UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, Stephen A. Walter, Debtor(s).	C/A No. 11-05521-HB Adv. Pro. No. 13-80037-HB
Randy A. Skinner, Plaintiff(s), v. Gay S Walter, Defendant(s).	Chapter 7 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed his Motion for Summary Judgment pursuant to Fed R. Civ. P. 56, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056, and Defendant objected. The Trustee instituted this adversary proceeding[1] pursuant to 11 U.S.C. § 363(h)[2] to compel the sale of a piece of real property jointly titled in the names of a debtor and another party.

FACTS

The facts below are found from the undisputed representations of counsel at the summary judgment hearing, the undisputed facts in the Motion for Summary Judgment and response, the transcript of Defendant's deposition, and the bankruptcy schedules from the underlying bankruptcy case.

1. The Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. § 1334.

[1] Pursuant to Fed. R. Bankr. P. 7001(3) "a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a co-owner in property" is an adversary proceeding.
[2] Further reference to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, will be by section number only.

2. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).[3]

3. Plaintiff is the Chapter 7 Trustee Randy A. Skinner ("Trustee").

4. Stephen A. Walter ("Debtor") is the debtor in the above captioned bankruptcy case.

5. Defendant Gay S. Walter ("Defendant") is Debtor's mother.

6. In August of 2006 Debtor and Defendant agreed to jointly purchase a condominium located at Caravelle Resort, 6900 North Ocean Boulevard, Unit 1007 ("condo").

7. The purchase price paid to the seller was approximately $175,000.00.

8. Debtor may have paid at most $5,000.00 of the initial $10,000.00 down payment. However, Defendant could not remember whether Debtor paid anything at all.

9. The remainder of the purchase price came from a joint loan to Debtor and Defendant, evidenced by a note and secured by a mortgage on the condo.

10. Both Debtor and Defendant signed the note and the HUD statement at closing.

11. The seller was paid from the loan proceeds and Debtor and Defendant were obligated to repay the borrowed funds.

12. The deed from seller recorded in Horry County indicates Debtor and Defendant co-own the condo as tenants in common.

13. Defendant testified during her deposition that it was her intent when the condo was purchased that Debtor would help her make the payments.

14. Defendant also testified that it was the intent of both parties from the date of purchase to use the condo as an investment property.

15. Neither Debtor nor Defendant has ever lived in the condo, and both have only visited the property an estimated two times.

[3] In the response filed to the Initial Case Management Order, the parties jointly represented that "[a]ll matters in this adversary proceeding are core" and "[t]here are no reasons that the trier of fact may not issue a final order in this adversary proceeding." *See* Doc. No. 10, filed May 20, 2013.

16. The condo has been used as a rental from the time of purchase. Since at least 2010, any proceeds available have gone to Defendant. However, it has not produced a profit.
17. After Debtor and Defendant took title to the property, Debtor lost his job and as a result did not make any payments toward the mortgage or expenses as contemplated at the time of purchase.
18. Defendant handled and paid all mortgage payments and maintenance expenses for the condo from the date of purchase forward.
19. Debtor did not contribute, other than possibly foregoing his share of any rental proceeds available.
20. Defendant testified that she never asked Debtor to make any of the payments after the loss of his job and has not sought reimbursement for amounts paid because Debtor has struggled financially.
21. In March of 2010, Defendant unilaterally paid off a second mortgage on the property, in the amount of approximately $16,106.84, with her individual funds.
22. In January of 2011, Defendant unilaterally paid off the remaining mortgage balance to satisfy the $132,166.12 first mortgage in a lump payment with her individual funds.
23. Debtor did not assist in the final pay off of the balance of the mortgages in any way.
24. The record does not include evidence of the amount of the rental proceeds that have been received or applied to any expenses or mortgage payments since purchase.
25. The parties do not dispute that at the time Defendant paid off the encumbrances on the condo, the mortgages exceeded the value of the condo.

26. A tax assessment, referenced during Defendant's deposition but not presented into this Court's evidence, indicated the property was assessed at $74,000.00. The date of the referenced tax assessment is unknown by the Court.

27. No formal appraisal of the property has been done to assess the current value.

28. Defendant explained that she asked Debtor, at some point after he consulted a bankruptcy attorney, to deed his portion of the property over to her and he said he could not do so based on the advice of his attorney.[4]

29. On September 2, 2011, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.[5]

30. Debtor's bankruptcy schedules, filed in September of 2011, include any interest he has in the condo with a value of $37,000.00, apparently based on one half of the tax value.

31. The schedules also include a notation by Debtor that explained Defendant paid off the mortgages and stated that "[t]echnically, the debtor legally owns a ½ interest in this property" but "[e]quitably, his mother [Defendant] may be the sole owner of the property."

32. In his bankruptcy schedules Debtor claimed an exemption of a portion of his interest in the property pursuant to S.C. Code § 15-41-30(A)(7).

33. Debtor did not list any amounts owed to Defendant in his bankruptcy schedules.

34. Defendant did not file a timely proof of claim in the underlying bankruptcy case for any amount before the January 3, 2012 deadline.

35. This adversary proceeding was filed on April 4, 2013.

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[4] Defendant's deposition indicates that although Debtor actually filed bankruptcy in September of 2011, he approached a bankruptcy attorney prior to that time but "his attorney . . . got very ill and couldn't put it through the system, so the attorney kind of sat on it for a year while he recuperated." *See* Doc. No. 20, Exhibit B, filed December 5, 2013.

[5] *See* C/A No. 11-05521-hb.

36. Defendant asserted her alleged ownership rights to the whole of the property in her Answer filed May 6, 2013, in response to the Trustee's attempts to sell the condo.

37. Defendant admits that the deed to the property indicates she and Debtor each hold a one half interest as tenants in common, but alleges that she is the equitable owner of the condo having paid off the mortgages with her funds.

38. If Trustee is successful in this proceeding, he will market and sell the condo as a whole and deliver one half of the proceeds to Defendant, retaining one half for Debtor's estate and creditors. Before any sale would be consummated, the Bankruptcy Code and Rules require notice of the sales terms to all creditors in this case and to Defendant, an opportunity to object should the sales price be insufficient and an opportunity to offer upset bids.[6]

39. There is no evidence in the record that the condo is so unique that it cannot be replaced by a similar investment property.

SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[7] "[S]ummary judgment should be granted in those cases in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 738 (D.S.C. 2001). "In deciding a summary judgment motion, the court must look beyond the pleadings and determine whether there is a genuine need for trial." *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 420 (D.S.C. 1995) (citing *Matsushita Electric*

[6] *See* 11 U.S.C. § 363.
[7] Made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056.

Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986)). If the moving party carries its burden of showing there is an absence of evidence to support a claim, then the non-moving party "must demonstrate by affidavits, depositions, answers to interrogatories or admissions on file that there is a genuine issue of material fact for trial." *Id.* (citing *Celotex Corp. v. Cartrett*, 477 U.S. 317, 324–25 (1986)).

An issue of fact is "genuine" if the evidence is such that a reasonable finder of fact could return a verdict for the non-moving party. *Id.* (internal citations omitted). "An issue of fact concerns 'material' facts only if establishment of the fact might affect the outcome of the lawsuit under governing substantive law." *Id.* (citing *Anderson v. Liberty Lobby Ins.*, 477 U.S. 242, 248). Further, the presentation of a "mere scintilla of evidence" in support of an essential element will not forestall summary judgment. *See Anderson v. Liberty Lobby, Ins.*, 477 U.S. 242, 251 (1986) ("Formerly it was held that if there was . . . a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, . . . there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.").

One of the purposes of summary judgment is to determine whether the parties can provide evidentiary support for their version of the facts, and if a party has credible evidence for its position, it must make the existence of such evidence known, because summary judgment cannot be defeated by the vague hope that something may turn up at trial. *See E. P. Hinkel & Co., Inc. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974) (citations omitted). Summary judgment is intended to "avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." *See Morgan v. Havir Mfg. Co.*, 887 F. Supp. 759 (E.D. Pa. 1994)

(citations omitted).

Resulting or Constructive Trust

If the bankruptcy estate is not entitled to split the proceeds of any sale, there is no reason to authorize a sale pursuant to 362(h). Defendant argues that she is the equitable owner of Debtor's interest as well as her own through imposition of a resulting or a constructive trust.

"Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248-49, 489 S.E.2d 472, 475 (1997) (internal citations omitted). Generally, under South Carolina law "when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf." *Id.*; *see also In re Brittain*, 435 B.R. 318, 321-22 (Bankr. D.S.C. 2010) ("While federal law creates the bankruptcy estate, the determination of property rights is controlled by state law.").

On these facts, however, the law favors the Trustee. "[W]hen the conveyance is taken to a spouse or child, . . . no such presumption attaches. On the contrary, the presumption in such a case is that the purchase was designated as a gift or advancement to the person to whom the conveyance is made." *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987). "This presumption, however, is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention." *Legendre v. South Carolina Tax Comm'n*, 215 S.C. 514, 56 S.E.2d 336 (1949). "In order to rebut this presumption, the Debtors must demonstrate a contrary intention by definite, clear, unequivocal and convincing evidence." *In re Blackwell*, C/A No. 98-02748-W, 1998 WL 2017334 (Bankr. D.S.C. Sept. 2, 1998) (citing *ACLI Government Securities*,

Inc. v. Rhodes, 764 F.2d 1033 (4th Cir.1985) ("In order to establish a resulting trust, the evidence must be definite, clear, unequivocal and convincing.")).

There is no evidence, clear or otherwise, to support a finding that at the time of purchase either party intended for Defendant to own the property to the exclusion of Debtor. Regardless of the source of the down payment, both parties signed the notes and mortgages and the evidence indicates that they intended to venture forth together in joint ownership of the property. Even if Defendant contributed more towards the down payment than Debtor, there is no evidence in the record to rebut the presumption that any alleged inequity in payment was anything other than a gift between mother and son. No resulting trust occurred at the time the property was purchased.

Assuming Defendant claims that the resulting trust arose after the purchase and after the joint deed was filed, and assuming this timing would be legally sufficient, there is insufficient evidence to rebut the presumption of a gift between parent and child. Despite any facts in the record regarding payments made by Defendant, title on the public record has not changed since the property was acquired in 2006. This is strong evidence not only of the title to the property, but also of the intent of the parties from 2006 forward. The public records continue to represent joint title and ownership to creditors and third parties and Debtor and Defendant have taken no affirmative steps to make a change in title, except for a simple request from Defendant to Debtor at some unknown point in time. Despite that request, Defendant paid the funds without securing any change in ownership. The actions of Defendant and Debtor prior to the bankruptcy filing are consistent with the presumption that any benefit Debtor received as a result of Defendant's actions was nothing more than a gift to a family member, and considering that the evidence to rebut that presumption must demonstrate a contrary intention by definite, clear, unequivocal and

convincing evidence, no reasonable trier of fact could conclude that the presumption has been sufficiently rebutted from the evidence presented to the Court.

Further, "in order for a resulting trust to arise, such must arise, if at all, at the time the purchase is made. The funds must then, or prior thereto, be advanced and invested. A trust will not result from funds subsequently furnished." *Moore v. McKelvey*, 266 S.C. 95, 98, 221 S.E.2d 780, 781 (1976). The facts before the Court do not support the imposition of a resulting trust at the time of purchase, nor at any time before the bankruptcy case was filed.

Defendant also asks the Court to find a constructive trust in her favor. "A constructive trust results when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002). Counsel for Defendant failed to point to any specific evidence in the record to support these elements of a constructive trust. The evidence simply indicates that due to unfortunate circumstances, after a joint purchase a son was not able to pay as he had hoped toward the mortgage and upkeep of a jointly owned property and his mother paid more than her equal share. As a result, the Court cannot find evidence in the record to support a constructive trust in favor of Defendant and Trustee must prevail on that point.

On these facts, and considering South Carolina state law, the Court finds that Debtor and Defendant own the property jointly as the public records indicate and Debtor's one half undivided ownership interest in the condo belongs to creditors of this bankruptcy estate.

11 U.S.C. § 363(h)

The Trustee requests that he be allowed to sell the whole of the property pursuant to § 363(h) of the Bankruptcy Code. The Trustee has the burden of demonstrating that a sale under § 363(h) is proper. *See In re Ziegler*, 396 B.R. 1, 3 (Bankr. N.D. Ohio 2008) (citing *In re Prakope*, 317 B.R. 593, 602 (Bankr. E.D.N.Y. 2004)).

Section 363(h) provides that

> [T]he trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if –
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of co-owners;
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
>
> (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

In order to sell the property the Trustee must satisfy all four requirements set forth in § 363(h). The parties agree that partition of the property is impracticable and that the fourth requirement is irrelevant to the property in question. However, the parties disagree as to whether sale of the property free of the co-owner's interest would realize significantly more for the estate and whether the benefit to the estate of selling the property free of all liens outweighs any detriment to Defendant.

At the hearing on the summary judgment motion, Defendant objected to Trustee's assertion that a sale of Debtor's one half interest in the property would realize significantly less

for the estate than a sale free of the interest of Defendant. However, "[i]t is generally accepted that the sale of a bankruptcy estate's undivided interest will generate substantially less than the sale of the property free of each owner's interest because of the chilling effect that the sale of the undivided interest usually has on prospective purchasers of the property." *Maxwell v. Barounis (In re Swiontek)*, 376 B.R. 851, 866 (Bankr. N.D. Ill. 2007) (taking judicial notice that a sale of the estate's undivided interest would realize less than a sale of the property free of the interest of co-owners); *see also Maiona v. Vassilowitch (In re Vassilowitch)*, 72 B.R. 803, 807–808 (Bankr. D. Mass. 1987). Considering that the record includes no evidence to the contrary, the Court finds that Trustee has met his burden of proof as to this element.

Trustee has also established that there would be a benefit to the estate in selling the property given that Debtor lists an interest in the property that can be liquidated, valued on Debtor's schedules at $37,000.00. The estate would benefit from the receipt of one half of the proceeds of the sale of the property as a whole. This is a significant benefit. If the property is not sold, the Trustee will lose any benefit of the value of Debtor's interest in the property for the estate and its creditors. Therefore, the Trustee has shown that the estate would receive a significant benefit from selling the property.

Determination of whether the benefit to the estate outweighs any detriment to Defendant is a fact intensive inquiry in which the Court should consider the economic hardship that Defendant may suffer as well as any emotional harm to her arising from the forced sale. *See In re Oswald*, 883 F.2d 69, slip op. *1 (4th Cir. August 9, 1989) (citing *In re Addario,* 53 B.R. 335, 338 (Bankr. D. Mass.1985); *In re Bell*, 80 B.R. 104, 106 (M.D. Tenn. 1987)).

Even if this adversary proceeding is concluded in Trustee's favor, before any sale would be consummated, the Bankruptcy Code and Rules require notice to all creditors in the

bankruptcy case and to Defendant, an opportunity to object should the sales price be insufficient, and an opportunity to offer upset bids. Pursuant to § 363(i), Defendant as co-owner has the right to "purchase such property at the price at which such sale is to be consummated."[8] If Defendant elects not to do so and the property is sold to another buyer pursuant to § 363(h) then under § 363(j) Defendant is entitled to her share of the proceeds. These provisions are intended to protect a co-owner's interest in property sold in this manner.

Since Defendant does not live in the condo and testified that she in fact has only visited the property two times, and given that the condo was purchased and has been used solely as an investment, the Court cannot find from the record any evidence that there would be any significant emotional harm to Defendant if the Trustee sold the property pursuant to § 363(h). Further, a sale of the property would pay to Defendant the value of her current ownership rights, whatever the current value may be.

The benefits of a sale of the estate's interest in the condo along with the interest of Defendant outweigh any detriment to Defendant. The record supports Trustee's position and does not include sufficient evidence from which a reasonable trier of fact could conclude otherwise. There is no genuine issue of material fact remaining and the Trustee is entitled to judgment as a matter of law.

IT IS THEREFORE, ORDERED THAT:

1. Trustee's Motion for Summary Judgment is hereby **GRANTED**; and

[8] Section 363(i) provides as follows: "Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated."

2. Trustee is entitled to a judgment allowing him to compel the sale of the property at issue. The Trustee may market both the interest of the Debtor and the Defendant in the condo, located at 6900 N. Ocean Blvd., Unite 1007, Myrtle Beach, SC for sale and split the proceeds, net of all realtor or auctioneer commissions and expenses, closing costs and other costs of sale, with the Defendant. Any further sale of the Property must be approved by the Court and Trustee must provide Defendant the protections offered a co-owner by 11 U.S.C. § 363.

FILED BY THE COURT
03/31/2014

US Bankruptcy Judge
District of South Carolina

Entered: 03/31/2014