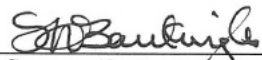




**SO ORDERED.**

**SIGNED this 29th day of September, 2021**

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.  
PLEASE SEE DOCKET FOR ENTRY DATE.**

  
Suzanne H. Bauknight  
UNITED STATES BANKRUPTCY JUDGE

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

In re

PAUL CARSTEN WEBER

Debtor

ANN MOSTOLLER, TRUSTEE

Plaintiff

v.

PAUL CARSTEN WEBER,  
EUGENIA HOUNSHELL

Defendants

Case No. 3:19-bk-33492-SHB  
Chapter 7

Adv. Proc. No. 3:20-ap-3046-SHB

**MEMORANDUM AND ORDER ON  
AMENDED MOTION TO DISMISS AND/OR FOR  
SUMMARY JUDGMENT BY DEFENDANTS**

This adversary proceeding presents the Court with a proverbial “Catch-22” situation caused by the Defendant-Debtor’s conflicting characterization of his interest in real property located at 368 Flatwoods Road, Speedwell, Tennessee (the “Property”).

## I. PROCEDURAL POSTURE & UNDISPUTED FACTS

Defendant-Debtor's initial Schedule A/B filed with his October 29, 2019 Chapter 7 petition identified no real property [Bankr. Doc. 1 at p. 19], and his Schedule G disclosed an executory contract or unexpired lease with Charles Woods, which Debtor described as "Debtor will retain lease on land." [*Id.* at p. 32.] More than nine months later, the Chapter 7 Trustee, who is Plaintiff here, examined Defendant-Debtor under Federal Rule of Bankruptcy Procedure 2004. [*See* Bankr. Doc. 21.] Only after that examination did Defendant-Debtor file Amended Schedules A/B and C [Bankr. Doc. 26], reflecting that he held an interest in the Property that was valued at \$0.00. Notably, Debtor-Defendant's Amended Schedule A/B reflected that the nature of his interest in the Property was "contract" and further identified "house and lot" as "other information." [*Id.* at p. 1.] He also claimed a \$12,500.00 exemption in the Property under Tennessee Code Annotated § 26-2-301(e). [*Id.* at p. 10.] Finally, the Notice of Amendment stated filed with the amended Schedules A/B and C stated that the amendments were "to add and [exempt] real estate." [*Id.* at p. 8.]

Shortly after Defendant-Debtor filed Amended Schedules A/B and C, Plaintiff filed the Complaint in this adversary proceeding, seeking authorization, pursuant to 11 U.S.C. § 363(f)(3) and (h),<sup>1</sup> to sell the Property free and clear of liens. [Doc. 1.] Plaintiff alleged in the Complaint that Defendant-Debtor and Defendant Eugenia Hounshell co-own the Property under an Installment Sale Contract dated May 29, 2009, between Charles Woods as "Seller" and Defendants as "Buyer," for the purchase price of \$55,000.00, payable by a \$7,000.00 down-payment, monthly payments of \$458.71 for twenty-four months, followed by a balloon payment for the balance after two years. [*See* Doc. 17-3.] The Installment Sale Contract, however,

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<sup>1</sup> This is a core proceeding. 28 U.S.C. § 157(b)(2)(N).

provided that Defendants “shall have no interest in the property, equitable or otherwise,” except “[u]pon payment of all sums due pursuant to this contract[,] and upon the payment of the final installment by the Buyer, the Seller shall execute a warranty deed transferring all of Seller’s rights in the property to Buyer . . . free and clear of liens” and that “title to the subject property shall be in the name of Paul C. Weber and wife, Eugenia Hounshell and Travis Steven Weber.”<sup>2</sup> [Doc. 17-3 at pp. 6-7, 9 ¶¶ 3, 7, 19.]

Defendants and Mr. Woods later signed an Amended Installment Sale Contract<sup>3</sup> on April 2, 2013, which acknowledged “all payments have been timely made by Buyers [and t]he parties agree to extend the balloon payment from the original date to April 1st, 2015.” [Doc. 17-3 at p. 15 ¶ 19.] Finally, on June 1, 2017, Defendants<sup>4</sup> agreed, *inter alia*, to pay an additional \$5,000.00 lump sum to Mr. Woods, and the “contract date” was extended to June 1, 2019. [Doc. 17-3 at p. 17.]<sup>5</sup>

Defendants filed a motion to dismiss the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure<sup>6</sup> on December 10, 2020, arguing that because Plaintiff, as Chapter 7 Trustee, did not seek to assume “any executory contract . . . , the lease referenced in the

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<sup>2</sup> Notwithstanding that Travis Steven Weber is identified in the Installment Sale Contract (as well as the Amended Installment Sale Contract) as a person who would own the Property with Defendants [Doc. 17-3 at pp. 9, 15], Plaintiff did not name Mr. Weber as a defendant in this case.

<sup>3</sup> The Amended Installment Sale Contract differs from the Installment Sale Contract by identifying “Buyer” as “Paul C. Weber and *wife*, Eugenia Hounshell *Weber*,” and Defendant Hounshell signed the Amended Installment Contract “Eugenia Hounshell Weber.” [Doc. 17-3 at pp. 11, 15, 16 (emphases added).] Defendant Hounshell identifies as Defendant-Debtor’s “girlfriend.” [Doc. 17-4 at ¶ 1.]

<sup>4</sup> The Addendum identified the “Buyer” as Paul Webber, but both Defendants signed the Addendum, with Defendant Hounshell signing as “Eugenia Hounshell.” [Doc. 17-3 at p. 17.]

<sup>5</sup> The Court will collectively refer to the Installment Sale Contract, the Amended Installment Sale Contract, and the Addendum as the “Contract.”

<sup>6</sup> Rule 12 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012.

Complaint was rejected as a matter of law” under 11 U.S.C. § 365 so that the Complaint failed to state a claim upon which relief could be granted. [Doc. 9 at ¶ 3.] In support of their motion, Defendants filed the Contract; an Administrator’s Deed recorded with the Claiborne County Register of Deeds on January 30, 2007; and Schedule G filed by Defendant-Debtor in his underlying bankruptcy case. [Docs. 9-1 through 9-3.] Plaintiff replied in opposition on December 29, 2020 [Doc. 11], arguing that she was not given notice of any executory contract within the time provided by § 365 and that, in any event, she seeks to sell the Property, not assume the Contract. Because Defendants filed documents outside the pleadings in support of the motion to dismiss, pursuant to Rule 12(d), the Court directed that the motion would be treated as seeking summary judgment under Federal Rule of Civil Procedure 56,<sup>7</sup> and the parties were to supplement their pleadings and arguments and to provide statements of undisputed material facts as required by Rule 56(c).

On March 26, 2021, Defendants filed their Amended Motion to Dismiss and/or for Summary Judgment by Defendants (“Motion”), together with a statement of undisputed material facts and a supplemental brief [Docs. 17-19]. Defendants attached the following as exhibits to the Statement of Undisputed Material Facts: (A) the CM/ECF docket sheet for Defendant-Debtor’s underlying bankruptcy case and Schedule G: Executory Contracts and Unexpired Leases filed on October 29, 2019, reflecting a “lease on land” with Mr. Woods; (B) the Affidavit of Debtor/Defendant dated March 18, 2021; (C) the Affidavit of Kendra Blevins dated March 24, 2021, that includes as attachments the documents previously attached as exhibits to the Motion to Dismiss (i.e., the Contract and Administrator’s Deed); a letter dated December 31, 2019, from Plaintiff to Mr. Woods requesting an accounting of the payments made under the Contract and

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<sup>7</sup> Rule 56 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

any payments remaining; the Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline for Defendant-Debtor’s case dated October 29, 2019 [Bankr. Doc. 10]; and an email request from Plaintiff’s office for a copy of the contract; and (D) the Affidavit of Defendant Eugenia Hounshell [Doc. 17.] Plaintiff filed responsive documents on April 14, 2021 [Docs. 20-22],<sup>8</sup> which reflect the foregoing undisputed material facts.

After careful review of the pleadings and exhibits submitted and a determination that it would be beneficial, the Court held oral argument on August 5, 2021, at which the parties agreed to the following additional facts: that Defendants do not own the Property, and because the Contract expired by its terms in June 2019, it was not an executory contract subject to the provisions of § 365 when Defendant-Debtor filed his bankruptcy case in October 2019. At the August 5 hearing, the Court also gave notice to the parties, pursuant to Rule 56(f), that it was considering granting summary judgment on a basis not raised by Defendants in the Motion and allowed the parties an opportunity to respond.

The Motion is now ripe for determination. The record before the Court includes all pleadings of record in this adversary proceeding, the attachments thereto, and all documents and facts of record in the underlying bankruptcy case. *See* Fed. R. Evid. 201(a).<sup>9</sup>

## **II. CONCLUSIONS OF LAW**

### **A. Summary Judgment Standard**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact

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<sup>8</sup> Defendants filed a Reply to Trustee’s Response of April 14, 2021 Dkt #21 [Doc. 23]; however, because they did not seek permission to file this reply, the Court has not considered any arguments therein.

<sup>9</sup> Rule 201 is applicable in bankruptcy cases and adversary proceedings pursuant to Federal Rule of Evidence 1101(a), (b) and Federal Rule of Bankruptcy Procedure 9017.

and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* at 248.

Defendants, the moving parties, bear the burden of proving, based on the record before the Court, that they are entitled to judgment as a matter of law because there is no genuine dispute concerning any material fact, such that the defenses alleged are factually unsupported. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to Plaintiff to prove that there are genuine disputes of material fact for trial; however, she may not rely solely on allegations or denials contained in the pleadings because reliance on a “mere scintilla of evidence in support of the nonmoving party will not be sufficient.” *Nye v. CSX Transp., Inc.*, 437 F.3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The facts and all resulting inferences are viewed in a light most favorable to Plaintiff as non-movant, with the Court to decide whether “the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 243. Nevertheless, when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citations omitted).

When a defendant moves for summary judgment on the ground that the plaintiff lacks evidence of an essential element of the plaintiff’s claim, as in the present case, Rule 56 requires the plaintiff to present evidence of evidentiary quality that demonstrates the existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994). Examples of such

evidence include admissible documents or attested testimony, such as that found in affidavits or depositions. *Winskunas*, 23 F.3d at 1267 (citations omitted). The proffered evidence need not be in admissible form, but its content must be admissible. *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; *Winskunas*, 23 F.3d at 1268. For instance, deposition testimony will assist a plaintiff in surviving a motion for summary judgment, even if the deposition itself is not admissible at trial, provided substituted oral testimony would be admissible and create a genuine issue of material fact.

*Bailey v. Floyd Cty. Bd. of Educ. By & Through Towler*, 106 F.3d 135, 145 (6th Cir. 1997).

Furthermore, after notice and an opportunity to respond, a court may grant summary judgment on grounds not raised by the motion. Fed. R. Civ. P. 56(f).

### **B. Authorization to Sell Under 11 U.S.C. § 363(f)(3)**

Plaintiff alleges in the Complaint that Defendants are co-owners of the Property as purchasers under the Contract and that she is entitled to sell the Property because Defendant-Debtor “had, at the time of the commencement of the case, an undivided interest as tenant in common.” [Doc. 1 at ¶ 9.] At oral argument, however, the parties acknowledged that the Contract expired before commencement of Defendant-Debtor’s case and that he did not, as of the commencement of the case, hold any legal or equitable interest in the Property. The parties also acknowledged at oral argument that the title to the Property was (and remains) held by Mr. Woods, who is not a party to this adversary proceeding, and that any agreement between Defendants and Mr. Woods for renewal of the Contract for purchase of the Property after the Contract’s expiration would not satisfy the statute of frauds. *See, e.g., Patterson v. Davis*, 192 S.W.2d 227, 230-31 (Tenn. Ct. App. 1945) (“The rule is that were a written contract for the sale of land has ceased and terminated by its own terms upon the happening of a certain contingency, or by the action of the parties under it, an oral agreement to revive it is within the statute [of frauds] and unenforceable.”). The parties further agreed that because Debtor did not own the Property and the Contract expired prepetition, no legal right of enforcement existed for Plaintiff

to control as Chapter 7 Trustee.

Thus, based on the record as a whole and the parties' admissions at the August 5 hearing, the Court must find that the Complaint fails to state a claim upon which relief could be granted to sell the Property under § 363.

### **III. ORDER**

Based on the foregoing, the Court directs the following:

1. To the extent that it seeks dismissal or summary judgment based on Plaintiff's failure to assume the Installment Sale Contract, as extended and amended, as an executory contract under 11 U.S.C. § 365, the Amended Motion to Dismiss and/or for Summary Judgment by Defendants filed on March 26, 2021 [Doc. 18], is DENIED.

2. Notwithstanding that the argument raised by Defendants in their Motion is rejected, because there is no genuine dispute of material fact that Defendants are entitled to judgment as a matter of law that Defendant-Debtor holds no enforceable interest in the Property that may be sold by Plaintiff under 11 U.S.C. § 363, neither party having filed any response to the Court's notice at oral argument of its intention to enter summary judgment on grounds not raised in the Motion, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, applicable to this adversary proceeding under Federal Rule of Bankruptcy Procedure 7056, the Complaint filed on October 20, 2020 [Doc. 1], is DISMISSED.

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