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IT IS SO ORDERED.



Charles M. Caldwell
Charles M. Caldwell
United States Bankruptcy Judge

Dated: February 26, 2010

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

<i>In re:</i>	:	
	:	Case No. 08-60881
DEBORAH ANN GAVIN,	:	Chapter 7
	:	Judge Caldwell
	:	
<i>Debtor.</i>	:	
<hr/>		
Susan L. Rhiel, Trustee,	:	
	:	
<i>Plaintiff,</i>	:	
	:	
v.	:	Adv. Pro. No. 09-2059
	:	
Mortgage Electronic	:	
Registration Systems, Inc., <i>et al.</i> ,	:	
	:	
<i>Defendants.</i>	:	

**ORDER DENYING MOTIONS FOR
SUMMARY JUDGMENT (DOCS. 24 & 25)**

On November 5, 2008 (“Petition Date”), Deborah Ann Gavin (“Debtor”) filed a petition for relief under Chapter 7 of the United States Bankruptcy Code (“Code”). On February 3, 2009,

Chapter 7 trustee Susan Rhiel (“Plaintiff”) commenced this adversary proceeding against the Debtor’s husband, Bryan Gavin (“Bryan”), as well as against Mortgage Electronic Registration Systems, Inc. (“MERS”) and Quicken Loans, Inc. (“Quicken Loans”). Bryan and the Debtor each own an undivided one-half interest in the residential real property located at 5704 Morlich Square, Dublin, Ohio 43017 (“Property”), subject to a mortgage in favor of MERS as nominee for Quicken Loans.

By her complaint, to which she attached a copy of the mortgage, the Plaintiff requests authority to: (1) avoid the transfer effectuated by the recording of the mortgage to the extent that the mortgage encumbers the Debtor’s interest in the Property (“Transfer”) as a constructive fraudulent transfer under § 548 of the Code; (2) avoid the Transfer as a constructive fraudulent transfer under § 544(b) and Ohio Rev. Code Ann. § 1336.04(A)(2); (3) preserve the mortgage on the Debtor’s interest for the benefit of her estate under § 551; (4) recover the Property subject to the Transfer, or the value thereof, from MERS and Quicken Loans (collectively, “Corporate Defendants”) and/or from Bryan under § 550; and (5) sell both the Debtor’s and Bryan’s interests in the Property under §363(h). The Plaintiff must first avoid the Transfer if she is to obtain the other relief she seeks.

On September 30, 2009, the Corporate Defendants filed a motion for summary judgment (“Corporate Defendants’ Motion”) (Doc. 24) on all counts of the Complaint. On October 21, 2009, the Plaintiff filed a cross-motion for summary judgment on all counts of the Complaint and a memorandum in opposition to the Corporate Defendants’ Motion (“Plaintiff’s Motion”) (Doc. 25). On November 12, 2009, the Court held a hearing on the motions for summary judgment. The Court has jurisdiction to determine this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and

the general order of reference entered in this district. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(H), (K) and (N).

The following background is taken from the joint stipulations (Doc. 23) and stipulated exhibits (Doc. 26) filed by the Plaintiff and the Corporate Defendants. On or about August 7, 2007, the Debtor and Bryan acquired the Property for a purchase price of \$360,000 by a deed recorded on September 4, 2007 in the Office of the Delaware County, Ohio Recorder (“Recorder”). At the time of the acquisition, Bryan executed two promissory notes (each a “Prior Note” and collectively, the “Prior Notes”) in favor of Quicken Loans for loan proceeds totaling approximately \$342,000. The Debtor, who at all relevant times was unemployed, did not execute the Prior Notes. On September 4, 2007, a mortgage stating that it was executed by Bryan and the Debtor in favor of MERS as the nominee for Quicken Loans was filed with the Recorder to secure a Prior Note in the principal amount of \$288,000 (“Prior Mortgage 1”), and a mortgage stating that it was executed by Bryan and the Debtor in favor of MERS as the nominee for Quicken Loans was filed with the Recorder to secure a Prior Note in the principal amount of \$54,000 (“Prior Mortgage 2” and, together with Prior Mortgage 1, the “Prior Mortgages”). On or about October 5, 2007, Bryan executed an Interest Only Period Fixed Rate Note in the principal amount of \$342,000 in favor of Quicken Loans (“Current Note”), as a refinance of the Property, the proceeds of which were used to satisfy the Prior Notes. As a result of the satisfaction of the Prior Notes, the Prior Mortgages were released. The Debtor did not sign the Current Note. A mortgage stating that it was executed on October 5, 2007 by Bryan and the Debtor in favor of MERS as the nominee for Quicken Loans as security for the Current Note was filed with the Recorder on October 29, 2007 (“Current Mortgage”).

Under Fed. R. Civ. P. 56(c)(2), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7056, summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Applying this standard, the Court concludes that it cannot grant summary judgment here for several reasons.

First, genuine issues of material fact exist as to the Debtor’s financial condition at the time of the Transfer. In an attempt to demonstrate the Debtor’s insolvency, the Plaintiff invites the Court to take judicial notice of the Debtor’s bankruptcy petition, her schedules of assets and liabilities and statement of financial affairs, as well as the proofs of claim filed in her bankruptcy case. As a matter of law, however, those documents do not by themselves demonstrate that the Debtor was insolvent as of the relevant time—the date of the Transfer—or that she was rendered insolvent by the Transfer, which occurred approximately one year prior to the Petition Date. *See Daneman v. Stanley (In re Stanley)*, 384 B.R. 788, 806–08 (Bankr. S.D. Ohio 2008). Likewise, there is no evidence in the record that, as of the date of the Transfer, the Debtor was engaged or was about to engage in a business or transaction for which her remaining assets were unreasonably small or that she intended to incur, or believed or reasonably should have believed that she would incur, debts beyond her ability to pay as they became due. Accordingly, genuine issues of material fact exist regarding the Debtor’s financial condition as of the date of the Transfer.

Second, genuine issues of material fact exist as to whether the Debtor received less than a reasonably equivalent value in exchange for the Transfer. An analysis of reasonably equivalent value is “based upon the facts and circumstances of each particular case.” *Staats v. Butterworth Props., Inc. (In re Humble)*, 19 Fed. Appx. 198, 200 (6th Cir. Aug. 20, 2001). The Corporate

Defendants contend that the Debtor received the release of the Prior Mortgages in exchange for the Transfer. The Plaintiff, however, argues that the release of the Prior Mortgages was in exchange for the payment of the Prior Notes with the proceeds of the Current Note, not in exchange for the Debtor's granting the Current Mortgage. *Cf. Chase Manhattan Mortgage Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 467 (6th Cir. 2008) ("There was no debt to be secured under the Original Mortgage once the Original Loan was paid."). This dispute is material because the Debtor must have received reasonably equivalent value "in exchange for" the Transfer. *See Killips v. Schropp (In re Prime Realty, Inc.)*, 376 B.R. 274, 279 (Bankr. D. Neb. 2007), *aff'd*, 380 B.R. 529 (B.A.P. 8th Cir. 2007).

The Plaintiff also contends that the Debtor did not receive reasonably equivalent value in exchange for the Transfer because she was not a signatory to the Prior Notes. By the Prior Mortgages, however, the Borrower—who is identified in each instance as "Bryan Gavin and Debbie A. Gavin, husband and wife"—agreed to "pay when due the principal of, and interest on, the debt evidenced by the Note" Depending on the existence of facts not yet in the record, this agreement by the Debtor could provide a basis for her personal liability. *See Pioneer Sav. & Loan Co. v. City of Cleveland*, 479 F.2d 595, 597 (6th Cir. 1973) ("The rule is that the mortgagor is personally liable if the mortgage contains a covenant to pay the debt secured"); *City of Lorain v. Torres*, 1996 WL 27932 at *3 (Ohio Ct. App. Jan. 24, 1996) ("Ms. Torres has not claimed that anyone misled her about the contents of the Mortgage Deed and Security Agreement, or that she signed it based upon an understanding that she would not be obligated by it. A mortgagor is personally liable for the underlying debt if she has signed a promissory note for that debt, or if the mortgage contains a covenant to pay the debt." (citation omitted)). At least one Ohio court has held

that a mortgagor has personal liability on an associated promissory note she did not sign only if there is evidence that the mortgagor was aware that the mortgage contained a promise to pay and the parties' mutual understanding was that signing the mortgage would make the mortgagor personally liable. *See Weigel v. Weigel*, 1936 WL 2012 at *2 (Ohio Ct. App. Jan. 10, 1936). There is nothing in the record regarding the parties' intentions with respect to the Debtor's personal liability. Nor is there sufficient information regarding the Debtor's knowledge of the promise to pay contained in the mortgage. Indeed, the Debtor did not disclose a mortgage on Schedule D even though that schedule specifically directs debtors to "[l]ist creditors holding . . . mortgages[.]"

Finally, the circumstances surrounding the refinancing call into question whether the Debtor received reasonably equivalent value in exchange for the Transfer. In his Answer (Doc. 6), Bryan suggests that the refinancing occurred for the benefit of Quicken Loans:

On or about October 5, 2007, a refinance of the described residence was executed. . . . As previously explained . . . this was a solicited transaction performed by Quicken Loans. The initial loan funding that occurred in August 2007 was in need of a refunding. Quicken Loans stated to the Defendant that they were unable to market/sell the second mortgage to the secondary market. They suggested a viable solution which was satisfactory to the Defendant which allowed them to market the new loan. Upon closing, the loan was sold to Countrywide Financial.

Answer ¶ 4.

Based on the record as it currently exists, the Court cannot decide whether the Debtor was insolvent as of the date of the Transfer or was rendered insolvent thereby and cannot decide whether the Debtor received reasonably equivalent value in exchange for the Transfer. "A court should not grant a summary judgment until the facts have been sufficiently developed to enable it to decide with reasonable certainty that it is making a correct determination of the law." *Local 1423, Glaziers v.*

P.P.G. Indus., Inc., 378 F. Supp. 991, 1000 (N.D. Ind. 1974). Here, there are too many unanswered questions related to the Transfer for the Court to render summary judgment. For the foregoing reasons, the Court **DENIES** both the Plaintiff's Motion and the Corporate Defendants' Motion.

Trial of this matter will be set by separate order.

IT IS SO ORDERED.

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