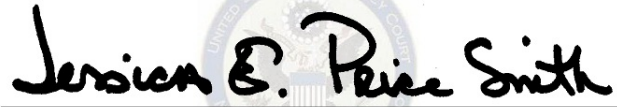


IT IS SO ORDERED.

Dated: 12 November, 2013 02:55 PM



Jessica E. Price Smith

JESSICA E. PRICE SMITH
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:

IN PROCEEDINGS UNDER CHAPTER 7

MILLARD P. THOMAS, III,
Debtor.

CASE NO. 12-14916

LAUREN A. HELBLING, TRUSTEE

ADVERSARY PROC. NO. 13-1012
JUDGE JESSICA E. PRICE SMITH

Plaintiff,

v.

MILLARD P. THOMAS, III, et. al.,

Defendants.

MEMORANDUM OPINION

The sole matter before the Court is whether Defendant Millard P. Thomas, Jr.'s home, located at 25919 Highland Road, Richmond Heights, Ohio, is held in a constructive trust for him, by his son, Millard P. Thomas, III ("Debtor"). Lauren A. Helbling, the Chapter 7 Trustee administering the estate of the Debtor ("Trustee"), seeks authority to sell the home asserting that

legal title to it is in the name of the Debtor and his sister, making the home property of the Debtor's estate. There was no judicial finding of a constructive trust of the Highland Road residence prior to the filing of the Debtor's bankruptcy. Therefore, the Court's determination is based on whether Ohio law allows for a constructive trust to arise by operation of law. I believe that it does. Based on that, and upon consideration of the parties' stipulations of facts, testimony and exhibits admitted into evidence, as well as the arguments of counsel, the Court finds that the Debtor holds no equitable interest in the Highland Road residence of the Defendant. The equitable interest in the residence rests solely with Defendant Millard P. Thomas, Jr., subject to such liens and encumbrances as have been properly filed. Accordingly, the Trustee is not authorized to sell the property.

JURISDICTION

The Court has jurisdiction over this action. The complaint seeks the determination of liens and interests in real property and authority to sell real property, including the interest of a non-debtor co-owner pursuant to 11 U.S.C. §363(b), (f) and (h). It is a core proceeding pursuant to the provisions of 28 U.S.C. Section 157(b)(2)(A), (E), (K), (N) and (O). Core jurisdiction was alleged in paragraph 2 of the complaint and the answering defendants consented to that allegation in their answers.

FACTS

This adversary proceeding was commenced by the Trustee filing the Complaint to Determine Liens and Interests in Real Property and to Sell Real Property Including the Interest of a Non-Debtor Co-Owner. [Doc. 1]. An Answer to Complaint was filed by Millard P. Thomas, Jr. [Doc. 5], Millard P. Thomas, III [Doc. 9], the Cuyahoga County Fiscal Officer [Doc. 12], and

PNC Bank National Association (“PNC”) [Doc 23]. Defendant CitiMortgage, Inc. filed a motion to dismiss, which along with the Answer of the Cuyahoga County Fiscal Officer was resolved by agreed order with the Trustee [Doc. 18 and 17]. The Trustee and PNC also entered into an agreed order to resolve the interest asserted by PNC. [Doc. 25]. However, after it was discovered that the mortgage of PNC was executed and filed after the title to the property had been transferred to the Debtor, PNC and the Trustee agreed to relief from judgment and entered into a stipulation of facts regarding their respective rights and interests. Defendant Brion S. Thomas failed to answer the Complaint and an entry of Default was entered against her. [Doc. 14].

The trial on this matter was held on September 4, 2013. Although the Debtor and PNC remained named defendants in this action, at the time of the trial, the only active litigants were the Trustee and Defendant Millard P. Thomas, Jr. Based on the Joint Stipulations of Trustee and Defendant Millard P. Thomas, Jr. [Doc. 64], the Stipulation Between Lauren A. Helbling, Trustee, and PNC Bank National Association [Doc. 63], the documents admitted into evidence and the credible and undisputed testimony of Millard P. Thomas, Jr., Millard P. Thomas, III, and Brion S. Thomas, the Court makes the following factual findings:

Millard P. Thomas, Jr. purchased and became the title owner to certain real property located at 25919 Highland Road, Richmond Hts., Ohio (the “Highland Road Residence”), by Warranty Deed dated March 30, 2001, Cuyahoga County document number 200103301464. He has resided at and been in possession of his Highland Road Residence since or shortly after the purchase in 2001. All mortgage and equity loan payments, real property taxes, and utility bills have been paid by him; and he has kept the real property maintained and in repair. At all times, Mr. Thomas, Jr. has held himself out to third parties as the sole owner of the property.

In 2003 Mr. Thomas, Jr. was solicited by SouthEast Equity Title Company who told him that they could ensure that the Highland Road Residence was given to his children after his death without having to go through probate court. On September 8, 2003, Mr. Thomas, Jr. executed a document prepared by Margaret B. Hayes, Attorney at Law and titled Transfer on Death Deed (the "September 8, 2003 Deed"). It was his understanding that the document would allow his children to become joint owners of the Highland Road Residence upon his death. The deed was recorded as Cuyahoga County instrument number 200309081909. But, because of an error in the language in the body of the document, it transferred legal title to Debtor Millard P. Thomas, III and his sister, Brion S. Thomas upon its filing.

On November 10, 2003, Mr. Thomas, Jr. and PNC entered into an Equity Reserve Agreement. In connection with the agreement, Mr. Thomas Jr. executed a mortgage in favor of PNC with the Highland Road Residence as collateral for the mortgage. PNC filed the mortgage with the Cuyahoga County Recorder's Office on December 3, 2003. PNC Bank National Association is owed \$14,513.53 as of March 18, 2013 with a per diem of \$1.5077 on the Equity Reserve Agreement. As of the trial, all payments due under that agreement were current and being made by Mr. Thomas, Jr. PNC filed its mortgage when the title of the property was in the name of the Debtor and his sister.

His testimony, and the actions of Mr. Thomas, Jr. in relation to the property, including the execution of the agreement with PNC, prove that he did not intend to transfer his Highland Road Residence to his children while he was alive. Although in early 2004, he believed that there was a mistake in the September 8, 2003 Deed, because tax bills were not coming to him as they had been prior to its execution, he did not understand that the mistake effected a present transfer of ownership of the Highland Road Residence to his children. Further, he thought the

mistake had been corrected after executing a Quit Claim Deed and another Transfer on Death Deed. Those documents were presented to him by SouthEast Equity Title Company to correct the mistake in the September 8, 2003 Deed. But in fact, the February 18, 2004 Quit-Claim Deed, Cuyahoga County instrument number 200402180318 transferred nothing since at the time of its execution Mr. Thomas, Jr. did not hold title to the property. In addition, since he could not transfer title back to himself via the Quit Claim Deed, the June 2, 2004 deed captioned “Transfer on Death”, Cuyahoga County instrument number 200402180318, transferred nothing.

Mr. Thomas, Jr. is a person without knowledge of real estate law or probate law. He relied upon the representations of a title company and its attorney drafting the documents presented to him that by signing the September 8, 2003 Transfer on Death Deed, his real property would transfer to his children upon his death. He further relied upon their representations that the error in the first deed that caused him to stop receiving tax bills was corrected by signing the Quit Claim Deed on February 18, 2004; and the subsequent Transfer on Death Deed signed on June 2, 2004 would allow his children to receive the property upon his death as was originally intended.

Mr. Thomas, Jr. never intended or knew that he had transferred legal title to his Highland Road Residence to anyone, always considering himself to be the sole owner of the property. The evidence shows that PNC, a sophisticated business entity with attorneys and staff in place to check the title of property that it obtains mortgages on, did not recognize that title to the property was not in the name of Millard P. Thomas, Jr. when it filed its mortgage to secure the Equity Reserve Agreement. It is worth noting that even the Trustee entered into an agreed order with PNC regarding their interest in the property under the mistaken belief that title to the property was held by Mr. Thomas, Jr. when the mortgage was filed. Finally, neither Millard P. Thomas III

nor Brion S. Thomas knew that they held legal title to the Highland Road Residence and neither believed themselves to have any ownership interest in the property.

ANALYSIS

The Trustee's complaint seeks to sell the Highland Road Residence free and clear of any interests in such property pursuant to 11 U.S.C. § 363. Mr. Thomas, Jr. contends that the Trustee cannot sell the property because the Debtor did not possess an equitable interest in it, thereby excluding it from property of the estate. According to 11 U.S.C. § 541(d), "property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, . . . 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." He argues that the Highland Road Residence is held in constructive trust, and the Debtor has an equitable duty to return it to him. Therefore, the Trustee's request for authority to sell must be denied.

It is the Trustee's position that a constructive trust must be impressed by a court of law prior to the filing of a bankruptcy in order for it to be recognized by the Bankruptcy Court. Although she acknowledges that Mr. Thomas, Jr. did not intend to convey the Highland Road Residence to the Debtor, she asserts that he cannot demonstrate the existence of a prepetition constructive trust by clear and convincing evidence. The property is therefore property of the Debtor's estate to be sold for the benefit of his creditors. She further asserts that imposition of a constructive trust in this case cannot be reconciled with the major goal of federal bankruptcy law - ratable distribution among creditors, citing *XL/Datacomp, Inc. v. Wilson (In re Omega Group, Inc.)*, as controlling authority in support of her position. 16 F.3d 1443 (6th Cir. 1994).

The existence of a constructive trust is a matter of state law. As clarified by the Sixth Circuit in *Morris v. Morris*, the *Omegas Group* decision, addressed the relatively common situation in which a creditor with a claim arising in the ordinary course appeals to the bankruptcy court for preferential treatment. 260 F.3d 654, 666 (6th Cir. 2001). The policy considerations of *Omegas Group* are not implicated by the facts of this case. Further, and contrary to the Trustee's position, Ohio law recognizes that a constructive trust *can* arise as a matter of law. Her reliance on *Omegas Group* is therefore misplaced.

A constructive trust arises under Ohio law “against one . . . who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.” *Ferguson v. Owens*, 459 N.E.2d 1293, 1295 (1984). The party seeking recognition of a constructive trust bears the burden of proof by clear and convincing evidence. *University Hospitals of Cleveland, Inc., et al, v. Lynch, et al*, 772 N.E.2d 105, 116 (2002). As set forth below, Mr. Thomas, Jr. has met this burden.

To determine whether a constructive trust has been impressed under Ohio law, this Court must first determine whether this case contains a specific legal principal or situation that would give rise to jurisdiction by a court of equity. *Poss v. Morris (In re Morris)* 260 F. 3d 654, 667 (2001)(citing *Croston v. Croston*, 18 Ohio App2nd 159, 274 N.E.2d 765,768 (Ohio Ct.App.1969). It does. In Ohio, contracts for the conveyance of real property fall within the jurisdiction of courts of equity, because of the inherent inadequacy of any legal remedy. *In re Morris* 260 F. 3d 654; *Ayres v. Cook*, 140 Ohio St. 281, 43 N.E.2d 287, 291 (Ohio 1942). The “contract” in this matter was the September 8, 2003 Deed.

The next inquiry is whether it is appropriate to use equity to fashion a remedy in this matter. Ohio courts will use the remedy of constructive trust “where there is some ground...upon

which equity will grant relief.” *In re Morris* 260 F.3d at 668; *Henkle v. Henkle*, 600 N.E.2d 791, 796 (citing *Croston*, 247 N.E.2d at 768-69.) Those grounds include an equitable duty to convey real property when there has been either a wrongful acquisition or wrongful retention of the property, or when the person holding legal title would be unjustly enriched if permitted to retain it. *Id.* (additional citations omitted); and *McCafferty v. McCafferty*, 96 F.3d 192, 198 (6th Cir. 1996). SouthEast Equity Title Company filed the September 8, 2003 Deed transferring Mr. Thomas, Jr.’s interest in the Highland Road Residence to his children contrary to his intention. Mr. Thomas, Jr. testified that his intent in signing that deed was to keep the property titled to himself until his death, at which time it would transfer to his children, bypassing probate. He relied on the expertise of a professional for the transaction. It was the error of that professional that caused legal title to the property to presently transfer. Therefore, the Court finds that the means by which the Debtor and Brion Thomas obtained legal title to the Highland Road Residence constitute a wrongful acquisition of the property. Allowing the legal and equitable interest in the property to become property of their bankruptcy estates constitutes wrongful retention of the property and would allow them, and by extension the creditors of their bankruptcy estates, to be unjustly enriched.¹ Accordingly, equity requires Millard P. Thomas, III and Brion S. Thomas to transfer the Highland Road Residence back to their father, Mr. Thomas, Jr.

Where an equitable duty to convey property exists, it is not necessary for a court to impress a constructive trust by decree. Rather, under Ohio law, it attaches by operation of law. *In re Morris* 260 F.3d 654 at 668; *In re McCafferty*, 96 F.3d at 198 (citing *Croston*, 247 N.E.2d at 767, and *Kungle v. Equitable Gen. Ins. Co.*, 27 Ohio App. 3d 203, 500 N.E.2d 343, 348 (Ohio

¹ Brion S. Thomas filed a bankruptcy petition on August 9, 2013, Case No. 13-15620.

Ct. App 1985). Applying this principle to the facts of this case, the Court finds that the Highland Road Residence was impressed with a constructive trust when the September 8, 2003 Deed was filed. Because the property was held in constructive trust for the benefit of Mr. Thomas, Jr., when the bankruptcy was filed, it did not become property of the Debtor's estate. 11 U.S.C. § 541(d). Accordingly, the Trustee is not authorized to sell the Highland Road Residence under Section 363 of the Bankruptcy Code.

CONCLUSION

The facts of this case, as set forth in the stipulations and testimony, establish that it would be contrary to equity and good conscience for either the Debtor or his sister to be allowed to retain title to the Highland Road Residence. The property was impressed with a constructive trust as a matter of law, as of the filing of the September 8, 2003 Transfer On Death Deed. There is, therefore, no interest in the Highland Road Residence to be sold by the Trustee for the benefit of the creditors of the Debtor's estate.

Judgment is entered in favor of Defendant Millard P. Thomas, Jr. The case is dismissed, and each party shall bear its own costs.

IT IS SO ORDERED.