

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Ralph David Johnsonius,

Case No. 00-12270

Debtor.

Chapter 7

Marianna Williams, Trustee,

Plaintiff,

v.

Adv. Pro. No. 02-5221

Commercial Bank and Trust,

Defendant.

**MEMORANDUM OPINION AND ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The Court heard arguments in this matter on October 30, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the briefs of the parties and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At issue in this matter is whether or not Commercial Bank and Trust Company, ("Bank"), is entitled to apply the excess proceeds from a foreclosure sale of the debtor's real property to a loan which was executed by Johnsonius and Sons, Inc., and personally guaranteed by the debtor. The Trustee filed a complaint to recover the excess proceeds on July 11, 2002, alleging that Commercial Bank and Trust may not set off the excess proceeds. The Bank, on the other hand, alleges that it may set off the excess proceeds pursuant to 11 U.S.C. § 553. Both parties to this action filed motions for summary judgment which were taken under advisement by this Court on October 30, 2002.

In furtherance of their competing motions for summary judgment, the parties filed the following "Stipulations" of fact on 9/26/02:

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1. On or about October 17, 1997, Johnsonius and Sons, Inc., executed a Master Credit Collateral Note and Draw Note number 23523 to Commercial Bank and Trust, Company, secured by a certain inventory. Said corporate obligation was personally guaranteed by [Ralph David Johnsonius, (“Debtor”).]
2. On or about February 19, 1999, the Debtor executed loan number 44299 to Commercial Bank and Trust Company which was secured by a Deed of Trust on certain real estate located at 321 East Wood Street in Paris, Tennessee.
3. The Debtor filed an individual Chapter 13 case 00-12270 on or about June 27, 2000. Said Chapter 13 was converted to Chapter 7 on or about February 20, 2001.
4. Johnsonius and Sons, Inc., filed a separated corporate Chapter 7 bankruptcy, case number, 01-11095, on or about March 12, 2001. Said case has been closed and is listed as a non-asset case.
5. Marianna Williams, in her capacity as Chapter 7 Trustee in the instant Chapter 7 case, signed an Abandonment Order abandoning the real estate of the Debtor. Said order was filed with the Court on May 29, 2001.
6. In July 2001, pursuant to the Abandonment Order and its rights under its loan documents, Commercial Bank and Trust Company conducted a combination auction and foreclosure sale at which time the property was bid in by a third party for the amount of \$51,733.50. After deducting the auctioneer's commissions, net proceeds of \$49,146.81 were left over.
7. Out of the net real estate proceeds of \$49,146.81, Commercial Bank and Trust Company, applied \$40,244.32 [to the] outstanding balance on loan number 44299, and said loan was paid off.
8. Excess proceeds of \$8,902.49 from the Debtor's real estate foreclosure sale were applied by Commercial Bank and Trust Company to loan number 23523 (see Stipulation number 1 above).
9. As to Stipulations 7 and 9, the Trustee does not agree to the application of said net proceeds (amount of principal, interest, or expenses charge against loan number 44299). In the event the Trustee prevails, a full accounting will be provided and these Stipulations

are without prejudice to the Trustee's rights to seek additional amounts over and above \$8,902.49.

II. CONCLUSIONS OF LAW

As this Court has previously stated, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any show 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. CIV. P. 56(c). "In determining whether the non-moving party has raised a genuine issue of material fact, '[t]he evidence of [the non-moving party] is to be believed, and all justifiable inferences are to be drawn in [his] favor.'" *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 814 (6th Cir.1997) (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076, 119 L.Ed.2d 265 (1992)).

In the case of *In re Passafiume*, 242 B.R. 630 (Bankr. W.D. Ky. 1999), Bankruptcy Judge J. Wendell Roberts discussed the applicability of § 553 to situations like the one at bar:

[T]o offset a debt under § 553, there must not only be a mutuality of parties, but also a mutuality of obligations. *In re A.J. Nielson*, 90 B.R. 172, 175 (Bankr.W.D.N.C.1988); *In re Julien Co.*, 136 B.R. 784 (Bankr.W.D.Tenn.1992). Both the creditor's claim against the debtor-in- bankruptcy and the creditor's debt owed to the debtor-in-bankruptcy must have arisen *pre-petition*. *In re Peterson Distrib., Inc.*, 82 F.3d 956 (10th Cir.1996); *Ruiz*, 146 B.R. at 879. Claims which arise post-petition lack the requisite mutuality, even if they arise with regard to work performed pre- petition. *In re B & L Oil Company*, 782 F.2d 155 (10th Cir.1986); *Ruiz*, 146 B.R. at 879; *Nielson*, 90 B.R. at 175. Section 553 simply "does not permit a creditor to collect a pre-petition debt by withholding payment of a post-petition debt owed to the debtor." *Ruiz*, 146 B.R. at 879; *In re Sluss*, 107 B.R. 599 (Bankr. E.D. Tenn. 1989). Thus, to assert set-off in bankruptcy, the claim or debt at issue must have been *absolutely owing* -- that is, a definite liability must have already accrued--at the time of the commencement of the bankruptcy proceeding. *Matter of Martin*, 130 B.R. 930 (Bankr. N.D.Ill. 1991); *Sluss*, 107 B.R. at 601-02.

Passafiume, 242 B.R. at 633-34; *Gordon Sel-Way, Inc., v. United States (In re Gordon Sel-Way, Inc.)*, 270 F.3d 280, 290-91 (6th Cir. 2001); *United States v. Gerth*, 991 F.2d 1428, 1433 (8th Cir. 1993) ("For setoff purposes, a debt arises when all transactions necessary for liability occur, regardless of whether the claim was contingent, unliquidated, or unmatured when the petition was filed.") In the case at

bar, the debtor's bankruptcy petition was filed on June 27, 2000. The foreclosure of the debtor's property in Paris was conducted in July 2001. The Bank's debt to the debtor did not arise until the foreclosure sale was conducted, over a year after the filing of the bankruptcy petition. Clearly under the mandates of *Passafiume* and related cases, Commercial Bank was not entitled to setoff the pre-petition debt Johnsonius owed it under his personal guaranty against the post-petition excess proceeds of the foreclosure sale.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is **DENIED**. It is **FURTHER ORDERED** that, within 45 days of the entry of this Memorandum Opinion and Order, Commercial Bank & Trust shall provide a full accounting of the proceeds of the sale of the property at 321 East Wood Street, Paris, Tennessee, to the Trustee, Marianna Williams, and deliver any funds in excess of the payoff on the note secured by the deed of trust on 321 East Wood Street, Paris, Tennessee, to the trustee, Marianna Williams.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: December 6, 2002

cc:

Marianna Williams
Chapter 7 Trustee
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