and SouthStar agreed that HSBC would deliver the loan documents and the

allonge to SouthStar for the purpose of selling the loan to a prospective purchaser, surely a “special object beneficial” to both of them. SouthStar agreed either to remit the proceeds from the sale or return the loan documents and the allonge, a disposition “of the property in conformity with the purpose of the trust.” Consequently, the transaction here qualifies as a bailment.²⁷

Alternatively, the effect of the transaction was to create an express trust. O.C.G.A. § 53-12-20 provides:

(a) An express trust shall be created or declared in writing.

(b) An express trust shall have each of the following elements,

ascertainable with reasonable certainty:

(1) An intention by a settlor to create a trust;

(2) Trust property;

(3) A beneficiary;

(4) A trustee; and

(5) Active duties imposed on the trustee, which duties may be

specified in the writing or implied by law.

²⁷The Trustee argues that the transaction cannot be a bailment because a bailment cannot exist when title to the property is transferred. *See* *McDaniel v. American Druggists Insurance Co. (In re National Buy-Rite, Inc.)*, 11 B.R. 196, 198 (Bankr. N.D. Ga. 1981) (“A bailee acquires no title in the property he holds as bailee.”). In view of the Court’s conclusion that HSBC remained the actual owner of the loan, the Trustee’s premise fails.

The Trustee also cites *Securities and Exchange Commission v. Credit Bancorp., Ltd.*, 290 F.3d 80 (2d Cir. 2002), to support his position. In that case, the court concluded that the owner of corporate securities had transferred them outright, and not in trust, to an entity engaged in a “Ponzi” scheme. Unlike the situation here where the conduct of the parties clearly evidences their intent that HSBC retain equitable ownership and the documentation is contradictory, the court there found that “the documents accomplishing the transfer of assets are entirely inconsistent with a trust arrangement.” *Id.* at 88.

“No formal words are necessary to create an express trust.” O.C.G.A. § 53-12-21.

The bailee letter states that SouthStar will be acting as “custodian, agent, and bailee” of the loan documents for HSBC. It thus provides a written declaration from which the Court can ascertain, with reasonable certainty, an intent to create a trust for specified property, with SouthStar as the trustee and HSBC as the beneficiary. The bailee letter imposed the active duty on SouthStar to remit the proceeds from the sale of the loan or to return the loan documents within ten days. Although the bailee letter does not use the words “trust” or “trustee,” the absence of these formal words does not negate the existence of an undertaking by SouthStar to take legal title to the loan and possession of the loan documents and the allonge in trust for the benefit of HSBC as the actual owner of the loan.

In either case, SouthStar held legal title to the loan in trust for the benefit of HSBC, its equitable owner. As such, the loan is not property of SouthStar’s estate under 11 U.S.C. § 541(d). *E.g., Begier v. Internal Revenue Service*, 496 U.S. 53, 59 (1990); *City National Bank of Miami v. General Coffee Corp. (In re General Coffee Corp.)*, 828 F.2d 699 (11th Cir. 1987).

The remaining question is whether the Trustee can avoid SouthStar’s ownership interest under 11 U.S.C. § 544(a), assuming that this section permits avoidance of an equitable ownership interest notwithstanding the provisions of 11 U.S.C. § 541(d).²⁸ With regard to avoidance of an interest in personal property, § 544(a)(1) gives a bankruptcy trustee the powers

²⁸See footnote 21 *supra*.

of a hypothetical creditor holding a judicial lien.²⁹ The Trustee's argument for avoidance of HSBC's interest in the loan rests primarily on the proposition that HSBC holds only a security interest that has not been perfected by filing a financing statement or by possession of the mortgage instrument such that the security interest is subject to the rights of a judicial lien creditor under Article 9 of the Uniform Commercial Code. O.C.G.A. § 11-9-317(a)(2). The conclusion that HSBC retained its ownership interest, however, makes Article 9 inapplicable; it applies only to a security interest. O.C.G.A. § 11-9-109(a)(1). Under Georgia law, the lien of a judgment creditor attaches only to the property that the judgment debtor actually owns and does not reach property in which a third party has an equitable ownership interest. *E.g., Shivers v. Hunnicutt*, 220 Ga. 620, 140 S.E.2d 872 (1965). Thus, § 544(a)(1) does not permit avoidance of the equitable ownership rights of HSBC. *E.g., City National Bank of Miami v. General Coffee Corp. (In re General Coffee Corp.)*, 828 F.2d 699 (11th Cir. 1987).

III. Conclusion

For reasons set forth above, HSBC's motion for summary judgment is hereby **GRANTED** and the Trustee's motion for summary judgment is **DENIED**. HSBC is entitled to judgment (1) granting it possession of the documents in the possession of the Trustee relating to a mortgage loan referred to by account number 15708001, including that certain Adjustable Rate Note executed by Justin Williams as borrower, originally in favor of SouthStar, in the original principal amount of \$142,500 and that certain Security Deed in favor of SouthStar, recorded as document number 00728368022 in the Superior Court of Fayette County, Georgia,

²⁹Under 11 U.S.C. § 544(a)(3), a trustee has the rights of a bona fide purchaser of real property. The loan in question, of course, evidenced by a promissory note, is personal property.

on September 26, 2006; and (2) dismissing, with prejudice, the Trustee's counterclaim. A separate judgment will be entered.

[End of Order]

[This Order is not intended for publication.]

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