

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DIANE LYNN FIMOGNARI,

Debtor.

CASE NUMBER 02-42499

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

vs.

ADVERSARY NUMBER 03-4431

DIANE LYNN FIMOGNARI, et al.

Defendants.

M E M O R A N D U M O P I N I O N

This cause is before the Court on the Motion for Summary Judgment filed by Plaintiff/Trustee Andrew W. Suhar (the "Trustee"). No response was filed. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

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

[t]he judgment sought shall be rendered forth-with 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 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.

F A C T S

Debtor/Defendant Diane Lynn Fimognari (the "Debtor") filed a voluntary petition for relief under Chapter 7 of Title 11 of the United State Code on June 10, 2002. The bankruptcy estate contained real estate located at 380 Robinson Road, Campbell, Ohio 44405 (the "Real Estate"). On April 19, 2003, the Trustee filed the Motion to Sell Real Estate by Public Auction; Notice of Trustee's Intent to Sell Real Estate Other than in the Ordinary Course of Business (the "Motion to Sell"). On May 13, 2003, the Court entered an Order granting the Trustee's Motion to Sell free and clear of all liens, encumbrances and other interests, with all liens, encumbrances and other interests transferring to the

proceeds of sale. That Order notes that all parties in interest received notice of the Motion to Sell and, despite having the opportunity, no party objected or requested a hearing. On or about May 19, 2003, the Real Estate was sold by public auction, pursuant to the Court's Order.

The Trustee received Seventeen Thousand Five Hundred Dollars (\$17,500.00) resulting from the public auction of the Real Estate. On September 22, 2003, the Trustee filed an adversary proceeding to determine the validity, extent and priority of all liens, and encumbrances related to the Real Estate in which the Trustee alleges that Defendant Mahoning County Treasurer was paid in full from the sale proceeds and that Bank One and Debtor, the other named Defendants, do not have valid liens or interests encumbering the Real Estate, and therefore do not have a claim to the sale proceeds (the "Complaint"). Bank One filed an answer in which Bank One states that it has no interest in the sale proceeds at issue and requests that it be dismissed from the lawsuit. Debtor filed an answer in which she states that, as set forth in her petition, she claimed an exemption pursuant to Ohio Revised Code § 2329.66(A)(18) and that by designating her exemption right, she is entitled to Four Hundred Dollars (\$400.00) of the proceeds resulting from sale of the Real Estate. In the Trustee's Motion for Summary Judgment, he states that he does not oppose Debtor's claimed exemption of Four Hundred Dollars (\$400.00).

D I S C U S S I O N

It is undisputed that, pursuant to the Court's Order granting the Motion to Sell, the Trustee sold the Real Estate and received Seventeen Thousand Five Hundred Dollars (\$17,500.00) of sale proceeds. It is also undisputed that the Mahoning County Treasurer was paid in full from the sale proceeds of the Real Estate. Bank One admits that it no longer has any interest in the Real Estate or proceeds resulting from its sale. In addition, the Trustee does not oppose Debtor's claimed exemption of Four Hundred Dollars (\$400.00). Accordingly, summary judgment is granted in favor of the Trustee.

The Court finds that there are no liens, interests or encumbrances attaching to the sale proceeds received from the sale of the Real Estate, except for the exemption of Four Hundred Dollars (\$400.00) to Debtor.

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DIANE LYNN FIMOGNARI,

Debtor.

CASE NUMBER 02-42499

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

vs.

ADVERSARY NUMBER 03-4431

DIANE LYNN FIMOGNARI, et al.,

Defendants.

*

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion for Summary Judgment filed by Plaintiff/Trustee Andrew W. Suhar (the "Trustee") is granted. The Trustee is directed to pay Debtor/Defendant Diane Lynn Fimognari Four Hundred Dollars (\$400.00) from the proceeds from the sale of the Real Estate.

IT IS SO ORDERED.

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 July, 2005, addressed to:

ANDREW W. SUHAR, ESQ., 1101 Metropolitan Tower, P. O. Box 1497, Youngstown, OH 44501.

JOSEPH C. LUCCHI, ESQ., 20 Federal Plaza West, Suite 600, Youngstown, OH 44503.

THEODORE A. KONSTANTINOPOULOS, ESQ., 1300 East Ninth Street, 14th Floor, Cleveland, OH 44114.

THOMAS R. MERRY, ESQ., 200 East Campus View Boulevard, Suite 200, Columbus, OH 43235.

MAHONING COUNTY TREASURER, 120 Market Street, Youngstown, OH 44503.

SAUL EISEN, United States Trustee, BP America Building, 200 Public Square, 20th Floor, Suite 3300, Cleveland, OH 44114.

JOANNA M. ARMSTRONG