

IT IS SO ORDERED.



Dated: July 03, 2007
03:10:41 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDOLPH WAYNE MOORE,	*	
	*	CASE NUMBER 06-41741
Debtor.	*	
	*	
*****	*	
RANDOLPH WAYNE MOORE,	*	
	*	ADVERSARY NUMBER 07-4039
Plaintiff,	*	
	*	
vs.	*	
	*	
RICK HALDIMAN, et al.,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

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

(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This matter is before the Court upon Defendant Rick Haldiman's Motion to Dismiss Pursuant to FRCP 12(b)(6) ("Motion to Dismiss") filed by Defendant Rick Haldiman ("Defendant") on April 27, 2007. On May 5, 2007, Debtor/Plaintiff Randolph Wayne Moore ("Plaintiff") filed Response to Defendant Rick Haldiman's Motion to Dismiss Pursuant to FRCP 12(b)(6). Defendant filed Defendant Rick Haldiman's Reply to Response to Defendant Rick Haldiman's Motion to Dismiss Pursuant to FRCP 12(b)(6) on May 16, 2007.

In his Complaint, Plaintiff seeks (i) a determination of the validity, priority, and extent of liens, interests, and encumbrances on property¹ ("Property") jointly owned by himself and Defendant; and (ii) authorization of the Court to sell the Property free and clear of liens. In the Motion to Dismiss, Defendant contends that the Property is owned by R&R Land Clearing ("R&R"), an Ohio partnership formed by Plaintiff and Defendant, and, as a consequence, is not property of the estate.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding

¹ Pursuant to paragraph 3 of the Complaint, the Property includes:

Massey Ferguson tractor;

Hopper;

Satellite screen;

Business equipment; and

Real estate at 46486 State Route 14, Columbiana Ohio.

pursuant to 28 U.S.C. § 157(b)(2)(A), (K), and (N). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. Standard of Review

FED. R. CIV. P. 12(b)(6), incorporated into the Bankruptcy Rules through FED. R. BANKR. P. 7012, governs a motion to dismiss for failure to state a claim upon which relief can be granted. Where, as here, both the moving party and the opposing party present matters outside the pleadings, the Court may exclude such matters or convert the Rule 12(b) motion to a motion for summary judgment. *Song v. City of Elyria*, 985 F.2d 840, 842 (6th Cir. 1993).

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:

The 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); *Tennessee Department 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, 1479 (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 November 1, 1999, the real estate at 46486 State Route 14, Columbiana, Ohio ("Real Estate") was transferred by General Warranty Deed to Plaintiff and Defendant. (Complaint, Ex. A.) A

Title Commitment dated October 17, 2006 identifies Plaintiff and Defendant, individually, as owners of the Real Estate. (*Id.*) The title search also revealed two liens on the Real Estate, a judgment lien recorded in December 2003 listing Defendant as judgment debtor, and a tax lien recorded in May 2006 listing Defendant as taxpayer. (*Id.*) There is no evidence before the Court that ownership of the Real Estate was ever transferred to R&R. (See Affidavit of Randolph Wayne Moore ("Moore Aff."), ¶ 14.)

Approximately three months later, on February 3, 2000, Plaintiff and Defendant executed a Partnership Agreement for the purpose of conducting a land clearing business. (Complaint, Ex. A.; Motion to Dismiss, Ex. A.)

On April 14, 2003, R&R, Plaintiff, Plaintiff's wife, and Defendant executed a Promissory Note/Loan Agreement on the Massey Ferguson tractor. (Answer to Complaint by Defendant Farm Credit Services of Mid-America PCA, Ex. A.) The Promissory Note/Loan Agreement contains a security agreement signed by: (i) Plaintiff and Defendant, both identified as "Partner;" (ii) Plaintiff's wife; (iii) and Plaintiff and Defendant, both identified as "Partner," on behalf of R&R. (*Id.*)

With respect to the remainder of the Property, Plaintiff asserts that he and his wife have an ownership interest, because they had both been asked by Defendant on several occasions to sign promissory notes in their individual capacity to purchase equipment and machinery. (Moore Aff., ¶¶ 7 - 9.)

Defendant, on the other hand, contends that all of the Property is owned by R&R. (Affidavit of Rick Haldiman ("Haldiman

Aff."), ¶¶ 2, 7.) With respect to the Real Estate, Defendant states that (i) he and Plaintiff purchased the Real Estate as a location to operate R&R, (ii) R&R used the Real Estate as its business location, and (iii) the mortgage payments on the Real Estate were paid by R&R. (*Id.* ¶¶ 5, 6.)

On March 22, 2006, Plaintiff filed a Complaint for Dissolution of Partnership in the Columbiana Common Pleas Court. (Complaint, Ex. A.) Plaintiff filed his Chapter 7 petition in this Court on October 23, 2006.

III. Law

Judge Burton Perlman provided a succinct summary of the relevant portion of the Ohio Uniform Partnership Law in *In re Doddy*, 164 B.R. 276 (Bankr. S.D. Ohio 1994).

Absent an agreement to the contrary, Ohio partnerships are governed by the Ohio Uniform Partnership Law. Ohio Rev. Code §§ 1775.01-42 (Anderson 1992). The statute provides that real property may be held in the partnership name, and that such property is partnership property. *Id.* § 1775.07. The statute also enumerates events which, by operation of law, cause dissolution of the partnership. These events include "the bankruptcy of any partner." *Id.* § 1775.30. The partnership is not terminated upon dissolution, however, and it continues until completion of the winding up of partnership affairs. *Id.* § 1775.29. The winding up of the partnership involves applying the partnership property to obligations of the partnership, first toward debts owing to outside creditors, and then toward amounts owing to partners for loans, capital contributions, and profits, in that order. *Id.* § 1775.39. Until the winding up is complete, the partnership property remains an asset of the partnership. *Id.* It thus is not property of the debtor's estate.

Id. at 278.

IV. Analysis

The General Warranty Deed and Title Commitment support Plaintiff's contention that the Real Estate is owned by Plaintiff

and Defendant in their individual capacities. Likewise, the two encumbrances on the Real Estate represent debts incurred by Defendant as an individual, not as a representative of R&R.

Apparently relying on R.C. § 1775.07, Defendant argues that the mortgage on the Real Estate was paid with partnership funds. R.C. § 1775.07(B) reads, in pertinent part, "Unless the contrary intention appears, property acquired with partnership funds is partnership property." OHIO REV. CODE ANN. § 1775.07 (West 2006). Black's Law Dictionary defines "acquire" to mean "[t]o gain possession or control of; to get or obtain." BLACK'S LAW DICTIONARY 24 (8th ed. 2004). Despite Defendant's argument that payments of the mortgage on the Real Estate were made with partnership funds, the Real Estate was purchased (*i.e.*, acquired) by Plaintiff and Defendant prior to creation of R&R. Even if, *arguendo*, R&R made the mortgage payments and used the Real Estate as its business location, the Real Estate at all times remained under the ownership and control of Plaintiff and Defendant. In this case, because the parties never transferred the Real Estate to the partnership, Plaintiff and Defendant expressed an intention contrary to acquisition of the Real Estate by R&R. As a consequence, Defendant is not entitled to judgment as a matter of law with respect to the Real Estate.

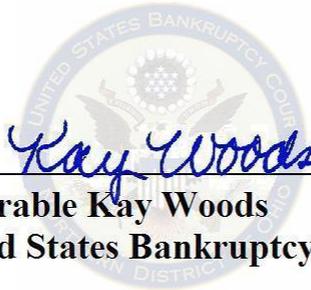
Genuine issues of material fact exist regarding the ownership of the personal property. The security agreement on the tractor is signed by Plaintiff as Partner, Plaintiff's wife, Defendant as Partner, and Plaintiff and Defendant on behalf of the partnership. Without additional evidence, it is not clear what percentage, if

any, of the ownership interest in the tractor is held by the partnership. The ownership of the remaining personal property is the subject of conflicting affidavits by the parties. Defendant states that the remaining property is owned exclusive by the partnership. (Haldiman Aff., ¶ 7.) Plaintiff contends that he and his wife have an ownership interest in the personal property because they were asked to sign promissory notes for equipment in their individual capacities. (Moore Aff., ¶¶ 7 - 9.) Accordingly, as a matter of law, genuine issues of material fact preclude summary judgment in favor of Defendant with respect to the personal property.

An appropriate Order will follow.

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IT IS SO ORDERED.



Dated: July 03, 2007
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Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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Plaintiff,	*	
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vs.	*	
	*	
RICK HALDIMAN, et al.,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

O R D E R

For the reasons set forth in this Court's Memorandum Opinion,
the Motion to Dismiss filed on behalf of Defendant Rick Haldiman is
denied.