

1/28/04

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G98-20470-REB
	:	
WAYNE D. JORDAN and	:	
BARBARA ANN JORDAN,	:	
	:	
Debtors.	:	
	:	
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ALBERT F. NASUTI,	:	ADVERSARY PROCEEDING
Chapter 7 Trustee,	:	NO. 02-3052
	:	
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
WAYNE D. JORDAN, BARBARA ANN	:	
JORDAN, FIRST HORIZON HOME LOAN	:	
CORPORATION d/b/a EQUIBANC MORTGAGE :	:	
CORPORATION, and BANK ONE, NA,	:	
	:	JUDGE BRIZENDINE
Defendants.	:	

**ORDER DENYING PLAINTIFF-TRUSTEE'S MOTION
FOR PARTIAL SUMMARY JUDGMENT AND GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT FILED BY CO-DEFENDANT BANK ONE, NA**

Before the Court are cross-motions for partial summary judgment filed by Plaintiff-Chapter 7 Trustee and Co-Defendant Bank One, NA ("Bank One") on Counts I and II of the Trustee's complaint. Based upon a review of the motions, briefs, and accompanying documents contained in the record, the Court concludes that the Trustee's motion should be denied and that the motion of Bank One should be granted.¹

¹ This is a core proceeding under 28 U.S.C §157(b)(2)(E) and (K). In addition, the above case style reflects entry of a stipulation and voluntary dismissal of former Co-Defendant Southern Heritage Bank on April 2, 2003. This Order does not address Count III of the complaint, which

In Counts I and II of his complaint, the Trustee argues that he is entitled to entry of an order determining Bank One's asserted lien against certain real property of the estate to be invalid and/or granting an equitable lien in favor of the Trustee superseding any alleged claim of any purported holder of a lien against the real property in question. This case was filed on February 26, 1998.² It is undisputed that following the commencement of this case, Debtors participated in two separate real estate transactions whereby a prior indebtedness, secured by a deed to secure debt on real property located on Nohl Crest Drive in Hall County, Georgia, was satisfied from the proceeds of a new loan secured by a new deed to secure debt on the property. Southern Heritage Bank participated in the first post-petition transfer on November 30, 2000. First Horizon Home Loan Corporation participated in the second post-petition loan transaction on February 9, 2001, and thereafter sold, assigned, and transferred its interest to Bank One on February 20, 2001. The original prepetition loan was secured by a deed to secure debt held by Danny Gilleland in the amount of \$110,000.00.

In these post-bankruptcy transactions, Southern Heritage lent the sum of \$115,000.00 to Debtors and First Horizon subsequently lent Debtors the sum of \$140,200.00. The proceeds of each loan were used to pay off the prior indebtedness secured by the real estate. In addition, at the closing of each loan, Debtor Wayne Jordan received cash in the amounts of \$21,869.74 and \$17,462.50, respectively. Following a confrontation with the Debtors, the Trustee states Debtor

alleges conversion against Wayne Jordan, or Count IV of the complaint in which the Trustee seeks additional relief contending that Bank One commenced a wrongful foreclosure against the property which the Trustee was forced to stop.

² Plaintiff was appointed Chapter 11 Trustee on August 6, 1998 and this case was converted to a case under Chapter 7 on September 2, 1998.

Wayne Jordan admitted these facts but to date has failed to comply with a settlement agreement to make the estate whole.

At the time of the transfers in question, the Trustee had neither abandoned nor administered the subject property. Further, each of these transactions occurred after the filing of the Debtors' bankruptcy petition without the knowledge or consent of the Trustee or authorization from the Court. With Court approval, the Trustee has now sold the property for \$150,000.00 to a third party and currently holds the sales proceeds pending the outcome of this lawsuit.

The Trustee argues that any asserted lien interest of Bank One should be avoided because Debtors had no legal or equitable interest to convey post-bankruptcy filing and that the Trustee's interests in the property on behalf of the estate supersede all others pursuant to his powers under 11 U.S.C. § 544(a)(3) or (a)(1). Although the Trustee admits that a copy or notice of Debtors' bankruptcy petition was not filed in the real property records of Hall County at the time of First Horizon's assignment to Bank One, he contends this failure has no effect on his claim. However, because the closing attorney in connection with the First Horizon loan was aware of the bankruptcy case, the Trustee argues that Bank One is charged with knowledge of the bankruptcy filing as assignee of First Horizon.

In response, Bank One contests the Trustee's claim that the estate was the fee simple owner of the subject property at the time of each post-bankruptcy transfer and, therefore, contests the assertion that Debtors could not convey title. Bank One further asserts this matter is governed by section 549 and that it qualifies under section 549(c) as a good faith purchaser. In the alternative, Bank One contends that it should be equitably subrogated to the position of the

original prepetition lienholder whose interest was paid and satisfied. The Trustee counters Bank One's reliance on section 549 arguing: (1) that the bank violated the automatic stay; (2) that it cannot claim good faith purchaser status by virtue of the knowledge of First Horizon, the assignor of Bank One; and (3) that Bank One's claim is subject to setoffs for wrongful foreclosure if the bank is granted equitable subrogation. In addition, as set forth in supplemental briefs, the Trustee asserts Bank One had actual knowledge of this bankruptcy case by reason of the notice it received as a scheduled creditor listed in the Debtors' bankruptcy petition.

Summary judgment may be granted pursuant to Fed. R. Civ. P. 56, applicable herein by and through Fed. R. Bankr. P. 7056, if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Further, all reasonable doubts should be resolved in favor of the non-moving party, and "if reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied." *Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994), citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Presumptions or disputed inferences drawn from a limited factual record cannot support entry of summary judgment under Fed. R. Civ. P. 56(c), applicable herein through Fed. R. Bankr. P. 7056.

As asserted by the Trustee, all property owned by Debtors on the date of filing of the bankruptcy petition became property of the bankruptcy estate under section 541(a) subject to administration by the Trustee. Post-petition transfers of such property are governed by section

549(a) and may be avoided by a trustee absent authorization by either the Court or the Bankruptcy Code. *See* 11 U.S.C. § 549(a)(2)(B). Such transfers may, however, fit within a narrow exception as set forth in section 549 even if they are in violation of the automatic stay as provided in section 362(a). Specifically, post-petition transfers of an interest in real estate may be protected under section 549(c) which provides as follows:

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

11 U.S.C. § 549(c). Accordingly, a transferee may defeat a trustee's effort to avoid a post-petition transfer if the transferee obtained its interest without knowledge of the pending bankruptcy case, the transaction was conducted in good faith and at arms-length, the transferee pays fair value, and the transferee properly records and perfects title before notice of the bankruptcy petition is filed. *See generally In re Ward*, 837 F.2d 124 (3d Cir. 1988). In other words, although a debtor in bankruptcy does not have the right to transfer title as such property vests within the estate, he or she retains sufficient power to convey same if the transferee comes within the exception provided in section 549(c).

Citing various case authority, the Trustee first argues that the transfer at issue is void

because it violated the automatic stay.³ Yet, if all post-petition transfers were treated as automatically void under section 362 as claimed by the Trustee, section 549 would serve no purpose. Such a construction should not be forced upon these statutory provisions. See generally *Groupe v. Hill (In re Hill)*, 156 B.R. 998, 1007-08 (Bankr. N.D.Ill. 1993); *In re King*, 35 B.R. 530, 533 (Bankr. N.D.Ga. 1983). For this reason, the Court disagrees with the logic of decisions such as *Smith* and *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992).⁴ Section 549 subjects all such post-petition transfers to recovery by a trustee unless a transfer fits within one of its specific exceptions.⁵ Any conduct that is prohibited under another Code section, such as section 362, is not shielded under section 549 because its provisions only protect the transfer itself.⁶ Even when an exception such as section 549(c) applies to a transfer, a transferor-debtor may still be held accountable for any violation of the automatic stay under section 362.

³ See *Smith v. London (In re Smith)*, 224 B.R. 44, 48 (Bankr. E.D.Mich. 1998); *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963 (Bankr. N.D.Ill. 1990); *Maloney v. American Nat'l Bank (In re Terkeltaub)*, 117 B.R. 47 (Bankr. D.Conn. 1990).

⁴ The Trustee cites *Ford v. Loftin (In re Ford)*, 296 B.R. 537, 544-45 (Bankr. N.D.Ga. 2003), in its criticism of *King* and in support of the argument that the defense offered in section 549(c) does not apply to transfers in violation of the automatic stay. In discussing these provisions, however, *Ford* draws an important distinction emphasizing that whereas section 549(c) addresses debtor initiated post-petition transfers, section 362(a) covers collection efforts by creditors. 296 B.R. at 549. Hence, cases such as *In re Majors*, 298 B.R. 363 (Bankr. S.D.Iowa 2003) are distinguishable herein insofar as they address creditor-initiated actions. By contrast, in the case before this Court the issue squarely centers on alleged improper conduct by a debtor and protection for innocent parties affected thereby.

⁵ Section 549 governs post-petition transfers whether or not the trustee chooses to plead same as a cause of action.

⁶ In addition, the law provides additional protection against such post-petition transfers by simply filing a notice of bankruptcy in the real property records. No such filing is indicated in the record. Regarding the perfection of Bank One's interest, the record reveals that the assignment of First Horizon's interest to Bank One was recorded on April 18, 2002. See Exhibit G, attached to Trustee's Memorandum.

Similarly, the Trustee's assertion of his rights under section 544(a)(3) (rights and powers of a bona fide purchaser) and section 544(a)(1) (rights and powers of a hypothetical judgment lien creditor) do not advance his avoidance claim herein. These provisions address purported pre-bankruptcy transfers and interests, not post-petition transfers which are governed exclusively under section 549. The Court's prior decision in the case of *Nasuti v. Piano (In re Piano)*, Case No. G94-20539-REB, Adversary Proceeding No. 95-2044 (Bankr. N.D.Ga. Jan. 30, 1996), cited by Trustee herein, is consistent with this conclusion. In that Order, this Court addressed the avoidance of an unrecorded interest and held, among other things, that the trustee's failure to file notice of the bankruptcy did not affect the trustee's avoidance powers under the particular facts of that case.⁷ The facts in that case differed from the present case because in the former the transfer occurred prepetition, not postpetition as herein. By reason of the foregoing, the Court concludes that the transfer in question in this case is governed by section 549.

With respect to the application of section 549, the Trustee initially contends that the transfer should be avoided because knowledge of the bankruptcy filing should be imputed to Bank One. The Trustee does not dispute that First Horizon or Bank One paid fair value in exchange for their security interest in the property, but he does challenge Bank One's asserted ignorance of the bankruptcy.⁸ The Trustee contests the affidavit of Chris Cole, a custodian of Bank One's business records, on grounds that Cole lacks personal knowledge of the loan closing.

⁷ *Accord Murray v. Guillot (In re Guillot)*, 250 B.R. 570, 601-02 (Bankr. M.D.La. 2000) (reconciling sections 544 and 549 by characterizing latter as a "federal public records law").

⁸ Although the Trustee bears the burden of proof in seeking to avoid the transfer in question, Bank One bears the burden of proof at trial under section 549(c) as provided in Fed. R. Bankr. P. 6001. In terms of the burden of production, however, once a sufficient showing is made in support of a claim on summary judgment, the burden of coming forward with evidence shifts to the opposing party.

Admittedly, the bank's evidence would have been stronger had it been more specific regarding the basis of Cole's knowledge, which apparently arises from his review of the file, but the Court cannot weigh the evidence or draw inferences on summary judgment. Apparently, Cole cannot testify about the closing from personal knowledge, but Cole can make statements about the content of the files of which Cole is custodian. Further, the Trustee presents no evidence whatsoever of specific facts to counter this statement and show a genuine issue for trial. See Fed.R.Civ.P. 56(e).

The principal basis for the Trustee's initial contention centers on whether First Horizon's knowledge may be imputed to Bank One as a legal question on facts that are basically undisputed. Although knowledge has been imputed as in the case of *In re Adams*, 86 B.R. 867, 870 (Bankr. E.D.N.C. 1988), the circumstances in that case included a closer relationship between the parties that is simply not presented herein. First Horizon's closing attorney, Ben Bagwell, is not identified as having any relationship with Bank One. Further, there is no allegation of an agency or similar relationship between First Horizon and/or its agents and Bank One. Therefore, even if First Horizon had knowledge of the Debtors' bankruptcy, the Court concludes Bank One's status as assignee of First Horizon's interest is insufficient in and of itself to support imputation of knowledge. See generally *In re Wingo*, 89 B.R. 54, 58 (B.A.P. 9th Cir. 1988); see also *Bryant v. Woodland (In re Bryant)*, 103 B.R. 95, 101 (Bankr. E.D.Pa. 1989).

Beyond imputed knowledge, through supplemental briefs the Trustee further argues Bank One had actual or constructive notice of this case as a scheduled creditor. In response, the Bank offers the uncontested affidavit of Christopher Holly wherein Holly avers that the entity listed in the schedules as 'Bank One' refers to Bank One, Delaware, N.A. which is different from Bank One, N.A. as Trustee, who Holly states is the party defendant herein. Contrary to the Trustee's

argument, notice to one entity is not automatically notice to a separately named entity. Absent any countervailing evidence of actual notice being presented by the Trustee, the Court will not conclude that Bank One had actual knowledge of the Debtors' bankruptcy case by reason of notice from the Bankruptcy Court to a related, but separate, entity that was listed on the schedules. Again, the Trustee has presented no evidence to create a fact issue regarding the Bank's assertion as supported in its affidavit. Based on the undisputed facts of record and reasoning above, the Court therefore concludes that the assignment of First Horizon's interest in the subject property to Bank One comes under the exception provided in section 549(c).⁹

Upon review of the record and the argument and citation of authority presented, the Court concludes that the Trustee has not established that he is entitled to summary judgment on the claims presented herein as a matter of law, and thus entry of summary judgment in favor of Trustee is not appropriate. The Court further concludes that Co-Defendant Bank One has established an entitlement to summary judgment on Counts I and II of the complaint.

Accordingly, for the above reasons, it is

ORDERED that the motion of the Plaintiff-Chapter 7 Trustee for partial summary judgment be, and hereby is, **denied** on Counts I and II of the complaint; and it is

FURTHER ORDERED that the motion for partial summary judgment filed by Co-Defendant Bank One, NA be, and hereby is, **granted** as to said Counts.

A status conference will be scheduled by separate written notice on the remaining counts of the Complaint.

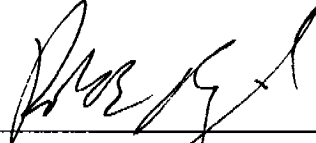
The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff-Chapter 7

⁹ As noted previously, other arguments were advanced by the parties herein but in light of this Court's ruling there is no need to address them.

Trustee, counsel for Bank One, N.A., counsel for Debtors, counsel for First Horizon Home Loan Corp., counsel for Southern Heritage Bank, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia, this 27th day of January, 2004.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

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Pursuant to Fed. R. Bank. P. 9022 and 7005, I certify that on the date stated below, I served a copy of the foregoing document(s) on each of the persons and entities named in the foregoing list either by United States Mail at the respective addresses shown or, if an attorney subscribes to a mail pick-up box in the Clerk's Office, by placing a copy in such attorney's mail pick-up box.

Date: 1/28/04

W. Yvonne Evans, Clerk of Court

By: 

James Cornett (CORNETTJ)