



**IT IS ORDERED** as set forth below:

*James E. Massey*

**Date: August 6, 2012**

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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IN RE: CASE NO. 09-80845

Gordon B. Singer and Rose S. Singer,  
CHAPTER 7

Debtors. JUDGE MASSEY

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Jason L. Pettie, Trsutee,

Plaintiff,

v. ADVERSARY NO. 11-5389

Marie R. Saffan and David Saffan,

Defendants.

\_\_\_\_\_|

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

Both sides in this dispute move for summary judgment. The issue is whether Debtor Rose S. Singer has an interest in a condominium that her mother, Defendant Marie R. Saffan, purchased in 2001 in the names of herself, her son, Defendant David Saffan, and Ms. Singer, as

joint tenants with rights of survivorship. Plaintiff contends that the deed alone is evidence that Debtor has an interest in the condominium that is property of the estate.

In opposing the motion the Defendants filed affidavits in which Ms. Singer and the Defendants state that Marie Saffan paid the entire purchase price of the condo, lived there for some time, rented the condo and retained all of the net profits and never intended to make a gift of any interest in the condominium to either of her children by including them in the deed. Rather, she said she was following advice of counsel to put legal title in her children's names to better enable them to manage the property when she was no longer able to do so. Ms. Singer and Mr. Saffon stated that they have received no benefit of any kind with respect to the condo. Under these facts, the Debtor and the Defendants contend that Marie Saffan owns all of the equitable interest in the condo through a purchase money resulting trust.

Defendants have also shown that the income generated by the condo is an important element in Mrs. Saffan being able to pay her bills in an assisted living facility.

Pursuant to Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056, a party moving for summary judgment is entitled to prevail if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material for the purposes of summary judgment only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

The moving party bears the initial burden to establish that no genuine factual issue exists or alternatively, that the non-moving party cannot prove its case at trial. *Celotex*, 477 U.S. at

323-326; *Exigent Technology, Inc. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1307-1309 (11th Cir. 2006). The movant must point to the pleadings, discovery responses or supporting affidavits that tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court must construe this evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249; *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987). "If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003)." *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1314 (11th Cir. 2007).

"If the non-moving party bears the ultimate burden of proof regarding the claim at issue in the motion, that party, in response to the motion, must go beyond the pleadings and establish, through competent evidence, that there truly is a genuine, material issue to be tried." *Shell v. Schwartz*, 357 Fed.Appx. 250, 251, 2009 WL 4854133, 1 (11th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. at 324).

The affidavits of the Defendants and the Debtor create an issue of fact concerning the extent of the equitable interest, if any, of Ms. Singer in the condo and concerning the detriment to Defendants that a sale might entail relative to the benefit to the estate. Moreover, even if the affidavits were not sufficient to prove by clear and convincing evidence that no gift was made, they nonetheless constitute evidence of their claim which might be established at a trial. Plaintiff has not shown that it would be impossible for Defendants to prove their case at trial. *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991). Hence, Plaintiff's motion for summary judgment must be denied.

Defendants have also not established the absence of an issue of fact. Under their theory that the property is held in a purchase money resulting trust, Defendants have the burden of proving by clear and convincing evidence that Marie Saffan did not make a gift of an interest in the condo to Rose Singer in 2001. O.C.G.A. § 53-12-92 (Ga. L. 1991)

When the moving party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it "must support its motion with credible evidence ... that would entitle it to a directed verdict if not controverted at trial." [*Celotex*] at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting); see also *Chanel, Inc.*, 931 F.2d at 1477. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party. See *id.* at 1477. If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, "come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Id.*; see also Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting).

*U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11<sup>th</sup> Cir. 1991).

Nothing in the affidavits submitted by Defendants shows that Ms. Singer did not accept a gift. Rather, her affidavit, like that of her brother, repeats what Mrs. Saffan stated and is largely hearsay. On the critical issue of whether she accepted a gift from her mother of an interest in the condo, the affidavit of Mrs. Singer is silent. It uses the passive voice and avoids any mention of her understanding: "The Subject Property, and any proceeds from it, was never intended to be a gift or devise to me or my brother." Affidavit of Rose Singer, Doc. No. 15, p. 2. Intended by whom? The deed itself is some evidence that a gift was intended and therefore creates an issue of fact. Hence, Defendants' motion for summary judgment must be denied.

Accordingly, Plaintiff's motion for summary judgment and Defendants' motion for summary judgment are DENIED.

\*\*\*END OF ORDER\*\*\*