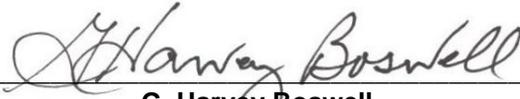


Not intended for publication



Dated: March 28, 2005
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re: J. Lyle Smith,

Case No. 01-14168

Debtor.

Chapter 7

First South Bank,

Plaintiff,

v.

Adv. Pro. No. 02-5177

**John Hancock Financial Services, Inc.; B & H Investments, Inc.;
Bancorp South Bank fka Milan Banking Company; Bank of Alamo;
Bank of Jackson; Amsouth Bank fka First American Bank; First Bank
fka Henderson County Bank and Bank of West Tennessee; First State
Bank; First Tennessee Bank; Insouth Bank f/k/a Brownsville Bank;
McKenzie Banking Co.; Merchants & Planters Bank; Sadler Management
Group; Union Planters Bank N.A.; and J. Lyle Smith,**

Defendants.

McKenzie Banking Company,

Cross-Claimant

v.

**John Hancock Financial Services, Inc.; J. Lyle Smith, II; Regina C.
Smith; Bradley S. Smith, Richard A. Smith; and Julie A. Smith,**

Cross-Defendants.

**Memorandum Opinion and Order Granting in Part and Denying in Part
“Motion for Partial Summary Judgment” filed by McKenzie Banking Company**

The Court conducted a hearing on McKenzie Bank’s Motion for Partial Summary Judgment on January 7, 2005. FED. R. BANKR. P. 9014. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court’s findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

McKenzie Banking Company filed its Motion for Partial Summary Judgment on July 29, 2004. In that motion, McKenzie asked the Court to determine that it has a first priority position in life insurance policy numbers VL 000197491, VL 000088176, FV 003044935, FV003006747, FV 003014573, VL 000024622, and VL 000008624 issued by John Hancock to J. Lyle Smith, (“Smith” or “debtor”), and that John Hancock is liable to McKenzie Banking Company for conversion in the amount of \$90,879.19. In support of its motion, McKenzie Banking Company filed a Statement of Material Facts and a Memorandum of Law and Fact on July 29, 2004. John Hancock filed responses to both of these pleadings on September 24, 2004.

McKenzie’s claim against John Hancock revolves around seven life insurance policies issued by Hancock to the debtor between 1981 and 1993. There are several facts on which the parties agree. First, McKenzie issued a master credit collateral note to the debtor on July 2, 1993, in the amount of \$225,920.44. Second, as collateral for this note, Smith assigned fourteen John Hancock life insurance policies to McKenzie.¹ Third, McKenzie issued a disbursement note relating to the master credit collateral note on March 29, 2001. Fourth, the master note has not been paid by Smith and is in default. The payoff balance for the note as of July 28, 2004, is \$111,848.66. Fifth, after acknowledging the assignment of each policy to McKenzie Banking Company, John Hancock loaned Smith various sums of money from the cash value of each policy. Sixth, John Hancock admits that these loans were made in violation of McKenzie’s rights under the assignment of each policy. Finally, McKenzie and John Hancock also agree that after Smith assigned the policies to McKenzie in July 1993, he assigned the

¹ Smith assigned a total of fourteen life insurance policies to McKenzie Banking Company as collateral for the master note; however, McKenzie’s motion for summary judgment only addresses seven of those policies. McKenzie does not claim to have a first priority position in the other seven policies.

same policies to several different banks as collateral for other loans; however, the parties did not present any proof of these assignments.

In order to address the seven policies at issue in this case, the Court will set forth the facts on which the parties agree by policy number:

a. **Policy Number VL 000197491**: Smith assigned the policy to McKenzie on May 1, 1992. John Hancock stamped the assignment and acknowledged receipt of same on June 10, 1992.

b. **Policy Number VL 000088176**: Smith assigned the policy to McKenzie on May 1, 1992. John Hancock stamped the assignment and acknowledged receipt of same on June 10, 1992.

c. **Policy Number FV 003044935**: Smith assigned the policy to McKenzie on June 24, 1993. John Hancock stamped the assignment and acknowledged receipt of same on July 5, 1993. Milan Banking Company held a prior assignment position on the policy; however, that assignment was extinguished by virtue of payment in full and has been dismissed from this adversary proceeding.

d. **Policy Number FV 003006747**: Smith assigned the policy to McKenzie on November 19, 1993. John Hancock stamped the assignment and acknowledged receipt of same on November 17, 1993.² Milan Banking Company held a prior assignment position on the policy; however, that assignment was extinguished by virtue of payment in full and has been dismissed from this adversary proceeding.

e. **Policy Number FV 003014573**: Smith assigned the policy to McKenzie on June 24, 1993. John Hancock stamped the assignment and acknowledged receipt of same on July 5, 1993.

f. **Policy Number VL 000024622**: Smith assigned the policy to McKenzie on February 12, 1992. John Hancock stamped the assignment and acknowledged receipt of same on March 23, 1992. Milan Banking Company held a prior assignment position on the policy; however, that assignment was extinguished by virtue of payment in full and has been dismissed from this lawsuit.

² The parties did not address the issue of why the actual assignment to McKenzie was made on November 19, 1993, but was received and acknowledged by John Hancock two days prior to the actual assignment. Since the parties are not in dispute over these dates, the Court has no other choice but to state the facts as they are set forth in the pleadings.

g. **Policy Number VL 000008624:** Smith assigned the policy to McKenzie on June 24, 1993. John Hancock stamped the assignment and acknowledged receipt of it on July 5, 1993.

Although the parties agree on most of the relevant facts, they do dispute the amount of money John Hancock loaned Smith from the cash value of each policy.

a. **Policy Number VL 00197491:** McKenzie alleges that subsequent to acknowledging the assignment of the policy to McKenzie, John Hancock loaned Smith \$12,771.63 from the cash value of the policy. In opposition to this claim, John Hancock asserts that it made two loans to the debtor in the amounts of \$381.78 and \$4,166.95.³ According to John Hancock's records, the policy lapsed on October 4, 2001 and it terminated on December 19, 2003. The loan interest on these two loans calculated at 8% through the date of lapse was \$790.87.⁴

b. **Policy Number VL 000088176:** McKenzie alleges that subsequent to acknowledging Smith's assignment of the policy to McKenzie, John Hancock loaned Smith \$7,486.00 from the cash value of the policy. In opposition to this claim, John Hancock asserts that it made two loans to the debtor in the amounts of \$215.03 and \$3,167.78.⁵ According to John Hancock's records, the policy lapsed on December 1, 2001, and was terminated on February 12, 2004. The loan interest on these two loans calculated at 8% through the date of lapse was \$577.84.⁶

c. **Policy Number FV 003044935:** McKenzie alleges that subsequent to acknowledging Smith's assignment of the policy to McKenzie, John Hancock loaned Smith \$7,113.85 from the cash value of the policy. In opposition to this claim, John

³ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 42 - 47.

⁴ Id. at ¶¶ 43 and 45.

⁵ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 36 - 41.

⁶ Id. at ¶¶ 37 and 39.

Hancock asserts that it made one loan to the debtor in the amount of \$3,907.05.⁷ According to John Hancock's records, the policy lapsed in October 2002 and was terminated on December 19, 2002. The loan interest on this loan calculated at 6% through the date of lapse was \$708.44.⁸

d. **Policy Number FV 003006747:** McKenzie alleges that subsequent to acknowledging Smith's assignment of the policy to McKenzie, John Hancock loaned Smith \$8,294.01 from the cash value of the policy. In opposition to this claim, John Hancock asserts that it made two loans to the debtor in the amounts of \$504.58 and \$5,762.32.⁹ According to John Hancock's records, the policy lapsed in May 2002 and was terminated on January 17, 2003. The loan interest on this loan calculated at 6% through the date of lapse was \$1,022.52.¹⁰

e. **Policy Number FV 003014573:** McKenzie alleges that subsequent to acknowledging Smith's assignment of the policy to McKenzie, John Hancock loaned Smith \$7,067.43 from the cash value of the policy. In opposition to this claim, John Hancock asserts that it made one loan to the debtor in the amount of \$4,193.59.¹¹ According to John Hancock's records, the policy is still in effect. The loan interest on this loan calculated at 6% through September 2004 was \$1,170.48.¹²

f. **Policy Number VL 000024622:** McKenzie alleges that subsequent to acknowledging Smith's assignment of the policy to McKenzie, John Hancock loaned Smith \$40,948.29 from the cash value of the policy. In opposition to this claim, John

⁷ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 18 - 23.

⁸ Id. at ¶¶ 19 and 21.

⁹ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 6 - 11.

¹⁰ Id. at ¶¶ 7 and 9.

¹¹ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 12 - 17.

¹² Id. at ¶¶ 13 and 15.

Hancock asserts that it made two loans to the debtor in the amounts of \$1,771.74 and \$17,163.16.¹³ According to John Hancock's records, the policy lapsed on January 7, 2002, and was terminated on February 23, 2004. The loan interest on the loans calculated at 6% through the date of lapse was \$2,824.58.¹⁴

g. **Policy Number VL 000008624:** McKenzie alleges that subsequent to acknowledging Smith's assignment of the policy to McKenzie, John Hancock loaned Smith \$7,197.98 from the cash value of the policy. In opposition to this claim, John Hancock asserts that it made one loan to the debtor in the amount of \$2,484.76.¹⁵

According to John Hancock's records, the policy lapsed on August 1, 2002. The loan interest on the loan calculated at 6% through the date of lapse was \$322.76.¹⁶

Although the parties disagree about the amount of loans, they do agree that John Hancock made various deductions from the policies and/or ultimately depleted the cash values of the policies thereby reducing McKenzie's collateral value in the policies.

II. CONCLUSIONS OF LAW

"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.'" *Fogerty v. MCM Group Holdings Corp., Inc.*, 379 F.3d 348, 352 (6th Cir. 2004) (citing FED. R. CIV. P. 56(c).) "In deciding a motion for summary judgment, [a court must] view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Williams v. Mehra*, 186 F.3d 685, 869 (6th Cir. 1999) (citations omitted). "The moving party has the burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *R.S.W.W., Inc., v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005).

¹³ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 30 - 35.

¹⁴ Id. at ¶¶ 31 and 33.

¹⁵ See "Declaration of Antoinetta Lopolito" attached as Exhibit 1 to "Response of Defendant John Hancock Financial Services, Inc., to Cross-Claimant, McKenzie Banking Company's Statement of Material Facts in Support of Motion for Partial Summary Judgment," docket number 225, filed on September 24, 2004, ¶¶ 24 - 29.

¹⁶ Id. at ¶¶ 25 and 27.

In the case at bar, the parties agree that Smith assigned the seven policies at issue to McKenzie prior to John Hancock issuing loans to the debtor from the cash value of the policies. Clearly, the Court can conclude from this that McKenzie is entitled to priority over John Hancock with respect to those policies; however, the Court cannot conclude at this time that McKenzie is entitled to a first priority position in those policies over all other creditors. While it is true that McKenzie and John Hancock agreed that Smith made assignments to other banks after assigning the policies to McKenzie, the parties did not present any proof of these assignments. As a result, the issue of McKenzie's entitlement to a first priority position over other creditors is not appropriate for summary judgment.

In addition to the fact that both parties agree that McKenzie is entitled to priority in the policies over John Hancock, the facts also establish that John Hancock violated McKenzie's rights when it loaned Smith various sums of money from the cash value of the policies. What is not clear from the facts before the Court at this time is the amount of the loans. McKenzie claims that Hancock loaned the debtor significantly more money than Hancock asserts it did. Because the amounts of the loans is a material fact and because there is a genuine issue as to those amounts, the Court cannot reach a conclusion as to the amount of the loans at this time. It is not an appropriate issue for summary judgment.

Additionally, the Court concludes that it is not appropriate to grant summary judgment on the issue of damages in this matter. The facts that were presented to the Court did not establish (1) when McKenzie learned of the various loans, (2) when McKenzie was entitled to the proceeds of the policies, (3) what the value of the policies on that date was and (4) whether or not John Hancock was entitled to deduct any fees or premiums from the cash value of the policies. As stated above, the parties also did not establish that McKenzie is entitled to a first priority position over any other parties for any of the policies.

ORDER

It is therefore **ORDERED** that McKenzie Banking Company's Motion for Partial Summary Judgment is **GRANTED AS FOLLOWS:**

1. McKenzie Bank has priority over John Hancock with respect to policy numbers VL 000197491, VL 000088176, FV 003044935, FV 003006747, FV 003014573, VL 000024622, VL 000008624.
2. John Hancock's loans to J. Lyle Smith from the cash values of policy numbers VL 000197491, VL 000088176, FV 003044935, FV 003006747, FV 003014573, VL 000024622, VL 000008624 was in violation of McKenzie Banking Company's rights in the policies; and
3. John Hancock is liable to McKenzie Banking Company for damages.

It is **FURTHER ORDERED** that McKenzie Bank's Motion for Partial Summary Judgment is **DENIED AS FOLLOWS:**

1. The issue of whether or not McKenzie Banking Company has priority over any other creditors, with the exception of the Bank of Milan on policy numbers FV 003044935, FV 003006747, and VL 000024622, is reserved for trial;
2. The issue of what amounts John Hancock loaned to J. Lyle Smith from the cash value of the various policies which had been assigned to McKenzie Banking Company is reserved for trial; and
3. The issue of the amount of damages McKenzie Banking Company is entitled to from John Hancock is reserved for trial.

It is **FURTHER ORDERED** that the "Objection of B & H Investments, Inc., Insouth Bank, and Firstbank to Motion for Partial Summary Judgment filed by McKenzie Banking Company" is **SUSTAINED** as follows:

1. The issue of whether or not McKenzie Banking Company is entitled to priority over B & H Investments, Inc., Insouth Bank and Firstbank is reserved for trial.

Mailing List

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Jerry P. Spore, Attorney for First South Bank

Stephen L. Hughes, Attorney for Bank of Alamo, Bancorpsouth Bank, and McKenzie Banking Co.

Harold F. Johnson, Attorney for Merchants & Planters Bank

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