

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
SCOTT DOUGLAS DALRYMPLE, \*  
\* CASE NUMBER 03-44975  
\*  
Debtor. \*  
\*  
\*\*\*\*\*  
\*  
ANDREW W. SUHAR, TRUSTEE, \*  
\*  
Plaintiff, \*  
\*  
vs. \* ADVERSARY NUMBER 04-4095  
\*  
SCOTT DOUGLAS DALRYMPLE, \*  
\*  
et al., \*  
\*  
Defendants. \*  
\*

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

The matter before the Court is the Motion for Summary Judgment on the Complaint to Determine Validity, Priority, and Extent of Liens and Interests and to Sell Property of the Estate Free and Clear of Liens (the "Motion") filed by Trustee Andrew W. Suhar (the "Trustee") on December 11, 2004. This Motion is unopposed. For the reasons listed below, the Court finds in favor of the Trustee on the Motion. The Trustee may sell the Property (as defined below) free and clear of all liens, claims, encumbrances, and interests, with such liens, claims, encumbrances and interests being transferred to the proceeds of the sale in the

same order and priority and with the same validity as they apply currently to the Property.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

### **FACTS**

Proceedings began on September 30, 2003 when Scott Douglas Dalrymple (the "Debtor") filed a petition pursuant to Chapter 7 of the Bankruptcy Code. The Trustee filed this adversary proceeding on May 21, 2004 to determine the validity, priority and extent of liens and interests, as well as obtain authority to sell commercial real estate known as 18 East State Street, Albion, Erie County, PA, 16401 (the "Property") free and clear of liens. Currently, the Debtor holds title to the Property with Linda Starks as joint tenants with rights of survivorship. The Trustee filed the proceeding against the Debtor, Linda C. Starks (Co-Owner), Co-Owner's husband (currently listed as John Doe), Sherry Clancy (judgment lien holder on the Property), the Port Conneaut Federal Credit Union (mortgage lien holder on the Property) and Erie County Treasurer (collector of delinquent tax obligations.)

Port Conneaut Federal Credit Union and Sherry Clancy filed Answers on June 15, 2004 and July 9, 2004, respectively. The other Defendants failed to answer or otherwise plead to the

adversary complaint. Port Conneaut Federal Credit Union does not contest the sale of the Property, but asserts its mortgage lien on the Property (or proceeds). Similarly, Sherry Clancy does not oppose the sale of the Property, but simply asserts her judgment lien against the proceeds.

#### STANDARD OF REVIEW

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 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 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.

#### **DISCUSSION**

Pursuant to 11 U.S.C. § 363(b), the trustee, after notice

and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate. Section 363(h) provides that a

trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h). See *Price v. Harris (In re Harris)*, 155 B.R. 948 (Bankr. E.D. Va. 1993); *Skiba v. Nelson (In re Nelson)*, 129 B.R. 427 (Bankr. W.D. Pa. 1991). Upon proving these factual elements, judgment must be granted as a matter of law. The Complaint meets this criteria for the sale of the Property.

The Property is commercial - not a primary residence. Because of the commercial nature of the Property, partition in kind

would be impracticable. The parties acknowledge that they would be unable to effectively utilize only part of the land or the building. The sale of only the estate's interest in the Property is similarly impractical because the market for only the Debtor's interest is significantly less than half of the market value for the whole Property. The entire Property has a higher market value and sale of the entirety will result in greater proceeds to the estate and the co-owners. A sale will also curtail the co-owner's current financial obligations relating to the Property. As a consequence, the benefit of a sale to the Debtor's estate outweighs the detriment that the co-owner may suffer. The Trustee alleges - and it has not been disputed - that the Property is not used in the transmission of public utilities.

No co-owner or lien holder on the Property has objected to the sale of the Property or challenged the factual assertions in the Complaint. The only two answering Defendants merely asserted their continuing liens on the Property or its proceeds.

Therefore, the Court grants partial summary judgment in favor of the Trustee. The Trustee may proceed with the sale of the Property, free and clear of all liens, claims, encumbrances, and other interests, with such liens, claims, encumbrances and interests attaching to the proceeds of the sale in the same order and priority and with the same validity that they currently have against the Property. The Trustee shall not distribute the proceeds of the sale of the Property without further order of the

Court.

An appropriate order will follow.

---

**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

\*

\*

SCOTT DOUGLAS DALRYMPLE,

\*

CASE NUMBER 03-44975

\*

\*

Debtor.

\*

\*

\*\*\*\*\*

\*

ANDREW W. SUHAR, TRUSTEE,

\*

\*

Plaintiff,

\*

\*

vs.

\*

ADVERSARY NUMBER 04-4095

\*

SCOTT DOUGLAS DALRYMPLE,

\*

et al.,

\*

\*

Defendants.

\*

\*

\*\*\*\*\*

O R D E R

\*\*\*\*\*

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Court finds in favor of the Trustee on the Motion and grants partial summary judgment in favor of the Trustee. The Trustee may sell the Property free and clear of all liens, claims, encumbrances, and interests, with such liens, claims, encumbrances and interests being transferred to the proceeds of the sale in the same order and priority and with the same validity as they apply currently to the Property.

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 August, 2005, addressed to:

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

SCOTT DOUGLAS DALRYMPLE, 407 Furnace Road,  
Conneaut, OH 44030.

ROBERT E. NAYLOR, ESQ., 171 Broad Street,  
P. O. Box 460, Conneaut, OH 44030.

DAVID A. SCHROEDER, ESQ., 1612 East Prospect  
Road, Ashtabula, OH 44004.

NICHOLAS A. IAROCCI, ESQ., 213 Washington  
Street, Conneaut, OH 44030.

LINDA C. STARKS and JOHN DOE, 28 Julia Drive,  
Lake City, PA 16423.

ERIE COUNTY TREASURER, 2306 Pennisula Drive,  
Erie, PA 16506.

SAUL EISEN, United States Trustee, Howard M.  
Metzenbaum U.S. Courthouse, 201 Superior  
Avenue, East, Suite 441, Cleveland, OH 44114.

---

JOANNA M. ARMSTRONG