

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on January 22, 2007, which may be different from its entry on the record.

IT IS SO ORDERED.



A handwritten signature in blue ink, appearing to read "Arthur I. Harris".

Arthur I. Harris
United States Bankruptcy Judge

Dated: January 22, 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:)	Case No. 05-24045
)	
VESELIN POPOVIC,)	Chapter 7
Debtor.)	
)	
LAUREN A. HELBLING,)	Adversary Proceeding No. 06-1408
Plaintiff,)	
)	Judge Arthur I. Harris
v.)	
)	
VESELIN POPOVIC, <i>et al.</i> ,)	
Defendants.)	

MEMORANDUM OF OPINION¹

Before the Court is the plaintiff-trustee's unopposed motion for summary judgment against defendant National Check Bureau. The trustee seeks: (1) an order avoiding National Check Bureau's judgment liens entered against the debtor's real property within the ninety days prior to the filing of the bankruptcy

¹ This opinion is not intended for official publication.

petition; and (2) an order authorizing the sale of the property free and clear of National Check Bureau's liens. For the reasons that follow, the trustee's unopposed motion for summary judgment is granted.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A),(F),(K),(N), and (O). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

FACTS

The debtor Veselin Popovic filed a Chapter 7 petition on September 11, 2005. The debtor's amended schedules list real property at 4301 Warner Road in Cleveland, Ohio (the real estate), valued at \$26,000, with no secured claims against it. After conducting a limited title examination of the property, the trustee discovered two judgment liens on the property in favor of National Check Bureau (NCB). According to the affidavit of James Laughery, president of State Title Company, the first judgment lien was filed against the property on August 3, 2005, for \$7,866.24, plus interest and costs. The second was filed on August 22, 2005, for \$1,754.76, plus interest and costs.

On May 17, 2006, the plaintiff-trustee filed this adversary proceeding

against the debtor Veselin Popovich, the debtor's spouse Natasha Popovic, and creditor NCB. The complaint sought: (1) a declaratory judgment determining the validity, priority, and extent of all liens and encumbrances, and other interests in the real estate; (2) an order avoiding the liens of NCB; and (3) an order approving the sale of the real estate free and clear of all liens, claims, and interests. On September 9, 2006, the plaintiff-trustee was awarded default judgment against debtor-defendant Veselin Popovic. On November 3, 2006, the Court entered an agreed order between Natasha Popovic and the plaintiff-trustee, in which Natasha Popovic consented to sale of the property. Therefore, the only remaining issues in this case involve NCB's interest in the real estate.

The plaintiff-trustee filed a motion for summary judgment against defendant NCB on October 22, 2006. NCB has not filed a response.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that a court shall render summary judgment:

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.

The party moving the court for summary judgment bears the burden of showing

that “there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law.” *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party meets that burden, the nonmoving party “must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial.” *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997); *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”). In determining the existence or nonexistence of a material fact, a court will view the evidence in a light most favorable to the nonmoving party. *Tennessee Dep’t of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

Absent such evidence from the nonmoving party in a motion for summary judgment, the Court need not excavate the entire record to determine if any of the available evidence could be construed in such a light. *See In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001) (holding that the “trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material

fact”); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993). “[S]ummary judgment, if appropriate, shall be entered against the adverse party.” Fed. R. Civ. P. 56.

DISCUSSION

Trustee’s Avoiding Power under 11 U.S.C. § 547(b)

The plaintiff-trustee seeks to avoid NCB’s liens as preferences under 11 U.S.C. § 547(b). Section 547 of the Bankruptcy Code² provides in pertinent part:

- (b) . . . the trustee may avoid any transfer of an interest of the debtor in property—
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made —
 - (A) on or within 90 days before the date of the filing of the petition; [and]
 -
 - (5) that enables such creditor to receive more than such creditor would receive if —
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.
 -
 - (f) For the purposes of this section, the debtor is presumed to have

² This bankruptcy case was filed prior to October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, 119 Stat. 23 (BAPCPA). Therefore, all references to the Bankruptcy Code are to the Bankruptcy Code as it existed prior to the effective date of BAPCPA.

been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

To prevail on her claim, the plaintiff-trustee must establish each element of a preference under subsection 547(b). *See* 5 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy*, ¶ 547.03 (15th Ed. Rev.).

NCB is a creditor of the debtor based upon the original debts for which judgments were entered in the Cleveland Municipal Court. Under Ohio law, a judgment becomes a lien on property when it “is filed in the office of the clerk of the court of common pleas.” Ohio Rev. Code § 2329.02 (2006). Therefore, NCB’s judgments became liens on the real estate when NCB filed the judgments with the court on August 3, 2005, and August 22, 2005. Obtaining these liens effectuated a transfer of an interest of the debtor in the real estate. *See* 11 U.S.C. § 101(37) (“ ‘lien’ means charge against or interest in property to secure payment of a debt or performance of an obligation.”). These transfers occurred thirty-nine and twenty days before the filing of the bankruptcy petition while the debtor was insolvent. *See* 11 U.S.C. § 547(f) (“the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.”). The transfers were on account of antecedent debts — the original debts for which judgments were entered. Finally, the liens enable NCB to receive a larger share of the estate than it would in liquidation under Chapter 7 had the

transfer not occurred because the liens enabled NCB to recover as a secured creditor rather than as a general unsecured creditor. *See generally Stewart v. East Tenn. Title Ins. Agency (In re Union Sec. Mortg. Co.)*, 25 F.3d 338 (6th Cir. 1994) (discussing whether the assignment at issue allowed the creditor to receive more than it would have received if the assignment had not been made and debtor's assets had been liquidated under Chapter 7).

Given the evidence adduced from the parties' pleadings, and the affidavit of James Laughery, the plaintiff has shown that NCB's liens were preferential transfers avoidable under 11 U.S.C. § 547(b). NCB has failed to respond to the motion for summary judgment or to produce any evidence admissible under Federal Rule of Civil Procedure 56(e) to show the existence of a material fact.

Viewing the evidence before it in a light most favorable to the defendant, the Court finds there is no genuine issue of material fact and that the plaintiff is entitled to judgment as a matter of law. Accordingly, the plaintiff-trustee's motion for summary judgment is granted, and NCB's liens are avoided as preferential transfers.

Sales of Property of the Estate Under 11 U.S.C. § 363

Section 363 of the Bankruptcy Code gives trustees the power to "sell . . . property of the estate." 11 U.S.C. § 363(b). Subsection 363(h) provides that the

trustee may sell both the estate's interest in property and a co-owner's interest if certain elements are met. *See* 11 U.S.C. § 363(h). In this case, the plaintiff-trustee has obtained default judgment against the debtor and has entered into an agreed order approving the sale of the spouse/co-owner's interest in the property. Because NCB's liens have been avoided, NCB has no interest in the real estate which would entitle it to challenge the sale. Therefore, the trustee has authority to sell the property free and clear of any interests in the property.

CONCLUSION

For the foregoing reasons, plaintiff Lauren Helbling's motion for summary judgment is granted. The defendant National Check Bureau's liens are avoided pursuant to 11 U.S.C. § 547(b), and the trustee is authorized to sell the property located at 4301 Warner Road free and clear of all liens, claims, and encumbrances.

IT IS SO ORDERED.