

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-31712

MARY CATHRYN JEDLICKA  
a/k/a MARY C. JEDLICKA  
a/k/a CATHY JEDLICKA

Debtor

WILLIAM T. HENDON, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3080

NEW CENTURY MORTGAGE CORPORATION  
and STEPHEN J. LUSK, TRUSTEE

Defendants

**MEMORANDUM ON PLAINTIFF'S  
MOTION FOR SUMMARY JUDGEMENT**

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Attorney for Stephen J. Lusk, Trustee

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

On June 18, 2001, William T. Hendon, Trustee (Trustee), filed a Complaint seeking to avoid, as a preferential transfer, the lien of a Deed of Trust held by New Century Mortgage Corporation (New Century). By Agreed Order entered September 21, 2001, Stephen J. Lusk (Lusk), the Trustee under the Deed of Trust, was added as an additional party defendant.

The Trustee then filed a "Plaintiff's Motion for Summary Judgment" (Summary Judgment Motion) on October 15, 2001, accompanied by a supporting brief and affidavit. New Century submitted a late-filed response and brief on November 6, 2001.<sup>1</sup> Lusk has not filed a response and, pursuant to E.D. Tenn. LBR 7007-1,<sup>2</sup> is deemed not to oppose the relief sought by the Trustee.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(F) (West 1993).

## I

The facts material to this matter are both undisputed and few. On January 20, 1999, the Debtor executed an Adjustable Rate Note in the amount of \$344,720.00 in favor of New Century. As security for the note, the Debtor also executed the Deed of Trust presently at issue, granting New Century a security interest in the Debtor's residence located at 9005 Legends Lake Lane in

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<sup>1</sup> A motion filed in a proceeding shall be accompanied by a brief setting forth the facts and the law supporting the motion. Unless the court directs otherwise, the opposing party shall respond within twenty days after the date of the filing of the motion. Any opposing response shall be supported by a brief setting forth the facts and the law in opposition to the motion. A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion. After the time for response has expired, the court may rule on the motion without a hearing. A party may request a hearing.

E.D. Tenn. LBR 7007-1. The Defendants' responses were due on November 5, 2001.

<sup>2</sup> See footnote 1.

Knoxville, Tennessee. The Deed of Trust, although executed on January 20, 1999, was not recorded until February 2, 2001. The Debtor filed her voluntary Chapter 7 Petition on April 4, 2001.

## II

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by FED. R. BANKR. P. 7056, summary judgment is appropriate "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. CIV. P. 56(c). The Trustee bears the initial burden of proving both that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *See Owens Corning v. National Union Fire Ins. Co.*, 257 F.3d 484, 491 (6<sup>th</sup> Cir. 2001).

The burden then shifts to the Defendants, as nonmovants, to produce specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). In so doing, the Defendants are required to cite specific evidence and may not merely rely on allegations contained in the pleadings. *See Harris v. General Motors Corp.*, 201 F.3d 800, 802 (6<sup>th</sup> Cir. 2000).

The facts, and all inferences to be drawn from them, must be viewed in the light most favorable to the nonmovants. *See Matsushita*, 106 S. Ct. at 1356. The court must then decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether

it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986).

### III

The Trustee looks to avoid the perfection of New Century’s Deed of Trust as a preferential transfer under 11 U.S.C.A. § 547(b).<sup>3</sup> Each element of § 547(b) must be proven by the Trustee by a preponderance of the evidence. See 11 U.S.C.A. § 547(g) (West 1993); *Hunter v. Dupuis (In re Dupuis)*, 265 B.R. 878, 881 (Bankr. N.D. Ohio 2001).

The perfection of a security interest is a transfer under § 547(b). See *Waldschmidt v. Chrysler Credit Corp. (In re Messenger)*, 166 B.R. 631, 636 (Bankr. M.D. Tenn. 1994); *Still v. Murfreesboro Prod. Credit Ass’n (In re Butler)*, 3 B.R. 182, 185 (Bankr. E.D. Tenn. 1980). The transfer benefitted New Century, which is a creditor of the Debtor, and took place within ninety days of the filing of the Debtor’s petition. Further, the February 2, 2001 transfer was on account of an antecedent debt that arose in January 1999.

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<sup>3</sup> Except as provided in subsection (c) of this section, 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; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; 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.

11 U.S.C.A. § 547(b) (West 1993).

Section 547(f) establishes a presumption of insolvency during the ninety-day period before the Debtor filed her petition. New Century is required to introduce evidence of the Debtor's solvency in order to rebut this presumption. See *Bluegrass Ford-Mercury, Inc. v. Farmers Nat'l Bank of Cynthiana (In re Bluegrass Ford-Mercury, Inc.)*, 942 F.2d 381, 390 (6<sup>th</sup> Cir. 1991). New Century has provided the court with no such evidence.

Lastly, the Trustee, by affidavit, avers that unsecured creditors in this bankruptcy will receive minimal, if any, distribution from the Debtor's estate. New Century has offered no contradictory evidence. Section 547(b)(5) is therefore satisfied, as the transfer at issue would enable New Century to receive more than it would as an unsecured creditor under Chapter 7.

In sum, there is no genuine issue of material fact in this matter and the Trustee has established that he is entitled to judgment as a matter of law. The Trustee's Summary Judgment Motion will therefore be granted.<sup>4</sup>

The Trustee is entitled to avoid New Century's lien under § 547(b) and need not take additional steps to recover the avoided transfer under § 550(a) (West 1993). Section 550(a) has no application to an action brought to avoid a preferential security interest under § 547(b). See *Roberts v. Mountain Nat'l Bank (In re Phelps)*, Ch. 7 Case No. 00-31694, Adv. No. 01-3053, slip

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<sup>4</sup> New Century raises allegations of fraud by the Debtor, but those issues are not relevant under § 547. They are more properly addressed within the separate pending adversary proceeding filed by New Century, *New Century Mortgage Corporation v. Jedlicka (In re Jedlicka)*, Adv. No. 01-3086, in which New Century objects both to the Debtor's discharge and the dischargeability of the subject debt. New Century additionally asks the court to refrain from deciding the present motion until after the conclusion of the pending adversary proceeding. The court declines to delay this ruling as the Trustee is entitled to avoid the perfection of the Deed of Trust irrespective of the outcome of New Century's litigation with the Debtor.

op. at 11-12 (Bankr. E.D. Tenn. Oct. 30, 2001); *see also Hendon v. G.E. Capital Mortgage Servs., Inc. (In re Carpenter)*, 266 B.R. 671, 676 (Bankr. E.D. Tenn. 2001).

An appropriate order will be entered.

FILED: November 9, 2001

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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In re

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NEW CENTURY MORTGAGE CORPORATION  
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Defendants

**ORDER**

For the reasons stated in the Memorandum on Plaintiff's Motion for Summary Judgement filed this date, the court directs the following:

1. The Plaintiff's Motion for Summary Judgement filed by the Plaintiff on October 15, 2001, is GRANTED.

2. The lien of the Defendant New Century Mortgage Corporation encumbering the Debtor's residence at 9005 Legends Lake Lane, Knoxville, Tennessee, arising under the Deed of Trust executed by the Debtor on January 20, 1999, in favor of the Defendant Stephen J. Lusk is avoided as a preferential transfer pursuant to 11 U.S.C.A. § 547(b) (West 1993). The Plaintiff's interest in



the Legends Lake Lane property and its proceeds is superior to the interest of the Defendants.

SO ORDERED.

ENTER: November 9, 2001

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE