

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
DERRICK L. PATTERSON,)	CASE NO. 07-61961 - MHM
)	
Debtor.)	
)	
<hr/>		
NEIL C. GORDON, Trustee,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 08-6442
GMAC MORTGAGE CORPORATION,)	
)	
Defendant.)	

**ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The complaint filed by the Chapter 7 Trustee ("Trustee") seeks to avoid a transfer by Debtor to GMAC Mortgage Corporation ("Defendant")¹ of a first and second lien on Debtor's real property. By order entered June 22, 2010 (Doc. No. 34), Defendant's *motion for summary judgment* was denied (the "Order"). The Order concluded, "As

¹ Defendant's predecessor in interest is not a named defendant, but for the purposes of this order, "Defendant" will include Defendant's predecessor in interest.

perfection did not timely occur, Trustee may avoid the transfer of security interests to Defendant.”

Following entry of the Order, Trustee filed a *motion for summary judgment*, in which he presumes Defendant’s lien has been avoided and seeks a money judgment against Defendant (“Trustee’s Motion”). Defendant filed a *motion for partial summary judgment*, seeking a determination that Trustee is not entitled to a money judgment.

I. STATEMENT OF FACTS

On February 16, 2006, Debtor executed two promissory notes to Defendant, one for \$144,000 and another for \$18,000 – secured, respectively, by first and second liens on Debtor’s real property, located at 377 South Bend Avenue, SE, Atlanta, Fulton County, Georgia (the “Property”).² Two security deeds were executed to document these liens.

These security deeds were sent February 16, 2006 by Defendant’s closing attorney to the Clerk of the Superior Court of Fulton County (“Clerk”) for recording, but the filing was rejected and the deeds returned by Clerk with a notice headed “Rejection Letter.” Approximately ten months later, on January 25, 2007, Defendant re-submitted the security deeds to Clerk for recording. The following day, January 26, 2007, the security deeds were stamped “filed” and properly recorded. Ten days later, February 5, 2007, Debtor filed the bankruptcy petition initiating this Chapter 7 case. The Order found that

² The Property is residential real estate, but it is not Debtor’s domicile. Debtor owned several parcels of residential real estate that he rented to provide himself with income.

because Defendant's security deeds were not timely perfected, the transfers to Defendant could be avoided by Trustee as preferential transfers under 11 U.S.C. §547.

In Trustee's Motion, Trustee seeks a money judgment against Defendant equal to the value of the Property at the time of the transfer. Trustee shows that the main bankruptcy case was initially filed as a Chapter 11 case, but on May 31, 2007, Trustee was appointed Chapter 11 Trustee and on July 23, 2007, the case was converted to a Chapter 7 case, and Trustee became the Chapter 7 trustee.

On August 17, 2007, Trustee filed a motion to sell at auction 25 parcels of real property owned by Debtor (the "Properties"), including the Property (Doc. No. 205)(the "Motion to Sell"). Trustee sought to sell the Properties free and clear of liens and encumbrances, with valid liens to attach to the proceeds of the auction. By order and notice entered August 21, 2007, creditors and parties in interest were given notice of the Motion to Sell and of the deadline of September 11, 2007 for written objections; the order and notice also provided that if no objections were filed, the Motion to Sell would stand approved as of expiration of the objection deadline (Doc. No. 226).

Defendant and other lienholders of other properties filed objections to the Motion to Sell. Hearing on the Motion to Sell was originally scheduled for September 14, 2007, and was continued to September 21, December 12, 2007, and January 14, 2008. In connection with the Motion to Sell, Defendant asserted that the amount of its lien, \$162,000, should be the floor for any bid to purchase the Property at auction. By order

entered February 27, 2008, the sale of two of the Properties was approved with the lienholder's consent (Doc. No. 321) (the "Sale Order"). The Sale Order also authorized sale of the Property based upon a finding that the Property was the subject of a *bona fide* dispute, *i.e.*, Trustee asserted Defendant's lien was avoidable because it was not timely perfected; but the Sale Order provided that any title insurance company or errors and omissions insurance carrier could file an objection to the sale order within ten days. Defendant (not a title insurance company or errors and omissions insurance carrier) filed an objection to the Sale Order March 7, 2008. No subsequent order was entered.

The facts in this proceeding present extraordinary circumstances. At the time Trustee filed his Motion to Sell, the real estate market was just beginning to decline, but by the Spring of 2008, the real estate market, the stock market and indeed the entire U.S. – and world – economy were in free fall. The real estate market for the Properties, all in the Atlanta area, is still declining. Trustee alleges the current market value of the Property is \$8,000. Defendant alleges the current market value of the Property is \$16,000. This decline in value is due both to the decline in real estate value and significant deterioration of the Property itself.

The Bankruptcy Code, §§550(a) and 551, allow the bankruptcy court, as a court of equity, to exercise its discretion based upon all the facts and circumstances and to fashion a remedy that provides a fair and equitable solution for all parties. *Rodriguez v. Drive*

Financial Services, L.P. (In re Trout), 609 F. 3d 1106 (10th Cir. 2010); *Parks v. Brooks*,

452 B.R. 809 (Bankr. D. Kan. 2011). Section 551 provides:

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

The legislative history explains:

The operation of [§551] is automatic, unlike [under the Bankruptcy Act of 1898], even though preservation may not benefit the estate in every instance. A preserved lien may be abandoned by the trustee under proposed 11 U.S.C. 554 if the preservation does not benefit the estate.

Senate Report No. 95-989. The relevant portions of §550 provide:

- (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property. . . .
- (d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

The legislative history explains that §550 “enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee. . . .” Senate Report No. 95-989.

Relying on *Kelley v. General Motors Acceptance Corporation (In re Farmer)*, 209 B.R. 1022 (Bankr. M.D. Ga. 1997), Defendant argues that, in the case of avoidance of the transfer of a lien, only §551 is applicable. In *Farmer*, GMAC conceded that its lien

on the debtor's 1994 Pontiac Grand Am was a voidable preference but opposed Trustee's request for recovery of the value of the vehicle. The court, finding in favor of GMAC, explained:

This adversary proceeding seeks to set aside the transfer of a lien not a vehicle. The relief awarded pursuant to this adversary proceeding will be a voiding of that lien. Since the vehicle is already property of the estate, the recovery for the avoidance of the lien is inherent in the enhancement of the value of the vehicle, in its character as property of the estate, free and clear of the lien. This enhancement of value is itself a recovery of "the property transferred" as contemplated by section 550. In declaring the lien void, GMAC has suffered a complete loss of the benefit of the transfer. Subject to the recovery of payments made by the Debtors, any additional recovery against GMAC might cause GMAC to lose an amount greater than the funds advanced to make the loan.³

Id. at 1024-1025. Trustee, on the other hand, argues that in special circumstances, the value of the transferred property may, in the court's discretion, be awarded upon determination that a lien represents a voidable preference.⁴ Trustee relies upon the decisions in *Trout*, 609 F. 3d 1106 (10th Cir. 2010) and *USAA Federal Savings Bank v. Thacker (In re Taylor)*, 599 F. 3d 880 (9th Cir. 2010). Arguments similar to those espoused by the court in *Farmer* were presented to and rejected by the courts of the Ninth Circuit and the Tenth Circuit.

³ Arguably, *Farmer* could be read as concluding that avoidance of the lien is tantamount to an award of the property.

⁴ Of course, if Trustee is allowed to recover from Defendant the value of the Property, under §550(d), Defendant would retain its lien on the Property.

As discussed in *Trout* and *Taylor*, usually, simple avoidance of the lien under §551 is a sufficient remedy. Section 550, however, provides for remedies designed to restore the estate to the financial condition that would have existed had the transfer never occurred. In some circumstances, such as when the property is unavailable to the trustee (*e.g.*, because it has been repossessed and sold), or when the property's value has been diminished by conversion or depreciation, an award of the value of the property is appropriate. Of critical importance when determining whether to award the value of the property is that value must be easily or readily determined. *Taylor, supra*.

In the instant case, both parties agree that the Property, due to market conditions and deterioration, has lost substantial value. Trustee asserts that this loss in value was in large part due to Defendant's resistance to the sale of the Property as proposed by Trustee in the fall of 2007 and Defendant's insistence that the Property be offered for sale for an amount no less than the amount of the lien. Under these circumstances, Trustee may be entitled to recover the value of the Property, but of critical importance is the date at which the Property will be valued and whether a value may be easily or readily determined as of that date. Valuation as of the date of the transfer, however, would not necessarily restore the estate to the position it would have had if the transfer had not occurred. The Bankruptcy Code does not protect the estate from devaluation of assets resulting from the passage of time or elevate the estate above the risk of devaluation that any creditor would face. *Trout, supra*.

Trustee asserts that the value should be determined as of the date of the transfer, i.e. February, 2006. Valuation as of the date of the transfer, however, would not necessarily restore the estate to the position it would have had if the transfer had not occurred. The Bankruptcy Code does not protect the estate from devaluation of assets resulting from the passage of time or elevate the estate above the risk of devaluation that any creditor would have. *Trout, supra*. It was not until July 2007 that this case was converted and Plaintiff became the Chapter 7 Trustee. Trustee expeditiously filed a motion to sell the Property in September 2007. The sale was delayed, but Trustee overstates the extent to which Defendant was the cause of that delay. Trustee sought to sell at auction Debtor's numerous rental properties as a package, and Trustee's proposed auction was opposed by various of the other secured creditors, as well as Defendant. Nevertheless, it seems likely that if Defendant had acquiesced in the sale of the Property, the Property would have been sold before December 2007.

Therefore, the question becomes: *can the value of the Property be determined as of December 2007?* Unlike with personal property, such as motor vehicles, in which value as of a particular date in the past would be, at best, problematic, evaluation of real estate by professional real estate appraisers can yield more reliable determinations of historical value. If no reliable valuation of the Property as of December 2007 can be obtained, recovery from Defendant of the value of the Property may not be available; accordingly, it is hereby

ORDERED that, subject to Trustee's ability to establish a reliable determination of the value of the Property as of December 2007, Trustee's *motion for summary judgment* is **granted**. It is further

ORDERED that, as it is reasonable to accord the parties an opportunity to resolve the valuation issue by stipulation and to provide the parties an opportunity to obtain professional appraisals, within 21 days of the date of entry of this order, counsel for the parties shall confer regarding a discovery schedule and present a joint scheduling order.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 30th day of March, 2012.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE