

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
KATHY A. CARDUCCI, *
* CASE NUMBER 01-40490
*
Debtor. *
*

*
ANDREW W. SUHAR, TRUSTEE, *
*
Plaintiff, *
*
vs. * ADVERSARY NUMBER 02-4176
*
PATRICK JOHN CARDUCCI, *
*
Defendant. *
*

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

This matter came before the Court on the Amended Motion for Summary Judgment ("Amended Motion") filed by Plaintiff, Andrew W. Suhar ("Plaintiff"). Defendant, Patrick John Carducci ("Defendant"), failed to reply to the Amended Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157 and 11 U.S.C. § 363. 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.

I. 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.

II. FACTS

On February 15, 2001, Kathy A. Carducci ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Plaintiff is the duly appointed trustee in Debtor's bankruptcy estate.

At the time of the filing, Defendant, Debtor's ex-husband, allegedly owed Debtor Fourteen Thousand Eight Hundred Sixty-Eight and 50/100 Dollars (\$14,868.50) for a property division pursuant to the terms of Debtor's divorce. (Complaint at ¶ 3.) The aforementioned amount is secured by a mortgage dated December 1, 2000 on Defendant's real property at 850 Broad Street, Conneaut, Ashtabula County, Ohio 44030 (the "Mortgage").¹ (*Id.*) The Mortgage provides for an interest rate of 9% and 240 monthly payments of One Hundred Thirty-One and 50/100 Dollars (\$131.50), with said payments scheduled to begin on January 1, 2001. (Complaint at 2; Affidavit of Plaintiff at ¶¶ 5, 6.) The Mortgage was properly recorded in County of Ashtabula, Ohio on December 1, 2000. (Amended Motion at Ex. C.)

Subsequently on February 15, 2001, Monogram Credit Card Bank of Georgia ("Monogram") obtained a judgment against Defendant. (*Id.*) Monogram properly recorded its judgment lien against the

¹This property was quit claimed by Debtor to Defendant on December 1, 2000 as part of the property division. (Amended Motion at Ex. 6; Complaint at ¶ 3; Ex. A.)

subject property in the County of Ashtabula, Ohio on April 10, 2001.² (*Id.*)

On September 27, 2002, Plaintiff filed a Complaint to determine that the Mortgage is the first and best lien against the subject property. Plaintiff also sought a determination of the terms and the amount owed on the Mortgage. As of August 31, 2002, the last payment period before the Complaint was filed, the amount due and owing on the Mortgage was Thirteen Thousand Six Hundred Seventy-Seven and 25/100 Dollars (\$13,677.25).³ (Affidavit of Plaintiff at ¶¶ 5, 6.) Despite being served, Defendant has failed to respond to the Complaint. (Affidavit of Plaintiff at ¶ 5.)

On September 21, 2005, Plaintiff filed a Motion for Summary Judgment. Subsequently, on November 10, 2005, Plaintiff filed the Amended Motion. Defendant has failed to respond.

III. LEGAL ANALYSIS

Federal Rule of Civil Procedure 8(d), made applicable pursuant to Bankruptcy Rule 7008, states:

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

Federal Rule of Civil Procedure 7(a), made applicable pursuant to Bankruptcy Rule 7007, requires that an answer be filed to a complaint by stating "[t]here shall be a complaint and an answer[.]" Furthermore, Bankruptcy Rule 7012 requires a defendant to serve an answer

²The Mortgage and judgment lien are the only defects, liens, encumbrances or other adverse claims against the subject property. (Amended Motion at Ex. C.)

³Plaintiff has been unable to obtain verification from Defendant as to the exact remaining amount owed on the Mortgage. (Complaint at ¶ 4.)

within thirty days after being duly served with the summons and the complaint unless the court grants otherwise. Therefore, a complaint is a pleading that requires a responsive pleading and if such responsive pleading is not filed or does not deny the averments, the averments will be deemed admitted.

Over thirty days have elapsed since Defendant was properly served with the Complaint and this Court has not granted Defendant an extension of time to file an answer. (Affidavit of Plaintiff at ¶ 5.) To date, Defendant has failed to file an answer to the Complaint or deny any of the averments in the Complaint. According to the aforementioned rules, Defendant, by failing to file a responsive pleading and denying the averments in the Complaint, has admitted the averments in the Complaint, which incorporates a copy of the Mortgage. In addition, Defendant has failed to contest the information in the Amended Motion, which includes a title report for the subject property and an Affidavit of the Plaintiff.

Consequently, there remains no "genuine issue of material fact" between Plaintiff and Defendant on the issue of the Mortgage. This Court concludes the following:

Plaintiff, through the Mortgage, has the first and best lien on the property located at 850 Broad Street, Conneaut, Ashtabula County, Ohio 44030.⁴ (Complaint at ¶ 3.) Furthermore, the Affidavit establishes that the remaining balance on the Mortgage is Thirteen Thousand Six Hundred Seventy-Seven and 25/100 Dollars (\$13,677.25) accruing interest at a rate of 9%. (Complaint at ¶¶ 5, 6; Affidavit of Plaintiff at ¶¶ 5, 6.) Finally, the facts establish that the

⁴Pursuant to Title 53 of the Ohio Revised Code, the Mortgage has priority over the judgment lien.

Mortgage is to be paid in 240 monthly installments of One Hundred Thirty-One and 50/100 Dollars (\$131.50), with said payments scheduled to begin on January 1, 2001. (Complaint at 2.)

As a result of the aforementioned, this Court grants Plaintiff's Amended Motion.

An appropriate order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

KATHY A. CARDUCCI,

Debtor.

ANDREW W. SUHAR, TRUSTEE,

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vs.

PATRICK JOHN CARDUCCI,

Defendant.

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ADVERSARY NUMBER 02-4176

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Amended Motion for Summary Judgment is granted. Plaintiff, through the Mortgage, has the first and best lien on the property located at 850 Broad Street, Conneaut, Ashtabula County, Ohio 44030. The amount owing on such Mortgage is Thirteen Thousand Six Hundred Seventy-Seven and 25/100 Dollars (\$13,677.25).

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE