IT IS ORDERED as set forth below:

Date: June 20, 2016

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re:	:	BANKRTUPCY CASE NO:
LINDA COTY BULLOCK,	:	**08-43724-MGD**
Debtor.	:	CHAPTER 7
KYLE A. COOPER, Trustee,	:	
Plaintiff,	:	
v.	:	ADVERSARY PROCEEDING NO:
GENERATION MORTGAGE COMPANY,	:	**14-4003-MGD**
Defendant.	:	

MEMORANDUM OPINION

This matter is before the Court on cross-motions for summary judgment. (Docs. 36, 65). For the reasons that follow, the Court denies Defendant's Motion for Summary Judgment and grants in part Plaintiff's Cross-Motion for Summary Judgment. This adversary proceeding,

brought under Bankruptcy Code Section 550, is a core proceeding arising under Title 11 in which the Court has authority to enter a final order. 28 U.S.C. § 157(b)(2)(A), (E), (K), and (O). The Court has jurisdiction under 28 U.S.C. §§ 157(a) and 1334(b) by general reference, LR 83.7A, NDGa, and venue is proper under 28 U.S.C. § 1409(a).

I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982). Once this burden is met, the nonmoving party cannot rely merely on allegations or denials in its own pleadings. Fed. R. Civ. P. 56(c). Rather, the nonmoving party must present specific facts that demonstrate there is a genuine dispute over material facts. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The "[o]ne who resists summary judgment must meet the movant's affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial." *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000); Fed R. Civ. P. 56(c).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

"The fact that the parties have filed cross-motions for summary judgment does not change the standards on which this Court must evaluate summary judgment motions." *In re Williams*, 490 B.R. 236, 239 (Bankr. W.D. Ky. 2013) (citing *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)). "Courts still must resolve each motion on its own merits drawing all reasonable inferences against the moving party in each instance." *Id.* (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)). "If genuine issues of material fact remain, neither motion should be granted." *Id.*

II. Undisputed Facts

The genesis of this dispute is Debtor Linda Coty Bullock's nearly eight-year-old bankruptcy case originally filed under Chapter 11 on November 3, 2008. The case was converted to Chapter 7 on December 17, 2009. (Bankr. Doc. 115, *aff'd*, No. 4:10-cv-14-HLM (N.D. Ga. Apr. 12, 2010)). Plaintiff Kyle A. Cooper was appointed Chapter 7 Trustee on December 23, 2009. (Adv. Docs. 121, 122).

The parties agree that as of the petition date, Ms. Bullock owned a house at 411 Billy Bullock Road in Dallas, Georgia. (Trustee's Statement of Material Facts (Adv. Doc. 67) ("TS") ¶ 5; Generation's Response to Trustee's Statement (Adv. Doc. 71-2) ("GRTS") ¶ 5). The parties also agree that on July 16, 2010, while the Chapter 7 bankruptcy case was pending, Ms. Bullock entered into a reverse mortgage on that house (referred to in quotations as the "Property"). (TS

¶ 6; GRTS ¶ 6).[1] The Note and Security Deed executed by Ms. Bullock as part of that reverse mortgage identify Lenox Financial Mortgage, LLC as Lender. (Note at 1, Security Deed at 1). As part of the July 16 reverse mortgage closing packet, Ms. Bullock signed a Notice of Assignment, Sale or Transfer of Servicing Rights which indicated that servicing of the mortgage loan would be assigned "from **LENOX FINANCIAL MORTGAGE, LLC** to **GENERATION MORTGAGE COMPANY** effective **JULY 21, 2010**." (TS ¶ 17, Ex. A at GMC000325; GRTS ¶ 17). Lenox also executed an undated allonge to the Note assigning it to Generation. (TS ¶ 18, Ex. A at GMC000181; GRTS ¶ 18).

On December 21, 2010, Trustee filed an adversary proceeding against Lenox seeking, among other relief, to avoid the reverse mortgage as an unauthorized post-petition transfer under Section 549. (Adv. No. 10-4111-MGD, Doc. 1). Trustee and Lenox entered into a consent order on January 30, 2013 which stipulated that the transfer of the Security Deed was avoided under Section 549 because it occurred after the commencement of the case and was not authorized by the Court or the Trustee. (Adv. No. 10-4111-MGD, Doc. 81).

Trustee then commenced this adversary proceeding seeking to recover the avoided Security Deed or its value from Generation as a subsequent transferee under Section 550(a)(2). (Adv. Doc. 1).

III. Factual Contentions

The Court, mindful of its obligation on cross-motions for summary judgment to "resolve each motion on its own merits drawing all reasonable inferences against the moving party in

[1] The documents evidencing the reverse mortgage are part of the summary judgment record as Exhibits 1 (Closed-End Fixed Rate Note (Home Equity Conversion), or "Note") and 2 (Closed-End Fixed Rate Home Equity Conversion Security Deed, or "Security Deed") to the Affidavit of Mary Ann Rutledge, itself Exhibit A to Generation's Statement of Material Facts (Adv. Doc. 36-2).

each instance," separates the remainder of the factual contentions by party. *Williams*, 490 B.R. at 239. As to each set of contentions, the Court views the evidence in the light most favorable to each respective respondent to determine whether a genuine, material dispute of fact exists. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

A. Generation's Contentions

In supporting its Motion for Summary Judgment and opposing Trustee's Cross-Motion for Summary Judgment, Generation relies on the affidavit of its Executive Project Manager Mary Ann Rutledge. Ms. Rutledge asserts that Generation was the lender for the loan, and that Lenox only served as the broker. (Aff. Rutledge ¶ 4, Adv. Doc. 36-4). She explains that Generation funded the loan through its own proceeds and that Lenox was listed on the loan documents, including the Note and the Security Deed, by mistake and "contrary to the intent of the parties." (*Id.* ¶¶ 7, 9). Lastly, she asserts that "[a]t the time the Loan was approved and subsequently funded, Generation Mortgage had no knowledge, notice, or notification of any bankruptcy proceeding associated with the Property." (*Id.* ¶ 13).

B. Trustee's Contentions

While Trustee did not file any affidavits opposing Generation's contentions, he argues that the loan documents indicating Lenox as the lender, including the Note and Security Deed, speak for themselves. (TS ¶ 7). [2]

[2] To a number of Trustee's Statements referencing documents, Generation responded that it was "without sufficient knowledge to verify or dispute the allegation[]." Under Bankruptcy Local Rule 7056-1(a)(2), "[t]he response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Rule 56(f) of the Federal Rules of Civil Procedure. [In 2010, subdivision 56(f) was moved to (d).]" Generation failed to show by affidavit or declaration that it could not present facts essential to justify its opposition. Accordingly, the Court will treat the documents referenced in the Statements as undisputed as to authenticity for the purpose of ruling on Trustee's Cross-Motion for Summary judgment only.

Trustee further asserts that as part of the loan transaction, Lenox ordered and received a Merged Credit Infile Report for Ms. Bullock that "referenced the instant Bankruptcy Case, and errantly indicated that it was dismissed on November 5, 2008, or two days after the petition date." (TS ¶ 23, Ex. A at GMC000091–99). Lastly, Trustee asserts that a number of documents referencing the bankruptcy case existed in the real property records and general execution docket of the Superior Court of Paulding County, including "at least 16 Paulding County Tax Fieri Facies [sic]" and a Notification of Assertion of Attorneys' Lien filed by Mark S. Marani of Cohen Pollock Merlin & Small, P.C. (TS ¶¶ 24–29, Exs. B and C).

IV. Discussion

A. Initial Transferee

As noted above, Generation argues that Lenox, as broker for the loan, was not the initial transferee of the Property, and therefore Trustee's prior avoidance judgment against Lenox was insufficient to support a subsequent transferee action under Section 550. If the Court were to accept this argument, it would end the litigation, because Trustee is time-barred from bringing a new avoidance case against Generation. 11 U.S.C. § 549(d)(1).

The basis of Generation's argument is Rutledge's sworn statement that Lenox was listed on the Transfer Documents by "mistake." (Aff. Rutledge ¶ 7, Adv. Doc. 36-4). Trustee argues in response that under Georgia law, Generation should be barred from offering parol evidence which contradicts the plain language of the Transfer Documents. The Court need not reach the parol evidence issue because it concludes that the Rutledge Affidavit does not create a material dispute of fact as to whether Lenox was the initial transferee. [3]

[3] Trustee's reliance on Georgia's parol evidence rule is likely misplaced. *Cf. In re Colin*, 546 B.R. 455, 461 (Bankr. M.D. Ala. 2016) (holding that a determination of whether a divorce decree constitutes a domestic support obligation

Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While bankruptcy courts look to state law to determine the extent of interests in property, "'[w]hat constitutes a transfer and when it is complete' is a matter of federal law." *Barnhill v. Johnson*, 503 U.S. 393, 397–98 (1992) (quoting *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369–370 (1945)).

Whether Lenox was mistakenly listed on the Transfer Documents is not material to whether a transfer to Lenox actually occurred under 11 U.S.C. § 101(54). A security deed listing the wrong grantee by mutual mistake may be subject to reformation under Georgia law. O.C.G.A. § 23-2-25. That fact alone, however, does not render the transaction any less a "retention of title as a security interest" or a "mode . . . of disposing of or parting with . . . an interest in property." 11 U.S.C. § 101(54). Accordingly, the Court concludes that there is no genuine issue of material fact as to the initial transferee status of Lenox, and Trustee is entitled to judgment as a matter of law on that issue. Having concluded that Generation was a subsequent, and not initial transferee, the Court must next turn to the good faith defense available to subsequent transferees under Section 550(b).

B. Good Faith Defense

Unlike initial transferees, Section 550(b) affords subsequent transferees an additional layer of protection. Under that section, "[t]he trustee may not recover [from a subsequent

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"is a matter of federal law, not state law," and the parol evidence rule is therefore inapplicable). However, the Court agrees with decision of the district court in *Henshaw v. Field (In re Henshaw)*, 485 B.R. 412 (D. Haw. 2013), *appeal docketed*, No. 13-15331 (9th Cir. Feb. 21, 2013) that, in most cases, it is appropriate as a matter of federal common law and policy to exclude extrinsic evidence offered to vary the grantee to a deed in an avoidance action. *But see In re Harwell*, 628 F.3d 1312, 1322–23 (11th Cir. 2010) (holding that in fraudulent transfer cases, courts should "examin[e] all the facts and circumstances surrounding a transaction to prevent recovery from a transferee innocent of wrongdoing and deserving of protection.").

transferee] . . . that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. § 550. Because the Court concludes it cannot determine on summary judgment whether Generation took the Security Deed in good faith without knowledge of the voidability of the transfer, it focuses its analysis on those provisions and does not address value in this Opinion.

Courts agree that "'knowledge' as used in § 550(b)(1) . . . does not mean 'constructive notice.'" *Smith v. Mixon*, 788 F.2d 229, 232 (4th Cir. 1986). However, "several circuit courts have held that 'actual knowledge of facts that would lead a reasonable person to believe that the transferred property was voidable is all that is required to show knowledge.'" *Kerr v. Roeser (In re Hackney)*, Ch. 7 Case No. 09-79795-JRS, Adv. No. 13-5056-JRS, 2014 WL 4059787, at *4 (Bankr. N.D. Ga. Apr. 2, 2014) (quoting *Goldman v. Capital City Mort. Corp. (In re Nieves)*, 648 F.3d 232, 238 (4th Cir.2011)).

Few courts have addressed what it means to take property in good faith and without knowledge of the voidability of an unauthorized post-petition transfer. One court noted that "unlike Section 549, which looks for the transferee's knowledge of the commencement of the case, Section 550(b) speaks of knowledge of the voidability of the transfer. The latter suggests a broader inquiry . . . ." *In re Auxano, Inc.*, 96 B.R. 957, 965 (Bankr. W.D. Mo. 1989).

In *Hackney*, the trustee asserted that a lender in a subsequent transferee action had knowledge of the voidability of the initial transfer because it "must have known" about certain documents filed in the property records a few months after the initial transfer. 2014 WL 4059787, at *5. The trustee further contended that even if the lender did not know about the documents, it should have in good faith conducted a reasonably diligent investigation which would have disclosed the filings indicating the voidability of the transfer. *Id.* at *6.

The Court declined to grant summary judgment on both issues. As to knowledge, it held that "without any testimony from the Title Search Agent or someone else familiar with what facts [the lender's] agents actually knew, questions of fact remain regarding what facts were actually known to [the lender], and thus whether [it] had actual knowledge of the Transfer's avoidability." *Id.* at *5. As to good faith, the court held that before determining what the lender "should have known, the Court must take into consideration the customary practices in the mortgage lending industry," an inquiry unsuitable for summary judgment. *Id.* at *6.

In this case, there is no genuine dispute that the documents referencing the bankruptcy case were already filed in the property records and general execution docket at the time of the transfer. (TS ¶¶ 24–29, Exs. B and C). However, like in *Hackney*, there is no evidence that Generation actually saw any of those documents. In fact, the record shows a genuine dispute as to that issue. (Aff. Rutledge ¶ 13, Adv. Doc. 36-4 ("At the time the Loan was approved and subsequently funded, Generation Mortgage had no knowledge, notice, or notification of any bankruptcy proceeding associated with the Property."). Likewise, the Court cannot determine on summary judgment what level of inquiry Generation should have conducted without evidence of customary practices in the industry. It is possible that Generation reasonably relied on Lenox to conduct an investigation. It is possible that Lenox was aware of the documents but did not disclose their existence to Generation. Without testimony, the Court cannot determine either issue.

V. Conclusion

A trial is necessary to determine whether Generation took "for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. § 550(b)(1). Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment (Doc. 36) is **DENIED**.

It is **FURTHER ORDERED** that Plaintiff's Cross-Motion for Summary Judgment (Doc. 65) is **GRANTED IN PART** and **DENIED IN PART** as set forth above.

The parties are **DIRECTED** to submit a consolidated pretrial order under BLR 7016-2(a) no later than thirty days after the date of entry of this Order.

The Clerk is directed to serve a copy of this Order upon Plaintiff, Defendant, their respective counsel, and the United States Trustee.

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