

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 05-94971
)	
JAMIE LEE SMITH and)	Chapter 7
MICHELLE EILEEN SMITH,)	
)	
Debtors.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
MARVIN A. SICHERMAN, TRUSTEE,)	Adversary Proceeding No. 06-1300
)	
Plaintiff,)	
)	
v.)	
)	
AMERICAN STOCK TRANSFER AND)	<u>MEMORANDUM OF OPINION</u>
TRUST COMPANY, et al.,)	<u>ON MOTIONS FOR SUMMARY</u>
)	<u>JUDGMENT (NOT FOR</u>
Defendants.)	<u>COMMERCIAL PUBLICATION)</u>

The complaint filed by the chapter 7 trustee requests turnover of shares of FirstMerit Corp. stock as property of the estate and a determination as to the validity, priority and amount of liens and claims regarding the stock.¹ Defendant Jerry Smith disputes the trustee’s request and asks to be declared the owner of the stock. This opinion addresses the trustee’s and Mr. Smith’s cross-motions for summary judgment.² For the reasons stated below, both motions are denied.

¹ The trustee was granted default judgment against American Stock Transfer & Trust Co., and debtors Jamie and Michelle Smith. (Docket 38). As a result, those parties do not have an interest in the stock and they are required to turn the stock over to the trustee subject to the entry of a final judgment as to Jerry Smith, the remaining defendant.

² Docket 49, 50.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E) and (K).³

I. THE MOTIONS FOR SUMMARY JUDGMENT

A. Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.*

The non-moving party may oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998)

³ This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

(quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)). The court must evaluate each summary judgment motion on its merits and “draw all reasonable inferences against the party whose motion is under consideration.” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).

B. Applicable Law

The chapter 7 estate is broadly defined to include “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). State law determines a debtor’s property rights, *see Butner v. United States*, 440 U.S. 48, 55 (1979), and the parties agree that Ohio law controls the determination of ownership of the FirstMerit stock.

Ohio law recognizes the contractual creation of a joint and survivor interest in stock. *See* OHIO REV. CODE § 1701.24(D), *see also In re Hutchinson’s Estate*, 166 N.E. 687 (Ohio 1929). Under Ohio law, a determination regarding ownership of stock jointly held with a right of survivorship is governed by the same case law that governs similar bank accounts. *See Krakoff v. United States*, 439 F.2d 1023, 1025-26 (6th Cir. 1971). In *Estate of Cowling*, the Ohio Supreme Court discussed the ramifications of joint and survivor ownership of stock investments and brokerage accounts and stated that ownership is to be determined in this manner:

‘The existence of a joint and survivorship bank account raises a rebuttable presumption that co-owners of the account share equally in the ownership of the funds on deposit.’ *Vetter v. Hampton* (1978), 54 Ohio St.2d 227, 8 O.O.3d 198, 375 N.E.2d 804, paragraph three of the syllabus. This presumption applies in the absence of evidence to the contrary. *Id.* at paragraph four of the syllabus: *see Wright v. Bloom* (1994), 69 Ohio St. 3d 596, 602-603, 635 N.E.2d 31. A joint and survivorship account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.” *In re Estate of*

Thompson (1981), 66 Ohio St.2d 433, 20 O.O.3d 371, 423 N.E.2d 90, paragraph one of the syllabus; see Uniform Probate Code 6-103. We expressly stated that Thompson did not “significantly alter our earlier case law” but merely amended our analytical framework to better effectuate “the intent of the parties to create joint and survivorship accounts.” *Thompson*, 66 Ohio St.2d at 439, 20 O.O.3d 371, 423 N.E.2d 90. This language indicates that, although we adopted a new presumption for determining ownership of joint and survivorship accounts, the presumption of equal ownership continues to exist when net contributions are not proven

Estate of Cowling v. Estate of Cowling, 847 N.E.2d 405, 409-10 (Ohio 2006).

The chapter 7 trustee bears the burden of proof in a turnover action. See *Kentucky Co. v. Hayes* (*In re Hayes*), 407 F.2d 1031, 1033 (6th Cir. 1969); *In re Danowski*, 320 B.R. 886, 887 (Bankr. N.D. Ohio 2005).

C. Discussion

These facts are undisputed based on the parties’ stipulation:⁴ Debtors Jamie Smith (the debtor) and Michelle Smith filed their chapter 7 case on October 15, 2005. Jerry Smith is the debtor’s father. American Stock Transfer & Trust Co. holds 1,821.636 shares of FirstMerit Corp. in the names of the debtor and Jerry Smith “JT TEN” which it has agreed to hold pending instruction by the court. An additional 276 shares of FirstMerit stock held in certificate form in the names of the debtor and Jerry Smith “JT TEN” are lost or missing. The stock designation “JT TEN” means the stock is held as joint tenants with right of survivorship. For tax purposes, the dividends and interest earned by the stock have been reported under Jamie Smith’s social

⁴ See docket 47.

security number. At all times before the bankruptcy filing, Jamie Smith reported the dividend and interest income earned by the stock on his income tax returns and Jerry Smith did not.

The trustee requests a summary determination that the bankruptcy estate is sole owner of the FirstMerit stock. He acknowledges that the debtor and Mr. Smith are each presumed to own one-half of the stock under Ohio law. He relies on the stipulated facts and the debtor's bankruptcy filing to rebut the presumption and to show that the debtor owned the stock at the time the bankruptcy case was filed. The trustee opposes Mr. Smith's summary judgment request based on the same evidence. Mr. Smith requests a summary judgment that he is the sole owner of the stock and opposes the trustee's motion. He agrees that he and the debtor are presumed to share equally in the stock and offers evidence to rebut the presumption and to support a determination that he is the sole owner of the stock. The evidence he offers is the debtor's deposition testimony and two letters which he wrote concerning ownership of the stock.

The trustee's evidence shows that the stock dividends and interest were reported under the debtor's social security number and were reported on his tax returns. Also, based on the debtor's bankruptcy filing, the trustee has shown that the debtor: (1) scheduled the stock as personal property with Mr. Smith shown as the sole source of the funds; (2) did not schedule Mr. Smith as a secured creditor with respect to the stock; and (3) did not in his statement of affairs say that he is holding property for Mr. Smith. The trustee has also shown based on the debtor's deposition testimony that he acknowledges receiving the quarterly stock statements.

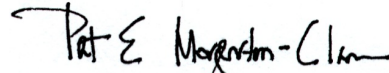
Mr. Smith, on the other hand, cites the debtor's deposition testimony as evidence that Mr. Smith purchased the stock and did not provide the debtor with the stock certificate. The deposition is also cited as evidence that the debtor does not believe he owns the stock and that he

did not receive the stock dividend income, but paid the related income taxes for his father as a means of repaying a loan.⁵

The court is required to view the evidence on each motion in the light most favorable to the non-moving party. Each party has provided evidence to rebut the presumption that the stock is owned equally and which supports the movant's theory of ownership. The trustee's evidence, when viewed in a favorable light, suggests that the debtor was the intended owner of the stock. In contrast, Mr. Smith's evidence suggests that he alone purchased the stock and that he was the intended owner of the stock. Based on this conflicting evidence, there are genuine issues of material fact regarding ownership of the stock and neither party is entitled to summary judgment.

CONCLUSION

For the reasons stated above, the parties' motions for summary judgment are denied. A separate order will be entered regarding this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

⁵ In addition to this evidence, Mr. Smith relies on unsupported statements regarding his intent and his failure to remove the debtor's name from the stock which are not appropriate evidence for purposes of summary judgment. *See* FED. R. BANK. P. 7056 (incorporating FED. R. CIV. P. 56 (c) which provides that summary judgment shall be rendered "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[.]"). Those statements have not been considered by the court.

NOT FOR COMMERCIAL PUBLICATION

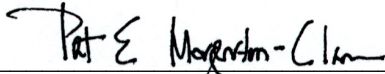
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Plaintiff,)	
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v.)	<u>ORDER</u>
)	
AMERICAN STOCK TRANSFER AND)	
TRUST COMPANY, et al.,)	
)	
Defendants.)	

For the reasons stated in the Memorandum of Opinion filed this same date, the cross-motions for summary judgment filed by the trustee and defendant Jerry Smith are both denied. (Docket 49, 50).

IT IS SO ORDERED.



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge