IT IS ORDERED as set forth below:

Date: April 2, 2014

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	
	}	Case No. 09-79795-JRS
MYKEL ANN HACKNEY,	}	
	}	Chapter 7
Debtor.	}	

JEFFREY K. KERR, Trustee,	}	
	}	ADVERSARY PROCEEDING
Plaintiff,	}	
	}	
v.	}	No. 13-5056-JRS
	}	
STEPHEN JOHN ROESER, AMY LINDSEY ROESER, and FIDELITY BANK,	}	
	}	
	}	
Defendants.	}	

ORDER

This adversary proceeding raises questions regarding a bank's responsibility to investigate a possibly avoidable transfer of property when loaning money to purchase that property. The Chapter 7 Trustee here (the "Trustee") has successfully obtained a judgment to

avoid the transfer of the property here as fraudulent, but he has for the most part been stymied in his efforts to actually collect on his judgment and recover the property or its value.

The Trustee filed this adversary proceeding to recover the property's value from Fidelity Bank ("Fidelity"),[1] who financed the purchase of the property and received a security deed about two and a half years after the prior transfer that was ultimately avoided. The Trustee argues that he may recover from Fidelity as a mediate or immediate transferee pursuant to Section 550(a) of the Bankruptcy Code. In response, Fidelity raises the "good faith transferee" affirmative defense contained in Section 550(b), under which it bears the burden of proof. *Goldman v. Capital City Mort. Corp.* (*In re Nieves)*, 648 F.3d 232, 237 (4th Cir. 2011) (citation omitted). Fidelity has filed a Motion for Summary Judgment—arguing that it undertook an arms-length lending transaction in good faith and without knowledge that the earlier transfer was avoidable—which is now before the Court. [Doc. 45].

Summary Judgment Standard

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. *Id.* The Court "should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his favor." *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (citations and punctuation omitted). The court may not weigh conflicting evidence or

[1] The Trustee also named the purchasers of the property as defendants here, but they have settled, and the claims against them were dismissed.

make credibility determinations. *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 919 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (1994) (en banc).

For issues upon which the moving party bears the burden of proof at trial, he must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of his claim on that legal issue. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). He must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. *Id.* If the moving party makes such a showing, he is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of material fact. *Id.*

Keeping this standard in mind, the Court considers the following facts based on the parties' submissions, drawing all justifiable inferences in the Trustee's favor and recognizing Fidelity's burden to demonstrate an absence of any genuine issues of material fact.

The Property and the Debtor's Bankruptcy Cases

Susie A. White—the Debtor's mother—acquired title to 201 Feld Avenue, Decatur, Georgia (the "Property") in 1976. (Def.'s Statement of Material Facts ("SMF") ¶1). In August 2005, White conveyed the Property via quitclaim deed to her daughter—the Debtor—Mykel Ann Hackney. (Def.'s SMF ¶2). In February 2008, the Debtor conveyed the Property via quitclaim deed back to her mother for no consideration (the "Transfer"). (Def.'s SMF ¶3).

Apparently the Debtor was struggling to pay her bills around the time of the Transfer. In April 2008—just a couple months after the Transfer—the Georgia Department of Revenue recorded a State Tax Execution against the Debtor in the DeKalb county property records, and the IRS similarly recorded a Notice of Tax Lien against the Debtor. (Compl., Ans. ¶12–15). The next month, the Debtor filed a petition for Chapter 13 bankruptcy relief, which was dismissed a few months later. (Case No. 08-69357-JEM). A year later—on July 31, 2009—the Debtor

commenced the underlying case here by filing a petition for Chapter 7 bankruptcy relief, and she listed the Transfer on her Statement of Financial Affairs, thus alerting the Chapter 7 Trustee (the "Trustee") to it. (Def.'s SMF ¶5–6).

The Probate Dispute

Meanwhile, the Debtor's mother died in May 2009. (Def.'s SMF ¶4). The validity of her will was contested, with one of her daughters filing a version of it in the Probate Court of DeKalb County, Georgia (the "Probate Court") and her siblings (including the Debtor) then filing a caveat challenging that will as fraudulent. (Kerr Aff. ¶7–8).

As the will dispute dragged on, the Trustee sought to unwind the Transfer as fraudulent and needed to name a defendant representing the Debtor's mother's estate. (Kerr Aff. ¶9). So on January 26, 2010, the Trustee filed a Petition for Appointment of Temporary Administrator in the Probate Court, in which he sought the appointment of a temporary administrator for the Debtor's mother's probate estate so that he could file a fraudulent transfer adversary proceeding and name her as defendant. (Def.'s SMF ¶7). The Trustee was ultimately not able to get a temporary administrator appointed due to bond requirements. (Kerr Aff. ¶12).

Eventually, the will dispute was resolved when the first will was withdrawn and a different will was then filed in the Probate Court. (Kerr Aff. ¶13). On August 13, 2010, Alexis Suzanne Denise Hackney—the Debtor's daughter—filed a petition to probate her grandmother's will in the Probate Court, which entered an order and issued Letters Testamentary confirming her as the executor of her grandmother's probate estate. (Def.'s SMF ¶8–10).

A few weeks later, the Trustee's counsel sent a demand letter to the Debtor's daughter seeking turnover of the Property, to which she did not respond. (Kerr Aff. ¶14). About a month later—on September 30, 2010—the Trustee initiated Adversary Proceeding No. 10-6537 (the

"Fraudulent Transfer Adversary") in this Court, seeking to avoid the Transfer and naming the Debtor's daughter (as executor of her grandmother's estate) as defendant. (Def.'s SMF ¶11).

The Purchase and the Title Search

Despite the demand letter and the Fraudulent Transfer Adversary pending against her, the Debtor's daughter sold the Property to Stephen John Roeser and Amy Lindsey Roeser on October 26, 2010 for $222,500.00 (the "Purchase"). (Def.'s SMF ¶12). To finance the Purchase, the Roesers obtained a loan for $215,825.00 from Fidelity and granted it a security deed. (Def.'s SMF ¶14). As part of the closing, the Debtor's daughter signed an affidavit indicating that she had authority as the executor of her grandmother's estate to sell the Property. (Def.'s SMF ¶13).

In connection with the Purchase, an agent for Fidelity and the Roesers (the "Title Search Agent")[2] reviewed the real property records and concluded that the Debtor's mother's estate held title to the Property. (Def.'s SMF ¶15). Fidelity admits that its agent was aware of the Transfer from the Debtor to her mother via quitclaim deed as well as the previous transfer to the Debtor from her mother, also via quitclaim deed. (Compl., Ans. ¶82–83). Fidelity also admits that none of its agents attempted to read the Debtor's mother's will, nor did they attempt to read any of the filings in the Probate Court or in the Debtor's bankruptcy case (nor did they search for any such bankruptcy case). (Compl., Ans. ¶72–76, 84–86).

Fidelity asserts that it followed normal lending practices and points to several things the Trustee could have done to properly put the world on notice of the voidability of the Transfer: as of the date of the Purchase, the Trustee had not filed a *lis pendens* in the real property records indicating that the Property was the subject of an adversary proceeding, nor did he file any notice of the Debtor's bankruptcy case. (Def.'s SMF ¶16,17).

[2] The identity of the Title Search Agent is unclear from the record currently before the Court.

The Trustee Avoids the Transfer and Seeks to Recover from Fidelity

After learning about the Purchase, the Trustee implored the Probate Court to remove the Debtor's daughter as executor of her grandmother's estate, and the Probate Court eventually obliged, removing her and substituting Mary Margaret Oliver as executor. (Kerr Aff. ¶19–20). The Trustee then substituted Oliver as the named defendant in the Fraudulent Transfer Adversary. (Kerr Aff. ¶20). The Fraudulent Transfer Adversary went to trial, and this Court found in favor of the Trustee, entering judgment in his favor against Oliver as executor of the probate estate for $201,266.79 plus interest and costs. (Adv. Case No. 10-6537-JEM, Doc. 39). The Trustee has been able to collect only a small fraction of this judgment amount. (Kerr Aff. ¶22–23).

The Trustee later commenced this adversary proceeding, seeking to recover the value of the Property from the Roesers and/or Fidelity. The Roesers have settled with the Trustee, and the Court entered an order approving that settlement. (Case No. 09-79795, Doc. 67). Fidelity, on the other hand, maintains as an affirmative defense that it took its interest in the Property "for value . . . in good faith, and without knowledge of the voidability" of the Transfer. 11 U.S.C. § 550(b)(1). The Trustee responds that Fidelity is not a good faith transferee because it knew or should have known that the Transfer was avoidable at the time of the Purchase.

Fidelity filed a Motion for Summary Judgment (the "Motion"), which is now before the Court. [Doc. 45]. The Trustee filed a response [Doc. 56], and Fidelity filed a reply brief [Doc. 64]. Judge Massey[3] heard oral arguments on the Motion on December 17, 2013. At the conclusion of that hearing, Judge Massey expressed his concern that neither party had filed affidavits from anyone qualified to attest to the procedures a title examiner ought to follow under the circumstances of this case.

[3] This adversary proceeding and the underlying bankruptcy case were transferred from Judge Massey to Judge Sacca on January 22, 2014. To the extent necessary, pursuant to Federal Rule of Civil Procedure 63—applicable to this adversary proceeding via Bankruptcy Rule 9028—the Court certifies that it is familiar with the record and that the determination of this matter may be completed without prejudice to the parties.

Fidelity has since filed such an affidavit [Doc. 66], to which the Trustee has filed an objection [Doc. 69]. In his objection, the Trustee argues that Fidelity did not properly or timely disclose its affiant as an expert witness and asks that the Court disregard the affidavit. The Court agrees that the affidavit was not timely filed, so the Court will not consider it at this time. However, the Court will ultimately overrule the Trustee's objection and will consider the affidavit on a renewed motion for summary judgment, but only in the event the Trustee fails to retain his own expert and on the terms more fully set forth below.

The Section 550(b) Good Faith Transferee Defense

Section 550(a) of the Bankruptcy Code provides that a trustee may recover the property involved in an avoidable transfer or its value from any of several various parties, including "any immediate or mediate transferee." 11 U.S.C. § 550(a)(2). Fidelity admits that it is either an immediate or mediate transferee of the Property. (Compl., Ans. ¶115). But Fidelity maintains that it was a "good faith" transferee, invoking § 550(b), which provides that a trustee may not recover from a transferee that takes "for value . . . in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. § 550(b)(1). The parties do not dispute that Fidelity provided value, namely the money it loaned in exchange for a security deed to the Property. Thus the question here is whether Fidelity acted in good faith and without knowledge of the voidability of the Transfer.

Section 550(b)(1) is phrased in the conjunctive, so Fidelity must prove that it took its security deed in good faith *and* without knowledge of voidability. Put another way, the Trustee could win if Fidelity fails to show that it *both* did not have knowledge of voidability *and* acted in good faith.

The Bankruptcy Code does not define what it means to take "without knowledge of the voidability of the transfer avoided" or "in good faith." As for knowledge of voidability, several

circuit courts have held that "actual knowledge of facts that would lead a reasonable person to believe that the transferred property was voidable is all that is required to show knowledge." *Goldman v. Capital City Mort. Corp.* (*In re Nieves),* 648 F.3d 232, 238 (4th Cir. 2011); *see also Internal Rev. Svc. v. Nordic Village, Inc. (In re Nordic Village, Inc.),* 915 F.2d 1049, 1055 (6th Cir.1990) (same). It is not necessary to have a "complete understanding of the facts and receipt of a lawyer's opinion that such a transfer is voidable; some lesser knowledge will do." *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 898 (7th Cir. 1988) (citations omitted). This question is necessarily a factual one: what constitutes actual knowledge of facts putting someone on notice that a transfer was avoidable will depend on the facts of each case.

Here, Fidelity admits it knew that the Transfer occurred—the Title Search Agent knew the Debtor transferred the Property to her mother via quitclaim deed—and that her mother had transferred that same property to her via quitclaim deed a few years prior. But the Court does not have to decide whether these facts, standing alone, are sufficient as a matter of law to hold that Fidelity had actual knowledge that the Transfer was avoidable because the Trustee has not filed a motion for summary judgment. The Trustee asserts that Fidelity "must have" known about the State Tax Execution and Notice of Tax Lien filed in the property records against the Debtor just a few months after the Transfer. But these allegations are not currently supported by any evidence in the record. To the contrary, these negative filings against the Debtor did not occur until after the Transfer; thus they may have been outside the chain of title and may not have been revealed during the title search. But without any testimony from the Title Search Agent or someone else familiar with what facts Fidelity's agents actually knew, questions of fact remain regarding what facts were actually known to Fidelity, and thus whether Fidelity had actual knowledge of the Transfer's avoidability.

Even if Fidelity is ultimately able to prove that its agents did not have actual knowledge of avoidability, it still must prove that it acted in good faith. Most courts focus on an objective definition of good faith and "look to what the transferee objectively 'knew or should have known' instead of examining the transferee's actual knowledge from a subjective standpoint."[4] *In re Sherman,* 67 F.3d at 1355 (citations omitted). Thus transferees cannot simply bury their heads in the sand and later claim they took in good faith "if they remain willfully ignorant in the face of facts which cry out for investigation." *In re Nieves*, 648 F.3d at 241 (punctuation and citation omitted); *see also In re Sherman,* 67 F.3d at 1355 (holding that "a transferee does not act in good faith when he has sufficient knowledge to place him on inquiry notice of the debtor's possible insolvency") (citations omitted). When analyzing what a business transferee should have known, courts take "into consideration the customary practices of the industry in which the transferee operates." *In re Nieves*, 648 F.3d at 239–240 (citation and footnote omitted).

The Trustee contends that the two quitclaim deeds between the Debtor and her mother should have put Fidelity on notice that something was amiss and that the Title Search Agent "must have" discovered the Debtor's State Tax Execution and Notice of Tax Lien, which would indicate the Debtor was having financial troubles around the time of the Transfer. The Trustee further alleges that Fidelity's agent(s) reviewed or should have reviewed the case in the Probate Court and thus discovered or should have discovered the Trustee's Petition for Appointment of Temporary Administrator, which revealed or would have revealed Debtor's bankruptcy filings and the pendency of the Fraudulent Transfer Adversary.

But in order to determine what Fidelity should have known, the Court must take into consideration the customary practices in the mortgage lending industry, specifically those

[4] *But see In re Nieves*, 648 F.3d at 239–240 (analyzing good faith under both objective and subjective prongs).

involving title searches related to sales of property in a situation such as this one.[5] What would a reasonably diligent investigation look like under these circumstances? Should the two transfers via quitclaim deed have caused Fidelity's agents to investigate further? Should Fidelity have discovered the Debtor's State Tax Execution and Notice of Tax Lien? Should the docket in the Probate Case have been reviewed? Should the Trustee's Petition for Appointment of Temporary Administrator have been found and reviewed, and if so, would Fidelity have discovered that the Trustee intended to bring the Fraudulent Transfer Adversary?

Without testimony from anyone qualified to speak to the customary practices in the mortgage lending industry—and specifically with respect to title searches involving sales of property by probate estates—the Court cannot determine whether Fidelity performed a reasonably diligent investigation.[6] What "constitutes reasonable diligence will vary with the facts of each case" and "this determination is appropriately considered to be a question of fact." *Martin v. Occupational Safety & Health Review Comm'n*, 947 F.2d 1483, 1485 (11th Cir. 1991). Accordingly, the question of whether Fidelity performed a reasonably diligent investigation—

[5] Although courts typically refer to "customary practices," the customary practice in an industry—while very relevant and probative—is not necessarily determinative of good faith. If the customary practice in an industry now is to do something that was once considered sloppy or negligent—perhaps because the perceived risk is worth taking—this Court may not find the practice to be undertaken in good faith, even if it is now customary. For example, if the title examination industry now customarily relies on the records available on the internet from the Georgia Superior Court Clerk's Cooperative Authority in lieu of doing a physical title examination—even though there is a disclaimer on the website not to rely on those records—such an unreasonable yet customary practice would not suffice to establish good faith.

[6] In its Supplemental Brief filed after the oral argument in front of Judge Massey, Fidelity offered the deposition testimony of John Pruitt—its senior vice president and division manager of its residential mortgage group—who suggested that reviewing the Probate Court docket in a case such as this one would be "far outside normal lending practices." His testimony has not been offered as that of an expert capable of attesting to customary practices in the title examination industry, but instead he was testifying on behalf of Fidelity as its employee. Although this Court is not holding that a defendant asserting a good-faith defense must present third-party expert testimony in order to establish prevailing industry standards, certain cases, such as this one, may warrant or even require such specialized testimony. "[A]n inflexible rule that expert testimony must be presented in every case to prove a good-faith defense unreasonably would restrict the presentation of a defense that ordinarily is based on the facts and circumstances of each case and on a particular witness' knowledge of the significance of such evidence." *Gold v. First Tenn. Bank Nat. Assoc. (In re Taneja)*, 743 F.3d 423, 431 (4th Cir. 2014) (citations omitted). For example, if the issue in this case was whether a practice of Fidelity—rather than a third party agent it hired—was customary in the industry, the testimony of an employee of Fidelity might be sufficient.

and thus whether it financed the Purchase and received its security deed in good faith—presents a genuine issue of material fact regarding what Fidelity should have known about the avoidability of the Transfer. This genuine issue of material fact—as well as potential issues surrounding Fidelity's actual knowledge—is sufficient to preclude summary judgment.

Conclusion

For the reasons stated above, it is hereby

ORDERED that Fidelity's Motion for Summary Judgment is DENIED. It is further

ORDERED that both the Trustee and Fidelity shall promptly and properly identify and disclose any expert witness who may testify at trial no later than April 30, 2014, and the parties shall depose such expert witnesses within 30 days after the last such disclosure. Should the Trustee fail to identify and disclose an expert witness who will testify regarding what investigation Fidelity should have undertaken by the deadline specified herein, Fidelity may renew its Motion for Summary Judgment and file additional affidavits or other evidence in support, and the Court would then consider its motion anew. If the Trustee does timely identify an expert witness, the Court will not consider a further motion for summary judgment, but instead the parties shall submit a consolidated pre-trial order in the form set forth in B.L.R. 7016-2 to the Court by the earlier of (a) 90 days after the entry of this Order or (b) 30 days after the date of the deposition of the last expert witness.

[END OF ORDER]