

THIS OPINION IS NOT INTENDED FOR PUBLICATION

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

IN RE:)	CASE NO. 01-54674
)	
WILLIAM & GAIL MYERS,)	CHAPTER 7
)	
DEBTOR(S))	
)	
LYDIA SPRAGIN, TRUSTEE,)	ADVERSARY NO. 02-5116
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
WILLIAM MYERS, ET AL.)	MEMORANDUM OPINION RE:
)	DEFENDANT-DEBTORS'
)	MOTION FOR JUDGMENT ON
DEFENDANT(S).)	THE PLEADINGS

This matter is before the Court on defendant-debtors' "Motion for Judgment on the Pleadings" [docket #11] and the plaintiff-trustee's response thereto [docket #20]. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (K) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the foregoing pleadings and the pleadings on file in defendant-debtors' main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following conclusions of law.

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BACKGROUND

Defendant-debtors and plaintiff-trustee do not dispute any of the background facts in this case and the issues raised in their pleadings are ones of law.

1. Defendant-debtors filed a joint voluntary chapter 7 bankruptcy on November 28, 2001.

2. On their Schedule C - Property Claimed as Exempt, defendant-debtors each claimed a \$5,000.00 exemption in real property located at 6697 E. Baird, Barberton, Ohio (the "Residence").

3. No objections have ever been filed to defendant-debtors' claimed exemptions in the Residence.

4. The Residence is encumbered by a mortgage in favor of Equicredit Corporation of America ("Equicredit"). That mortgage was assigned to Equicredit by the original mortgagee.

5. On their Schedule A - Real Property, defendant-debtors listed the current market value of the Residence at \$99,000.00 and the current amount due on the mortgage as \$98,401.00.

6. On March 18, 2002 the chapter 7 trustee appointed to defendant-debtors' chapter 7 case initiated this adversary proceeding naming debtors and Equicredit as defendants. Through her complaint plaintiff-trustee contends that she is entitled to avoid the mortgage on the Residence pursuant to §544 of the Bankruptcy Code because that mortgage was not executed in accordance with the requirements of §5301.01 of the Ohio Revised Code.

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7. Plaintiff-Trustee and Equicredit reached a resolution of the issues raised in the complaint and on October 2, 2002 the Court entered an “Order Granting and Approving Motion for Authority and Notice of Intent to Compromise Controversy” in defendant-debtors’ main chapter 7 case. Pursuant to that resolution Equicredit will pay plaintiff-trustee the sum of \$2,000.00 and assert no unsecured claim against the chapter 7 estate. In exchange, plaintiff-trustee will dismiss this adversary proceeding with prejudice and abandon the Residence as property of the bankruptcy estate. Equicredit’s mortgage on the Residence is unaffected by such settlement.

DISCUSSION

Through their “Motion for Judgment on the Pleadings,” defendant-debtors contend that, because no objections were filed to their claimed exemptions in the Residence,

[they] are entitled to a judgment that their exemption . . . is allowed to the extent of \$10,000 and this sum of money must be paid to the defendants prior to the distribution by the trustee of funds to the claims of general unsecured creditors in the event that this action ultimately results in the disposition through sale by the trustee or through the acceptance by the trustee of any case settlement in lieu of sale of the subject real property.

[Motion at pg. 2]. Although plaintiff-trustee does not dispute that defendant-debtors are entitled to a homestead exemption in the Residence, she does dispute that such entitlement is superior to the rights of creditors holding allowed unsecured claims. [Objection at pg. 3].

Defendant-debtor’s base their contention on §522(g) of the Bankruptcy Code which provides, in relevant part, that:

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Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee *recovers* under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section, if such property had not been transferred, if -

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property;

11 U.S.C. §522(g) (emphasis added). As acknowledged by defendant-debtors, §522(g) would apply only to the extent that plaintiff-trustee makes a “recovery” for the benefit of the bankruptcy estate pursuant to §550 of the Bankruptcy Code. [Mem. in Supp. of Motion at pg. 1]. Through her complaint, plaintiff-trustee seeks only to avoid Equicredit’s mortgage on the Residence pursuant §544(a)(3) of the Bankruptcy Code. Plaintiff-trustee contends that this avoidance action alone is sufficient to bring the avoided property interest into the bankruptcy estate and that a separate recovery action pursuant to §550 is not necessary. *See* Objection at pg. 3.

In its decision in *Suhar v. Burns (In re Burns)*, the Sixth Circuit Court of Appeals analyzed the distinct concepts and processes of avoidance and recovery under the Bankruptcy Code and held that, as soon as the trustee avoided a defectively executed mortgage pursuant to §544(a)(3), that interest was preserved for and became a part of the bankruptcy estate. 322 F.3d 421, 428 (6th Cir. 2003) (“The statutory scheme provide[s] that, immediately upon avoidance of the transfer, [the transferee’s] interest in the Debtor’s property returned to the estate without need for resort to the recovery process.”). Based upon such holding, plaintiff-

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trustee's avoidance action alone was a sufficient challenge to Equicredit's mortgage on the Residence. Because plaintiff-trustee did not also have to rely upon the recovery process provided by of §550 of the Bankruptcy Code to secure value for the bankruptcy estate, defendant-debtors' contention regarding §522(g) is without merit.

Defendant-debtors also claim that even if plaintiff-trustee's action does not amount to an attempt to "recover" property for the benefit of the estate, they can still assert their homestead exemption ahead of any interest of the estate pursuant to §522(i)(2) of the Bankruptcy Code. [Mem. in Supp. of Motion at pg. 2]. To support this claim defendant-debtors reason as follows:

This section [§522(i)(2)] provides, '**Notwithstanding section 551** of this title, a transfer avoided under section 544 . . . may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section.' It is important to note that both Sections 522(g) and 522(i)(2) apply "**notwithstanding** 11 U.S.C. §551" which automatically preserves an avoided transfer for the benefit of the estate. The debtors submit that the fact that the Bankruptcy Code allows the debtors' exemption to be preserved **notwithstanding** the estate's rights indicated Congress's intention to allow the debtors' homestead exemption to trump the estate's interest in situations such as those presented by the case at bar.

[Mem. in Supp. of Motion at pg. 2 (emphasis in original)]. What is missing from this reasoning, however, is the fact that §522(g) is not operative if debtors voluntarily transferred the property that becomes a part of the estate pursuant to §544 and §551 of the Bankruptcy Code.

The property that was at issue in this adversary proceeding is a lien on the Residence. That lien was created when defendant-debtors granted a mortgage on that property. Because

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defendant-debtors' transfer of that property interest was a voluntary one, §522(g) of the Bankruptcy Code does not apply.

Essentially, §522(g) recognizes, where a property interest has been involuntarily taken from a debtor by means such as execution, repossession or certification or a judgment, that it would be inequitable not to permit a debtor to assert an otherwise allowable exemption for an interest in that property once the property or its value has been recovered by the Trustee under powers granted by the Bankruptcy Code. However, the same rationale does not hold for interests which were voluntarily transferred by the debtor.

In re Savage, 92 B.R. 259, 261 (Bankr. S.D. Ohio 1988).

CONCLUSION

Based upon the foregoing, the Court finds that defendant-debtors' "Motion for Judgment on the Pleadings" is not well taken and is hereby overruled. A entry of judgment consistent with this Memorandum Opinion will be entered separately in this case.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 5/19/03