DOCKET NUMBER: 99-40955
ADV. NUMBER: 00-80002
JUDGE: M. A. Mahoney
PARTIES: William Searles, John E. Venn, Jr., Judith L. Reschke
CHAPTER: 7
ATTORNEYS: J. E. Venn, Jr.
DATE: 9/11/00
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re

WILLIAM SEARLES Case No. 99-40955-PNS3

Debtor.

JOHN E. VENN, JR., Trustee

Plaintiff,

v. Adv. No. 00-80022

JUDITH L. RESCHKE

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

John E. Venn, Jr., Pensacola, Florida, Trustee
Judith L. Reschke, Destin, Florida, Pro Se

This matter is before the Court on the motion of Judith L. Reschke to dismiss for failure to state a claim upon which relief can be granted or in the alternative for summary judgment The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the motion to dismiss or in the alternative for summary judgment is denied.

FACTS

William Searles filed for relief pursuant to Chapter 7 of the Bankruptcy Code. At the time of filing, Debtor owned an undivided one-half interest in a piece of undeveloped real property located in Walton County, Florida. The defendant, Judith L. Reschke owns the other

one-half interest. The Trustee filed a complaint for authority to sell the property pursuant to 11 U.S.C. § 363(h).

LAW

Motions for summary judgment are controlled by Rule 56 of the Federal Rules of Civil Procedure, which has been made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, at 2510, 2511. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id*.; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Under 11 U.S.C. § 363(h), the court may permit a trustee to sell the interest of both a debtor and his co-owners in property in which a debtor had an interest prior to the commencement of the case provided that:

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of the co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

All four conditions must be satisfied in order for a trustee to sell the property. *Grant v. McDow (In re McDow),* 248 B.R. 466 (Bankr. M.D. Fla. 2000). Defendant agrees that all conditions have been met to allow a sale by the trustee in this case, except for § 363(h)(3) requiring that the benefit to the estate outweigh the detriment to the co-owner.

To determine the benefit to the estate, a court must calculate the proceeds that would be generated from the sale. The current payoff of the mortgage on the property is $53,074.85. Debtor and Defendant purchased the property in 1996 for $75,000.00 The value of the property as assessed by the Walton County Taxing Authorities is $57,200.00. A realtor has assessed the value of the property at $120,000.00. Defendant claims that the value assessed by the taxing authority is accurate, however she has offered no evidence or explanation as to why the value of the property decreased since it was purchased four years ago. Since this is Defendant's motion for summary judgment the court must look at the facts in the light most favorable to the Trustee. If the court uses the value set by the realtor of $120,000, then according to the affidavit of Joan E. Weber, who is responsible for the administration of Chapter 7 cases assigned to the Trustee, the estate and Defendant would each get approximately $24,124. This would be of considerable benefit to the estate. The Court cannot assess the credibility of the witnesses in a summary judgment context. The Court therefore takes as true the value submitted by Trustee's appraiser solely for purposes of this motion.

In determining whether the benefit outweighs the detriment, the Court must consider the economic and emotional detriment which the co-owner would face. *Griffin v. Griffin (In re Griffin)*, 123 B.R. 933 at 936 (Bankr. S.D. Fla.1991) (citations omitted). Based upon the facts presented for this motion and given the presumption in favor of the truth of the trustee's facts, there is a genuine factual issue. Defendant asserts that sale of the property would lead to economic loss and emotional stress. The Defendant states that the property was purchased with the intent of possibly building a dwelling to be occupied by Defendant and Debtor as a retirement residence in the future. However, neither of the parties reside on the property and the property remains undeveloped. Defendant would receive her half of the net proceeds and thus, should have no economic loss. In addition, § 363(i) of the Bankruptcy Code gives Defendant the right of first refusal to purchase the property at the price at which a sale would be consummated. Courts have held that the benefit outweighs the detriment, where the co-owner has the right to purchase the property and there is a significant amount of equity in the property that would enable the co-owner to secure new financing to purchase the property. *In re Oswald*, 90 B.R. 218 (Bankr. N.D. W. Va.1988); *In re Addario*, 53 B.R. 335 (Bankr. D. Mass.1985); *In re Ivey* 10 B.R. 230, 233 (Bankr. N.D. Ga.1981).

CONCLUSION

The trial of this case is set on **September 25, 2000 at 9:00 a.m.** The Court will hear evidence at that time solely on the balancing of the benefit of a sale to the estate and the detriment of a sale to Ms. Reschke. The Trustee has met his burden to survive denial of his claim at the summary judgment stage.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The motion of Judith L. Reschke, defendant, to dismiss or in the alternative for summary judgment is DENIED.

2. A trial of the issues will be held on **September 25, 2000 at 9:00 a.m.** in the United States Bankruptcy Court, 220 West Garden Street, Pensacola Florida.

Dated: September 11, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE