


Dated: April 13, 2018
The following is ORDERED:




Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

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

In re
RAYMOND F. THOMAS,
Debtor.

Case No. 17-25100-L
Chapter 7

Lynda F. Teems, Trustee,
Plaintiff,
v..

Adv. Proc. No. 18-00015

Raymond F. Thomas and Michelle H. Thomas,
Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS COMPLAINT

BEFORE THE COURT is the Motion to Dismiss filed by Defendants, Raymond F. Thomas and Michelle H. Thomas, on March 1, 2018 (Dkt. No. 7). The Plaintiff filed her Objection on April 2, 2018 (Dkt. No. 10), and the Defendants filed their Reply on April 6, 2018 (Dkt. No. 11). The Defendants seek to dismiss the Complaint pursuant to Federal Rule of Civil Procedure

12(b)(6) and (7), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012. None of the parties has requested oral argument; thus, the Motion is ready for decision.

JURISDICTION AND VENUE

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The approval of a trustee's request to sell property is a matter concerning the administration of the estate, and thus is a core proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(A).

ALLEGATIONS OF THE COMPLAINT

Defendant Raymond F. Thomas commenced his bankruptcy case by filing a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on June 9, 2017, and Plaintiff Lynda F. Teems was appointed Trustee. The Plaintiff commenced this Adversary Proceeding by filing a Complaint to Sell Real Property on January 26, 2018.

Although it is not entirely clear in the Complaint, it appears that the Trustee seeks authority to sell two parcels of real property located in Fayette County, Tennessee.¹ The complaint alleges that the Defendants are “co-owners” of the parcels. The first parcel is described by the Fayette

¹ Throughout the Complaint, the Trustee switches between references to the “Properties” and to the “Property.” The Complaint describes two parcels as the “Properties,” but nowhere defines the word “Property.”

County Assessor as Parcel 9.02 and is comprised of approximately 3.4 acres and a single-family house. The second is described by the Fayette County Assessor as Parcel 8.04 and is comprised of approximately 52 acres of vacant land classified as agricultural (the “Properties”). Complaint, ¶ 7.

The Complaint alleges that the parcels are subject to a mortgage debt owed to the Bank of Fayette County (the “Bank”). Complaint, ¶ 8.

The Complaint alleges that the “Defendant and Debtor are jointly obligated on general, unsecured claims, including but not limited to certain joint debts owed to the Bank, that are apart from, and in addition to, the mortgage debt owed on the Properties.” Complaint, ¶ 9.

The Complaint alleges that partition in kind of the Properties is impracticable, and that sale of the bankruptcy estate’s “undivided interest in the Properties would realize significantly less for the Bankruptcy Estate than a sale of the Properties free of the interests of the co-owners.” Complaint, ¶¶ 11 and 12.

The Complaint alleges that the benefit to the bankruptcy estate of “a sale of the Properties free of the interests of the co-owner outweighs the detriment, if any, to such co-owner.” Complaint ¶ 13.

The Complaint alleges that the “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.” Complaint, ¶ 14.

The Complaint alleges that the value of the “Property” is believed to be in excess of the liens which encumber it. Complaint, ¶ 15.

The Trustee proposes that to the extent that the “Property” is owned by the Defendants as tenants by the entirety, the proceeds be administered for the benefit of their joint creditors. Complaint, ¶ 16.

The Trustee seeks authority to sell the “Property” free of the interests of “Defendant”² and administer the proceeds for the benefit of joint creditors of the “Debtor and Defendant.”

THE MOTION TO DISMISS

The Defendants seek to dismiss the Complaint for failure to state a claim upon which relief can be granted and for failure to join a party under Rule 19.

Failure to State a Claim

Although the Defendants filed a Motion to Dismiss, which is intended to test the sufficiency of the Complaint, they have included information outside the Complaint including information taken from the Debtor’s bankruptcy schedules, information contained in an Agreed Order entered in the Debtor’s bankruptcy case, and the Affidavit of David Robertson, an employee of the Bank. Thus, the Motion may, but need not be treated as a motion for summary judgment under Rule 56. *See* Fed. R. Civ. P. 12(d).

The Motion to Dismiss recites that real property in Fayette County described on “Schedule A”³ is owned as tenants by the entirety. Motion to Dismiss, ¶ 3. The Motion also states that the real property is the Defendants’ primary residence. Motion to Dismiss, ¶ 3. The Motion states that the Debtor and the Bank entered into a Reaffirmation Agreement with respect to the debt secured by the real property. Motion to Dismiss, ¶ 4. The Motion states that in a prior Agreed

² The Trustee apparently indicates the Defendant Michelle H. Thomas.

³ Presumably Schedule A/B filed by the Debtor in his bankruptcy case.

Order, the parties stipulated that the “Debtor’s claim of exemption in real estate pursuant to Section 522(b)(3)(B) is allowed as to all debts except the joint debts of the Debtor, Michelle Thomas, and R&M Farms owed to the Bank of Fayette County.” Motion to Dismiss, ¶ 6. The Motion states that the Debtor and the Bank have entered into Reaffirmation Agreements with respect to the Debtor’s contingent guaranties of debts owed to the Bank, which debts are also secured by the real property. Motion to Dismiss, ¶ 8. The Motion recites that the Debtor is not in default under the Reaffirmation Agreements and that the contingencies on the reaffirmed guaranties have not been triggered. Motion to Dismiss, ¶ 9. The Motion states that the Bank has not authorized a sale of the real property, and this statement is supported by the Affidavit of David Robertson. Motion to Dismiss, ¶ 11.

The Motion argues that no benefit would accrue to the bankruptcy estate from the sale of the real property, and that Mrs. Thomas, the Defendants’ college-aged children, R&M Farms, and the Bank would be harmed by the sale of the real property.

Failure to Join

The Defendants also argue that the Complaint should be dismissed for failure to join the Bank, which they describe as an indispensable party because it has a lien upon the real property.

OBJECTION TO THE MOTION TO DISMISS

The Trustee objects to the Motion to Dismiss. She argues that at best the Motion alleges that the detriment to the co-owner of the real property outweighs any benefit to the bankruptcy estate, but notes that the purpose of a motion to dismiss is to test the sufficiency of the Complaint, which does allege that the value of the property exceeds the mortgage debt and that sale of the

property “would yield funds for the Estate for the purpose of paying joint unsecured debts.” Objection, ¶ 3.

The Objection then lists a number of statements from the Motion to Dismiss that the Trustee asserts are incorrect. These include both statements of fact and statements of law.

The Trustee asks that the Motion to Dismiss, on the basis of failure to join the Bank, be denied because it is not supported by legal authority.

The Trustee asks that the Affidavit of David Robertson be stricken because the Defendants have not asked that the Court treat their Motion as a motion for summary judgment.

REPLY TO THE OBJECTION

In their Reply, the Defendants argue that the Motion should be granted either under Rules 12(b)(6) and (7), or Rule 56. They state that the Complaint should be dismissed because the Bank does not want its collateral liquidated.

LAW AND DISCUSSION

Rule 12(b)(6)

In reviewing a motion to dismiss a complaint for failure to state a claim upon which relief can be granted the trial court must “(1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true.” *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 486 (6th Cir. 2009).

The Trustee seeks authority to sell property pursuant to 11 U.S.C. § 363(h). That section provides:

Notwithstanding subsection (f) of this section, the trustee may sell both the estate’s interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case,

an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

- (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 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.

In a somewhat conclusory fashion, the Trustee has pled each of these elements in her complaint. The Defendants admit that at the commencement of the case, the Debtor and his wife held an interest in property as tenants by the entirety. They do not address the practicality of partition, the amount to be realized upon sale, or the use of the property. The Defendants assert that the real property that the Trustee plans to sell is not property of the bankruptcy estate. The Complaint alleges that it is. The Defendants question whether a sale of the real property would benefit the estate, or whether any benefit would be outweighed by the detriment to the co-owner. This also raises a question for the trier of fact should the case proceed to trial. The Complaint alleges that the benefits to the estate will outweigh the detriments to the co-owner. In the context of this Motion to Dismiss, the facts pled by the Trustee must be taken as true. The Defendants have disagreed with the facts pled by the Trustee, but have pointed to no deficiency in the Complaint. The Motion to Dismiss pursuant to Rule 12(b)(6) should be denied.⁴

⁴ Although the Defendants did not ask for a more definite statement, the Court would appreciate a clarification from the Trustee about whether she intends to sell both parcels of property or only one of them.

Rule 12(d)

The Defendants have introduced information outside the pleadings in their Motion to Dismiss. They have not asked the Court to treat their Motion as a motion for summary judgment, but the Court may do so if it first gives the parties notice of its intent to do so and a reasonable opportunity to respond. Fed. R. Civ. P. 12(d). Whether to convert a Rule 12(b)(6) motion to a motion for summary judgment lies within the discretion of the court. It is to be “exercised with great caution and attention to the parties’ procedural rights.” *Tackett*, 561 F.3d at 487, quoting 5C CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366. The briefest reading of the Motion to Dismiss and the Objection show that there are material factual issues in dispute with respect to the Trustee’s desire to sell real property. The value of the parcels is in question, the value of the Debtor’s interest in them is in question, the value of the estate’s interest in the Debtor’s interest is in question. None of these issues is easily decided in the context of a motion for summary judgment, and the process of developing the proof needed in connection with such a motion should not be short circuited. The Court declines to convert the motion to dismiss to a motion for summary judgment.

Rules 12(b)(7) and 19

The Motion to Dismiss asserts that the Bank, which is alleged to have a lien upon the real property which is the subject of the Complaint, is a party that must be joined in the Complaint pursuant to Federal Rule of Civil Procedure 19. The Defendants raise the failure to join the Bank as an additional ground for dismissing the Complaint.

Rule 19, made applicable to adversary proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7019, provides in pertinent part:

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The Defendants made no attempt to flesh out their argument that a lienholder must be joined in a trustee's complaint to sell property under 11 U.S.C. § 363(h). A quick review of Rule 19 shows that the Bank is not an indispensable party. The Trustee seeks no relief with respect to the Bank. Complete relief can be granted among the existing parties. The Bank's interests are fully protected by its lien, which is acknowledged by the Trustee. No affirmative relief is sought with respect to the Bank, so there is no risk that it will incur inconsistent obligations.

The Trustee merely seeks permission to advertise for sale both the estate's interest and the co-owner's interest in property that is encumbered by a lien held by the Bank. No particular sale is contemplated at this time. If the Court grants the Trustee permission to sell both the estate's interest and the co-owner's interest, she will return with a motion to approve a particular sale when and if an agreement for sale is reached. The Trustee might have included a request to approve a particular sale in her Complaint, but she did not. The Defendants' concern for the interests of the Bank is premature.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss is **DENIED**.

cc: Debtor
Attorney for Debtor
Plaintiff
Attorney for Plaintiff
Defendants
Attorneys for Defendants
United States Trustee