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1/3/07

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

IN RE:	:	
	:	Case No. 00-72597-PWB
CHARLES S. TURNER,	:	
Debtor.	:	Chapter 7
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C. BROOKS THURMOND, III, as Trustee,	:	
Plaintiff,	:	
FRANK D. SMITH,	:	
Intervenor Plaintiff,	:	
vs.	:	Adversary No. 02-6433
EUNICE TURNER and CHARLES S. TURNER,	:	
Defendants.	:	
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C. BROOKS THURMOND, III, as Trustee,	:	
Plaintiff,	:	
vs.	:	Adversary No. 02-6435
ROY TURNER, JR., JAMES ZO TURNER, and	:	
DOROTHY ROSS,	:	
Defendants.	:	
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FRANK D. SMITH, ELVIRA T. SMITH, and	:	
PETER MANCUSO,	:	
Plaintiffs,	:	
vs.	:	Adversary No. 05-9141
CHARLES S. TURNER and INDYMAC	:	
BANK, F.S.B.,	:	
Defendants.	:	
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**ORDER DIRECTING ENTRY OF FINAL JUDGMENTS**

These three adversary proceedings arise out of the chapter 7 bankruptcy case of Charles

Turner (the “Debtor”) in which C. Brooks Thurmond, III (the “Trustee”) is the trustee. The Court consolidated them by order entered on March 3, 2006 (the “Consolidation Order”).<sup>1</sup> The Consolidation Order provided for all further papers and pleadings to be filed in Adversary No. 02-6433.

In Adversary No. 02-6433, the Trustee sought to avoid, as a fraudulent conveyance, the Debtor’s transfer of an undivided one-half interest in his residence, 1787 Fayetteville Court, Atlanta, Georgia (the “Residence”), to his wife, Eunice Turner. In Adversary No. 02-6435, the Trustee sought to avoid, as a fraudulent conveyance, the Debtor’s transfer of an undivided two-thirds interest in 40 acres in Green County, Georgia (the “Greene County Property”) to Roy Turner, Jr., Dorothy T. Ross, and James Zo. Turner (collectively, the “Turner Siblings”). In Adversary No. 05-9141, Frank D. Smith (as original plaintiff) and Elivra T. Smith and Peter Mancuso (later joined as involuntary plaintiffs) assert that, if the transfer of the Debtor’s interest in the Residence is set aside, their judgment lien against the Debtor attaches to that interest. They also assert that their judgment lien has priority over a postpetition security deed to a one-half interest in the Residence the Debtor executed in favor of IndyMac Bank, F.S.B. (the “Bank”) following his postpetition acquisition of that one-half interest from Ms. Turner.

The facts and issues as asserted by the parties are summarized in the Consolidation Order and in the Court’s Order entered on September 21, 2006,<sup>2</sup> following the initial trial of certain issues on May 18, 2006, and will not be repeated here. For reasons set forth in the September 21 Order, the Court reopened the evidence on the issue of the Debtor’s insolvency at the time of the transfer of the

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<sup>1</sup>Adv. No. 02-6433 [44]; Adv. No. 02-6435 [34]; Adv. No. 05-9141 [17].

<sup>2</sup>Adv. No. 02-6433 [58].

Residence. The continued trial was held on December 19, 2006, following which the Court announced its findings of fact and conclusions of law. At that time, the Court also ruled on motions for summary judgment filed by the Bank and Mr. Smith. Consequently, all issues in these adversary proceedings have been resolved and entry of final judgments is now appropriate. This Order explains the bases for entry of such judgments.

### **I. Jurisdiction**

#### Adversary No. 02-6433

In Adversary No. 02-6433, the Trustee sought to avoid, as a fraudulent conveyance, the Debtor's transfer of an undivided one-half interest in the Residence to his wife, Eunice Turner. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(h) over which the District Court has jurisdiction under 28 U.S.C. § 1334(b) and which this Court is authorized to hear and determine under 28 U.S.C. § 157(b)(1) and LR 83.7, N.D. Ga.

#### Adversary No. 02-6435

In Adversary No. 02-6435, the Trustee sought to avoid, as a fraudulent conveyance, the Debtor's transfer of an undivided two-thirds interest in the Greene County Property to the Turner Siblings. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(h) over which the District Court has jurisdiction under 28 U.S.C. § 1334(b) and which this Court is authorized to hear and determine under 28 U.S.C. § 157(b)(1) and LR 83.7, N.D. Ga.

#### Adversary No. 05-9141

Frank D. Smith filed Adversary No. 05-9141 on September 27, 2005. The complaint asserts that Mr. Smith obtained a judgment lien against the Debtor that attaches to the Debtor's interest in the Residence if the transfer of it to Ms. Turner is set aside as a fraudulent conveyance. The

complaint also asserts that the judgment lien is superior to the postpetition deed to secure debt that the Bank acquired in connection with the refinancing of the Residence in May 2004. In connection with this transaction, Ms. Turner conveyed a one-half interest in the Residence to the Debtor. By Order entered on March 14, 2006, in Adversary No. 05-9141, the Court granted Mr. Smith's motion to add Elvira T. Smith and Peter Mancuso as additional party plaintiffs because they have an interest in the judgment lien.<sup>3</sup> As explained in an Order entered on October 31, 2006,<sup>4</sup> Ms. Smith and Mr. Mancuso were not served with process and had no notice of a trial conducted with regard to certain issues in these adversary proceedings on May 18, 2006, the results of which are summarized in the September 21, 2006, Order.<sup>5</sup> The October 31, 2006, Order gave Ms. Smith and Mr. Mancuso the opportunity to contest any matters decided prior to their appearance in the adversary proceedings at the continued trial scheduled for December 19, 2006, by separate Order entered that same day.<sup>6</sup> The October 31 Order further directed counsel for Mr. Smith to file a motion to add Mr. Mancuso and Ms. Smith as involuntary plaintiffs if they did not appear within ten days after its entry and that, if no objection to joinder were filed, they would be added as involuntary plaintiffs. Because no appearances were timely filed, counsel filed a motion to add them as involuntary plaintiffs on November 14, 2006.<sup>7</sup> The Court granted the motion by Order entered on November 22, 2006, in

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<sup>3</sup>Adv. No. 05-9141 [19].

<sup>4</sup>Adv. No. 02-6433 [68]; Adv. No. 05-9141 [25].

<sup>5</sup>Adv. No. 02-6433 [58].

<sup>6</sup>Adv. No. 02-6433 [69]; Adv. No. 05-9141 [26]

<sup>7</sup>Adv. No. 02-6433 [79].

the absence of objection.<sup>8</sup> It appears that both Mr. Mancuso and Ms. Smith were provided with adequate notice of these proceedings, of their interest therein, of their opportunity to participate, and of their imminent joinder by virtue of the service on them by the Clerk of the October 31 Order and the notice of scheduling of the trial for December 19.<sup>9</sup> Moreover, Mr. Mancuso appeared at and participated in the December 19 trial. In view of these circumstances and the fact that the interests of Mr. Mancuso and Ms. Smith with regard to these proceedings are the same as those of Mr. Smith and that they have been adequately represented in these proceedings, the Court determines that Mr. Mancuso and Ms. Smith may be properly considered as involuntary plaintiffs aligned with Mr. Smith and that as such they are properly before the Court.

The complaint filed by Mr. Smith asserts that this Court has jurisdiction of Adversary No. 05-9141 under 28 U.S.C. § 157(b)(2)(K) and § 1334 because it is a proceeding to determine the priority of the judgment lien, but it does not expressly state whether the proceeding is core or non-core or whether, if the proceeding is non-core, Mr. Smith does or does not consent to entry of final orders or judgment by the bankruptcy judge as required by FED. R. BANKR. P. 7008. The Bank's answer admits jurisdiction; it does not, however, state whether, if the proceeding is non-core, the Bank does or does not consent to the entry of final orders or judgment by the bankruptcy judge. None of the parties to these adversary proceedings have asserted that this Court should not enter final judgment. To the extent that, as the parties appear to agree, this is a core proceeding under 28 U.S.C. § 157(b)(2)(K), the District Court has jurisdiction of it under 28 U.S.C. § 1334(b) and this Court is

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<sup>8</sup>Adv. No. 02-6433 [81].

<sup>9</sup>Adv. No. 02-6433 [71, 72]. Counsel for Mr. Smith also served Mr. Mancuso and Ms. Smith with a copy of the October 31 Order. *Id.* [73].

authorized to hear and determine it under 28 U.S.C. § 157(b)(1) and LR 83.7, N.D. Ga. Alternatively, if it is not a core proceeding, its outcome could have a conceivable effect on the Debtor's bankruptcy estate. Consequently, the District Court has jurisdiction of it as a related proceeding under 28 U.S.C. § 1334(b), and this Court is authorized to hear it under 28 U.S.C. § 157(c)(1) and LR 83.7, N.D. Ga. Furthermore, the Court concludes that, because the parties have effectively consented to the entry of judgment by this Court, the Court is authorized to enter final judgment under 28 U.S.C. § 157(c)(2), even if it is a non-core proceeding.

## **II. Procedural Background and May 18, 2006 Trial**

In the Consolidation Order, the Court directed that a trial on the issues raised in Adversary Nos. 02-6433 and 02-6435 (*i.e.*, whether the Debtor fraudulently transferred the Residence and the Greene County Property, respectively), be conducted on May 18, 2006, and that the findings of fact and conclusions of law entered by the Court with regard to those issues would be applicable in all of the adversary proceedings.

The trial was conducted as scheduled. As explained in the Court's order entered on September 21, 2006,<sup>10</sup> the Court determined, based on findings of fact and conclusions of law announced at the conclusion of the trial, that the transfer of the Greene County Property was avoidable as a fraudulent conveyance under former O.C.G.A. § 18-2-22(3).

With regard to the transfer of the Residence, the Court determined that the transfer was not avoidable under former O.C.G.A. § 18-2-22(2) because Ms. Turner had no notice of the Debtor's actual intent to defraud a creditor but that it would be avoidable under former O.C.G.A. § 18-2-22(3) as a voluntary conveyance not for a valuable consideration if it rendered the Debtor insolvent. In its

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<sup>10</sup>Adv. No. 02-6433 [58].

findings of fact announced at the conclusion of the May 18 trial, the Court found that the Debtor's property other than his residence was worth more than the amount of his debts other than any alleged liability to Mr. and Ms. Smith. The September 21 Order determined that, for purposes of the fraudulent conveyance claim against the Debtor's wife, the default judgment obtained by the Smiths against the Debtor did not establish the Debtor's liability to the Smiths as of the date of the transfer. In the exercise of its discretion, the Court reopened the evidence to permit the parties to introduce additional evidence on the question of the Debtor's insolvency at the time of the transfer to Ms. Turner. The Court scheduled the continued trial on these matters for December 19, 2006.

In the meantime, Mr. Smith and the Bank filed motions for summary judgment.<sup>11</sup> The Court ruled on these motions following the conclusion of the trial on December 19, as summarized below.

### **III. December 19, 2006 Trial and Motions for Summary Judgment**

The continued trial as contemplated by the September 21 Order took place as scheduled on December 19, 2006. The Debtor Ms. Turner, the Trustee, Mr. Smith, and Mr. Mancuso attended the trial and had the opportunity to participate fully in the trial, introduce evidence, and cross-examine witnesses. Ms. Smith did not attend but, as noted earlier, she had the same opportunity to participate in the trial.

At the conclusion of the trial, the Court announced its findings of fact and conclusions of law, which are summarized as follows. The Court first found that there was no additional evidence or argument presented to cause the Court to modify its original findings and conclusions that, as stated in the September 21 Order, the Debtor's transfer of his one-half interest in the Residence did not render him insolvent unless he was liable to the Smiths. The Court then found that the evidence did

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<sup>11</sup>Adv. No. 02-6433 [61] (Bank); [77] (Mr. Smith).

not establish that the Debtor was liable to the Smiths for two reasons. First, the Court found that the Debtor and Mr. Smith had intended that the contract for the work on the Smiths' home be between the Smiths and the Debtor's corporation. Second, the Court found that, in any event, the evidence did not establish that the Debtor had breached the contract by failing to perform, that the work resulted in damage to the Smiths, or the amount of any damages that might have been sustained. Accordingly, the Court concluded that the evidence did not establish that the Debtor had been insolvent at the time of the transfer of his interest in the Residence to his wife.

Having determined that the initial transfer of the Debtor's interest in the Residence to his wife could not be avoided, the Court ruled on the remaining legal issues raised by the motions for summary judgment in view of this determination. Because the transfer to the Debtor's wife occurred prior to entry of judgment in favor of the Smiths, the Court ruled that the judgment lien could not have attached to the Residence prior to the Debtor's postpetition acquisition of a one-half interest from his wife after the filing of his bankruptcy petition in May 2004 in connection with the financing by the Bank and the simultaneous grant of a security deed by the Debtor and his wife encumbering the residence in favor of the Bank. Because the Debtor received a discharge in his bankruptcy case, the judgment lien could not, and did not, attach to any property acquired by the Debtor after the filing of his bankruptcy case. 11 U.S.C. § 524. The judgment lien now held by the Smiths and Mr. Mancuso, therefore, did not attach to the Debtor's interest in the Residence that he acquired after the filing of the petition. Consequently, the judgment lien has no priority over the Bank's security deed.

The Bank is entitled to summary judgment that the judgment lien did not attach to the Debtor's interest in the Residence that he acquired postpetition. Because the prepetition transfer is not avoidable and the Debtor had no interest in the Residence at the time the Smiths acquired the

lien, the Bank and the Debtor are entitled to judgment as a matter of law that the judgment lien does not attach to the Debtor's interest in the Residence and that the judgment lien does not have priority over the Bank's security deed. For the same reasons, Mr. Smith's motion for summary judgment is denied.

#### **IV. Entry of Judgments**

In accordance with the foregoing, judgments in these consolidated proceedings will be entered as follows.

First, based on the Court's findings of fact and conclusions of law announced at the trial on May 18, 2006, judgment will be entered in favor of the Trustee, and against the Turner Siblings, avoiding the Debtor's transfer of the Greene County Property.

Second, based on the Court's findings of fact and conclusions of law announced at the trial on May 18, 2006, in the Court's Order entered on September 21, 2006, and at the conclusion of the continued trial on December 19, 2006, judgment will be entered in favor of Ms. Turner, and against the Trustee, Mr. Smith, Ms. Smith, and Mr. Mancuso, that the prepetition transfer of the Debtor's one-half interest in the Residence was not a fraudulent conveyance and is not avoidable. Because the transfer of the Debtor's interest in the Residence to Ms. Turner is not avoidable, the postpetition security deed that she and the Debtor executed in favor of the Bank did not result in any loss of equity that the Trustee may recover. Thus, judgment will also be entered in favor of the Debtor and Ms. Turner, and against the Trustee, on that claim. Finally, because the transfer is not avoidable and because the judgment lien did not attach to the Debtor's interest in the Residence that he acquired after the filing of the petition, the Bank and the Debtor are entitled to judgment against Mr. Smith, Ms. Smith, and Mr. Mancuso that the judgment lien does not attach to the Debtor's interest in the

Residence and that the judgment lien has no priority over the Bank's security deed.

The Trustee's claim with regard to the Greene County Property is distinct from the other issues relating to the Residence. It is, therefore, appropriate and in the interests of judicial economy that the Court expressly direct the entry of separate judgments, one with regard to the Trustee's claims concerning the Greene County Property and one with regard to the claims of the Trustee, the Debtor, Ms. Turner, Mr. Smith, Ms. Smith, Mr. Mancuso, and the Bank concerning the Debtor's interest in the Residence. FED. R. CIV. P. 54(b), *applicable under* FED. R. BANKR. P. 7054. Accordingly, separate judgments will be entered.

It is **SO ORDERED** this 3 day of January, 2007.

  
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Paul W. Bonapfel  
United States Bankruptcy Judge