U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-01888

ADVERSARY PROCEEDING NO: 08-80034

Order On Summary Judgment

The relief set forth on the following pages, for a total of 29 pages including this page, is hereby ORDERED.

FILED BY THE COURT
09/10/2009

US Bankruptcy Court Judge
District of South Carolina

Entered: 09/11/2009

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Lee Holt Judd, Debtor(s).	C/A No. 06-01888 Adv. Pro. No. 08-80034 Chapter 7 **ORDER**
Robert F. Anderson, Trustee, Plaintiff(s), v. Carol Simpson, Lillian Maresch, Van Wilson and Serepta Wilson, Defendant(s).	

THIS MATTER comes before the Court on cross motions for summary judgment pursuant to Fed. R. Civ. P. 56, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056. Plaintiff Robert F. Anderson ("Trustee") filed this adversary proceeding seeking recovery of $231,000.00 resulting from the pre-petition sale of property owned by Lee Holt Judd ("Debtor"). The amount in controversy was transferred to Defendant Carol Simpson ("Simpson") and then disbursed to Defendants Lillian Maresch ("Maresch"), Van Wilson and Serepta[1] Wilson ("the Wilsons"). Trustee's Complaint claims that he can avoid the transfer as a pre-petition preferential transfer of the Debtor's property pursuant to 11 U.S.C. § 547(b), or alternatively that he may avoid the transfer as an unauthorized post-petition transfer of property of the estate pursuant to 11 U.S.C.

[1] Various pleadings and documents filed in this case reference this Defendant as "Sarepta" Wilson but the original Adversary Complaint and Court's case caption names "Serepta" Wilson.

§ 549.[2] At the hearing on the motions, the parties proffered evidence and directed the Court's attention to certain portions of the record in this adversary and the underlying case as follows:

FACTS

1. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157, 1334, and Local Civil Rule 83.IX.01 (DSC). This is a core proceeding pursuant to 28 U.S.C. § 157.

2. The Debtor filed for Chapter 11 protection on May 4, 2006. The Trustee was appointed in this case after it was converted to Chapter 7 on May 4, 2007.

3. On or about March 24, 2005, the Debtor executed a Mortgage of Real Estate in favor of Maresch. On or about March 24, 2005, the Debtor executed a Mortgage of Real Estate in favor of the Wilsons (collectively referred to as the "March 24 Mortgages").

4. Each of the March 24 Mortgages state that they secure loans existing on that date, plus future advances for a total not to exceed $198,000.00 (Wilson Mortgage) and $200,000.00 (Maresch Mortgage), costs, attorneys' fees incurred in collection and any payments made by the mortgagee to protect the mortgagee's interests in the property upon Debtor's default.

5. The March 24 Mortgages are virtually identical and they attach exhibits that refer to security including several Units at Mariner's Club in Moore County, Key Largo, Florida. The units are listed therein in the following order: Unit 708, 704, 206, 603, 711

[2] In addition, Trustee's Complaint and Motion for Summary Judgment both discuss recovery of the transfer pursuant to 11 U.S.C. § 550. However, for the reasons set forth below in this Order, the Court need not address the issue of recovery under § 550.

and 806.[3] After each Unit number, a more detailed property description is provided. Starting with Unit 704, the description states that each property is "more particularly described as *Lot 4, Block 7,* Key Largo North . . . ." This lawsuit involves the sale of Unit 603. While this "more particularly described as" information is correct for Unit 704, it is not correct for Unit 603.[4] A portion of the exhibit appears as follows:

EXHIBIT A

DocN 1548873
Bk# 2152 Pg# 643

Unit 708 of MARINER'S CLUB as shown on the site plan attached as Exhibit "B" to the Declaration of Covenants, Conditions and Restrictions for Mariner's Club, recorded in Official Record Book 1659 Page 1981, more particularly described as Lot 8, Block 7, KEY LARGO NORTH, according to the Plat thereof, recorded in Plat Book 7, page 22 of the Public Records of Monroe County, Florida as modified by the Notice of Withdrawal of Certificate of Ownership and Dedication.

ALSO: Unit 704 of MARINER'S CLUB as shown on the site plan attached as Exhibit "B" to the Declaration of Covenants, Conditions and Restrictions for Mariner's Club, recorded in Official Record Book 1659 Page 1981, more particularly described as Lot 4, Block 7, KEY LARGO NORTH, according to the Plat thereof, recorded in Plat Book 7, page 22 of the Public Records of Monroe County, Florida as modified by the Notice of Withdrawal of Certificate of Ownership and Dedication.

ALSO: Unit 206 of MARINER'S CLUB as shown on the site plan attached as Exhibit "B" to the Declaration of Covenants, Conditions and Restrictions for Mariner's Club, recorded in Official Record Book 1659 Page 1981, more particularly described as Lot 4, Block 7, KEY LARGO NORTH, according to the Plat thereof, recorded in Plat Book 7, page 22 of the Public Records of Monroe County, Florida as modified by the Notice of Withdrawal of Certificate of Ownership and Dedication.

ALSO: Unit 603 of MARINER'S CLUB as shown on the site plan attached as Exhibit "B" to the Declaration of Covenants, Conditions and Restrictions for Mariner's Club, recorded in Official Record Book 1659 Page 1981, more particularly described as Lot 4, Block 7, KEY LARGO NORTH, according to the Plat thereof, recorded in Plat Book 7, page 22 of the Public Records of Monroe County, Florida as modified by the Notice of Withdrawal of Certificate of Ownership and Dedication.

ALSO: Unit 711 of MARINER'S CLUB as shown on the site plan attached as Exhibit "B" to the Declaration of Covenants, Conditions and Restrictions for Mariner's Club, recorded in Official Record Book 1659 Page 1981, more particularly described as Lot 4, Block 7, KEY LARGO NORTH, according to the Plat thereof, recorded in Plat Book 7, page 22 of the Public Records of Monroe County, Florida as modified by the Notice of Withdrawal of Certificate of Ownership and Dedication.

ALSO: Unit 806 of MARINER'S CLUB as shown on the site plan attached as Exhibit "B" to the Declaration of Covenants, Conditions and Restrictions for Mariner's Club, recorded in Official Record Book 1659 Page 1981, more particularly described as Lot 4, Block 7, KEY LARGO NORTH, according to the Plat thereof, recorded in Plat Book 7, page 22 of the Public Records of Monroe County, Florida as modified by the Notice of Withdrawal of Certificate of Ownership and Dedication.

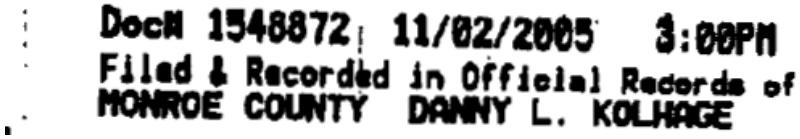
MONROE COUNTY
OFFICIAL RECORDS

[3] The "Exhibit A" attached to Defendant Maresch's mortgage references an additional property in "CUTTHROAT HARBOR ESTATES." Aside from that minor difference, the exhibits are identical.

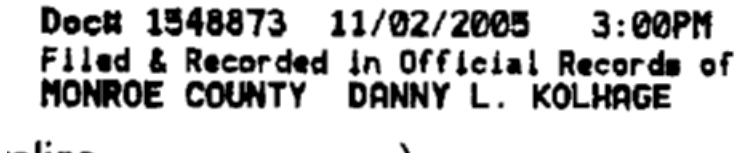
[4] The record does not indicate whether the description is incorrect for the other units.

6. The parties stipulated at the hearing that the March 24 Mortgages were properly recorded and that Florida uses a Grantor-Grantee index for recordation of official real estate records. The parties agreed that there is only one Unit 603 at Mariner's Club and that it is visibly marked "Unit 603" at the property site.

7. The March 24 Mortgages were not recorded with the Monroe County Clerk of Court until November 2, 2005. The recording information on the March 24 Mortgage to Maresch appears as follows:


DocN 1548872 11/02/2005 3:00PM
Filed & Recorded in Official Records of
MONROE COUNTY DANNY L. KOLHAGE

The recording information on the March 24 Mortgage to Wilson appears as follows:


DocN 1548873 11/02/2005 3:00PM
Filed & Recorded in Official Records of
MONROE COUNTY DANNY L. KOLHAGE

8. Defendant Simpson filed an Affidavit (the "Simpson Affidavit') which includes the following information: Defendants Simpson and the Wilsons are related. Defendant Simpson is a lawyer engaged in real estate transactions and maintains an escrow account for that purpose. In the Fall of 2005, Maresch and the Wilsons asked Simpson to serve as escrow agent to receive payments owed to them by the Debtor. Maresch and the Wilsons held mortgages on multiple properties that the Debtor owned. As the Debtor sold or refinanced each property, Simpson stated that her duties were "to receive funds into my trust account and disburse the funds as instructed by Maresch and the Wilsons." She stated that any funds resulting from the sale of Debtor's properties were deposited into her escrow account and disbursed as instructed by Maresch and the Wilsons. She states

that she had no control over the funds and her role was to "get the funds from the Debtor to Maresch and/or the Wilsons in amounts determined by them in their sole discretion."

9. The following agreement, executed between Defendants one day after the March 24 Mortgage was recorded, further evidences the relationships between the Debtor and Defendants:

AGREEMENT

This Agreement ("Agreement") memorialized this 3rd day of November 2005, by and between Lillian S. Maresch ("Maresch"), B. Van Wilson, Sarepta P. Wilson and Carol A. Simpson ("Simpson") (collectively "the Parties").

Whereas, the Parties have made various loans to Lee H. Judd and investments in real estate units in Mariners Club, Key Largo, Florida with Lee H. Judd;

Whereas, Lee H. Judd signed various mortgages and made various promises regarding payments of principal, interest, and amounts advanced under said mortgages;

Whereas, Judd has promised to repay mortgage payments made by the Parties on her behalf on Units 203, 603, 701, 708, and 710;

Whereas, the Parties are becoming increasingly insecure about Lee H. Judd's ability to repay the sums owed to them; and

Whereas, the Parties have previously agreed to work together to secure repayment of all funds owed to them, the Parties acknowledge and agree to the following:

1. The Parties are owed the following amounts:

   a. Lee H. Judd ("Judd") owes Maresch the principal sum of $200,000, plus interest, costs, and amounts advanced. Judd gave Maresch a mortgage, which is recorded in Monroe County, Florida, on Units 206, 603, 704, 708, 711, 806, and a house known as Spanish Main to secure this loan;

   b. Judd also owes Maresch the principal sum of $100,000 plus interest, costs, and amounts advanced. Judd gave Maresch a mortgage, which is recorded in Greenville County, South Carolina, on two parcels of real estate in Greenville County to secure this loan;

   c. Judd owes B. Van and Sarepta P. Wilson the principal sum of $198,000, plus interest, costs, and amounts advanced. Judd also gave B. Van Wilson and Sarepta P. Wilson a mortgage, which is recorded in Monroe County, on Units 206, 603, 704, 708, 711, and 806 to secure this loan;

   d. Judd owes Simpson for mortgage payments on Units 701 and 710, which Simpson purchased from Judd's father-in-law and for which Judd agreed to make all mortgage payments in exchange for the right to rent the units; and

   e. Judd owes Sarepta P. Wilson for mortgage payments on Units 203, 603, and 708 which Sarepta P. Wilson purchased with Judd with the agreement that Judd was to make all mortgage payments in exchange for the right to rent said units.

2. Collectively, the Parties have the following sources from which to recoup the monies owed to them:
   a. Proceeds from Units 206, 603, 704, 708, 711, 806, and a house known as Spanish Main;
   b. Proceeds from the two parcels in Greenville, SC; and
   c. Proceeds from Units 203, 701, and 710.

3. The Parties agree that Judd should be able to continue extracting her equity in these properties as she has been successful in refinancing as follows:
   a. B. Van Wilson purchased three units with Judd, specifically Units 206, 704, and 806, for which Judd was to make all mortgage payments in exchange for the right to rent the units. Judd made all mortgage payments on these units as agreed before successfully refinancing them into her name and removing B. Van Wilson from the mortgage and deed during June 2005; and
   b. Judd successfully refinanced Unit 902 in June 2005.

4. As the refinancings occur, the Parties agree, with the understanding that Judd concurs, that all monies received shall be applied in the following order:
   a. First, to repayments for all mortgage payments made on Units 203, 603, 701, 704, and 710;
   b. Second, to payments advanced under the mortgages on Units 206, 603, 704, 708, 711, 806, and a house known as Spanish Main;
   c. Third, to interest owed to the Parties under any loans made to Judd;
   d. Fourth, to principal owed to B. Van Wilson and Sarepta Wilson because they borrowed the funds that they loaned to Judd and they are making and must continue to make payments on Unit 203, 603, and 708;
   e. Fifth, to principal owed to Maresch.

IN WITNESS HEREOF, the parties hereto have executed this Agreement as of the day and year first written above.

B. Van Wilson

Lillian S. Maresch

Sarepta P. Wilson

Carol A. Simpson

10. The record includes a letter (the "April 2006 Letter") from an attorney in Florida to Simpson discussing negotiations between the Debtor and Defendants to settle outstanding business:

April 6, 2006

Carol Simpson, Esq.
37 Greenland Drive
Suite A
Greenville, SC 29615-3018

VIA TELEFAX (864-233-2004) and U.S. MAIL

Re: Lee Holt Judd

Dear Ms. Simpson:

I am writing you this letter on behalf of Lee Holt Judd. This letter concerns a mortgage claim of Serepta Wilson and/or William S. Maresch, as well as a title interest of Ms. Wilson (as to unit 203). You prepared and recorded the mortgages and deed.

Ms. Judd is in the process of selling various properties, the effect of which should be to fully repay mortgage debt claimed by William S. Maresch and/or Serepta Wilson. Based on our telephone call, I understand that any and all negotiations and communications concerning these individuals are to be directed through you.

Ms. Judd is in the process of entering into simultaneous closings on units 603 and 708, the effect of which should permit payment in full of the mortgage claims. Closings may be held as soon as tomorrow. My understanding is that you are working with David Nicnicq concerning payoff amounts and satisfactions, including a satisfaction of those mortgages (that are shown to encumber units 206, 603, 704, 708, and 806). If this understanding is wrong and/or if there are problems on your end that could block the anticipated closings, then please call me immediately.

Ms. Judd also is taking steps to sell units 203, 206, 704 and 806. Serepta Wilson is shown as an additional owner on the deed to unit 203. My understanding is that the ownership position was used so that financing might be secured and that as Serepta Wilson is repaid, she has been deeding back to Ms. Judd her interest in the property.

I would appreciate your confirming that Serepta Wilson would provide a special warranty deed to Ms. Judd, to be held in trust by the attorney closing the Turco (unit 203) transaction (Patrick G. Kelley, Esq. of Ft. Lauderdale, Florida, would hold the special warranty deed in trust), which special warranty deed could only be released to Ms. Judd upon confirmation that the Wilson and Maresch mortgages have been fully satisfied through the closings on unit 603 and 708, and the existing unit 203 mortgage debt to third parties satisfied. Please advise me if Ms. Wilson is willing to enter into such a transaction and, if so, we can forward a special warranty deed. If she is not willing to enter into such a transaction, then I need to hear from you as to her position and what needs to be done to effectuate a sale. Please be mindful that if a sale is not accomplished, there will be very negative ramifications that Ms. Judd is trying to avoid for the benefit of all concerned.

Ms. Judd hopes that the closing on unit 203 can occur on Tuesday (April 11, 2006). Accordingly, it is important that we act quickly to arrange for the execution and delivery of the special warranty deed.

We would appreciate your providing us with a unit-by-unit breakdown as to the amount of debt attributable to each of the various units encumbered by the Wilson and Maresch mortgages. We would appreciate having this information soon, but in all events, do not want to hold up the closings addressed above as the information is gathered.

We do not understand your role in this situation and you chose not to disclose it to me over the telephone. We strongly caution you to avoid sharing privileged or confidential information concerning Ms. Judd with third parties. We understand that you have been most uncomplimentary during discussions with Mr. Kelley; we strongly urge you to cease and desist from such communications concerning your former client.

I thank you in advance for your cooperation and look forward to hearing from you.

Very truly yours,

Lee H. Rightmyer

11. The Defendants assert that the transfer the Trustee seeks to recover was a payment to Maresch and the Wilsons on account of and applied to debts owed to each of them that are secured by the March 24 Mortgages on Unit 603. The Trustee's Complaint alleges that on or about June 28, 2005, Maresch loaned the Debtor $200,000.00 evidenced by a Promissory Note of the same date. Defendants admit this allegation in their Answer. The Note states that it "is secured by a mortgage of even date . . . ."

although no such mortgage is in the record. This Note was dated more than three months after the March 24 Mortgages.

12. The Complaint alleges that on or about July 1, 2005, the Wilsons loaned the Debtor the sum of $198,000.00, evidenced by a Promissory Note of the same date. The Note was dated more than three months after the March 24 Mortgages. The Note states that it "is secured by a mortgage of even date . . . ." although that document is not in the record. In Defendants' jointly filed Answer they deny that the loan from the Wilsons to the Debtor was made on July 1, 2005, and instead state that the Wilsons "loaned $198,000.00 to Debtor in December 2004."

13. On April 27, 2006, Debtor sold/transferred her interest in Unit 603 to her father, John T. Holt ("Holt"). Holt financed the transfer of the property from Debtor with loans from and granted mortgages to third party lenders, and the resulting sales proceeds were placed in the closing agent's escrow account to pay claimed encumbrances. The Settlement Statement indicates a sales price of $1,350,000.00 and indicates payments for "Payoff of first mortgage loan to American Home Mtg" and "Payoff of second mortgage loan to EMC Mortgage," and the sum of $231,000.00 was earmarked to "Payoff of third and fourth mortgage." Defendants assert that the last amount was a payment to Maresch and the Wilsons to obtain a Partial Release of Unit 603 from the March 24 Mortgages. The Settlement Statement indicates significant funds remaining from the sale of Unit 603 for the Debtor/Seller. Trustee's Memorandum asserts that some of the figures in the Settlement Statement are incorrect, but does not elaborate. Comprehensive Title Company served as the closing agent.

14. The Debtor's bankruptcy petition was received electronically at 3:35 p.m. on May 4, 2006 per the Court's records.[5]

15. At the time of the Debtor's bankruptcy filing Defendants Maresch and the Wilsons had not personally received any funds earmarked for the "Payoff of third and fourth mortgage." On May 4, Comprehensive wired $231,000.00 to Simpson. Defendants proffered a portion of the deposition testimony of an officer of the closing agent wherein he speculated that "he was uncertain as to the exact time of day the wire was sent, but he knew that it had to be before 3:00 pm because his bank did not send wires after that time." The money was present in Simpson's trust account on May 5, 2006, at 11:14 a.m. However, there is no evidence in the record regarding the exact status of the funds prior to the time they reached Simpson's account on May 5.

16. At the time the Debtor filed bankruptcy, the deed transferring Unit 603 to her father and the mortgages thereon that he obtained to accomplish the transfer were not yet recorded on the public record. The Trustee previously filed related A/P No. 08-80012, Anderson v. John T. Holt, SunTrust Mortgage, Inc., and EMC Mortgage Corp., seeking recovery of Unit 603 from Holt as a fraudulent conveyance pursuant to 11 U.S.C. § 548. Holt did not Answer the Complaint, and the Court entered a default judgment against Holt voiding the deed received from Debtor. Holt's default resulted in Trustee's recovery of Unit 603. The Trustee sold Unit 603 pursuant to an order of this Court and is holding the sum of $391,336.78, with any liens attaching to the proceeds of the sale pending resolution of any lien issues. Co-defendants in that adversary, SunTrust and EMC, asserted liens on the proceeds and the Trustee challenged their liens pursuant to 11

[5] In related matter Anderson v. Holt, SunTrust Mortgage, Inc., and EMC Mortgage Corp. (In re Judd), C/A No. 06-01888-hb, Adv. Pro. No. 08-80250-hb, slip op. (Bankr. D.S.C. Aug 6, 2009), the order granting summary judgment incorrectly stated the time as 3:55 p.m.

U.S.C. § 544(a)(3). This Court granted summary judgment to SunTrust and EMC Mortgage in that matter on August 6, 2009, which would require payment of the sales proceeds to those co-defendants. At this time an appeal of that decision is pending.

17. The Wilsons submitted an affidavit (the " Wilson Affidavit") dated September 5, 2008, which provides details regarding the closing of the sale of Unit 603:

> 5. In April 2006, the Debtor sold Unit 603 and wired $231,000 to the Trust Account of Carol Simpson Law Offices in exchange for a Partial Release of Mortgage from us and one from Lillian Maresch.
>
> 6. Following up on previous discussions regarding how to handle the disbursement of funds when they arrived, we discussed the disbursement of these proceeds with Lillian Maresch. The three of us agreed on the following:
>
> a. We should be paid part of our principal since we had borrowed against our primary residence to get the funds to loan to the Debtor; [1]
>
> b. We should be paid interest owed to us since we were having to make monthly interest payments on funds borrowed from Wachovia Bank;
>
> c. Van Wilson should be reimbursed for payments made to the Debtor's mortgage companies for Units 603 and 708; and
>
> d. Van Wilson should be reimbursed for mortgage payments made to the companies holding mortgages on Unit 203 that is jointly owned by the Debtor and Sarepta Wilson.
>
> 7. The three of us mutually agreed upon the following payments and instructed Carol Simpson to disburse the $231,000 from the Trust Account at Carol Simpson Law Offices as follows:
>
> a. $154,000 to be paid to Wachovia Bank for repayment of principal owed to us;[2]
>
> b. $3,819.74 to be paid to Van Wilson for accrued interest;[3]
>
> c. $3,819.74 to be paid to Sarepta Wilson for accrued interest;[4] and

d. $60,054.09 to be paid to Van Wilson for reimbursement of payments made on Units 603 and 708 secured by our and Lillian Maresch's mortgages.[5]

e. The remaining $9,306.43 to be paid to Van Wilson for the balance due as reimbursement of payments made on Units 603 and 708 and reimbursement for payments made on Unit 203 that Sarepta Wilson jointly owns with the Debtor.[6]

8. No part of the $231,000 received from the sale of Unit 603 was paid to Carol Simpson.

9. Several days later after receiving the check for $60,054.09 and at Sarepta Wilson's request, Van Wilson transferred those funds to the Carol Simpson Law Offices to be used to make payments on Unit 203 that the Debtor owns with Sarepta Wilson. See mortgage statements and check stubs attached for payments made from May 2006 to December 2006 totaling $62,296.40. These statements show that these funds were indeed used to make payments on Sarepta Wilson's behalf for Unit 203 jointly owned with the Debtor. Carol Simpson has no ownership interest in Unit 203 and did not receive these funds for her use.

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[4] See attached copy of check number 20353 written from the Trust Account of Carol Simpson Law Offices.
[5] See attached copy of check number 20354 written from Carol Simpson Law Offices IOLTA Account.
[6] These payments were made in conjunction with funds received from other sources. Thus, no separate check was written to Van Wilson for $9,306.43 that can be attached.

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[1] See attached statements from Wachovia Bank dated December 16, 2004 showing withdrawal of $50,000 and dated January 17, 2005 showing withdrawal of the $148,000 for a total of $198,000.
[2] See attached copy of check number 20348 written from the Trust Account of Carol Simpson Law Offices and the statement from Wachovia Bank dated May 16, 2006 showing the repayment of $154,000.
[3] See attached copy of check number 20352 written from the Trust Account of Carol Simpson Law Offices.

18. Defendants also submitted a joint affidavit of Maresch and the Wilsons (the "Joint Affidavit") dated July 3, 2008, including the following:

4. As security for the funds loaned, the Debtor executed a mortgage to Maresch and another mortgage to the Wilsons granting them a security interest in multiple properties that the Debtor owned in Key Largo, Florida.

5. In the aggregate, the properties had enough equity to repay the total amount owed to all of us.

6. However, no single property had enough equity to pay the total amount owed to all of us.

7. For the Debtor to sell any of the properties, she had to get a Partial Release of both of the mortgages.

8. Thus, as the Debtor sold any of the properties, we had to mutually agree on an amount for which we would each sign a partial release of our respective mortgages.

9. While the Debtor was working diligently to sell or refinance all the properties, we were never certain as to when a property would be sold; how much we would receive from the sale; or what we would be owed at the time of the sale.

10. To give us the flexibility to make decisions based on the actual amounts owed to each of us at the time of the sale of each property, we agreed that the funds should be wired to Carol Simpson Law Offices IOLTA account and that Carol Simpson would act as our escrow agent for the disbursement of the funds.

11. Carol Simpson agreed to act as escrow agent for us. Specifically, she agreed to allow the Debtor's closing attorney to wire the funds to her escrow account and then disburse them to us as we instructed.

12. We understood that, by having the funds wired to her escrow account and, not to her regular account, Carol Simpson would have no control of the funds.

13. On April 27, 2006, the Debtor sold Unit 603 on which we held mortgages.

14. On or about May 1, 2006, the Debtor's closing attorney told Carol Simpson, our escrow agent, that he had already received the funds to pay us and that he would wire them to her escrow account as soon as he received the Partial Releases from all of us.

15. Maresch had already signed her Partial Release and the Wilsons, who had been out of town, signed their Partial Release on May 3, 2006. We sent both Partial Releases via overnight mail to the Debtor's closing attorney so that he received them on May 4, 2006. See Exhibits A and B.

16. On the same day that he received the Partial Releases, the bank statements of the Debtor's closing attorney indicated that he wired the $231,000.00 from his account to the escrow account of Carol Simpson Law Offices. See Exhibit C.

17. At that time, Maresch was owed the principal of $200,000.00 and accrued interest of $7,716.63.

18. The Wilsons were owed the principal of $198,000.00 and accrued interest of $7,639.48 plus payments advanced for the protection of their lien pursuant to their mortgage on Unit 603 of $30,840.62. They were also owed other funds that are not pertinent to these motions.

19. Because Carol Simpson was merely our escrow agent and not owed any of the funds, she had no control as to how the funds were distributed.

20. Once we made a final determination as to the disbursement of the funds, we instructed Carol Simpson to whom and how she was to disburse the funds.

DISCUSSION AND CONCLUSIONS OF LAW

The parties have filed cross motions for summary judgment. The Fourth Circuit has set forth the standard of review for summary judgment as follows:

> A court may award summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); In re Apex Express Corp., 190 F.3d 624, 633 (4th Cir. 1999); see also Fed. R. Civ. Proc. 56(c) (providing that award of summary judgment is appropriate only "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"). In evaluating a summary judgment motion, a court "must consider whether a reasonable jury could find in favor of the non-moving party, taking all inferences to be drawn from the underlying facts in the

> light most favorable to the non-movant." Apex Express Corp., 190 F.3d at 633. In so doing, a court is not entitled to either weigh the evidence or make credibility determinations. See Anderson, 477 U.S. at 255, 106 S.Ct. 2505 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ."). If the moving party is unable to demonstrate the absence of any genuine issue of material fact, summary judgment is not proper and must be denied. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 185 (4th Cir. 2004).

Mercantile Peninsula Bank v. French (In re French), 499 F.3d 345, 351-52 (4th Cir. 2007).[6] "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (quoting Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 62 n.4 (1st Cir. 1997)). "When considering each individual motion, the court must take care to 'resolve all factual disputes and any competing, rational inferences in the light most favorable' to the party opposing that motion." Id. (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996)). The fact that both parties have moved for summary judgment does not mean that summary judgment should be granted one or the other. In re Kugler, 170 B.R. 291, 303 (Bankr. E.D. Va. 1994). Nor does it establish that there are no genuine issues left for trial. McCown v. Humble Oil & Refining Co., 405 F.2d 596, 597, n.1 (4th Cir. 1969). "It is possible, therefore, that in any given case involving

[6] In French, the Fourth Circuit emphasized that the trial court must assess whether *a reasonable fact finder* could find in favor of the non-moving party. In that case, the debtor's intent to defraud was at issue. While the bankruptcy court evaluated two pertinent affidavits, it did not address the "central" summary judgment question of "whether a reasonable trier of fact, viewing the evidence in the light most favorable to [debtor], could have found that he lacked" the necessary intent. 499 F.3d at 353. The court also noted that the bankruptcy court erred by making credibility determinations regarding two affidavits which it rejected as unreliable. "In the summary judgment context, a court is simply not empowered to make [credibility] determinations." Id. at 354. Further, the bankruptcy court weighed the evidence of whether debtor's records were adequate with regard to movant's § 727(a)(3) claim. The appellate court reiterated that while the bankruptcy court could make such determinations at a bench trial, it cannot weigh the evidence or make credibility determinations at the summary judgment stage. Id. at 357 n.10.

genuine disputes of material fact that neither party filing cross motions would be entitled to summary judgment having failed to meet its burden under Fed. R. Civ. P. 56." Medimaging Tech., Inc. v. Mallinkrodt, Inc. (In re Medimaging Tech., Inc.), No. 03-8090, 2007 WL 3024068, at *6 (Bankr. D. Md. Oct. 12, 2007).

The Complaint states causes of action under 11 U.S.C. §§ 547(b) and 549 to avoid the transfer of the $231,000.00. Defendants Maresch and the Wilsons claim that the $231,000.00 was transferred to them to pay pre-petition loans secured by a perfected lien on Unit 603 and/or the proceeds thereof as a result of the March 24 Mortgages. The Trustee asserts that, due to the discrepancy in the mortgage descriptions, he can use his status as a bona fide purchaser pursuant to § 544(a)(3)[7] to avoid any interest Defendants Maresch and the Wilsons may have had in Unit 603 or the sales proceeds. He therefore claims that if the payment of the $231,000.00 was a post-petition transfer of estate funds that is recoverable under § 549 from the ultimate transferees (the Wilsons and/or Maresch) and from the initial transferee (Simpson) pursuant to § 550(a)(1).

Alternatively, if the transfer occurred post-petition, he claims that the discrepancies in the property descriptions render any security interest granted by the March 24 Mortgages unperfected and therefore any obligations secured by those mortgages were unsecured obligations. The Trustee therefore claims that if the transfer in question occurred pre-petition, Defendants Maresch and the Wilsons received a preference recoverable under § 547.

Defendants assert numerous defenses in their Answer. Both parties stated at the hearing that they believe there is no issue of material fact in dispute and all relevant

[7] Reference to 11 U.S.C. § 544(a)(3) appears for the first time in Plaintiff/Trustee's Memorandum in Support of Trustee's Motion for Summary Judgment.

documents (mortgages, deed, and bank statements) necessary to resolve the motions are available in this record.[8]

I. Cause of action to recover an unauthorized post-petition transfer pursuant to 11 U.S.C. § 549 by asserting bona fide purchaser status under § 544(a)(3)

If the transfer in question occurred after the Debtor filed her bankruptcy case, Trustee seeks to recover any funds transferred pursuant to § 549:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--
>
> (1) that occurs after the commencement of the case; and
>
> (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

Trustee seeks to assert his bona fide purchaser status provided by § 544(a)(3) to avoid the March 24 Mortgages, thereby enabling him to recover the $231,000.00 payment Defendants received from Debtor's sale of the property to her father as an unauthorized post-petition transfer of estate property under §549. 11 U.S.C. § 544(a)(3) provides:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

"While the Bankruptcy Code gives the trustee the status of a bona fide purchaser, it is state law that defines whether even a hypothetical bona fide purchaser could exist under the facts." LR Partners L.L.C. v. Steiner (In re Steiner), 251 B.R. 137, 142 (Bankr. D. Ariz. 2000) (citing In re Washburn & Roberts, Inc., 795 F.2d 870 (9th Cir. 1986)).

[8] Plaintiff/Trustee stated in his motion for summary judgment that the only remaining issue for trial would be whether Defendant Simpson qualifies as an initial transferee pursuant to §550.

Fla. Stat. § 695.01(a) deals with bona fide purchasers of real property and states the following:

> (1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

Florida's case law clearly states that "notice required by the statute may be constructive, actual or implied actual notice." Crown General Stores, Inc. v. Ultra Meat Market, Inc., 843 So.2d 287, 289 (Fla. App. 3 Dist. 2003) (citing Sapp v. Warner, 141 So. 124, 105 Fla. 245 (1932)).

"The Trustee, as a hypothetical bona fide purchaser, is subject to the duty imposed by Florida's inquiry rule." In re CJW Ltd., Inc., 172 B.R. 675, 685 (Bankr. M.D. Fla. 1994). Florida's inquiry rule "creates a duty to pursue inquiries suggested by facts contained in the documents in the record which would lead to greater inquiry." Id. "[U]nder Florida's recording act, the recordation of an instrument is constructive notice to creditors and subsequent purchasers not only of its own existence and contents, but also of such other facts concerned with the instrument as would have been ascertained from the record if it had been examined and if inquiries suggested by it had been prosecuted." Leffler v. Smith, 388 So.2d 261, 263 (Fla. App. 1980); see also In re CJW Ltd., Inc., 172 B.R. at 682 ("[A]n individual relying on the public record to determine the state of title is charged with notice not only of what is in the record but with that which could be discovered through inquiries suggested by the record."). "[O]ne charged with

examination of the record title may be bound by defective, erroneous or incomplete matters of record the discovery of which would lead to a duty to further inquire." In re Chateau Royale, Ltd., 6 B.R. 8, 12 (Bankr. N.D. Fla. 1980). "Constructive notice is a legal inference, while implied actual notice is an inference of fact, but the same facts may sometimes be such as to prove both constructive and implied actual notice." Sapp, 141 So. at 127. In Florida, "constructive notice . . . is imputed only through the grantor-grantee index of the official public records." Oz v. Countrywide Home Loans, Inc., 953 So.2d 619, 620 (Fla. Dist. Ct. App. 3d Dist. 2007); see also Slachter v. Swanson, 826 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 3d Dist. 2001) (Constructive knowledge "is imputed to creditors and subsequent purchasers by virtue of any document filed in the grantor/grantee index of the Official Records.").

Under Florida law, a bankruptcy trustee's rights as a hypothetical bona fide purchaser of real property do not exist when there are matters of record that put the trustee on constructive notice. In re Raborn, 470 F.3d 1319, 1323-24 (11th Cir. 2006); see also Toranto v. Dzikowski, 380 B.R. 96, 98 (Bankr. S.D. Fla. 2007) (providing that a trustee's avoidance powers under § 544(a) are contingent upon state law); compare with In re Corzo, 406 B.R. 154, 161 (Bankr. S.D. Fla. 2008) (explaining that the absence of any transaction, declaration, or indication on the public record allowed the Trustee to assert his status as a bona fide purchaser in order to defeat an unrecorded interest).

> It is a familiar and thoroughly well-settled principle of realty law that a purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise, upon the face of any deed which forms an essential link in the chain of instruments through which he deraigns his title. The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another,

> until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained. Being thus put upon inquiry, the purchaser is presumed to have prosecuted it until its final result and with ultimate success.

Sapp, 141 So. at 129 (quoting Loomis v. Cobb, 159 S.W. 305 (Tex. Civ. App. 1913). "While a trustee's actual knowledge of an unrecorded interest does not defeat a trustee's ability to set aside such interest under 11 U.S.C. § 544(a), the trustee's constructive notice of such an interest does not insulate the trustee because, in such a case, the interest could not be defeated by a bona fide purchaser." S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Auto. Group, LLC), 385 B.R. 347, 369-70 (Bankr. S.D. Fla. 2008) (citing Briggs v. Kent (In re Prof'l Inv. Props.), 955 F.2d 623, 627 (9th Cir. Wash. 1992).

It is undisputed that the March 24 Mortgages were recorded in the Grantor-Grantee index of Monroe County's official records under Debtor's name, and that they describe Unit 603 of Mariner's Club, Key Largo, Florida as security. Trustee argues that the incorrect "more particularly described as Lot 4, Block 7" language allows a bona fide purchaser to avoid the March 24 Mortgages. See Bright v. Buckman, 39 Fed. Rep. 243 (C.C.D. Fla. 1889) (Mortgage described two lots of land as "lots 13 and 14 of Burbridge's addition" and there were *sixteen* different blocks fitting the description, making the description ambiguous.) Unlike Buckman, the parties in this case have stipulated that there is only one Unit 603 at Mariner's Club.

Florida's inquiry rule places a duty upon a hypothetical bona fide purchaser, such as Trustee, to "pursue inquiries suggested by facts contained in the documents in the record which would lead to greater inquiry." In re CJW Ltd., Inc., 172 B.R. at 685. Applying Florida law to our facts, a prospective purchaser viewing the March 24 Mortgages would be on notice that Unit 603 of Mariner's Club is mentioned as security

in the mortgages. Additional language may be confusing or require further clarification, but Florida's law on constructive and inquiry notice requires a prospective purchaser to pursue inquiries suggested by such inconsistencies. Therefore, the Court cannot grant summary judgment in favor of the Trustee on this issue. From the public record and the contents of the March 24 Mortgages a purchaser would have at least constructive notice of the claim of a mortgage on Unit 603 of Mariner's Club and also a duty to inquire into the ambiguities suggested by the March 24 Mortgages.

II. Cause of action to recover a pre-petition transfer of an interest of the debtor in property (preference) pursuant to § 547(b)

Alternatively, if a transfer of the Debtor's property occurred pre-petition, Trustee seeks avoidance of the payment of $231,000.00 to Maresch and the Wilsons pursuant to § 547(b) as a preferential transfer, arguing that payment of the sales proceeds on account of their defective mortgages allowed the Defendants to receive more than they would in a Chapter 7 proceeding. Section 547 provides:

> (b) 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--
>
> (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 of the 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 of such transfer 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.

Trustee asserts that the $231,000.00 payment to Maresch and Wilsons was applied to pre-petition unsecured debt(s) because the March 24 Mortgages were insufficient to grant a perfected security interest in Unit 603. In re Continental Country Club, Inc., 108 B.R. 327, 332 (Bankr. M.D. Fla. 1989) ("[A]ny creditor holding an unsecured claim who receives a payment during the preference period is in a position to receive more than it would have received in a Chapter 7 liquidation.").

The initial question for the Court is whether the obligations paid were secured by mortgages on Unit 603 that were sufficient under Florida law to place Defendants in the same position they would occupy if the sale of the property and payment of the debt had not occurred, and the Chapter 7 trustee was proceeding with a structured liquidation.

Florida law provides that a mortgage is perfected upon recording. In re CJW Ltd., Inc., 172 B.R. at 682.[9] That law also provides that property descriptions are "sufficient if the reference to the property . . . is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property." Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416, 419 (Fla. Dist. Ct. App. 5th Dist. 1991). "The modern tendency is to allow a liberal interpretation of the description of land and to uphold the validity of such description if there is any way possible to arrive at the intention of the parties thereto." Id. at 419, n. 5 (citing Stoffel v. Stoffel, 241 Iowa 427, 41 N.W.2d 16 (1950)). Clerical errors will not invalidate an instrument where the parties' intent can be identified. Mitchell v. Moore, 152 Fla. 843,

[9] This rule is not absolute because individuals "relying on the public record to determine the state of title [are] charged with notice not only of what is in the record but with that which could be discovered through inquiries suggested by the record." In re CJW Ltd., Inc., 172 B.R. at 682.

849 (Fla. 1943).[10] Further, an uncertain description will not render a mortgage null and void if a reasonable construction is available, and "[e]xtrinsic facts . . . may be resorted to to ascertain the land conveyed . . . ." Id. at 850.

Viewing the March 24 Mortgages in their entirety and in the light most favorable to the Defendants, it appears that a clerical error was made in the property description quoted above[11] but that the parties intended to encumber Unit 603 of Mariner's Club. The Court cannot find from these facts that the intention of the parties to encumber Unit 603 is so unclear in the March 24 Mortgages as to invalidate any security interests in that property. The Trustee's Motion for Summary judgment is denied.

III. Remaining Motions for Summary Judgment

In the average case involving a sale of property and the payment of a mortgage lien, a well defined, isolated obligation exists between a mortgagor and a mortgagee that are essentially strangers. In that case the legal responsibilities of the parties are negotiated in advance, documented, and are easily determined. If a sale is made with proceeds sufficient to retire the obligation, the proceeds are either immediately paid over to the mortgagee or placed in escrow and promptly paid. The mortgagor has little if any control over the process. The facts here indicate relationships and transactions that are far from the average case and the current record leaves the Court with numerous

[10] It is important for the Court to note the existence of Florida law that appears to directly conflict with the aforementioned legal authorities. The case of Black v. Skinner Mfg. Co., 43 So. 919 (Fla. 1907) clearly states that where an instrument contains two descriptions of property, the more particular description will take precedence over the more general description of property. Taken by itself, this legal conclusion appears to favor the Trustee's position. However, the Black case further explains that an instrument conveying an interest in real property must be construed as a whole, and meaning should be given in order that each portion is effective. Id. at 920. Because the clerical errors become evident when the mortgages are viewed in their entirety with accompanying exhibit A's, the Black case is reconcilable with the cited legal authorities.

[11] In fact, it appears that the clerical error is evident from the exhibit itself as the "more particularly described as" portion of the exhibit in question is repeated five times for five different unit numbers.

unanswered questions that make it impossible to decide this matter on summary judgment. Due to the remaining questions and for the reasons set forth below, Defendants' Motion for summary judgment on various defenses is denied.

A. What obligations were secured by the March 24 Mortgages?

The March 24 Mortgages, recorded on November 2, 2005, state that they secure *existing* notes that are not in this record ($200,000.00 in favor of Maresch, $198,000.00 in favor of the Wilsons), plus future advances. The record does include a note, presumably a future advance, executed in favor of Maresch on June 28, 2005, in the amount of $200,000.00. The Complaint alleges that the underlying loan was made on or about June 28, 2005, and Maresch admits this fact in the Answer. The record also includes a note executed in favor of the Wilsons on July 1, 2005, in the amount of $198,000.00, again presumably a future advance. The Complaint alleges that the loan was made on or about July 1, 2005, but the Wilsons deny this fact in the Answer and state that the loan was made in December of 2004. The notes state that each "note is secured by a mortgage of even date" although no such document is in the record. At the time the March 24 Mortgages were recorded, several debts were outstanding between Debtor, Maresch and the Wilsons and the record indicates that some of the proceeds of the sale of Unit 603 were used to pay debt associated with Unit 203, a property not mentioned in the March 24 Mortgages. Considering these facts in the light most favorable to the Trustee, the Court is unsure of the exact debts secured by the March 24 Mortgages.

B. Did the transfer allow any of the Defendants to receive more than they would have received in a Chapter 7 (11 U.S.C. § 547(b)(5))?

1. Was the $231,000.00 paid on account of and applied to debt secured by a lien on Unit 603?

It is not clear from the record that all of the $231,000.00 delivered to Simpson was applied to obligations secured by the March 24 Mortgages. The Wilson Affidavit states that some of the funds were paid to reimburse payments made on "Unit 203 that Sarepta Wilson jointly owns with the Debtor." As discussed above, Unit 203 is not mentioned in these mortgages.

2. What were the details of the agreement(s) to grant Partial Releases of Unit 603 from the March 24 Mortgages?

The lump sum paid by Comprehensive to "Payoff third and fourth mortgages" must have been paid per someone's instructions and terms to obtain a Partial Release from Maresch and the Wilsons. While the facts indicate Defendants' explanation of how the $231,000.00 was ultimately applied, it does not include details regarding how the parties arrived at the figure and why, whether the agreement between the parties included any side deals to deed property back to the Debtor as discussed in the April 3 Letter, or any other terms that could affect the Court's analysis of whether each individual Defendant received more than he or she would have received in a Chapter 7 proceeding.

3. How can the actual distribution of the $231,000.00 be compared to a § 547(b)(5) Chapter 7 distribution on this record?

Although they were both recorded at 3:00 p.m. on November 2, 2005, the number sequence of the March 24 Mortgages indicate that the mortgage to Maresch may have been recorded on the public record first. Regardless of the correct priority, it appears that one of the mortgages has priority over the other—one is the third mortgage and one the

fourth. If this is the case the mortgage with priority would likely have been paid in full in a Chapter 7 proceeding by a Trustee before any amount would be realized by the subordinate mortgagee. Therefore, a preference analysis comparing the actual distribution to a Chapter 7 distribution and resulting in a finding in favor of all Defendants is not possible on summary judgment with this record.

C. Was the transfer a pre-petition transfer of the Debtor's interest in property or a post-petition transfer of property of the estate?

Although the parties stated that no material issue of fact remains, they do not seem to agree on what event marked "the transfer" and when it took place.

1. When was the wire transfer effective?

Limiting this question only to one of when was the Comprehensive wire transfer effective to transfer the $231,000.00 to Simpson on behalf of Maresch and the Wilsons, the Court cannot definitively answer this question on this record. The record does not include facts indicating the time the money was wired from Comprehensive and the status of the funds between the time the money was wired and the time they reached Simpson's trust account post-petition.

2. When did the Debtor lose control over the funds?

Expanding this question to one of whether the Debtor had control over the $231,000.00 at any time after the closing pre- or post-petition, finding an answer to that question is impossible on this record under summary judgment standards.[12] The evidence indicates that the transactions in question occurred between parties with ongoing business and personal relationships. All were aware of and concerned with the Debtor's poor financial condition at all relevant times. The facts before the Court indicate that there

[12] This is covered by legal arguments in Defendants' brief arguing that property transferred was not property of the Debtor or property of the estate due to a lack of control over funds in escrow.

were various loans and obligations due from the Debtor to Defendants Maresch and the Wilsons other than the Promissory Notes in evidence. The existence of any security for those other obligations is unclear, although numerous other properties are mentioned in the documents before the Court. The record includes evidence of holistic negotiations between the parties to settle pending issues and debts, and speaks of related side agreements to transfer property to the Debtor and indicates joint ownership of property between the Debtor and the Defendants, including Unit 203.

Evidence is missing of who decided that the sum of $231,000.00 was sufficient to secure the Partial Releases, when the decisions were final, what negotiated terms were reached and whether they included any other loans and properties. Attempting to determine who had ultimate control of the sales proceeds and pinpointing the exact moment that a transfer was made are dependent upon each other, and this record leaves numerous issues of material fact missing or in dispute.

The Court cannot conclude on this record that the Debtor lacked control over all or part of the $231,000.00 just because it was in the hands of a third party on its way to another. The record indicates that there were clearly decisions made between the parties as to what would be paid and how it would be applied—rather than the simple payment of the balance of a secured note per recorded priority with no discretion. Considering the evidence in the light most favorable to the Trustee, the Court cannot find on these facts that the Debtor had so little control over the $231,000.00 that all or a portion of the money was not property of the Debtor pre-petition—or that it was free from discretionary control—and thus property of the estate post-petition as defined by § 541.

D. Would any recovery in this matter constitute a windfall for the estate given the fact that the Trustee has already recovered Unit 603 in a related adversary proceeding?

Although the Trustee recovered Unit 603 in a related adversary proceeding and sold it with all liens attaching to the proceeds of the sale, the Court has now issued an order in favor of co-defendants in that related proceeding granting summary judgment that in effect requires payment of all sales proceeds to co-defendants/lienholders.[13] Although an appeal of that decision is pending, the facts before the Court at this time do not support a finding that the estate would receive any windfall should the Trustee successfully recover from Defendants in this matter and therefore, Defendants' Motion cannot be granted at this time based on this defense.

IT IS THEREFORE, ORDERED, that Trustee's Motion for Summary Judgment and Defendants' Motion for Summary Judgment are hereby **DENIED**.

[13] See Anderson v. Holt, SunTrust Mortgage, Inc., and EMC Mortgage Corp. (In re Judd), C/A No. 06-01888-hb, Adv. Pro. No. 08-80250-hb, slip op. (Bankr. D.S.C. Aug 6, 2009).