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 July 02, 2009, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: July 02, 2009

Arthur I. Harris
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 08-10969
	)	
ROBERT & LUCILLE PETERSON,	)	Chapter 7
	)	
Debtors.	)	Adversary Proceeding No. 08-1183
	)	
MARY ANN RABIN, Trustee,	)	Judge Arthur I. Harris
Plaintiff,	)	
	)	
v.	)	
	)	
JAMES L. PETERSON, *et al.*,	)	
Defendants.		

MEMORANDUM OF OPINION[1]

This adversary proceeding is currently before the Court on the plaintiff-trustee's (the "trustee's") motion for summary judgment against defendant James Peterson (Docket #16). The trustee seeks a determination that the transfer of the subject property is avoidable pursuant to 11 U.S.C. § 548 and Ohio Rev. Code § 1336.05. In addition she seeks a money judgment pursuant to 11 U.S.C. § 550.

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[1] This Opinion is not intended for official publication.

For the reasons that follow, the motion is granted in part.

PROCEDURAL HISTORY

On February 15, 2008, the defendant-debtors, Robert and Lucille Peterson, filed their Chapter 7 petition. On June 23, 2008, the trustee filed this adversary proceeding against the debtors and their son, James Peterson ("James"), asking the Court to determine that a transfer, made by the defendant-debtors to their son approximately one month prior to filing the petition, is avoidable pursuant to 11 U.S.C. § 548 and Ohio Rev. Code § 1336.05. On July 23, 2008, the defendant-debtors and James filed their answer, (Docket #6), denying the allegation.

On August 29, 2008, the Court held a pre-trial conference. In the Pretrial Minutes and Trial Scheduling Order issued following the conference, the parties were ordered to file dispositive motions, if any, by January 7, 2009. The trustee filed her motion for summary judgment on January 7, 2009, (Docket #16), and the defendants filed their response on January 21, 2009 (Docket #20).

In her motion, the trustee again states that, pursuant to 11 U.S.C. § 548 and Ohio Rev. Code § 1336.05, the defendant-debtors made a fraudulent transfer of real property located at 12500 Euclid Avenue, East Cleveland, Ohio, to James, for "no consideration" at a time when they were insolvent. The trustee further states that James obtained a mortgage on the property in 2008 in the amount of $75,000,

and that he received proceeds from the mortgage. The trustee seeks a monetary judgment equivalent to the amount of the mortgage proceeds received by James, as permitted under 11 U.S.C. § 550 and Ohio Rev. Code § 1336.07. The defendants objected, stating that the transfer was not fraudulent because the defendant-debtors received "reasonably equivalent value" for the property, and that the title was being held for James as a "convenience" until he could obtain a mortgage.

On February 23, 2009, the trustee filed a motion for leave to file a supplemental brief in response to the defendants' objection, which was granted (Docket #24). In her supplemental brief, the trustee further states that the defendants' assertion that "the property was held for James Peterson's benefit" does not defeat a *bona fide* purchaser like the trustee and that the transfer was fraudulent as not for "reasonably equivalent value," or, in the alternative, the transfer was preferential.

On March 24, 2009, the defendants filed their reply to the trustee's supplemental brief (Docket #30). In their reply, they stated that the transfer was not preferential under 11 U.S.C. § 547, and that, because James paid the defendant-debtors "reasonably equivalent value" for the property, the transfer was not fraudulent pursuant to 11 U.S.C. § 548.

FACTUAL BACKGROUND

The following facts are undisputed, unless otherwise noted. On August 1, 2002, James L. Peterson, defendant and son of the debtors, entered into a Land Installment Contract with Ira F. Adams to purchase real property located at 12500 Euclid Avenue, East Cleveland, Ohio. Adams did not record the Land Installment Contract, and the defendant-debtors' names do not appear on it. The total purchase price of the property was $35,000, $18,000 of which James paid to Adams over a one-year period, with the remaining $17,000 being loaned to James by the defendant-debtors. During 2004 and 2005, James paid the defendant-debtors an aggregate of $5,000 of the $17,000 loan for the purchase, leaving a balance of $12,000.

On November 20, 2003, for reasons unknown to the Court, Adams transferred the property to the defendant-debtors by way of a Joint and Survivorship Deed.[2] The deed was recorded on November 21, 2003. The defendant-debtors held the deed until January 11, 2008, when James obtained a mortgage on the property through Bluebird Investments, LLC ("Bluebird"), for the sum of $75,000. The defendant-debtors transferred their ownership interest in the

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[2] To the Court's knowledge, prior to November, 2003, the defendant-debtors held no interest in the property.

property to James at the same time the Bluebird mortgage was recorded. Following the transfer, James gave a check for $12,000 to Robert Peterson as final payment on the loan.

The trustee stipulated to the validity of Bluebird's mortgage lien (Docket #14). In her Amended Complaint, filed on January 13, 2009, the trustee stated that she did not seek to avoid the Bluebird mortgage, but instead sought monetary damages from James, pursuant to § 550 of the Bankruptcy Code. The trustee stated that by James's accounting, included as page 12 of the discovery responses, he received proceeds of $60,198.20 from the mortgage loan, gave $12,000 to Robert Peterson, and netted $48,198.20. The trustee is seeking the return of the net proceeds to the estate, stating that the amount received by the defendant-debtors from James is either "less than a reasonably equivalent value in exchange for such transfer," or was a preferential transfer, pursuant to § 548 of the Bankruptcy Code.

In response to the trustee's Interrogatories,[3] James stated that he is a business owner whose place of business is 12500 Euclid Avenue, East Cleveland,

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[3] The defendant-debtors did not file any responses to the "Plaintiff's First Set of Interrogatories and Request for Production of Documents and Request for Admissions Directed to Defendants Robert and Lucille Peterson." Pursuant to Fed. R. Civ. P. 36, made applicable to this case by Fed. R. Bankr. P. 7036, the defendant-debtors are deemed to have admitted all requested admissions. In any event, the pending motion only seeks summary judgment against the defendant James Peterson and not the defendant-debtors.

Ohio, and that he has run a car detailing service, called Pro-Clean Handwash, at that location for the last five years. In the trustee's Request for Admissions James denied that the defendant-debtors were "paid no consideration for the transfer of the property" to him. In addition, in response to the trustee's requests for documents, James produced a handwritten list of items paid from the proceeds of the Bluebird mortgage. In addition to the $12,000 payment to his father, James indicated that he made the mortgage payments for January and February, 2008, paid water bills and property taxes, and made renovations on the property adjoining 12500 Euclid Avenue.

JURISDICTION

The Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

SUMMARY JUDGMENT STANDARD

Fed. R. Civ. P. 56(c), made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 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. *Tenn. 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, 655 (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) (same).

DISCUSSION

Before addressing the trustee's statutory claim for a money judgment against defendant James Peterson, the Court will first address the concept of a purchase-money resulting trust. As noted previously, defendant James Peterson asserts that he paid for the real property in 2003 with $18,000 of his own money, plus $17,000 in funds he borrowed from the defendant-debtors; that the property was titled in the names of the defendant-debtors merely as a convenience; and that he repaid the $17,000 with $5,000 during 2004 and 2005, plus $12,000 in 2008. James therefore contends that the 2008 transfer of the property from the defendant-debtors to him was for reasonably equivalent value and cannot constitute a fraudulent conveyance. Whether the trustee is entitled to summary judgment under these circumstances depends in large part upon the extent of James Peterson's equitable ownership interest, if any, in the subject property at the time it was titled in the names of the defendant-debtors.

A. Partial Purchase-Money Resulting Trust

Upon commencement of a bankruptcy case, all property of the debtors

comes into the bankrupt estate, regardless of whether the interest in such property is legal or equitable. 11 U.S.C. § 541; *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1991) (all property becomes property of the estate at the filing of the petition). However, 11 U.S.C. § 541(d) provides, in pertinent part:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Property rights in bankruptcy are determined by reference to the state law of the jurisdiction. *XL/Datacomp, Inc. v. Wilson (In re Omegas Group),* 16 F.3d 1443, 1450 (6th Cir. 1994). "While the nature and extent of the debtor's interest are determined by state law, 'once that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate.'" *Omegas Group*, 16 F.3d at 1450, *quoting Bavely v. IRS (In re Terwilliger's Catering Plus, Inc.),* 911 F.2d 1168, 1172 (6th Cir. 1990).

The Ohio Supreme Court defines a resulting trust "as one which the court of equity declares to exist where the legal estate in property is transferred or acquired by one under facts and circumstances which indicate that the beneficial interest is not intended to be enjoyed by the holder of the legal title." *First Natl. Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, 515-16 (1956). The intent of the parties is

the determining factor. *John Deere Industrial Equip. Co. v. Gentile*, 459 N.E.2d 611, 616 (Ohio Ct. App. 1983).

One of the most common types of resulting trust is a purchase-money resulting trust. "A purchase-money resulting trust arises 'where title to property is transferred to one person, but the purchase price is paid by another.'" *Brate v. Hurt*, 880 N.E.2d 980, 986 (Ohio Ct. App. 2007) (citations omitted). A purchase-money resulting trust gives rise to an inference that the payor did not intend the transferee to take a beneficial interest in the property. *Id.* Rather, the property is considered to be held in trust for the transferee for the benefit of the payor. *See* Restatement (Third) of Trusts § 9 (2003).[4]

Restatement (Second) of Trusts § 454 provides, in pertinent part:

> Where a transfer of property is made to one person and a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made in such proportion as the part paid by him bears to the total purchase price, unless he manifests an intention that no resulting trust should arise or that a resulting trust to that extent should not arise.

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[4] Recent decisions by the Ohio Supreme Court have either favorably cited or expressly adopted the Restatement of Trusts on issues involving resulting trusts and other trust concepts. *See Stevens v. Radley*, 881 N.E.2d 855, 859 (Ohio 2008) (citing Restatement (Second) of Trusts § 430 (2001)); *Pack v. Osborn*, 881 N.E.2d 237, 241, 243 (Ohio 2008). Therefore, the Court believes that the Restatement of Trusts constitutes an authoritative statement of Ohio law regarding resulting trust issues that the Ohio Supreme Court has not directly addressed in its decisions.

In addition, comment b to this section states that where no intention is expressed, it will be inferred that the payor intended to "acquire a beneficial interest in the property in such proportion as the part paid by him bears to the total purchase price, and a resulting trust arises in his favor to that extent." *Id.* In this case, there was no manifestation that a resulting trust should not arise.

However, when the conveyance is made to a "natural object of the bounty" of the payor, there is no inference of a resulting trust. Restatement (Third) of Trusts § 9 (2003). Instead, where the transferee is a family member of the payor, there is a presumption of a gift, and the transferee will be viewed to have both legal and equitable title to the property. *John Deere Industrial Equip. Co.,* 459 N.E.2d at 616 (conveyance from a parent to a child is presumed to be gift, unless overcome by other evidence). However, the presumption may be rebutted by evidence showing that the payor intended to retain equitable title to the property.

> It is the payor's intention at the time of the transfer and not at some subsequent time that determines whether a resulting trust arises. The conduct of the payor and the transferee before or after the transfer . . . may be such as to show that at the time of the transfer the payor did not intend to make a gift to the transferee. Thus, the fact that the payor manages the property or directs its management, collects rents, pays taxes and insurance premiums, pays for repairs and improvements, or otherwise acts as an owner would act, especially with the transferee's acquiescence, is evidence that tends to rebut a presumption that the payor intended to make a gift to the transferee.

Restatement (Third) of Trusts § 9 cmt. c (2003); *see Brate*, 880 N.E.2d at 986 (presumption of a gift may be overcome with clear and convincing circumstantial evidence showing payor intended to retain a beneficial interest in the property); *accord In re Clemens*, 472 F.2d 939, 943 (6th Cir. 1972).

James purchased the property at 12500 Euclid Avenue, East Cleveland, Ohio, from Ira F. Adams, on August 1, 2002. He entered into an unrecorded Land Installment Contract for the property at a total purchase price of $35,000. Over a one year period, he paid Adams $18,000, and the remaining $17,000 was paid to Adams through a loan to James from the defendant-debtors. Therefore, a partial purchase-money resulting trust in favor of James may have been established when Adams transferred the property to the defendant-debtors by way of a recorded Joint and Survivorship Deed on November 20, 2003. The defendant-debtors held legal title to the property until January 11, 2008, when they transferred it to James.

Although a transfer is presumed to be a gift when the property is conveyed to a relative, the conduct of the payor and the transferee may be sufficient to overcome the presumption. *See In re Valente*, 360 F.3d 256, 263 (1st Cir. 2004) (resulting trust imposed and presumption of gift rebutted where father paid full purchase price, lived in house with son's knowledge, paid all bills, leased the property to third parties, and did not pay rent); *see also In re Clemens*, 472 F.2d at

944 (resulting trust imposed and presumption of gift rebutted where mother paid full purchase price, lived in house, reported income from the property on her tax returns, and paid all real estate taxes and property insurance).

Although no provision was made for James to pay interest on the $17,000 loan, the post-purchase behavior of the defendant-debtors and their son James shows James's intent to retain at least partial equitable ownership of the property, rebutting the presumption of a gift. James managed and ran a business, which was openly advertised, from the property. For almost five years, he did what was necessary to keep the enterprise operating and the property in good enough repair to stay open for business. Further, he repaid the loan the defendant-debtors made to him in 2002 by paying them an aggregate of $5,000 in 2004 and 2005, and an additional $12,000 from the mortgage proceeds. In addition, from the mortgage proceeds he also paid the property taxes, mortgage and utility bills, and otherwise acted "as an owner would act." Restatement (Third) of Trusts § 9 cmt. c (2003).

Legal title to the property was in the names of Robert and Lucille Peterson from November, 2003, to January, 2008, but there is no evidence that they paid the property taxes or utility bills or otherwise contributed to the property's upkeep or management. They presumably knew their son ran a business at the property, and there is no evidence that they made any attempt to close the business or otherwise

control the premises. They do not contest that they loaned their son $17,000 toward the purchase price of the property, or that they were repaid $5,000 in 2004-2005, and $12,000 from the proceeds of the Bluebird mortgage. Both defendant-debtors reported in their bankruptcy schedules that they were retired at the time of the filing and had been so for over seven years. Employee Income Records filed by Robert and Lucille Peterson (Docket #3). There is sufficient evidence to rebut the assumption that the $18,000 James paid toward the purchase of the property conveyed to his parents was intended to be a gift.

Construing the evidence in a light most favorable to the nonmoving party, the Court finds that James held an equitable ownership interest in 18/35ths of the property titled in the names of his parents. Nevertheless, the Court rejects James's assertion that his equitable ownership interest was 100 percent, with his parents holding only bare legal title. Under Ohio law, the purchase-money resulting trust applies only to the extent of the purchase money extended – in this case, $18,000 of the $35,000 purchase price. The evidence, when construed in favor of James, simply does not support a theory under Ohio law that would give James an equitable ownership interest in the entire property. *See In re Clemens*, 472 F.2d at 943; Restatement (Second) of Trusts § 454 cmt. b; *but cf. In re Todd*, 391 B.R. 504 (Bankr. S.D. Fla. 2008) (resulting trust in favor of prior owner under Florida law,

where prior owner furnished all money to purchase property and debtor paid nothing).

B. 11 U.S.C. §§ 548 and 550 [5]

Section 548 of the Bankruptcy Code provides, in pertinent part:

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
> . . .
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; . . .
>
> . . . or
>
> (IV) made such transfer to or for the benefit of an insider . . .[6]

Pursuant to § 548 of the Code, a trustee may avoid a transfer if a debtor received "less than a reasonably equivalent value in exchange for such transfer."

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[5] The provisions of the Ohio Revised Code upon which the trustee also relies are largely duplicative of the provisions of the Bankruptcy Code upon which the Court relies to grant the motion in part. Thus, it is not necessary to analyze those provisions of the Ohio Revised Code as applied to this case.

[6] The Court has already dealt with the issue of James being an "insider" in its consideration of the establishment of a partial purchase-money resulting trust. No further analysis is necessary.

The trustee states that in this case the defendant-debtors did not receive reasonably equivalent value in that they received only $12,000 from the proceeds of the Bluebird mortgage. The trustee seeks not to avoid the mortgage but to recover a money judgment pursuant to § 550 of the Code.

Section 550 of the Bankruptcy Code provides, in pertinent part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from-
>
> (1) the initial transferee of such transfer or the entity for whose benefit to transfer was made . . .

The trustee asserts that the avoided transfer may be recovered by the estate under section 550. Pursuant to that section, the trustee may recover either the property or, with court approval, the value of the property from the initial transferee or a party for whose benefit the transfer was made.

Section 550(a) is intended to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred. *Hirsch v. Gersten (In re Centennial Textiles, Inc.)*, 220 B.R. 165, 176-77 (Bankr. S.D.N.Y. 1998); *Aero-Fastener, Inc. v. Sierracin Corp. (In re Aero-Fastener, Inc.)*, 177 B.R. 120, 139 (Bankr. D. Mass. 1994). The Code provides no guidelines to aid the bankruptcy court in deciding when to permit recovery of the value of the property

rather than the property itself, *Rabin v. B & M Realty Corp. (In re Plechaty)*, 201 B.R. 486, 493 (Bankr. N.D. Ohio 1996), so it is within the discretion of the Court to make such determination. *Id.; see also Centennial Textiles*, 220 B.R. at 177.

The factors which the Court should consider in determining whether to order turnover of the property rather than payment of the value include whether the value of the property (1) is contested; (2) is not readily determinable; or (3) is not diminished by conversion or depreciation. *Plechaty*, 201 B.R. at 493; *Aero-Fastener, Inc.*, 177 B.R. at 139. Consideration of these factors, in addition to the finding of a partial purchase-money resulting trust in favor of James, warrants turnover of some portion of the proceeds of the mortgage to the trustee, rather than turnover of the property itself.

The defendant-debtors have admitted that they transferred the property on January 11, 2008, slightly more than a month before the filing of their petition, and that they were insolvent at the time of the transfer. By failing to respond to the trustee's requests for admissions, the defendant-debtors are deemed to have admitted that they received no consideration for the transfer at issue. However, James did answer the trustee's requests for admissions and denied that the defendant-debtors received "no consideration." There is uncontroverted evidence

that a check in the amount of $12,000 was paid by James to Robert Peterson from the mortgage proceeds. The trustee also does not challenge the defendants' assertions that James: (1) paid Adams $18,000 of his own money in 2002-03; (2) borrowed $17,000 from the defendant-debtors toward the total purchase price of $35,000; (3) paid the defendant-debtors an aggregate of $5,000 in 2004 and 2005, toward the payoff of the $17,000 loan; or that the $12,000 paid to the defendant-debtors from the mortgage proceeds was to pay off the loan in full.

When the defendant-debtors transferred ownership of the property to James in 2008, they only received $12,000 in return, even though James was able to borrow $75,000 against the property, which suggests a value in 2008 for the entire property of $75,000. Absent any prior equitable ownership in the property by James, this prepetition transfer of the defendant-debtors' property would constitute an avoidable transfer under § 548, and the trustee would be entitled to a monetary judgment under § 550. What complicates the Court's analysis, however, is that James held a partial purchase-money resulting trust in the property by virtue of his paying 18/35ths of the purchase price of the property back in 2003, when the property was first titled in the names of the defendant-debtors. Thus, when the property was purchased and placed in the names of the defendant-debtors in 2003, the defendant-debtors held an equitable ownership interest in only 17/35ths (or

approximately 48.6 percent) of the property, having contributed $17,000 toward the $35,000 purchase price. Accordingly, when the property was transferred in 2008 and James was able to borrow $75,000 against the property, the question for the Court becomes, was the transfer of the defendant-debtors' 17/35ths equitable ownership interest in the property in exchange for $12,000 a transfer for less than reasonably equivalent value?

An equitable interest in 17/35ths of property valued at $75,000 would be worth approximately $36,400, yet the defendant-debtors only received $12,000 from the transfer in 2008. Even if the Court deducts the $5,000 that James paid towards the $17,000 loan during 2004 and 2005, and even if the Court deducts the defendant-debtors' share of property taxes and utilities that James paid towards the property, the Court concludes, as a matter of law, that the defendant-debtors received less than a reasonably equivalent value in exchange for the transfer. Nevertheless, for purposes of summary judgment, the Court cannot determine the exact money judgment to which the trustee is entitled under § 550 because of uncertainty over calculating the deductions mentioned above. This determination will be the subject of further proceedings.

CONCLUSION

For the reasons stated above, the Court grants partial summary judgment in

favor of the trustee and against defendant James Peterson as follows: (1) the debtor-defendants' 2008 transfer of their 17/35ths equitable ownership interest in the real property for less than reasonably equivalent value constitutes an avoidable transfer under § 548 of the Bankruptcy Code; (2) the trustee is entitled to a monetary judgment pursuant to § 550 of the Bankruptcy Code, rather than turnover of the property itself, and (3) the exact amount of the monetary judgment will be the subject of further proceedings.

IT IS SO ORDERED.