

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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| IN RE: |) | CASE NO. 01-52999 |
| |) | |
| ANTHONY G. & LORI A. DeANGELIS, |) | CHAPTER 13 |
| |) | |
| DEBTOR(S) |) | |
| |) | |
| ANTHONY G. DeANGELIS, <i>et al.</i> , |) | ADVERSARY NO. 01-5346 |
| |) | |
| PLAINTIFF(S), |) | JUDGE MARILYN SHEA-STONUM |
| |) | |
| v. |) | |
| |) | |
| ALLIANCE MORTGAGE COMPANY, |) | ORDER GRANTING IN PART AND |
| <i>et al.</i> |) | D E N Y I N G I N P A R T |
| |) | DEFENDANT’S MOTION FOR |
| |) | JUDGMENT ON THE PLEADINGS |
| DEFENDANT(S). | | |

On October 4, 2001 the Debtors, Anthony G. and Lori A. DeAngelis (the “Debtors”) and Jerome L. Holub, standing chapter 13 trustee (the “Trustee”)(collectively, “the Plaintiffs”), filed their Complaint for Lien Avoidance, Determination of Validity, Priority and Amount, Turnover, and Declaratory Judgment Relief. A pre-trial conference was held on November 30, 2001 at which defendant Alliance Mortgage Company (“Alliance”) made an oral Motion to Answer Instantly, to which there was no objection and the Motion was granted. Alliance filed its Answer on December 20, 2002.

On January 14, 2002 Alliance filed a Motion for Judgment on the Pleadings (the “Motion”). The Plaintiffs responded on February 1, 2002. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on

July 16, 1984 and is determined to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (K) over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b).

I. BACKGROUND

In the Complaint the Debtors allege that they are the record title holders of real property at 856 Belding Road, Hartville, Ohio. Plaintiffs allege that the mortgage instrument held by Alliance “was not executed in accordance with the laws of the State of Ohio and is not entitled to record under Section 5301.25, Revised Code of the State of Ohio, and is fraudulent as to a bona fide purchaser of real estate, a judgment creditor or an execution creditor under the laws of the State of Ohio.” Complaint (“Comp.”) at ¶ 10. The Plaintiffs contend that the “purported mortgage of Alliance should be avoided and declared invalid as to the property of the Estate pursuant to Section 544 of the United States Bankruptcy Code.” Comp. at ¶ 11. The Debtors and the Trustee further contend that they each acquired, at the commencement of the case, “the rights and powers of a lien creditor, an execution creditor and a bona fide purchaser of real property,” Comp. at ¶ 12, “a position or status occupied by the Trustee or the Debtors pursuant to Section 544 of the United States Bankruptcy Code.” Plaintiff’s Pre-trial Statement at 2.

In its Motion, Alliance identifies one issue as being “whether the debtor has the power under chapter 13 to avoid a voluntary transfer.” Motion at 3. Alliance contends that the “debtors do not have standing to assert avoidance powers under Bankruptcy Code Sections 544 and 547 to avoid voluntary liens.” *Id.* In addition Alliance further argues

that the Trustee is not a real party in interest because of his limited role of reviewing plans, advising the court as to plans and acting as a disbursing agent under confirmed plans. *Id.* at 4.

II. MOTION FOR JUDGMENT ON THE PLEADINGS

Judgment on the pleadings is governed by Fed. R. Civ. P. 12(c), which is made applicable to this proceeding pursuant to Fed. R. Bankr. P. 7012. Rule 7012 provides, in pertinent part:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The standard of review applicable to a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is the same standard as applicable to a motion to dismiss under Rule 12(b)(6). *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 512 (6th Cir. 2001), *see also* *Mixon v. Ohio*, 193 F.3d 389, 399-400 (6th Cir. 1999). The Court must construe the Complaint in the light most favorable to the plaintiff, accept all of the Complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

III. ANALYSIS

A. Overview

Section 103(a) of the Bankruptcy Code states as follows:

Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.

Thus, the “strong-arm” avoiding powers provided in § 544 are applicable in this

chapter 13 matter.

Section 544 states in pertinent part:

(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.

...

In their Complaint and Pre-trial Statement the Plaintiffs assert that the Trustee and the Debtors are each in the position of *bona fide* purchasers and pursuant to § 544 each may seek to avoid the mortgage transaction with the defendant.

B. The Debtors

The Bankruptcy Code specifically authorizes narrow exceptions to the general rule that chapter 13 debtors lack standing to exercise the powers given to the trustee. In § 522(h), the Code provides:

The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if-

(1) such transfer is avoidable under section 544, 545, 547, 549 or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

Bankruptcy courts addressing this issue have applied section 522(h) to chapter 13 debtors. *See In re Elam*, 194 B.R. 412 (Bankr. E.D. Tex. 1996)(citing *Young v. Washington Fed. Sav. & Loan Ass'n (In re Young)*, 156 B.R. 282 (Bankr. D. Idaho (1993)); *Bruce v. Republicbank-South Austin (In re Bruce)*, 96 B.R. 717 (Bankr. W.D. Tex. 1989).

Section 522(h) specifically grants debtors standing to avoid certain transfers of exempt property, such as homesteads, if the trustee has not attempted to avoid the transfer. In this case the Trustee is attempting to avoid the transfer. Therefore, on the facts of this case the Debtors do not satisfy the requirements to proceed under § 522(h). *See In re Willis*, 48 B.R. 295 (S.D. Tex. 1985)(Every element of § 522(h) must be satisfied before the debtor may step into the shoes of the trustee.)

In addition, the Fifth and the Ninth Circuits have identified a five part test that generally tracks § 522(h) to determine whether the debtor has power to avoid a transfer of exempt property: (1) the transfer was not a voluntary transfer of property by the debtor; (2) the debtor did not conceal the property; (3) the trustee did not attempt to avoid the transfer; (4) the debtor seeks to exercise an avoidance power usually used by the trustee; and (5) the transferred property is of a kind that the debtor would have been able to exempt from the estate if the trustee had avoided the transfer under one of the provisions in § 522(h). *DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248 (9th Cir. 1995); *Realty Portfolio Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292 (5th Cir. 1997).

Under the Fifth and Ninth Circuit's test the Debtors would again have no standing to avoid the transfer both because the Trustee is attempting to avoid the transfer, and the transfer was a voluntary transfer of the property by the Debtors. The Debtors voluntarily entered into the mortgage with the defendant. Further, the Code does not permit the Debtors to assume the "strong-arm" powers of the Trustee when the Trustee is attempting to avoid the transfer.

The Plaintiffs argue that "even if the debtors cannot bring the action" they were properly joined as parties, and should at least be permissively joined "since their interests are consistent with those of the Chapter 13 Trustee." Plaintiffs' Response at 3. Plaintiffs cite to no cases, treatises or other authority that would bolster their assertion that every entity having interests "consistent with those of the Chapter 13 Trustee" should be permissively joined in an action. However, in this case the Debtors may more properly be viewed as defendants who may claim an interest, by way of a homestead exemption, in the property, in the same way debtors in chapter 7 one-witness mortgage cases have been joined as parties. Debtors will be allowed 30 days from the entry of this Order to address the alignment of parties. If no action is taken by Debtors within that time frame, movant's counsel is instructed to submit an order dismissing the Debtors as parties in this adversary proceeding.

C. The Trustee

Alliance Mortgage asserts that the chapter 13 Trustee is without standing to bring this avoidance action because he serves only limited administrative functions of objecting

to claims, ensuring compliance with confirmation requirements and plan provisions, and distributing proceeds under a confirmed plan. Motion at 4.

However, “[t]he chapter 13 trustee possesses all of the avoiding powers conferred by sections 544, 545, 547, 548 and 549, subject to the limitations on their exercise contained in section 526.” 8 *Collier on Bankruptcy* ¶ 1300.93 (15 ed. rev. 1999)(citations omitted). Section 544(a)(3) provides the Trustee with the right to avoid any transfer or obligation of the debtor that is voidable at state law by “a *bona fide* purchaser of real property . . . 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.” This provision grants the Trustee “the same interest in the Debtor’s property as that of a *bona fide* purchaser who obtained the property without any knowledge of a previous encumbrance.” *Wasserman v. Household Realty Corp.*, 263 B.R. 553, 566 (Bankr. N.D. Ohio 2001). The effect of this provision is to grant the Trustee power to avoid the interest. In addition, a statutory hurdle that chapter 13 plans must clear is that holders of allowed unsecured claims will receive at least what would have been available for distribution on such claims in a chapter 7 case. 11 U.S.C. § 1325(a)(4). This “best interests” test further supports the conclusion that a chapter 13 trustee has standing to pursue § 544 claims.

Construing the Complaint in the light most favorable to the Plaintiff/Trustee and accepting all of the Complaint’s factual allegations as true, the Court finds that it is not the case that “the plaintiff[/trustee] undoubtedly can prove no set of facts in support of his

claim that would entitle him to relief.” *Ziegler*, 249 F.3d at 512; *Mixon*, 193 F. 3d at 399-400..

IV. CONCLUSION

Based on the foregoing, the Court finds that the Debtors in this case do not have standing to pursue avoidance of the mortgage pursuant to the provisions of § 522(h). However, the Court finds that the chapter 13 Trustee has the avoidance powers provided by § 544 and thus has power to pursue avoidance of the mortgage. The Motion for Judgment on the Pleadings is GRANTED as to the Debtors and DENIED as to the chapter 13 Trustee.

In addition, the Debtors shall have 30 days from the entry of this Order to address the alignment of parties as discussed above. If Debtors take no action within that time frame, movant’s counsel is instructed to submit an Order dismissing the Debtors as parties in this adversary proceeding.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of March, 2002, the foregoing Order was sent via regular U.S. Mail to:

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Marjorie H. Kitchell, *Law Clerk*