UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
THOMAS TANOH,	)	CASE NO. **08-79087** - MHM
	)	
Debtor.	)	
	)	
TAMARA MILES OGIER, Trustee,	)	
	)	
Plaintiff,	)	
v.	)	**ADVERSARY PROCEEDING NO. 09-6017**
	)	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., FREEDOM MORTGAGE CORPORATION and JP MORGAN CHASE BANK, N.A.,	)	
	)	
Defendants.	)	

ORDER

The complaint filed by Trustee seeks a determination avoiding Debtor's transfer to Defendants as a preference, and a judgment against Defendants for the value of the transferred interest. Defendants filed motions for summary judgment, and Trustee filed a cross-motion for partial summary judgment that the elements of § 547(b) have been met. For the reasons set forth below, Trustee's motion for partial summary judgment is granted, and Defendants' motion for summary judgment is denied.

STATEMENT OF UNDISPUTED FACTS

In 2002, Debtor and his wife, Evelyn Tanoh, acquired the property located at 5694 Newburn Court, Powder Springs, Georgia 30127 (the "Property"). On June 28, 2002, a Warranty Deed was executed by N&H Development, Inc. as grantor, with Debtor and "Evelyn A. Kwarteng" as grantees taking title to the Property "as joint tenants with right of survivorship." Kwarteng is Evelyn Tanoh's maiden name. On the same day, a Security Deed of the Property was executed by Debtor and Evelyn Kwarteng in favor of HomeBanc Mortgage Corporation ("HomeBanc"), to secure a promissory note in the amount of $146,200.

On June 28, 2004, Debtor and Evelyn Kwarteng refinanced the debt to HomeBanc, granting a Security Deed against the Property in favor of ABN AMRO Mortgage Group, Inc. ("ABN AMRO") in connection with a note in the amount of $151,000. This refinancing paid off the original HomeBanc note, discharged the HomeBanc Security Deed, and created a first priority lien on the Property in favor of ABN AMRO.

In July 2008, the debt on the property was refinanced through Freedom Mortgage Corporation ("Freedom") (the "2008 Refinancing"). A note dated July 24, 2008 was executed in favor of Freedom in the amount of $163,922 (the "2008 Note"). The 2008 Note was signed only by Debtor's wife as the sole borrower, and not by Debtor. On the same day, a Security Deed (the "2008 Security Deed") was granted in connection with the 2008 Note, by Debtor and his wife as grantors to Mortgage Electronic Registration

Systems, Inc. ("MERS") as nominee for Lender. The 2008 Security Deed named Freedom as Lender. After executing the documents, they were sent to Trademark Title, Inc. ("Trademark"), a company hired by Freedom to record the documents. Trademark sent copies to Freedom; in reviewing the documents, Freedom's post-closing department noticed that Debtor's wife had signed her name as "Kwarteng" rather than "Tanoh" on several of the documents, and instructed Trademark to have Debtor's wife re-sign the documents. A Discharge of Deed to Secure Debt was executed regarding ABN AMRO's Security Deed on the Property, and was recorded August 27, 2008. Two days later, the 2008 Security Deed was recorded.

Subsequent to the recording of these documents, JPMorgan Chase Bank, N.A., Issuer for the Government National Mortgage Association ("GNMA") Mortgage Backed Securities Pool # 690601 ("JPMCB Issuer") became the owner and holder of the 2008 Note. Thereafter, JPMorgan Chase Bank, N.A. ("Chase") became the owner of the 2008 Note due to Debtor's wife's default on the loan, which triggered a repurchase obligation by Chase for JPMCB Issuer's interest in the 2008 Note.

The Settlement Statement of the 2008 Refinancing identifies disbursements to (1) CitiMortgage, the successor in interest to ABN AMRO's interest in the property, in the amount of $133,906.15; (2) Bank of America in the amount of $10,234.18; (3) Ford Motor Credit in the amount of $6,745.17; (4) Sallie Mae in the amount of $2,927.79; and (5) National Credit System in the amount of $1,902.43. Debtor was liable for each of

these debts with the exception of the Sallie Mae claim, which was for Evelyn Tanoh's student loans.

Debtor commenced this Chapter 7 case September 29, 2008. Evelyn Tanoh is not a debtor in this case. Debtor's Schedule A discloses his half ownership in the Property, and a current value of that half interest at $82,500. Schedule A also shows a secured claim in the amount of $163,000. Debtor's Schedule D shows Freedom as holding a first mortgage against the Property, with a claim in the amount of $163,000. In Schedule C, Debtor claims an exemption of $5,000 with respect to the Property. Schedule B, *et al.*, show a Ford F-150 and a Ford Explorer, and Schedule F (unsecured debts) discloses a Bank of America claim of $22,000 and a Sallie Mae claim in the amount of $9,000.

CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if the party meets the burden of showing no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). Only disputes of fact which might affect the outcome of the proceeding will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Because the facts above are undisputed, the respective parties are entitled to prevail if those facts support judgment as a matter of law.

Trustee seeks a ruling that the transaction is a preference. Under the Bankruptcy Code, a trustee may avoid any pre-petition transfer of an interest of a debtor in property:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an 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 or filing of the petition; or
> >
> > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if -
>
> > (A) the case were a case under Chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). Even if these elements are met, however, § 547(c) enumerates several safe harbors for the creditor. Most applicable to this case, a trustee cannot avoid a transfer to the extent that the transfer was intended to be a contemporaneous exchange for new value given to the debtor, and was in fact substantially contemporaneous. 11 U.S.C. § 547(c)(1)(A-B).

DISCUSSION

A. Prima Facie Preference Transaction under 11 U.S.C. § 547(b)

The undisputed facts show the elements of a preference under 11 U.S.C. § 547(b) have been met. The transfer at issue occurred within the 90 day period leading up to commencement of the case. Because § 547(f) creates a presumption of Debtor's insolvency during the 90 day period leading up to commencement, and that presumption has not been challenged, §§ 547(b)(3-4) have been met.

1. The transfer was "to or for the benefit of a creditor."

With respect to § 547(b)(1), Defendants argue that Defendants are not creditors as defined by § 101(10), which includes entities that have a claim against a debtor at the time or before the petition is filed. Section 101(5) defines a "claim" as a right to payment or a right to equitable remedy for breach of performance. Defendants argue that, because they had no right to payment from Debtor at the time of the transfer, Defendants are not creditors of Debtor and the Freedom Security Deed does not embody a transfer to or for the benefit of a creditor. However, under § 102(2), "claim against the debtor" includes claim against property of the debtor. *See Johnson v. Home State Bank,* 501 U.S. 78 (1991) (holding that even though the debtor's personal obligation was extinguished, insofar as a mortgagee retained the right to payment in the form of proceeds from the sale of property as a remedy for default, the mortgage was a "claim" against the debtor).

Because, at the time of filing the petition, Defendants had rights in Debtor's property in the event of default, they are creditors of Debtor.

Defendants further argue that MERS, as "nominee" on the 2008 Security Deed, cannot be a creditor because MERS is not entitled to enforce the Freedom Note. However, Defendants cite no authority defining the role or rights of a "nominee," and the language of the 2008 Security Deed contradicts Defendants' assertion that MERS is not entitled to enforce the 2008 Note: "MERS (as nominee for Lender and Lender's successors and assigns), has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property..."

2. The transfer was "for or on account of an antecedent debt owed by the debtor before such transfer was made."

Defendants argue that, even if § 547(b)(1) is met, the debt arose with the transfer of the security deed, and therefore cannot be an antecedent debt. However, it is well established that a security transfer made for consideration, if not perfected during the statutory grace period, is made for or on account of an antecedent debt. *Corn Exch. Nat'l Bank & Trust, Co. v. Klauder,* 318 U.S. 434, 437, 63 S. Ct. 679, 682 (1943) (holding the consideration to be an antecedent debt to the unperfected security transfer); *See also, E.g., Kallen v. Ash, Anos, Freedman & Logan (In re Brass Kettle Restaurant, Inc.),* 790 F.2d 574 (7th Cir. 1986); *Grover v. Gulino (In re Gulino),* 779 F.2d 546, 14 C.B.C. 2d 289 (9th Cir. 1985). The 2008 Note was executed July 24, 2008, and the 2008 Security Deed

was recorded August 29, 2008; under § 547(e)(2), a transfer perfected within 30 days of taking effect is "made" at the time of execution, but a transfer perfected after that 30-day window is "made" when perfected. While this case is different from the bulk of precedent in that only Debtor's wife, and not Debtor, signed the Freedom Note, the result is the same. Although Debtor did not sign the Freedom Note, the Security Deed created a claim against Debtor through his property interest. Although its priority versus third parties is affected by the untimely perfection, signed but unrecorded security deeds under Georgia law "remain valid against the persons executing them." O.C.G.A. 44-14-63 (2010). The claim against Debtor arose at the time the Security Deed was executed, not at the time it was recorded. Recording the Security Deed merely affected the claim's priority over other debts. Therefore, the transfer, which occurred at the time the Security Deed was recorded, was made on behalf of the antecedent debt (the July 2008 note), which arose at the time the Security Deed was executed.

3. As a result of the transfer, the creditor would receive more than it would be entitled under the bankruptcy process had the transfer not been made.

Although the Freedom Security Deed created a claim against Debtor, that unperfected claim would hold a lower priority than a subsequent deed on the same property under § 44-14-63 and § 44-2-1 of the Georgia Code. When coupled with 11 U.S.C. § 544(a)(3), which grants Trustee the rights and powers of "a bona fide purchaser of real property ... from the debtor ... that obtains the status of a bona fide

purchaser and has perfected such transfer," regardless of Trustee's actual knowledge of the prior unrecorded security deed, the result is clear: Trustee would have a superior claim over the Property had the transfer not occurred. Therefore, § 547(b)(5) is met, and the undisputed facts establish all the elements of a preference under § 547.

B. Contemporaneous Exchange for New Value.

Even if the transfer meets the elements enumerated under §547(b), a trustee may not avoid a transfer that was intended to be a contemporaneous exchange for new value, and that was in fact substantially contemporaneous. 11 U.S.C. §547(c)(1). As Trustee apparently concedes that the transfer was intended to be a contemporaneous exchange for new value, only the second part remains at issue: whether the exchange was substantially contemporaneous. In applying the "substantially contemporaneous" language to the perfection of a lien in connection with the making of a loan, the court must apply a flexible standard, taking into account all the facts and circumstances. *Gordon v. NovaStar Mortgage, Inc. (In re Hedrick),* 524 F.3d 1175, 1190 (11th Cir. 2008). "[T]he time taken to perfect the interest, the cause of any delay, and the motivations for it" should be weighed, and "[t]he most important fact may be whether the delay ... was intended by the creditor or resulted from its negligence." *Id.* The length of time a creditor usually takes to perfect the interest in other such transactions is also relevant. *Id.*

Defendants assert that the delay was the reasonable result of Freedom's efforts to correct the discrepancy between the signature of Debtor's wife and the typed name on the

documents. Defendants characterize the discrepancy as an error on behalf of Evelyn Tanoh, and that the correction of that error caused a 36-day delay in recording the 2008 Security Deed. Defendants further point to the doctrine of equitable subrogation to show that the 2008 Security Deed was subrogated to the rights of the 2004 Security Deed until that lien was cancelled on public record August 27, 2008. Therefore, Freedom's claim was unsecured for only two days, until it was recorded August 29, 2008, and thus, the delay was reasonable.

Trustee contends that the delay between executing and recording the 2008 Security Deed was not a result of Freedom's desire to correct the signature discrepancy, but instead was a result of Freedom's negligence. Trustee notes that, in the affidavit of the post-closing department employee that told Trademark to correct the discrepancy, the employee explains that she did not tell Trademark to delay recording the documents, and did not intend a delay. Trustee also points to the long chain of documents referencing this Property, and that in each, Debtor's wife signed her name as Evelyn Kwarteng; Trustee asserts that this suggests fault on the part of Freedom in drafting the documents with a signature line reading "Evelyn A. Tanoh," and does not support Defendants' contention that it was an error on the part of Mrs. Tanoh that caused the delay.

The discrepancy between the signature and the typed name on the documents lies entirely with Defendants and their agents. The documents were prepared with the name "Evelyn A. Tanoh" when Debtor's wife had historically signed documents referencing the

Property as "Evelyn Kwarteng." Nor could Debtor or Debtor's wife be responsible for the delay in identifying and correcting the discrepancy. In correcting their own error, Freedom or Freedom's agents either failed to recognize or chose to ignore the statutory significance of perfecting the interest within 30 days.

In discussing whether the exchange was substantially contemporaneous, it is helpful to look to the exemption given by § 547(c)(3), which is meant to exempt a transfer that creates a security interest in property acquired by the debtor to the extent that such interest secures new value and such transfer is perfected within 30 days after the debtor receives possession of such property. In fact, § 547(c)(3) at first glance appears to be the more directly applicable exemption. Had Defendants argued for an exemption under §547(c)(3), however, the transfer would fall outside the 30 day window. In characterizing this transaction as a "substantially contemporaneous exchange for new value" instead of a transfer that creates a security interest in property, Defendants seek to extend the "substantially contemporaneous" language of § 547(c)(1) beyond the bright line "30 days" of § 547(c)(3).

C. Freedom's Policy Arguments

Freedom asserts that the policy behind preference law does not support Trustee's preference action. A preference is a transfer through which a creditor receives payment of a greater percentage of his claim against a debtor than he would have received through distribution from the bankrupt estate, had the transfer not been made. *Union Bank v.*

Wolas, 502 U.S. 151, 160-61, 112 S.Ct. 527, 533 (1991). This facilitates equality of distribution among creditors, and prevents creditors from "racing to the courthouse to dismember the debtor during his slide to bankruptcy." *Id.*

Freedom asserts that this case does not involve creditors "racing to the courthouse;" rather, Freedom helped Debtor by refinancing the loan on the Property. But the Code does not require such a race. While discouraging pre-bankruptcy competition amongst creditors was an intended consequence of § 547, it is not a prerequisite for triggering the section. Indeed, the more important goal of the preference section is to "facilitate the prime bankruptcy policy of equality of distribution amongst creditors of the debtor." *Id.* at 161.

Next, Freedom argues that the estate was not diminished by the transaction, and so a preference cannot exist under § 547. In *Marathon Petroleum Co., LLC v. Cohen (In re Delco Oil, Inc.)*, the U.S. Court of Appeals for the Eleventh Circuit refused to find diminution of the estate to be a requirement for avoidance of a post-petition transfer under the Bankruptcy Code because § 549(a) did not require it, and neither § 549(b) nor § 549(c) exempt a "harmless" transaction from the statute. 599 F.3d 1255, 1262 (2010). That same reasoning applies here; the *prima facie* elements of a preference transfer under § 547(b) do not require diminution of the estate, and a transfer absent diminution of the estate is not an exempted transaction under §547(c).

Finally, Freedom asserts that the relief sought by Trustee is not legally authorized. Freedom notes that if the court avoids the security interest that Debtor transferred to Freedom, it would leave a security interest in only Mrs. Tanoh's portion of the Property – that is, a security deed on a joint tenancy with right of survivorship. In the realistic event of a foreclosure on the Property, Freedom believes this would result in an expanded proceeding contesting the effectiveness of Mrs. Tanoh's pledge, and would cause excessive and unnecessary harm to Freedom. Further, Freedom notes that no § 547 authority authorizes a partial avoidance of a single security deed granted by both a debtor and a nondebtor where the property is held in joint tenancy with rights of survivorship. Freedom's argument that no authority for avoiding the transfer of a particular type of interest exists simply ignores the plain language of the statute: "Except as provided in subsections (c) and (i) of this section, the trustee may avoid *any* transfer of an interest of the debtor in property..." 11 U.S.C. § 547(b) (emphasis added).

D. Motion to Strike Trustee's Motion for Summary Judgment and Affidavit of Maureen McCain.

On September 21, 2010, an order was issued establishing November 15, 2010 as a deadline for filing motions for summary judgment. On November 19, 2010, that deadline was extended to December 30, 2010. Trustee filed her motion for partial summary judgment and the affidavit of Maureen McCain January 19, 2011. Defendants filed a motion to strike both documents as late filings.

Trustee points out that no prejudice arises from allowing the motion for partial summary judgment. Deciding Defendants' motions for summary judgment necessarily involves deciding Trustee's motion for summary judgment. Defendants' first argument, that the undisputed facts show that the elements of § 547(b) *have not* been met, is the mirror image of Trustee's motion, that the undisputed facts show that the elements of § 547(b) *have* been met. Because Defendants have not pointed to any prejudice arising from allowing Trustee's motion for partial summary judgment, Defendants' motion to strike Trustee's motion for summary judgment should be denied.

The same cannot be said for the affidavit of Maureen McCain, which related to the proper procedure used in closing transactions such as the one at issue. BLR 7026-2 plainly states, "Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert" as well as to name its own expert. Trustee failed to designate Ms. McCain as an expert prior to filing Trustee's motion for partial summary judgment. Because Defendants had no opportunity to depose Ms. McCain, Defendants have been forced to speculate on the significance of Ms. McCain's phrasing. Therefore, Defendants' motion to strike the affidavit of Maureen McCain should be granted. Ms. McCain's testimony, however, related only to Defendants' affirmative defenses and not to the *prima facie* elements of a preference transfer, and as such is superfluous to this decision.

The undisputed facts show that the transfer met the elements of § 547(b), but those same facts cannot be used to show the elements of an affirmative defense under § 547(c) have been met as a matter of law. Accordingly, it is hereby

ORDERED that Trustee's motion for partial summary judgment is ***granted;*** Freedom Mortgage Corporation's motion for summary judgment is ***denied;*** and the motion for summary judgment of Mortgage Electronic Registration Systems, Inc. as nominee for Freedom Mortgage Corporation and JPMorgan Chase Bank, N.A. is ***denied.***

The Clerk shall serve a copy of this Order upon Debtor, counsel for Debtor, counsel for Plaintiff, counsel for Defendants, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 26th day of September, 2011.

MARGARET M. MURPHY
UNITED STATES BANKRUPTCY JUDGE