SO ORDERED.

SIGNED this 21 day of May, 2007.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

NOT DESIGNATED FOR PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
JUSTIN WAYNE SPOONEMORE,	)	**Case No. 05-17380**
CASSANDRA KATHALEEN SPOONEMORE,	)	**Chapter 7**
	)	
Debtors.	)	
	)	

ORDER DENYING CREDITOR CIT GROUP/CONSUMER FINANCE, INC.'S MOTION FOR SUMMARY JUDGMENT

The Court, having reviewed the motion of creditor CIT Group/Consumer Finance, Inc.("CIT") for summary judgment[1] on the Trustee's motion for turnover and sanctions and the trustee's response[2] thereto, concludes that factual issues remain in controversy in this matter

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[1] Dkt. 64 and 65.

[2] Dkt. 80.

precluding summary judgment. Moreover, CIT is not entitled to judgment as a matter of law.

Introduction

Debtors filed their bankruptcy petition on October 10, 2005. CIT claims a first and second mortgage on debtors' real property described as 507 E. Twisted Oak, Derby, Kansas (the "Property"). An Agreed Order granting CIT stay relief was entered December 30, 2005. On July 20, 2006, the Trustee filed a motion for turnover of the Property pursuant to 11 U.S.C. § 542 and for sanctions pursuant to 11 U.S.C. § 362(h) (Thomson/West 2005), alleging CIT violated the automatic stay and converted the Property.[3] CIT objected to the Trustee's motion and then filed the instant summary judgment motion on the Trustee's claim.

Standards on Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and is made applicable to contested matters by Rule 9014(c) and Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law.[4] In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment.[5] An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue

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[3] Dkt. 28.

[4] Fed. R. Civ. P. 56(c); Red. R. Bankr. P. 7056.

[5] *McKibben v. Chubb,* 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

is 'material' if under the substantive law it is essential to the proper disposition of the claim."[6]

Facts Established as Uncontroverted

As provided for by Rule 56(d), the Court concludes that the following facts are deemed uncontroverted and established for the purpose of any further litigation in this contested matter. Before they filed their bankruptcy case on October 10, 2005, debtors obtained two real estate loans from Wilmington Finance, a division of AIG Federal Savings Bank, and granted Wilmington two mortgages on certain real estate at 507 E. Twisted Oak Street in Derby, Kansas. Both mortgages were filed for record and each contains, among other clauses, an assignment of rents to the lienholder. There are no facts in the record that would suggest the payment status of either loan on the petition date, nor is there any evidence in the record that supports CIT's position that it owns either mortgage.

In any event, after the debtors filed their case here, CIT moved for stay relief, filing a separate motion for each mortgage loan.[7] The debtors did not object, but the trustee did, asserting that because the Property was not claimed by the debtors as exempt, she had a right to possession of the property and to be included as an *in rem* party defendant in any mortgage foreclosure action filed by CIT. The parties agreed to an order ("Agreed Order") that specified exactly that, but also included a clause stating that CIT could take such action to "exercise any and all rights it has under its Note and Mortgage."[8] Thereafter, CIT commenced a foreclosure suit in Sedgwick County

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[6] *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

[7] Dkt. 7 (original principal loan of $19,980) and Dkt. 8 (original principal loan of $79,920).

[8] Dkt. 15.

District Court and, on May 2, 2006, obtained a Journal Entry of Mortgage Foreclosure.[9] Then, in June, CIT asked the District Court to withdraw its Journal Entry and dismiss the foreclosure case without prejudice. This the district court did on June 5, 2006. CIT did this because it had received a deed in lieu of foreclosure from the debtors on March 18, 2006 (recorded with the Sedgwick County Register of Deeds April 20, 2006), well after the petition date here. Thereafter, the trustee alleges that CIT changed the locks on the property notwithstanding that the trustee had rented it to tenants and was collecting rents.

Analysis

CIT's legal arguments boil down to two: (1) because the stay relief Agreed Order authorizes CIT to take whatever action it deems appropriate under the terms of its note and mortgage, it was entitled to proceed in foreclosure without naming the trustee (even though the Agreed Order obligated it to do so) and to take possession of the Property in spite of the trustee's rights; and (2) because the debtors gave a deed-in-lieu to CIT, the trustee is not entitled to possession of the Property. Neither theory holds water.

Construing the record liberally in favor of the trustee, there are significant controversies of fact here. First, no documentation other than the vacated journal entry supports CIT's status as assignee or transferee of either mortgage. Second, there appears to be some controversy regarding who drafted the Agreed Order and what the drafters meant by it. Moreover, the parties cannot agree on whether or when the debtors had vacated the Property. Presumably these are all issues that could be cleared up with further discovery. Finally, while CIT asserts its omission of the trustee as a party

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[9] CIT sought to foreclose only the $79,920 mortgage; in their foreclosure petition, CIT named Wilmington Finance as a party defendant and alleged that Wilmington may claim an interest in the Property by virtue of the $19,980 mortgage.

defendant in the foreclosure suit was inadvertent, there is no evidence upon which that assertion could be based. Discovery has yet to be completed in this case, due in large part to CIT's and its counsel's intransigent, uncooperative attitude manifested throughout these proceedings. In any event, there remain issues of fact to be resolved, precluding summary judgment.

CIT's legal positions ignore an obvious point: because this Property was not claimed exempt, it remains titled in the trustee whether or not the rent assignments are valid. When the debtors filed their petition here on October 10, 2005, an estate consisting of all their legal and equitable property interests was created under § 541. When they did not exempt the Property, it remained in the estate, subject to the trustee's administration. When the stay was lifted to allow a state court foreclosure, one of the conditions of that relief was that the trustee be included as an *in rem* party defendant. Had CIT included the trustee as a party defendant and foreclosed the mortgages as against the estate, it would have been entitled to judgment and an order of sale under Kansas law. Assuming proper notice, the high bidder at the sheriff's sale would, when that sale was confirmed, receive a certificate of purchase for the real property. As the vacated journal entry stated, these debtors or their successors would have been entitled to a three month redemption period under KAN. STAT. ANN. § 60-2414 (2005). Once the three months passed without a redemption, the high bidder would be entitled to a sheriff's deed.

CIT seriously misconstrues the Agreed Order. CIT agreed to an order that is the same or similar to literally hundreds of orders entered in this District. It agreed, and the Court ordered, that the trustee be included as party defendant in the foreclosure. CIT failed to do this, for whatever reason. CIT's interpretation of the order is flawed. The final decretal paragraph upon which it relies does not state solely that CIT may "immediately exercise any and all rights." This statement must

be read in context with the balance of the paragraph and the rest of the order which mandated that the trustee be named as a party and provided notice. The "any and all" paragraph merely provides for the waiver of Fed. R. Bankr. P. 4001(a)(3)'s ten-day stay of effectiveness of a stay relief order and cannot be said to trump the requirement that the trustee be named a party. To read it otherwise would render superfluous and meaningless the preceding sentence directing that the trustee be named in the foreclosure. When the stay is lifted in a like situation, this Court intends that stay relief is conditioned upon the trustee's in rem rights being protected to prevent exactly what happened in this case.

Nor is the deed-in-lieu a cure-all for CIT's error. Given and recorded after the date of the petition, the deed conveyed no more than what the debtors had at that time – nothing. By filing their bankruptcy petition, the debtors effected the transfer of their legal title to the estate for the benefit of their creditors by operation of § 541. KAN. STAT. ANN. § 60-2414(i) provides that the holder of legal title to the foreclosed property is entitled to possession of it for the full redemption period. Accordingly, as a matter of state law, the trustee was, and remains, entitled to possession of the property. Only when the trustee abandons the property or sells it, or when CIT revives and successfully prosecutes its foreclosure, will the trustee's interest be divested.

Finally, CIT argues that its "perfected" rent assignment entitles it to possession of the property. For the purposes of this motion, the Court concludes that the mortgages contain valid assignment of rents clauses and that, pursuant to KAN. STAT. ANN. § 58-2343, the recording of the mortgages suffices to perfect the mortgagee's security interest in the rents. However, KAN. STAT. ANN. § 58-2343(c) is explicit that the mortgagee is only entitled to possession of the rents upon application to a court for that right after the borrower defaults. Typically that occurs as part of the

mortgage foreclosure proceedings. CIT chose to vacate its foreclosure judgment and dismiss its foreclosure case without prejudice. While the trustee may be accountable to the lender for the rents (assuming the mortgages and rent clauses remain valid and enforceable), until such time as her rights in the property are adjudicated and disposed of by a court of competent jurisdiction, she remains entitled to possession and control of the Property, subject only to the lender's right to seek adequate protection of its interests.

CIT or its counsel did virtually everything wrong here. Rather than admit their initial error of omitting the trustee from the foreclosure and righting that wrong, CIT and counsel have compounded their mistake, choosing the twisted path of filing a motion for summary judgment *and* a motion to dismiss the trustee's motion. Additionally, CIT and its counsel have demonstrated rare intransigence in the course of the trustee's discovery, causing the trustee and the estate significant expense and effort and burdening the Court. This fact bears directly on the degree and extent to which CIT should be sanctioned for its "inadvertent" stay violation.

There being no basis upon which to grant it, CIT's motion for summary judgment is DENIED.[10]

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[10] CIT is admonished that further dispositive motions are discouraged until such time as discovery has closed. Motions to reconsider should be filed within ten days of the entry of this order and shall be limited to five pages in length.