



SO ORDERED.

SIGNED this 7th day of July, 2014.


Robert E. Nugent
United States Chief Bankruptcy Judge

DESIGNATED FOR ONLINE PUBLICATION ONLY

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:

MARK ROBERT KOLARIK,)	
KELLY LYNN KOLARIK,)	Case No. 13-11985
)	Chapter 7
Debtors.)	
_____)	
J. MICHAEL MORRIS, Trustee,)	
)	
Plaintiff,)	
vs.)	Adv. No. 13-5196
)	
GREENPOINT CREDIT, LLC;)	
GREEN TREE SERVICING, LLC;)	
ROBERT E. ST. CLAIR and)	
R. ANNE ST. CLAIR;)	
MARK R. KOLARIK and)	
KELLY L. KOLARIK, and)	
BANK OF AMERICA, N.A.,)	
)	
Defendants.)	
_____)	

**ORDER DENYING ST. CLAIR DEFENDANTS' CROSS MOTION TO
DISMISS OR FOR SUMMARY JUDGMENT (*Dkt. 53*)**

The defendants Robert and Anne St. Clair have filed their separate cross motion to dismiss the chapter 7 trustee's strong arm complaint to avoid GreenPoint Credit, L.L.C.'s allegedly unperfected lien on a manufactured home that the St. Clairs sold to the debtors Mark and Kelly Kolarik under a 2004 installment contract.¹ The St. Clairs move for relief under Fed. R. Civ. P. 12(b)(6), but proffer material outside the complaint which allows the court to consider their motion as one for summary judgment.²

The Complaint

Exercising his strong-arm powers as a hypothetical lien creditor under § 544(a), the trustee alleges that the Kolariks entered into a prepetition contract of purchase and sale with the St. Clairs in July 2004 for the purchase of a 1997 Skyline mobile home. He further alleges that GreenPoint may claim a lien on the mobile home that was granted by the St. Clairs' to secure their purchase money indebtedness to GreenPoint and that this lien was unperfected on the date of the Kolariks' bankruptcy filing, July 31, 2013.

The Applicable Legal Standard

¹ On March 18, 2014 Green Tree Servicing, LLC previously filed a motion to dismiss or alternatively for judgment on the pleadings under Fed. R. Civ. P. 12(b)(6) and (c). *See* Adv. Dkt. 19. The Court issued its Order Denying Green Tree's motion (Green Tree Order) on July 2, 2014 at Dkt. 75.

² Adv. Dkt. 53 and 54. The St. Clairs appear by their attorney Samantha M.H. Woods. The chapter 7 trustee J. Michael Morris personally appears.

As the Court explained in the Green Tree Order, a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted is generally governed by the facial plausibility standard enunciated in the Supreme Court's *Twombly* and *Iqbal* decisions and is confined to the allegations contained in the complaint.³ But where, as here, the litigants have presented exhibits and materials outside the complaint in their motion papers, the Court may treat the motion as one for summary judgment.⁴ The St. Clairs attached the Contract of Purchase and Sale between them and the Kolariks bankruptcy Schedules C and G, and a Title and Registration Receipt for the subject mobile home. As with the Green Tree Order, we consider these additional documents and treat the motion as one for summary judgment. That requires me to determine whether material facts are in dispute and whether the undisputed facts entitle the St. Clairs to judgment as a matter of law on the trustee's complaint.

Facts

Most of the undisputed facts in this matter are set forth in the Green Tree Order and need not be repeated here. In support of their motion, and in addition to the documents I've already considered in the Green Tree Order, the St. Clairs offer a copy of a Title and Registration Receipt dated January 22, 2004 and related title documents that refer to the manufactured home. These are found at Exhibit C to their

³ *Fisher v. Lynch*, 531 F. Supp. 2d 1253, 1260 (D. Kan. 2008); *Wagner Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1159-60 (D. N.M. 2012).

⁴ Fed. R. Civ. P. 12(d).

motion.⁵ The trustee presumably joined the St. Clairs as party defendants because they claim an interest in the subject mobile home as owners of legal title, a fact which is not disputed by any party. As such, their interest must be adjudicated relative to the other parties in this action who claim an interest in the mobile home. The St. Clairs have not pleaded any cross claims against their purchasers, the Kolariks, or any other defendants. Based upon their bankruptcy schedules, the Kolariks remain in possession of the mobile home, but the record is silent on the status of the Kolariks' payments under the Contract of Purchase and Sale.

Analysis

As did Green Tree Servicing, the St. Clairs assert that the mobile home in question is not property of the estate because the Contract of Purchase and Sale for the mobile home between them and the Kolariks is an executory contract that was not timely assumed or rejected and is therefore deemed rejected by operation of § 365(d)(1) and that, as a consequence of that, the *mobile home* is no longer property of the estate under § 365(p). Thus the trustee has no avoidance rights. I rejected this argument in the Green Tree Order because I concluded that the Contract of Purchase and Sale is neither a lease nor an executory contract, but is instead an installment sales contract that falls outside of § 365(d)(1). I reached this conclusion because, under the Contract, the Kolariks, as buyers, received the right to possess the mobile home and incurred the attendant burdens of ownership including being responsible

⁵ Adv. Dkt. 54-3, Ex. C.

for paying property taxes and insurance premiums, and for maintaining the property. In describing the terms and effect of the Contract between the St. Clairs and the Kolariks in his brief on this motion, the trustee correctly notes that “the [Kolariks] acquired all the ‘beneficial incidents of ownership’ upon entering into the Contract, and were clearly the ‘equitable owners,’ with the St. Clairs being the ‘legal owners.’”⁶ Thus, the Kolariks’ equitable ownership interest became property of the estate upon their bankruptcy filing. A more thorough treatment of this issue can be found in the Green Tree Order and need not be repeated here.

Likewise, in the Green Tree Order, I also addressed whether GreenPoint’s or Bank of America’s purported lien on the mobile home was properly perfected. I rejected Green Tree’s attempt to extend the substantial compliance doctrine to perfect a lien described by the Tenth Circuit in *In re Charles*⁷ because neither GreenPoint nor Bank of America is identified anywhere on the Kansas Department of Revenue title search report for the mobile home, making this case factually different from *Charles*.

But with the St. Clairs’ submission of Exhibit C -- a Title and Registration Receipt on the mobile home, I must consider whether its content should change my

⁶ Adv. Dkt. 60, p. 9. *See also Roberts v. Osburn*, 3 Kan. App.2d 90, 94-589 P.2d 985 (1979), *rev. denied* 225 Kan. 845 (discussing effect of 15-year contract for sale of real estate where deed placed in escrow and legal title remained in the sellers).

⁷ *Morris v. The CIT Group/Equip. Financing, Inc. (In re Charles)*, 323 F.3d 841 (10th Cir. 2003).

prior conclusion.⁸ The St. Clairs do not attempt to authenticate the documents in Exhibit C or explain their meaning. The exhibit contains one title and registration receipt that indicates it is a “reissue title” dated January 22, 2004 upon which the St. Clairs are identified as the owners and “BAHS Bank of America FSB” is the lienholder. The document does not provide a registration expiration date but instead notes: “DISPOSED VEHICLE.” Another title and registration receipt contained in Exhibit C is a duplicate title dated March 22, 2002 again showing the St. Clairs as owners and “BAHS Bank of America FSB” as lienholder. Exhibit C also contains what appear to be inquiry or search reports from the KDOR on the mobile home. These reports reflect different title numbers and issuance dates. All refer to the St. Clairs as owners but not all refer to “BAHS Bank of America FSB” as the lien holder. None of these documents comprising Exhibit C necessarily show that GreenPoint or BAHS Bank of America FSB was the lienholder as of the date of the Kolariks’ bankruptcy filing, July 31, 2013.⁹ Indeed one of the KDOR search reports dated January 10, 2014 shows no lien on the mobile home.¹⁰ And the trustee’s search report on the mobile home appears to show no lienholder as of September 3, 2013.¹¹ In short, whether Bank of America’s lien was perfected by notation on the mobile home’s title as of the date of the bankruptcy remains a factual dispute that cannot be resolved by summary

⁸ Adv. Dkt. 54-3.

⁹ The Contract of Sale and Purchase between the St. Clairs and the Kolariks was entered into on July 20, 2004.

¹⁰ Adv. Dkt. 54-3, p. 3.

¹¹ Adv. Dkt. 60-1 (Ex. 1).

judgment.

Finally, the St. Clairs argue that *if their sale to the Kolariks is secured, their lien* is also perfected by applying the *In re Charles* substantial compliance doctrine. But the trustee in this avoidance action is not seeking to avoid a lien on the mobile home held by the St. Clairs to secure the Kolariks' purchase. As between the St. Clairs and the Kolariks, that sale and purchase is an unsecured transaction. There is no factual dispute that the St. Clairs hold legal title to the mobile home. The mobile home, however, is subject to the purported lien of GreenPoint (or Bank of America) granted by the St. Clairs. The trustee is seeking to avoid the alleged unperfected lien of GreenPoint (or Bank of America), the lien that secured the St. Clairs' original purchase of the mobile home from the dealer.

Conclusion

Because material facts remain in dispute regarding the existence of a lien on the mobile home and its perfection as of the date of the Kolariks' bankruptcy filing, the St. Clairs' motion must be DENIED.

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