



IT IS ORDERED as set forth below:

Date: June 12, 2012

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

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

In re:	:	Case No. 08-43724-MGD
	:	
LINDA COTY BULLOCK,	:	Chapter 7
	:	
Debtor.	:	Judge Diehl
	:	
KYLE A. COOPER, TRUSTEE,	:	
	:	Adversary Proceeding
Plaintiff,	:	
	:	No. 10-04111-MGD
v.	:	
	:	
LINDA COTY BULLOCK, LENOX	:	
FINANCIAL MORTGAGE, LLC,	:	
GINA PAIGE BULLOCK,	:	
	:	
Defendants.	:	

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LENOX
FINANCIAL MORTGAGE, LLC'S MOTION FOR SUMMARY JUDGMENT**

This case is before the Court on the Defendant Lenox Financial Mortgage, LLC's ("Lenox") Motion for Summary Judgment ("Motion"). (Docket No. 39). The Plaintiff Trustee timely filed a

response to Lenox's Motion and Lenox filed a reply. (Docket Nos. 41 & 43). The Trustee commenced this adversary proceeding by filing a complaint to avoid and recover transfers of real property interests under the avoidance powers set forth in 11 U.S.C. § 548 and 549 and under state law causes of action. As to Lenox, the Trustee asserts a claim for conversion (Count 3), a claim for fraudulent transfer under O.C.G.A. § 18-2-74 (Count 2), and a claim for an unauthorized post-petition transfer under 11 U.S.C. § 549 (Count 1). For the reasons set forth below, Lenox's Motion is granted as to the claims for conversion (Count 3) and for fraudulent transfer (Count 2), but is denied as to the claim for unauthorized post-petition transfer.

Material Undisputed Facts

Linda Coty Bullock ("Bullock"), debtor in the underlying bankruptcy case, filed a petition for relief under Chapter 11 of the Bankruptcy Code on November 3, 2008. Bullock's case was converted to Chapter 7 on December 17, 2009, and an interim Chapter 7 trustee was appointed on December 23, 2009. After the petition was filed, Bullock took out a reverse mortgage loan with Lenox on July 16, 2010. In exchange for the loan, Bullock entered a Home Equity Conversion Loan Agreement ("loan agreement"), signed a Home Equity Conversion Fixed Rate Note ("note"), and granted a Home Equity Conversion Security Deed ("security deed") to real property at 411 Billy Bullock Road, Dallas, Georgia ("Property").¹ (Loan Agreement, Exh. M, Docket No. 40; Security Deed, Exh. A, Docket No. 1; Note, Exh. T, Docket No. 40). As of July 16, 2010, the Trustee had not filed a notice on the property records in the Superior Court of Paulding County – where Bullock

¹ Mortgage Electronic Registration Systems, Inc. ("MERS") is named as the grantee on the security deed. MERS simply acts to hold legal title to the security deed, while the lender or the lender's assignee holds beneficial title to the security deed. Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 Loy. J. Pub. Int. L. 177 (Fall 2010).

owned property – to give notice that Bullock was in bankruptcy. (Plaintiff’s Response to Defendant’s First Request for Admissions, Exh. I, Docket No. 40).

According to the face of the Home Equity Conversion Mortgage Payment Plan (“payment plan”) that is attached to and referenced by the loan agreement, Bullock was to receive a principal loan amount of \$180,236. (Payment Plan, Exh. N, Docket No. 40). According to the face of the security deed, the security deed secures the note “up to a maximum principal amount” of \$430,000, including all accruing interest on the loan. (Security Deed, Exh. A, Docket No. 1). Lenox represents that the security deed will secure an approximate amount of \$197,783 as of July 2012, based on the interest accrued by then. (Motion, Part III, § C). As with many home equity conversion loans, the note does not require Bullock to make monthly payments. (Plan Payment, Exh. N & Note, Exh. T, Docket No. 40).

Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court in accordance with Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate only if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The moving party has the burden of establishing its entitlement to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The moving party must identify the

pleadings, discovery materials, or affidavits that show the absence of a genuine issue of material fact. *Celotex Corp. v. Cartrett*, 447 U.S. 317, 322 (1986). Once this burden is met, the nonmoving party cannot merely rely on allegations or denials in its own pleadings. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). Rather, the nonmoving party must present specific facts supported by evidence that demonstrate there is a genuine material dispute. *Id.* The “[o]ne who resists summary judgment must meet the movant’s affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial.” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000); Fed R. Civ. P. 56(e). In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). When the material facts are not in dispute, the role of the Court is to determine whether the law supports a judgment in favor of the moving party. *Anderson*, 477 U.S. at 250.

Discussion of Law

A. Unauthorized Post-petition Transfer

The Trustee seeks to avoid and set aside the security deed as an unauthorized post-petition transfer under 11 U.S.C. § 549 and 11 U.S.C. § 550. Pursuant to the same sections, the Trustee also seeks to recover from Lenox \$430,000, which the Trustee alleges is the value of the security deed Bullock transferred out of the estate. Lenox responds that it is not a proper party since it did not fund the reverse mortgage loan but merely acted as the mortgage broker. Alternatively, Lenox responds that, in accordance with § 549(c), the security interest cannot be avoided because Lenox had no knowledge of the debtor’s pending bankruptcy, Lenox acted in good faith, and the security deed was for the present, fair equivalent value of the reverse mortgage loan. (Motion for Summary Judgment

p. 10-11, Docket No. 39). The Trustee disputes these facts.

Section 549 provides that the trustee may avoid a transfer of property of the estate that occurs after the filing of the petition and without court authorization. 11 U.S.C. § 549(a). However, the trustee may not avoid such a transfer “to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value,” unless the trustee had filed a notice of the petition on the property records before the transfer occurred. 11 U.S.C. § 529(c).

After considering the record in the light most favorable to the Trustee, the Court concludes that the requirements for granting summary judgment to Lenox have not been met on the § 549 claim. The Trustee has provided sufficient evidence to support the existence of at least two issues of material fact. First, there is an issue of material fact as to whether Lenox is the appropriate defendant in this adversary proceeding. Lenox asserts that it merely acted as a mortgage broker between Bullock and Generation Mortgage Company (“Generation”), and that Generation actually funded the reverse mortgage loan. (Motion, p. 10). Lenox supports this factual claim with the affidavit of Brian Brown and a Notice of Assignment, Sale, or Transfer of Servicing Rights. (Brown Affidavit, ¶ 11, Docket No. 39; Notice of Assignment, Exh. P, Docket No. 40). However, the Trustee has pointed to several of the reverse mortgage loan documents that all name Lenox as the “Lender.” These documents include the HUD Settlement Statement, Home Equity Conversion Loan Agreement, Home Equity Conversion Mortgage Payment Plan, Home Equity Conversion Security Deed, and Closed End Fixed Rate Note. (Exhs. L-O, T, Docket No. 40). Therefore, a sufficient issue of material fact exists as to whether Lenox is the lender and proper defendant in this adversary proceeding.

Second, there is an issue of material fact as to whether Lenox had knowledge of the Bullock’s

pending bankruptcy at the time the reverse mortgage loan was issued. Lenox points to affidavits and loan documents to show that on several occasions Bullock represented both orally and in writing that she was not involved in a pending bankruptcy case. (Brown Affidavit, ¶ 8; Kham Affidavit, ¶ 6; Loan Documents, Exh. D, H, Docket No. 40). But the Trustee points to Bullock's Answer to the Complaint and to her Response to Plaintiff's Requests for Admissions. (Docket No. 6; Defendant's Responses and Objections to Plaintiff's Request for admissions, Exh. B/Part 3, Docket No. 41). Bullock does not directly and unequivocally admit she told Lenox of the bankruptcy, but her responses imply that she did. Because the Court does not weigh the evidence on summary judgment, and because the Court views the evidence in the light most favorable to the Trustee, an issue of material fact exists as to whether Lenox had knowledge of Bullock's active bankruptcy case at the time of the loan. Consequently, summary judgment is inappropriate on the § 549 claim.

B. Fraudulent Transfer

Lenox also seeks summary judgment on the fraudulent transfer claim brought under O.C.G.A. § 18-2-74. That section, a part of Georgia's adoption of the Uniform Fraudulent Transfer Act, defines a fraudulent transfer. Section 18-72-4(a) of the O.C.G.A. provides that

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
 - (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
 - (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (A) Was engaged or was about to engage in a business transaction for which the remaining assets of the debtor were unreasonably small in relation to the business transaction; or
 - (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

O.C.G.A. § 18-2-74(a).

Even assuming all material facts are undisputed, Lenox is entitled to judgment as a matter of law because the Trustee cannot prevail on a claim under O.C.G.A. § 18-2-74(1) on the facts as plead. O.C.G.A. §18-2-74 is wholly inapplicable to the facts of this case. Summary judgment will therefore be entered on this claim for Lenox.

The Trustee cannot prevail under O.C.G.A. §18-2-74 because the Trustee is not a “creditor” who is be able to utilize O.C.G.A. §18-2-74. First, to bring this state-law claim, the Trustee would have to proceed under 11 U.S.C. § 544(b) (the strong arm power). Section 544(b) of the Bankruptcy Code allows a trustee to step into the shoes of an unsecured creditor and avoid a transfer that is avoidable under state law. *Westgate Vacation Villas, Ltd. v. Tabas (In re Int’l Pharmacy & Discount II, Inc.)*, 443 F.3d 767, 770 (11th Cir. 2005). Here, the Trustee does not plead that he is moving under § 544; rather, the Trustee simply asserts a state law cause of action.²

Second, even if the Trustee had plead a claim under § 544, the Trustee still could not prevail on a claim under § 544 and O.C.G.A. §18-2-74 because of when the transfer was made. The transaction of which the Trustee complains involves a post-petition transfer of a security interest in property of the bankruptcy estate. The property transferred was not property of Ms. Bullock but of her bankruptcy estate. If the transfer had occurred pre-petition, the Trustee could have standing to raise this state-law claim. But the transfer here was made post-petition. The status of the Trustee as a lien creditor or bona fide purchaser under § 544 is as of the commencement of the case and cannot be employed to avoid a post-petition transfer of estate property. *In re 31-33 Corp.*, 100 B.R.

² The Court notes that the statute of limitations for raising claims under § 544 expired prior to the filing of this action. Lenox did not raise this defense, however.

744, 747-48 (Bankr. E.D. Pa. 1989) (concluding that “§ 549 is the exclusive means by which a trustee may attack post-petition transfers”). “Section 544(b), and hence, state law, applies solely to prepetition transfers.” *Hirsch v. PA Textile Corp., Inc. (In re Centennial Textiles, Inc.)*, 227 B.R. 606, 610 (Bankr. S.D.N.Y. 1998). The Trustee is unable to utilize § 544 here because the undisputed facts of this case deal squarely with a post-petition transfer. What the Trustee is seeking to remedy is the action by Bullock in conveying estate property post-petition — the exact facts that § 549 was designed to remedy. Thus, the Trustee’s remedy begins and ends with § 549. A determination of whether Lenox is protected under the exception of § 549(c) ends the inquiry.

Lenox is therefore granted summary judgment on the claim under O.C.G.A. § 18-2-74 because, on the undisputed facts, Lenox is entitled to judgment on this claim as a matter of law.

C. Conversion

As to the conversion claim, the Trustee did not dispute Lenox’s argument that a conversion claim can be premised on personal property but not on real property. Further, Georgia law is clear that a conversion claim can only be brought as to personal property. *Levenson v. Ward*, 294 Ga. App. 104, 105 n.2 (2008); and see *Maryland Cas. Ins. Co. v. Welch*, 257 Ga. 259, 261 (1987). Because there are no material disputed facts related to this claim, and because the Lenox is entitled to judgment as a matter of law, Lenox is granted summary judgment on the conversion claim.

Accordingly, it is

ORDERED that the Lenox’s Motion for Summary Judgment is **DENIED** as to the unauthorized post-petition transfer claim under 11 U.S.C. § 549. It is further

ORDERED that Lenox’s Motion for Summary Judgment is **GRANTED** as to the fraudulent transfer claim under O.C.G.A. § 18-2-74 and as to the conversion claim. It is further

ORDERED that all parties to this action submit a consolidated pre-trial order within thirty (30) days of entry of this Order.

The Clerk of Court is directed to serve a copy of this Order on the Plaintiff, the Defendants, and their respective counsel.

END OF DOCUMENT