

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

LANDY CHUNG,

Debtor.

CASE NUMBER 98-42200

LINDA FRONK,

Plaintiff,

vs.

ADVERSARY NUMBER 00-4102

JOSEPH R. ULRICH,

Defendant.

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M E M O R A N D U M O P I N I O N  
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This matter came before the Court on the motion of substituted Plaintiff Linda Fronk ("Substituted Plaintiff") for partial summary judgment (the "Motion"). Defendant Joseph R. Ulrich ("Defendant") failed to reply to the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

D I S C U S S I O N

FACTS

On July 30, 1998, Debtor Landy Chung ("Debtor") filed a petition under Chapter 7 of Title 11, United States Code. On

July 26, 2000, Trustee Andrew W. Suhar ("Trustee") filed an adversary proceeding against Defendant to recover money, property, and other relief (the "Complaint" or "Adversary Proceeding"). Trustee raised the following three counts against Defendant: (1) Defendant is liable to the estate for two promissory notes (collectively the "Notes") ("Count I"); (2) Defendant committed legal malpractice; and (3) Defendant breached his fiduciary obligations. Defendant filed an answer (the "Answer") in which he admitted he failed to make the payments when due under the Notes and is therefore liable to Debtor. Defendant did not contest the validity of the Notes or claim to have made any payments toward satisfaction of the Notes.

In Debtor's bankruptcy case, Trustee filed a notice of intent to abandon all assets of the estate, with certain exceptions, on July 21, 2000. On July 27, 2000, the Court entered an order granting Trustee's notice of intent to abandon. Every asset that was abandoned by Trustee's initial notice was assigned to Substituted Plaintiff. On September 24, 2003, Trustee filed a supplement to the notice of intent to abandon in Debtor's bankruptcy case in which he indicated an intent to abandon and assign to Substituted Plaintiff all claims and causes of action asserted by the estate against Defendant in the Adversary Proceeding, identified as "*Andrew W. Suhar, Chapter 7 Trustee vs. Joseph R. Ulrich*," Adv. Proc. No. 00-4102. On September 26, 2003, Trustee filed a notice of substitution of Plaintiff in the Adversary Proceeding.

Substituted Plaintiff filed the Motion on December 19, 2003. Although the Court granted Defendant's motion for leave to file a response to Substituted Plaintiff's Motion, Defendant failed to reply to the Motion. The Motion asserts that there are no genuine issues of material fact regarding Defendant's liability under the Notes, as referenced in Count I of the Complaint, and that Substituted Plaintiff is, therefore, entitled to judgment as a matter of law. Count I of the Complaint states that Defendant executed and delivered to Debtor two promissory notes, the principal sum collectively totaling Five Hundred Thousand Dollars (\$500,000.00), copies of which were attached as exhibits. (Compl., Exs. A & B.) The Complaint further states that Defendant failed to make payments under the Notes and that the Notes are now in default. In Defendant's Answer, he admitted the aforementioned statements. In addition, Defendant did not specifically deny the authenticity of the Notes or his signature. Defendant did not raise any applicable affirmative defenses regarding Count I. Furthermore, Defendant failed to reply to Substituted Plaintiff's Motion after the Court granted leave to do so.

Defendant executed and delivered the first promissory note on September 2, 1994. This note was for the principal amount of Three Hundred Thousand Dollars (\$300,000.00). The interest on the principal for the first year of the note was Twenty Thousand Dollars (\$20,000.00). Pursuant to the terms, after the first year, the specified interest was rolled into the note's principal amount.

Subsequently, interest would accrue on the new principal amount at the annual rate of six and two-thirds percent (6.666%). Therefore, there is currently due under the first note the amount of Three Hundred Twenty Thousand Dollars (\$320,000.00) plus interest at six and two-thirds percent (6.666%) from September 2, 1995.

Defendant executed and delivered the second promissory note on February 22, 1995. This note was for the principal amount of Two Hundred Thousand Dollars (\$200,000.00). The interest on the principal for the first year of the note was Thirteen Thousand Three Hundred Thirty-Three Dollars (\$13,333.00). Pursuant to the terms, after the first year, the specified interest was rolled into the note's principal amount. Subsequently, interest would then accrue on the new principal amount at the annual rate of six and two-thirds percent (6.666%). Therefore, there is currently due under this note the amount of Two Hundred Thirteen Thousand Three Hundred Thirty-Three Dollars (\$213,333.00) plus interest at six and two-thirds percent (6.666%) from February 22, 1996.

#### **STANDARD OF REVIEW**

The procedure for granting summary judgment is found in F ED. R. CIV. P. 56(c), made applicable to this proceeding through F ED. R. BANKR. P. 7056, which provides in part that

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary

judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

In situations where summary judgment is not appropriate for every count asserted in a complaint, a party may move for partial summary judgment. FED. R. CIV. P. 56(d), made applicable to this proceeding through FED. R. BANKR. P. 7056, provides that a party may seek summary judgment relief for some, but not all, of the claims asserted in a complaint. The Motion currently before the Court addresses only Count I of the Complaint. Upon review of the record, no genuine issue of material fact exists regarding Count I and partial summary judgment is appropriate.

#### **LEGAL ANALYSIS**

Section 1303.36(A) of the Ohio Revised Code provides, "[u]nless specifically denied in the pleadings, in an action with respect to an instrument, the authenticity of, and authority to make, each signature on an instrument is admitted." OHIO REV. CODE ANN. § 1303.36(A) (Anderson 2002). In his Answer, Defendant failed to

specifically deny the authenticity of the Notes and of his signature. In fact, Defendant admitted in his Answer that he executed each of the Notes. Therefore, pursuant to Ohio Revised Code § 1303.36(A), Defendant admitted the authenticity of the Notes and the genuineness of his signatures on them.

Section 1303.36(B) of the Ohio Revised Code provides,

[i]f the validity of signatures is admitted or proved and there is compliance with division (A) of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 1303.31 of the Revised Code, unless the defendant proves a defense or claim in recoupment.

As noted above, Defendant admitted to the validity of his signature on the Notes, thus complying with all applicable conditions of division (A). Defendant did not assert, let alone prove, any defense to Count I. Accordingly, Substituted Plaintiff is entitled to payment if she proves entitlement as provided by Ohio Revised Code § 1301.31.

Section 1303.31(A) of the Ohio Revised Code provides that "[a] nonholder in possession of the instrument who has the rights of a holder," is entitled to enforce the instrument. Trustee, the original plaintiff, had the rights of the holder. Section 542(b) of the Bankruptcy Code provides that, "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee[.]" 11 U.S.C. § 542(b). Both Notes are payable to Debtor

and property of the estate. Thus, the promissory note debt was payable to Trustee. However, Trustee assigned the right to enforce the promissory notes to Substituted Plaintiff. Therefore, pursuant to Ohio Revised Code § 1303.36 and 11 U.S.C. § 542(b), Substituted Plaintiff is entitled to payment of the Notes.

**C O N C L U S I O N**

Substituted Plaintiff's motion for partial summary judgment is hereby granted on both Notes in the amount of Five Hundred Thirty-Three Thousand Three Hundred Thirty-Three Dollars (\$533,333.00) plus interest as provided in the Notes.

An appropriate order shall entered.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
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ADVERSARY NUMBER 00-4102

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O R D E R  
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For the reasons set forth in this Court's memorandum opinion entered this date, Substituted Plaintiff's motion for partial summary judgment is granted on Count I on both Notes in the amount of Five Hundred Thirty-Three Thousand Three Hundred Thirty-Three Dollars (\$533,333.00) plus interest as provided in the Notes.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this \_\_\_\_\_ day of February, 2005, addressed to:

THOMAS M. HORWITZ, ESQ., 1301 E. 9th Street,  
Suite 2200, Cleveland, OH 44114.

JOSEPH R. ULRICH, 5802 Mallard Court, Mentor, OH  
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GLENN E. FORBES, ESQ., 166 Main Street,  
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JOANNA M. ARMSTRONG