

IT IS SO ORDERED.

Dated: 04:40 PM July 31 2009



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

IN RE:	)	
	)	CASE NO. 06-50692
MICHAEL L. NELSON	)	
LINDA S. NELSON	)	CHAPTER 7
	)	
DEBTOR	)	
	)	
	)	<b>ADVERSARY NO. 08-5129</b>
	)	
KATHRYN A BELFANCE, TRUSTEE	)	JUDGE MARILYN SHEA-STONUM
	)	
PLAINTIFF,	)	
	)	
vs.	)	<b>MEMORANDUM OPINION AND</b>
	)	<b>ORDER GRANTING PLAINTIFF'S</b>
MICHAEL L. NELSON, et al.,	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT</b>
DEFENDANT(S).	)	

This matter is before the Court on the Motion For Summary Judgment ("Motion") [docket #26] filed by Plaintiff-Trustee, Kathryn A. Belfance ("Trustee") on May 5, 2009. Following a status conference on March 30, 2009, this Court set deadlines for filing cross-

motions for summary judgment and responses. Trustee was the only party to file a motion for summary judgment and no responses were filed. This matter was taken under advisement by the Court once the response time elapsed.

This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I), over which this Court has jurisdiction under 28 U.S.C. §1334(b) and the Standing Order of Reference entered in this District on July 16, 1984.

### **PROCEDURAL BACKGROUND**

Trustee filed her complaint in this adversary proceeding on September 22, 2008 against Defendants-Debtors, Michael L. Nelson and Linda A. Nelson (“Debtors”), Defendant-HSBC Mortgage Services, Inc. (“HSBC”), and Defendant-Summit County Fiscal Office (“Fiscal Office”). First, Trustee seeks an order declaring and determining the right, title and interest of all parties in and to 1042 Crestline Dr., Akron, Ohio, 44312 (the “Property”). Second, Trustee seeks an order authorizing her to sell the Property at a public or private sale subject to the following liens and encumbrances, which will be defined further *infra*: (1) HSBC’s mortgage; (2) Debtors’ homestead exemption; and (3) Fiscal Office’s potential lien for accrued taxes not yet due and owing and any additional interest or penalty that may have accrued since the date of filing of the complaint in this adversary proceeding.

### **FACTUAL BACKGROUND**

#### ***Stipulated Facts***

Trustee, Debtors, and HSBC have filed the following Joint Stipulations of Fact

(“Joint Stipulations”) [docket # 25].<sup>1</sup> The parties agree that no factual matters remain in dispute [See docket #22].

1. This action is properly commenced as an adversary proceeding pursuant to Fed. R. Bankr. Proc. 7001.
2. This adversary proceeding relates to and arises in the chapter 7 case of Michael and Linda Nelson, Case No. 06-50692, pending in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division.
3. This Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157 and the General Order No. 84 entered in this District on July 16, 1984 and the claims set forth herein are core proceedings within the meaning of the United States Bankruptcy Code.
4. The Court has personal jurisdiction over the Defendants pursuant to Fed. R. Bankr. Proc. 7004(f).
5. This District is the proper venue for this adversary proceeding pursuant to 28 U.S.C. § 1408 and § 1409.
6. The Plaintiff-Kathryn A. Belfance is the duly appointed and qualified and acting Trustee for Debtors.
7. The Defendant, Michael L. Nelson, is a Debtor in a bankruptcy, having filed his petition seeking relief under chapter 7 of the United States Bankruptcy Code on or about May 4, 2006.

---

<sup>1</sup> Although the introductory paragraph of the Joint Stipulations states that the Fiscal Office is a party to the stipulated facts set forth therein, the signature block does not include the approval of counsel for the Fiscal Office. Because the priority of the Fiscal Office is undisturbed in this decision, the Court can proceed based upon the stipulations of the remaining parties.

8. The Defendant, Linda S. Nelson, is a Debtor in a bankruptcy, having filed her petition seeking relief under chapter 7 of the United States Bankruptcy Code on or about May 4, 2006.
9. The Property, which is the subject of the present litigation, is made up of four (4) contiguous parcels of land being numbers 51-05216, 51-05217, 51-06919, and 51-06920 (also known as lots 33, 34, 35 & 36, respectively).
10. The Defendant-HSBC holds a mortgage which encumbers only parcel number 5106920 ("Lot 36"), and as such, Lots 33, 34, and 35 are not encumbered by HSBC's mortgage or other lien.
11. As of the date Trustee's complaint was filed, there was no outstanding real estate tax or assessment due on the Property.
12. Defendant- Fiscal Office currently has a lien against the Property for accrued taxes not yet due and owing and any additional interest or penalty that may have accrued since the date of the filing of the present complaint.
13. At the time of the filing of Debtors' petition, Debtors were entitled to receive a \$10,000 homestead exemption in the Property according to Ohio Revised Code § 2329.66(A)(1).
14. At the time of the filing of Debtors' petition, Trustee had a duty to collect and reduce to money the property of the bankruptcy estate according to 11 U.S.C. § 704.
15. The equity existing in the Property at the time of the filing of Debtors' petition - excluding any amount representing Debtors' allowable exemptions and any amount representing valid secured liens - was property of the estate within the meaning of 11

U.S.C. § 541.

The parties stipulated as to the following documentation to be relied upon:

16. Joint Bankruptcy Petition of Debtors.
17. Mortgage from Debtors to Household Realty Company (Joint Stipulations, Exhibit A).
18. Copy of the Lien Search conducted by Lawyers' Title covering the Property (Joint Stipulations, Exhibit B).

***Findings of Fact***

In addition to the foregoing stipulated facts, the Court makes the following finding of fact based on the uncontroverted Motion:

19. Although the mortgage held by HSBC solely covered Lot 36, Debtors' residence was not located on Lot 36 but rather was located on parcel 51-06919 ("Lot 35"). As such, Debtors' residence was not encumbered by HSBC's mortgage.

**DISCUSSION**

***Summary Judgment Standard***

The court shall grant a movant's motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. The party seeking summary judgment bears the initial burden of production by demonstrating the absence of any genuine issue of material fact, but the ultimate burden of demonstrating that an issue of fact still remains for trial lies with the non-moving party. *Celotex Corp. v. Catrett*,

477 U.S. 317, 324 (1986). The non-movant must “come forward with ‘specific facts showing there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Where, as here, questions of law alone are involved, summary judgment is appropriate. *International Ass’n of Machinists v. Texas Steel Co.*, 538 F. 2d 1116, 1119-121 (5<sup>th</sup> Cir. 1976)).

If a motion for summary judgment is unopposed, the movant is not automatically entitled to a judgment in his favor, and judgment shall only be entered if the movant has met his burden and summary judgment is “appropriate” under Fed. R. Civ. P. 56. *Carver v. Bunch*, 946 F.2d 451, 454 (6th Cir. 1991). “[A] district court cannot grant summary judgment in favor of a movant simply because the adverse party has not responded. The court is required, at a minimum, to examine the movant’s motion for summary judgment to ensure that he has discharged that [initial] burden.” *Carver v. Bunch*, 946 F. 2d. 451 (6<sup>th</sup> Cir. 1991). However, when the non-moving party fails to respond to the motion for summary judgment, the court is not required to search the record to establish an absence of a genuine issue of material fact. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). Instead, the court can rely upon the facts presented and designated by the movant, *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 (6th Cir. 1992), bearing in mind that all inferences drawn from these facts must be considered in the light most favorable to the non-movant, despite having filed no opposition. *In re Parton*, 137 B.R. 902, 905 (Bankr. S.D. Ohio 1991).

The Court notes that Debtors’ failure to file their own motion for summary judgment or respond to the Trustee’s Motion results in a waiver of their opportunity to bring to this

Court's attention any legal authorities that might demonstrate why summary judgment in favor of the Trustee is inappropriate as a matter of law. During the last status conference which took place prior to this matter being taken under advisement, counsel for Debtors objected to the proposed agreed order regarding the sale of the Property, indicated that Debtors desired additional time to pursue redemption, and specifically requested that this matter be decided on motions for summary judgment. Nonetheless, Debtors ultimately did not participate in the summary judgment process.

After a review of the stipulated facts, pleadings, and the Motion, the Court finds that the Trustee has discharged her burden. As previously stated, there are no disputed material facts in this case. There is no dispute as to the amount or extent of any of the secured parties' security interest in the Property. *See* Joint Stipulations, ¶¶ 10, 12. There is no dispute as to the exemption amount owed to Debtors from the sale of the Property, *See* Joint Stipulations ¶ 13, and there is no dispute as to the Trustee's right to sell property of the estate. *See* Joint Stipulations ¶¶ 6, 14. Thus, taken as a whole, the record could not lead this trier of fact to find for the non-moving party and there is no genuine issue for trial.

Accordingly, based on the foregoing, the Trustee is entitled to judgment as a matter of law and is entitled to immediately sell the Property at public or private sale subject to: (1) HSBC's mortgage encumbering Lot 36; (2) Debtors' homestead exemption in the amount of \$10,000; and (3) Fiscal Office's potential lien for accrued taxes not yet due and owing and any additional interest or penalty that may have accrued since the date of the filing of the instant complaint.

## CONCLUSION

For the reasons discussed in this Memorandum Opinion, the Court grants summary judgment in favor of the Trustee. **IT IS HEREBY ORDERED :**

1. That Trustee is entitled to sell the Property and that: (1) HSBC's mortgage only encumbers Lot 36; (2) Debtors' interest in the Property is limited to their homestead exemption in the amount of \$10,000; and (3) any lien for accrued taxes or any additional interest or penalty that may have accrued since the date of the filing of the present complaint that is due Fiscal Office shall be paid upon the sale of said real estate; and
2. That Trustee is authorized to sell the Property at public or private sale, free and clear of all other liens and encumbrances not previously described at the earliest time permissible under law.

The Court will make a separate entry of judgment in this proceeding that is consistent with this Memorandum Opinion.

###