U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-80193

ORDER ON SUMMARY JUDGMENT

The relief set forth on the following pages, for a total of 11 pages including this page, is hereby ORDERED.

FILED BY THE COURT
07/03/2007

US Bankruptcy Court Judge
District of South Carolina

Entered: 07/03/2007

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re Daniel Gabriel Harbin and Tara Donald Harbin, Debtors.	C/A No. 05-03174-HB Adv. Pro. No. 06-80193-HB Chapter 7
Randy A. Skinner, Plaintiff, v. Daniel Gabriel Harbin, Tara Donald Harbin, Bank of America, N.A., Defendants.	**ORDER GRANTING SUMMARY JUDGMENT TO BANK OF AMERICA, N.A., AND DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court upon the Motion for Summary Judgment and to Dismiss filed by Bank of America, N.A. (BOA), and the Trustee's Motion for Summary Judgment Against BOA. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(1). The parties have agreed that there remain no issues of material fact and have provided to the Court a Stipulation of Facts and Documents for Cross Motions for Summary Judgment. Pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052, and referring to the Stipulation, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Donald Gabriel Harbin and Tara Donald Harbin ("Harbins" or "debtors") filed a Chapter 11 bankruptcy petition on March 18, 2005. At the time of the petition, the Harbins owned a piece of real estate located in Oconee County, known as the E. Brown Street Property, which became property of the Harbins' bankruptcy estate.

2. BOA held claims represented by a note and secured by a mortgage on the E. Brown Street Property. BOA filed a proof of claim based on its note and mortgage in the amount of $21,361.00.

3. On May 31, 2005 BOA filed a Motion to Terminate Automatic Stay ("Stay Motion") and on June 7 amended the motion.[1] Both the original and amended Stay Motions state: "In the event that relief is granted . . . [t]he claimant further agrees that any funds realized from any sale of collateral pursuant to state law, in excess of all liens, costs, and expenses, will be paid to the estate."

4. On June 2, 2005 the Harbins, through their counsel, filed an objection to BOA's Stay Motion, asserting that, "Debtors have equity in the collateral."

5. The Stay Motion was settled by agreement between the debtors and BOA. In accordance with Fed. R. Bankr. P. 4001(d)(1) BOA served a notice and motion for approval of the settlement agreement on the United States Trustee and all creditors on June 24, 2005. Rule 4001(d)(1) also requires that a copy of the agreement accompany the 4001(d) notice and motion. BOA did attach a copy of the agreement for which approval was sought, entitled "Settlement Order for Payment Schedule and Modification of Automatic Stay" (hereinafter "Settlement Order"). The proposed Settlement Order noticed pursuant to Rule 4001(d)(1) contained the following language: "Lender further agrees that any funds realized from the foreclosure sale, in excess of all liens, costs, and expenses, will be paid to the trustee."

6. At the time of the Rule 4001(d) notice, there was no trustee appointed in this case. The case was proceeding under Chapter 11 of the Code with the Harbins as debtors in

[1] The Stay Motion was amended only to add copies of the loan documents as attachments.

possession assuming many of the rights, responsibilities and powers of the trustee pursuant to 11 U.S.C. §§ 1107(a) and 1108.

7. SC LBR 4001-1 applies to "Proceedings to Modify Stay" and 4001-1(g) provided that "[u]nless otherwise allowed by the Court, all settlements shall be effectuated by a consent order or a certified settlement order attached as Exhibit C."[2] Exhibit C contains the following language: "The movant shall report to this Court any funds received as a result of a lawful disposition of the real property in excess of its total indebtedness plus any other valid lien against the subject property." This language does not appear in the Settlement Order proposed by the parties.

8. No party objected to the Rule 4001(d) notice or the terms of the proposed Settlement Order. As a result, the Settlement Order was signed without the Exhibit C language by Judge Wm. Thurmond Bishop, who was then assigned to this case, and entered on July 19, 2005.

9. Debtors defaulted under the terms of the Settlement Order. An Affidavit of Default was filed by BOA on August 18, 2005. Attached was a proposed Order Modifying Stay. The proposed Order Modifying Stay did not repeat the language from the Settlement Order that "any funds realized in excess of its debt will be paid to the trustee." Further, it did not contain any language similar to that in Exhibit C concerning reporting to this Court any excess funds received.[3]

10. On August 24, 2005, the proposed Order Modifying Stay was signed by the Court and entered as submitted. The Order Modifying Stay granted BOA relief from the stay

[2] At the time of these proceedings, the provision regarding settlements was designated as SC LBR 4001-1(g). However, this local rule was subsequently revised, and the language of 4001-1(g) now appears unchanged as 4001-1(a)(7). Similarly, the certified settlement order attached to the rule as Exhibit C is unchanged from the time of these proceedings.

[3] SC LBR 4001-1 does not require the inclusion of any such language in orders granting relief from the stay.

to pursue its state law rights as to the E. Brown Street Property as a result of the terms of the Settlement Order. There was no appeal from or request to modify the Order Modifying Stay in any way.

11. On October 10, 2005 BOA filed a Foreclosure Complaint on the E. Brown Street Property in the South Carolina Court of Common Pleas for Oconee County. BOA's Foreclosure Complaint merely demanded in its prayer for relief that "the distribution of any surplus [be applied] pursuant to Rule 71, SCRCP."

12. Subsection (c) of Rule 71, SCRCP, sets forth the procedure for the disposition of surplus after a foreclosure sale and puts the control of any surplus funds in the hands of the state court officer conducting the foreclosure sale. Rule 71(c) states:

> **(c) Disposition of Surplus.** In the event of a surplus fund resulting from the sale, the master or other officer conducting the sale shall at the time he makes his report to the court on the sale and disbursements, cause to be furnished to all parties appearing in the action a notice advising of the surplus fund. Unless otherwise provided therein, the original order of reference in a foreclosure action shall be considered to extend to the disposition of the surplus fund.
>
> Any party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, may have a hearing to determine such entitlement. All such claims must be verified or supported by affidavit and must be filed with the master or other officer conducting the sale within forty-five (45) days from the date of the filing of the statement of receipts and disbursements provided in Rule 71(b). If a claim is not filed within the said forty-five (45) day period, the same shall be considered abandoned and waived as to such surplus. The claim must contain the name of the claimant, the nature of the claim, the date the claim arose, and a calculation of the amount claimed. At the expiration of the claim filing period, the master or other officer conducting the sale shall set a hearing to accept proof of the claims filed. Only those who have filed a timely claim are entitled to notice of the hearing. In the event no claims are filed against the surplus funds, the fund shall be paid over to the mortgagor or lienor entitled to the fund.

13. BOA's Foreclosure Complaint does not mention the Harbins' bankruptcy or any limitations on the scope of the foreclosure or any requirement for reporting or conditioning the distribution of the proceeds. Further, there is neither evidence nor

allegation before the Court indicating that BOA advised the state court of the pending bankruptcy in any manner whatsoever or asked that court to alter the procedures of Rule 71(c) in any way on account of the bankruptcy court's orders or the content of BOA's Stay Motion.

14. As a result of BOA's efforts to remove the property from the bankruptcy stay and pursue the foreclosure in state court, an Order and Judgment of Foreclosure was entered in state court on December 8, 2005. The Oconee County Clerk of Court sold the E. Brown Street Property to a third party on January 3, 2006 for $43,000.00. BOA's mortgage was paid. The foreclosure sale generated a surplus of $14,582.85.

15. On March 9, 2006 the bankruptcy case was converted from chapter 11 to chapter 7, and a notice of conversion was sent on the same date to the Harbins' attorney, BOA's attorneys, the United States Trustee and parties in interest.

16. On March 14, 2006 Randy A. Skinner was appointed Trustee in the case. Thereafter the Harbins were no longer debtors in possession and their rights and responsibilities set forth in 11 U.S.C. §§ 1107(a) and 1108 passed to the Trustee.

17. On April 28, 2006, the Oconee County Clerk of Court sent to all defendants in the foreclosure a Notice of Surplus Funds pursuant to Rule 71(c), SCRCP. The South Carolina Department of Revenue filed a claim for $259.38 on May 11, 2006, and the Harbins filed a claim dated May 8, 2006 for "the surplus money that remains."[4] There is no evidence or assertion before the Court that any notice of the surplus was given to the trustee or general creditors in this case.

[4] The debtors did not claim and were not entitled to claim an exemption in the property in question nor the proceeds.

18. On July 14, 2006 the Master in Equity for the Court of Common Pleas for Oconee County ordered that the South Carolina Department of Revenue was entitled to $259.38. The Master stated that "the only other claim filed" was that of the Harbins. The Master therefore ordered that "the balance of proceeds in the amount of $14,323.47 shall be paid to" the Harbins. On July 27, 2006 the Clerk of Court of Oconee County sent a check to the Department of Revenue for $259.30 and a check to the debtors for $14,323.47.

19. Since that time the Harbins have or had possession, custody, or control of the excess proceeds, and have failed to deliver to the Trustee, or account for, the proceeds or the value of the proceeds.

20. On December 19, 2006 this Court granted a Judgment in this case in favor of the Trustee against the Harbins for turnover of the $14,323.47 pursuant to 11 U.S.C. § 542. The Trustee also sought and obtained the denial of the debtors' discharge under 11 U.S.C. § 727 based on the Harbins' inappropriate request for and retention of the surplus proceeds, and their failure to turnover those proceeds or the value thereof to the estate.[5]

21. The Trustee now also seeks to recover from BOA for the estate's loss under a turnover theory pursuant to 11 U.S.C. § 542(a). The Trustee alleges that BOA failed to deliver to the Trustee the funds realized from the foreclosure sale in excess of liens, costs and expenses, as agreed in BOA's Stay Motion, as ordered by the Court in the Settlement Order, and as allegedly required by SC LBR 4001-1.

DISCUSSION AND CONCLUSIONS OF LAW

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Bankr. P. 7056 (making Fed. R. Civ. P. 56 applicable to adversary proceedings in a bankruptcy case). The

[5] See Skinner v. Harbin (In re Harbin), No. 06-80194 (Bankr. D.S.C. Dec. 21, 2006).

Court must construe any underlying facts in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The parties have filed cross motions for summary judgment and have agreed that there is no issue of material fact remaining.

The Trustee's sole claim against BOA is one for turnover under 11 U.S.C. § 542(a). Section 542(a) states in part:

> [A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

An essential element of a turnover action is that the entity be in possession, custody, or control of the property during the case. In re Radden, 35 B.R. 821, 826 (Bankr. E.D. Va. 1983); In re Brandseed Media Commerce Group, No. 06-3068, 2006 WL 3716114, at *4 (Bankr. E.D. Va. Dec. 14, 2006). In this case the property in question is the surplus proceeds from the foreclosure sale paid directly from the state court to the debtors. The Trustee has not established, and in fact has not plead, that BOA was ever in possession, custody, or control of the surplus proceeds.

Absent an underlying cause of action entitling the Trustee to recover from BOA on some other theory, the Trustee's cause of action pursuant to § 542 cannot stand alone on these facts. See cf., In re Amcast Indus. Corp., No. 05-3515, 2007 WL 777704, at *22 (Bankr. S.D. Ohio Mar. 12, 2007) ("[t]o the extent that the Liquidating Trustee asserts that the transfers were 'wrongful' because they constitute fraudulent transfers, the funds are not considered property of the estate until the Liquidating Trustee obtains a judgment that the transfers were fraudulent transfers"); In re Am. Bus. Fin. Servs., Inc., 361 B.R. 747, 761 (Bankr. D. Del. 2007) ("the Trustee's right to turnover depends on the validity of his action

for breach of fiduciary duty, wrongful conversion of the seized collateral after default, and the other counts of the Complaint"); In re J. T. Moran Fin. Corp., 124 B.R. 931, 938 (S.D.N.Y. 1991) ("there is no unconditional property of the estate subject to a turnover proceeding for core jurisdiction unless the debtor ultimately prevails in the action on the contract") (citing Acolyte Elec. Corp. v. City of New York, 69 B.R. 155, 172 (Bankr. E.D.N.Y. 1986)); In re Saunders, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989) (fraudulently transferred property is not property of the estate subject to a turnover action "[u]ntil a judicial determination has been made that the property was, in fact, fraudulently transferred.")

Therefore, BOA's motion for summary judgment is granted and the Trustee's motion for summary judgment against BOA pursuant to 11 U.S.C. § 542(a) is denied.[6]

The Trustee's assertion that BOA did not adhere to applicable local rules or ensure that excess proceeds were returned to the estate merits further comment. The Trustee argues that although BOA presented an order to the Court that did not conform to Exhibit C to SC LBR 4001-1, it is either still bound by the language of that exhibit or should suffer some consequence as a result, specifically, paying the sum of $14,323.47 to the Trustee on a turnover demand. However, the local rules allow variance from the language set forth therein if otherwise allowed by the Court. A judge's execution of the order in question

[6] BOA also alleges that the trustee's claim should also be dismissed "for failure to state a claim under F.R.C.P. 12(c)." While Fed. R. Civ. P. 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted," such a motion must be made before a responsive pleading. BOA's answer having been filed, a motion to dismiss for failure to state a claim is now untimely under Rule 12(b). If BOA intended to move under Rule 12(c) for judgment on the pleadings, that rule provides that "if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. " Accordingly, any Rule 12(c) motion is merged with BOA's pending motion for summary judgment under Rule 56.

would suffice as "allowance." Accordingly, this argument must fail.[7]

BOA did include language *similar* to that found in the local rules in pleadings it presented to the Court. If we assume that BOA is bound by the language of the Settlement Order[8] that resulted in the stay lift, BOA stated, "Lender ***agrees*** that any funds realized from the foreclosure sale, in excess of all liens, costs, and expenses, will be paid to the trustee." BOA's statement that it "***agrees***" that such funds will be paid to the estate does not necessarily equal a duty to ensure that the funds are collected by the trustee. This is especially true given the intervening inappropriate conduct of the Harbins, which has been punished by entry of a judgment against them and denial of their discharge in the bankruptcy case.

Section 362(d), 11 U.S.C., provides that the Court may grant relief from the stay "by terminating, annulling, modifying, or conditioning such stay." In most cases before the Court relief is granted that modifies or conditions the stay, rather than granting it outright. A party requesting such relief and proceeding pursuant to an order of this court must strictly comply with any limitations or conditions set forth therein. However, no language found in the court's Settlement Order, if binding, or the Order Modifying Stay would support the Trustee's cause of action pursuant to 11 U.S.C. § 542(a) alone.

[7] The Trustee asserts in his summary judgment motion that SC LBR 4001-1(g) and Exhibit C place the burden on the creditor to *report* and *deliver* any excess foreclosure proceeds to the Court. He further asserts that BOA should have done this pursuant to the local rule whether the language was included in the orders or not. The Trustee is correct that the rule contemplates that a movant report excess funds to the Court. In addition, the movant must agree that "any funds realized from any sale of collateral pursuant to state law, in excess of all liens, costs, and expenses, will be paid to the estate." However, the plain meaning of this language would not require the movant to *deliver* excess funds which it did not receive to the Trustee or to be liable to the Trustee therefore under a turnover theory alone. This does not necessarily preclude recovery under some additional theory.

[8] The final Order Modifying Stay did not include any limiting language.

IT IS THEREFORE, ORDERED:

That the Trustee's Motion for Summary Judgment is hereby denied;

That BOA's Motion for Summary Judgment on Trustee's turnover action is hereby granted.