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

In Re:

JAMES R. BAIRD, JR.,

DEBTOR.

**CASE NO. 97-40561-7
CHAPTER 7**

JAMES R. BAIRD, JR.,

PLAINTIFF,

v.

ADV. NO. 97-7055

AMERUS BANK,

DEFENDANT,

and

ROBERT L. BAER, Trustee,

INTERVENOR.

**ORDER GRANTING SUMMARY JUDGMENT AND SCHEDULING
A PRETRIAL CONFERENCE ON INTERVENOR-TRUSTEE'S ANSWER,
CROSS-CLAIM, AND COUNTERCLAIM**

This proceeding is before the Court on the motion of defendant AmerUs Bank ("AmerUs") for summary judgment. AmerUs appears by counsel Justice B. King. Plaintiff-debtor James R. Baird, Jr., appears by counsel Brock R. Snyder. Although not directly involved in this motion, the intervenor-trustee has appeared by counsel John T. Houston. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

The following facts are not disputed. In August 1995, AmerUs loaned the debtor \$51,000. In return, the debtor and his two sisters intended to give AmerUs a mortgage on the house that they had inherited from their parents and that the debtor now claims as his homestead. The note the debtor signed indicated the loan was secured by real property, describing the property only by its street address. The mortgage that the debtor and his sisters signed indicated the real property involved was located at that same street address, but referred to an attached legal description that covered only an unimproved lot adjacent to the lot on which the house was located. When the debtor signed the mortgage, he understood it covered the house.

The debtor filed for bankruptcy on March 5, 1997. A few months later, he commenced this proceeding. In his amended complaint, he asked for a judgment avoiding any lien on his homestead and the lot on which it is located, declaring that AmerUs's mortgage lien applies only to the adjacent vacant lot, and awarding him a pro rata recovery of payments he had made to AmerUs since August 1995. AmerUs answered and the parties proceeded with discovery. They submitted an agreed pretrial order that was approved by the Court and filed on December 31, 1998. In it, the debtor again asserted that he wanted a judgment declaring that AmerUs had no lien on his homestead but only on the adjacent vacant lot, and awarding him a pro rata share of payments he had made on the note he gave the bank. The debtor did not identify in either his complaint or the pretrial order the legal theory or theories supporting his claims.

Amerus filed a motion for summary judgment on January 21, 1999. The debtor obtained extensions of time and ultimately filed a response on April 22. Amerus filed a reply on May 6. In the

meantime, on February 4, 1999, the chapter 7 trustee for the debtor's bankruptcy estate filed a motion to intervene. An order allowing him to intervene was entered, and then the debtor objected that the motion was untimely. Two days later, the trustee filed his answer to the debtor's complaint along with a cross-claim against Amerus that seeks to avoid its lien on the debtor's homestead pursuant to 11 U.S.C.A. §544(a)(3) and a counterclaim against the debtor that seeks to preserve Amerus's lien against the homestead for the benefit of the bankruptcy estate pursuant to §551. Amerus filed an answer to the trustee's cross-claim, denying that he was entitled to the relief he sought, and about a week later, joined in the debtor's objection to the timeliness of the trustee's motion to intervene. A hearing was then held on the trustee's motion and the Court granted it without prejudice to the other parties' pursuing the timeliness issue later.

In its summary judgment motion, AmerUs argued both that the transaction with the debtor and his sisters gave it an equitable mortgage on their house and that, despite the mistake in the legal description, the house was adequately described in the mortgage by the street address. In his response, the debtor raised several new issues besides the legal description problem: (1) AmerUs is not a Kansas corporation and has not filed a certificate of incorporation to permit it to conduct business in Kansas; (2) the debtor's sisters signed the mortgage to AmerUs under duress imposed by an unidentified realtor not alleged to be AmerUs's agent; and (3) AmerUs violated K.S.A. 16a-6-117, the Kansas Truth in Lending Act. To support the first claim, the debtor has attached to his brief a copy of a letter to the debtor's attorney from an apparent employee of a company called "CT Corporation System" declaring that: "Kansas Secretary of States [sic] has no record of [AmerUs Bank] on file." Neither an affidavit authenticating the letter nor any certified record from the Secretary of State about

AmerUs has been attached to the brief. The second claim is supported by references to the sisters' depositions. The third claim is based on portions of the mortgage contract. AmerUs filed a response in which it addressed the second and third of these claims, but not the first.

DISCUSSION

Federal Rule of Civil Procedure 56, governing grants of summary judgment, is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56 provides that this Court must grant 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." In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the party against whom summary judgment is sought. Summary judgment is inappropriate if an inference can be deduced from the facts which would allow the nonmovant to prevail. The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. Where different ultimate inferences may properly be drawn, summary judgment should be denied. *United States v. O'Block*, 788 F.2d 1433, 1435 (10th Cir. 1986).

The Court's review in this case has been made more difficult by the debtor's failure to specify what law he believes permits him to avoid AmerUs's mortgage on his homestead. By indicating he wants to "avoid" the bank's lien and asserting that he claims the house as his homestead, he seems to suggest that he might be relying on §522 of the Bankruptcy Code, which allows debtors to avoid liens on exempt property under certain circumstances. Section 522(f)(1)(A), for example, authorizes a

debtor to avoid a judicial lien, and §522(f)(1)(B) authorizes a debtor to avoid a nonpossessory, nonpurchase-money security interest in certain personal property. These provisions do not help the debtor here, though, because AmerUs's lien is consensual, not judicial, and is a lien on real, not personal, property. Section 522(h) gives a debtor the power to avoid a transfer of property that the trustee could avoid under §544, as the trustee is now seeking to do. However, this power is not available to the debtor in this case because the transfer by which he gave AmerUs its lien was voluntary, and §522(h) applies only to transfers also covered by §522(g) and that provision is limited to involuntary transfers. So long as the trustee is not now barred from trying to avoid AmerUs's lien by his delay in doing so, his present effort to avoid the lien also eliminates the debtor's power to avoid a transfer under §522(h). Other than as allowed under §522, a chapter 7 debtor has no standing to exercise the avoiding powers given to a chapter 7 trustee under §§544 through 548, and no other provision in the Bankruptcy Code would appear to authorize the debtor to avoid AmerUs's lien. Consequently, to the extent he may have been relying on the Bankruptcy Code, the debtor's attempt to avoid AmerUs's lien must fail.

On the other hand, in the portion of his brief in response to AmerUs's motion that discusses the significance of the misdescription of the property covered by the mortgage, the debtor relies on cases applying state law to determine the validity of a creditor's lien where a property description was incorrect, apparently indicating he believes AmerUs's lien can be avoided under Kansas law. Oddly enough, however, he cites no Kansas law on the question. To the extent that the debtor's attack on AmerUs's lien is based on state law, he can defeat the lien only if AmerUs could not enforce it against him personally; he has no ability to assert rights third parties might have to defeat AmerUs's lien.

As indicated, AmerUs contends Kansas law gives it an equitable mortgage on the house that is enforceable against the debtor even if the property description in the mortgage is completely inadequate. The debtor concedes he intended to give AmerUs a lien on his house. The Kansas Court of Appeals has stated the relevant Kansas law in these terms:

Where one party advances money to another upon the faith of an agreement by the latter to secure its payment by a mortgage upon specified lands, but which mortgage is never executed, or which, if executed, is so defective or informal as to fail in effectuating the purpose of the execution, equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt. *Garnett Savings Bank v. Tush*, 232 Kan. 447, 453, 657 P.2d 508 (1983); *Beck v. Brooks*, 224 Kan. 300, 302-03, 580 P.2d 882 (1978); *Hill v. Hill*, 185 Kan. 389, 396, 345 P.2d 1015 (1959).

Consolidated Oil Well Servs., Inc., v. State Oil Co., 12 Kan.App.2d 422, 425 (1987). In *Beck v. Brooks*, the Kansas Supreme Court relied on this theory of equitable mortgages to reverse the trial court and hold that a creditor had a lien on real property on which the debtor had intended to give it a lien even though the property had been improperly described in the written mortgage and the creditor unilaterally corrected the description before it was able to get the mortgage recorded. 224 Kan. at 300-03. The Court sees no relevant distinction between the facts in *Beck v. Brooks* and those now before the Court, and concludes Kansas law grants AmerUs an equitable mortgage on the debtor's homestead even if the description in the mortgage is inadequate.

In light of this conclusion, the Court need not address the sufficiency of the property description in AmerUs's mortgage to give third parties notice of the property covered by the mortgage. Since the debtor cannot avoid the lien under any provision of the Bankruptcy Code and Kansas law allows AmerUs to enforce its lien at least against the debtor, the question whether AmerUs's lien has priority

over third parties is not relevant to the dispute between the debtor and AmerUs. Instead, the Court will address that question only if necessary to resolve the trustee's claim against AmerUs.

Furthermore, the Court will not resolve the three new issues the debtor improperly raised for the first time in his response to AmerUs's motion for summary judgment. A pretrial order had been entered before the motion was filed, and Federal Rule of Civil Procedure 16(e), made applicable here by Bankruptcy Rule 7016, provides that such an order "shall control the subsequent course of the action unless modified by a subsequent order." The Tenth Circuit has ruled that where the parties agreed intentional discrimination was required in order for compensatory damages to be available under the applicable law, a trial court properly struck the plaintiff's claim for such damages because no such discrimination had been alleged in the pretrial order. *Tyler v. City of Manhattan*, 118 F.3d 1400, 1402-04 (10th Cir. 1997). Similarly, issues not included in a pretrial order cannot properly be raised in a response to a motion for summary judgment. The Court would also point out that: (1) the debtor failed to supply proper evidentiary support for his claim that AmerUs is not authorized to do business in Kansas or to cite any law indicating that it had to have such authorization in order to obtain a valid lien on his homestead or to assert its lien in this proceeding; (2) the debtor has not alleged that the unnamed realtor who purportedly improperly pressured his sisters to sign the mortgage was acting as AmerUs's agent so that AmerUs might properly be held responsible for his or her actions; (3) the debtor has not alleged that anyone improperly pressured him to sign the mortgage, or explained why any pressure placed on his sisters would affect the validity of AmerUs's mortgage on his one-third interest in the house; and (4) the debtor has not explained why he has standing to raise his sisters' duress defense.

For these reasons, the Court concludes that AmerUs is entitled to a summary judgment declaring that it has a valid equitable mortgage against the debtor's homestead that it may enforce against the debtor.

The present procedural posture of the trustee's cross-claim and counterclaim is somewhat unclear. An order allowing the trustee to intervene was entered, and the trustee filed his answer, cross-claim, and counterclaim before the debtor objected to the motion to intervene. AmerUs filed an answer to the cross-claim before it joined in the debtor's objection to the trustee's intervention. Later, a hearing was held and the Court granted the trustee's motion to intervene, but without prejudice to the debtor or AmerUs raising defenses to the timeliness of the trustee's intervention. The Court has not found in the file any answer from the debtor to the trustee's counterclaim. Under the circumstances, the Court hereby directs the debtor to file such an answer on or before August 25, and also schedules this proceeding for a pretrial conference on Thursday, August 26, 1999, at 1:20 p.m., at which the parties should be prepared to help establish the future course of this proceeding.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of August, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE