

ENTERED ON  
JUN 22 2010  
DOCKET

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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

**ORDER DENYING DEFENDANT'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")<sup>1</sup> of a first and second lien on Debtor's real property. Trustee asserts that all of the value of the real property should be preserved for Debtor's estate, with Defendant's claim relegated to general unsecured status. Defendant filed a motion for summary judgment, which Trustee opposes. For the reasons set forth below, Defendant's motion is *denied*.

---

<sup>1</sup> 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.

## 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"). 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. Four checks accompanied the deeds' submission to Clerk: two checks (one for \$77 and another for \$59) for recording fees, and two checks (one for \$540 and another for \$54) to pay the intangible tax. While the recording fees submitted were the correct amounts, the total intangible tax submitted, \$594.00, represented an overpayment of \$64.50.

On March 1, 2006, the filing was rejected and the deeds returned by Clerk. In a notice headed "Rejection Letter," Clerk stated: (1) "The enclosed document has not been recorded"; (2) "The amount of the check for the recording fees is incorrect"; (3) "The intangible tax amount submitted is not correct"; and (4) "Please contact the recording division *within 30 days.*" (emphasis added)

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.

## II. CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The moving party is charged with “the burden of showing the absence of a genuine issue as to any material fact.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (U.S. 1970)(explaining that any evidence “must be viewed in the light most favorable to the opposing party”); *Clark v. Coats & Clark, Inc.*, 929 F. 2d 604 (11th Cir. 1991).

Trustee seeks to avoid Defendant’s January 26, 2007 creation of liens in Debtor’s Property (the “transfer”) pursuant to 11 U.S.C. § 547(b). In relevant part, § 547(b) provides:

[T]he trustee may avoid any transfer of an interest of the debtor in property –

- (1) to or for the benefit of a creditor;
- (2) for or on account of antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made –
  - (A) on or within 90 days before the date of the filing of the petition . . .; and
- (5) that enables such creditor to receive more than such creditor would receive if –
  - (A) the case were a case under chapter 7;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided for by the provisions of this title.

Transfers containing each of these elements are preferential and may be avoided by Trustee. Section 547(e)(2)(A) adds: “For the purposes of this section . . . a transfer is made—at the time such transfer takes effect between the transferor and the transferee, *if such transfer is perfected at, or within 30 days after, such time. . . .*” (emphasis added) Section 547(e)(2)(B) provides that if the transfer is not perfected within 30 days, the transfer is deemed to have occurred at the time the transfer is perfected.

### **III. DISCUSSION**

#### **a. Defendant’s Security Deeds Were Not Timely Perfected**

In Georgia, a security instrument takes effect only after being recorded by the clerk of superior court of the county in which the real property is located. *Durrence v. Northern Nat’l Bank*, 117 Ga. 385, 386 (1903); O.C.G.A. § 48-6-62. The instruments are deemed recorded only after both payment of the correct tax and certification by the tax collecting officer “that the intangible recording tax . . . has been paid, the date, and the amount of the tax.” O.C.G.A. § 48-6-61. The actions of a clerk of the court are purely ministerial in nature. *Bowers v. Price*, 171 Ga. App. 516, 518 (Ga. Ct. App. 1984). Ministerial acts are those in which “a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority.” *Id.*

Defendant submitted the security deeds on Debtor’s Property to Clerk February 16, 2006 with an overpayment of the intangible tax. Clerk, performing in a ministerial fashion, returned the security deeds March 1, 2006 with a rejection letter. Defendant’s

February 16, 2006 submission failed to constitute perfection of Defendant's security interest in the Property.

In Georgia, "it is the responsibility of the plaintiff and his counsel to see that the appropriate fees are paid in a timely manner." *Slater v. Spence*, 246 Ga. App. 365, 366-67 (Ga. Ct. App. 2000). The clerk may justifiably refuse a filing until the proper fees have been paid. *Id.* Clerk's rejection letter warned that "the enclosed document has not been recorded" and urged a response within 30 days; however, Defendant failed to respond until January 25, 2007. As a result, Defendant's security deeds were not perfected until January 26, 2007. Pursuant to §547(e)(2)(B), the creation of Defendant's liens is deemed to have taken place January 26, 2007 – the date of perfection. Therefore, as Defendant's security deeds were not perfected within 30 days after creation, they were not timely perfected.

**b. 11 U.S.C. § 547 – Defendant's Liens are an Avoidable Preference**

The term "transfer," as defined by the Bankruptcy Code, explicitly includes "the creation of a lien." 11 U.S.C. § 101(54). Defendant's creation of liens in Debtor's Property thus constitutes a "transfer" for the purposes of § 547(b).

To avoid this transfer each of the elements of § 547(b) must be satisfied. The only elements in contention, however, are whether the transfer was: (1) made for or on account of an antecedent debt owed by Debtor; and (2) made while Debtor was insolvent. To avoid the transfer, each of these two remaining elements must be present.

A debt is antecedent to a transfer if the debt was incurred prior to the transfer. 5 *Collier on Bankruptcy* ¶ 547.03[4] (16th ed. Rev., 2009) (“Although ‘antecedent debt’ is not defined by the Code, a debt is ‘antecedent’ if it was incurred before the transfer: the debt must have preceded the transfer.”). “[I]f a security transfer actually made for contemporaneous consideration” is not perfected within the 30-day statutory grace period, then any consideration received becomes antecedent debt.” 11 U.S.C. § 547(e); 5 *Collier on Bankruptcy* ¶ 547.03[4] (16th ed. Rev., 2009).

Defendant’s security interest in Debtor’s Property was not perfected until January 26, 2007. The liens arise in connection with consideration received by Debtor February 16, 2006 (*i.e.*, the \$18,000 and \$144,000 loans to Debtor), but perfection was delayed for approximately ten months – a period outside the 30-day grace period. Therefore, the transfers were made on account of antecedent debts.

For the purposes of preference avoidance, debtors are presumed to be insolvent for the 90 days immediately preceding their bankruptcy filing. 11 U.S.C. § 547(f). The transfer is deemed to have taken place January 26, 2007, ten days before Debtor filed his bankruptcy petition. Defendant has presented no facts to rebut the presumption of insolvency. As a result, the transfer took place while Debtor was presumptively insolvent. Therefore, Trustee can avoid the transfer.

#### IV. CONCLUSION


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

When the nonmoving party bears the burden of proof at trial, the moving party in a summary judgment motion must show that the nonmoving party has no evidence to support its case. *Hammer v. Slater*, 20 F. 3d 1137 (11th Cir. 1994). As Defendant failed to do so, it is hereby

ORDERED that Defendant's motion for summary judgment is *denied*.

**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 22<sup>nd</sup> day of June, 2010.

  
\_\_\_\_\_  
MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE