



IT IS ORDERED as set forth below:

Date: September 04, 2007

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
JAMES A. NORSWORTHY,	:	BANKRUPTCY CASE
	:	NO. 05-15098-WHD
Debtor.	:	
_____	:	
	:	
ADAM M. GOODMAN, Trustee,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 06-1070
v.	:	
	:	
SOUTHERN HORIZON BANK,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Renewed Motion for Summary Judgment filed by the Plaintiff Adam M. Goodman (hereinafter the "Trustee"), in his capacity as trustee of

the Chapter 13 bankruptcy estate of James Anthony Norsworthy (hereinafter the "Debtor"), against the defendant, Southern Horizon Bank (hereinafter "SHB"). The motion arises from a complaint to avoid a transfer of an interest in property of the Debtor, pursuant to section 547 of the Bankruptcy Code. Accordingly, this matter constitutes a core proceeding over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(F); 1334.

On May 8, 2007, the Court entered an order denying summary judgment in favor of the Trustee. In that order, the Court found that the following facts were not in dispute. On November 23, 2005, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The Debtor owns real property located at 152 Hamm Road, Jackson, Georgia (hereinafter the "Property"). The Debtor granted SHB a security interest in the Property pursuant to a security deed (hereinafter the "Security Deed") dated December 30, 2004. The security interest in the Property secured funds that were used by the Debtor to purchase his primary residence located at 3445 Bill Gardner Parkway, Locust Grove, Georgia (hereinafter the "Residence"). The Security Deed was filed for recordation with the Clerk of the Superior Court of Butts County on November 21, 2005. *See* Joint Statement of Undisputed Facts, ¶ 4.

The May 8th Order also found that the Trustee had established the existence

of the following elements of a preferential transfer: 1) the Debtor transferred a security interest in the Property to SHB within the preference period; 2) at the time of the transfer, the Debtor was insolvent; and 3) the security interest was transferred to SHB on account of an antecedent debt. However, because the Court found that the Trustee had presented no evidence from which the Court could determine that the transfer, if not avoided, would have enabled SHB to receive more in a Chapter 7 liquidation than it would have received absent the transfer, the Court could not grant summary judgment in favor of the Trustee. The Court noted that the Trustee introduced no evidence that would establish the value of the assets in the bankruptcy estate or the amount of the claims against the Debtor's assets, but invited the Trustee to submit a renewed motion for summary judgment.¹

On May 18, 2007, the Trustee submitted the instant renewed motion for summary judgment to permit the Court to address the final issue with regard to whether the transfer of the security interest to SHB should be avoided pursuant to section 547(b). As noted by the Trustee, section 547(b)(5) will be satisfied "[u]nless the [debtor's] assets are sufficient to provide in liquidation a one hundred percent distribution to the unsecured creditors." *In re Sweetapple Plastics, Inc.*, 77 B.R. 304, 311 (Bankr. M.D. Ga. 1987). To establish whether the debtor's assets would have

¹ In the May 8th Order, the Court also rejected SHB's argument that it is entitled to affirmative defenses under subsections 547(c)(1), (2), and (3).

provided for full payment to unsecured creditors in a hypothetical Chapter 7 case, the Court must, "at a minimum, have facts which establish Debtor's total assets and liabilities." *Kelley v. Chevy Chase Bank (In re Smith)*, 231 B.R. 130 (Bankr. MD. Ga. 1999).

In the Renewed Motion, the Trustee asserts that, in a hypothetical Chapter 7 case, SHB would have received more as a secured creditor than it would have received had it not obtained the security interest in the Property. This is true because, as a secured creditor, SHB would have been entitled to the entire value of the Property, and that amount would have exceeded the pro rata share of the estate's unencumbered assets that SHB could have received as an unsecured creditor.

The Trustee points to the schedules filed by the Debtor in his bankruptcy proceeding as evidence that the value of the Debtor's non-exempt assets, not taking into account the costs of sale, would total \$75,050 (\$68,000 for the Property and \$7,050 for the Residence).² Assuming a typical 10% cost of sale, the funds available for distribution to unsecured creditors in a hypothetical Chapter 7 case would have been approximately \$67,545. The proofs of claim actually filed in the Debtor's Chapter 13 case indicate total liabilities of \$40,124.33, exclusive of the \$154,336.32

² The Trustee appears to be giving SHB the benefit of the doubt that the Residence has non-exempt equity of \$7,080. The proofs of claim filed indicate that claims against the Residence most likely exceed its value.

evidenced by SHB's proof of claim. Accordingly, the Trustee contends that, in a hypothetical Chapter 7 case in which SHB had received no security interest in the Property, SHB would have been required to share the \$67,545 available with the other unsecured creditors and would, therefore, have received approximately \$53,630. As a secured creditor, SHB would have been entitled to receive the full value of the Property, which would have exceeded \$53,630.

The Court may take judicial notice of the amount of the actual claims filed in the Debtor's bankruptcy case. The claims actually filed in the bankruptcy case are deemed allowed and are prima facie evidence as to the amount and validity of the claim unless a party in interest objects to the claim. *See* 11 U.S.C. § 502(a); FED. R. BANKR. P. 3001(f). Accordingly, the claims actually filed provide sufficient evidence of the total amount of liabilities that would be asserted against the estate in a hypothetical Chapter 7 case, as well as the amount of SHB's claim.

It appears to the Court that, assuming that the Residence has no non-exempt equity, SHB would necessarily have received more as a secured creditor than it would receive as an unsecured creditor, regardless of the value of the Property. This is true because the Debtor would have had no other non-exempt assets for distribution to unsecured creditors. So long as the Debtor's non-exempt property was limited to the Property, and other unsecured creditors would be permitted to share in

the distribution of the proceeds from the liquidation of the Property, SHB would receive less as an unsecured creditor than it would have received as a secured creditor. The Court need not determine the actual value of the Residence, as SHB has made a judicial admission in the Debtor's bankruptcy proceeding to the effect that the Residence has no equity. *See* Consent Order Granting Relief from the Automatic Stay in Favor of Southern Horizon Bank, 05-15098-WHD, Docket No. 38 (Apr. 12, 2006). Accordingly, no questions of fact remain, for the Trustee has established that the transfer of the security interest in the Property enabled SHB to receive more than it would have received if the case were a Chapter 7 case; the transfer had not been made; and SHB had received payment of its claim as provided by the provisions of Chapter 7.

For the reasons stated above, the Court finds that the Trustee has satisfied all five elements of section 547(b). As explained in the May 8th Order, SHB has failed to establish that it is entitled to an affirmative defense. The Court, therefore, finds that the Trustee is entitled to judgment as a matter of law. The Trustee's Motion for Summary Judgment is **GRANTED**. The transfer of a security interest in the Property to SHB is hereby avoided pursuant to section 547(b) of the Bankruptcy Code.

END OF DOCUMENT