

Not intended for publication



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

A handwritten signature in cursive script that reads "G. Harvey Boswell".

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 First South Bank**

The Court conducted a hearing on First South 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.

First South Bank, (“First South”), filed a Motion for Partial Summary Judgment on June 17, 2004. In that motion, First South asked the Court to determine that:

- a. First South has first priority to all rights under John Hancock Life Insurance Policy number FV003271739, including, but not limited to, the right to the actual cash value of the policy as a matter of law; and
- b. John Hancock is liable to First South for conversion in the sum amount of \$11,671.39, constituting all loans against the policy wrongfully made by John Hancock to Smith without the consent or permission of First South, plus pre-judgment interest accruing from the date of the conversion, July 25, 2000.

“Motion for Partial Summary Judgment” filed by First South Bank, docket # 197. In support of its motion, First South filed a “Statement of Undisputed Facts” and a “Memorandum of Law and Fact.”¹ John Hancock filed responses to both these pleadings on August 23, 2004.

First South’s claim against John Hancock revolves around a \$250,000.00 Individual Variable Life Insurance Policy, Policy Number FV 3271739, issued to J. Lyle Smith, (“Smith” or “debtor”), by John Hancock on December 1, 1995. J. Lyle Smith assigned this policy to First South as collateral for a line of credit in the maximum principal amount of \$85,100.00 on May 13, 1996. John Hancock received a copy of the assignment on May 14, 1996. John Hancock stamped its acknowledgment of the assignment on the bottom of the assignment form on the same day.

First South renewed the line of credit on August 15, 1997, and increased it to \$100,100.00. The assignment of the John Hancock policy was accepted as partial security for this increase. First South granted extensions to Smith on four occasions for repayment of the Line of Credit, the final of which extended the

¹Although First South served a copy of its “Statement of Undisputed Facts,” docket number 231, and its “Memorandum of Law and Fact in Support,” docket number 230, on interested parties along with its Motion for Partial Summary Judgment, First South did not file a copy of either of these documents with the Court until February 23, 2005. Unaware that the statement and the memorandum of law had not been filed with the Court, John Hancock filed responses to both these documents on August 23, 2004.

maturity date to August 15, 2001. J. Lyle Smith has not paid the line of credit in full and the principal amount of \$86,963.33 remains outstanding.

Although it had received and acknowledged the assignment of policy number FV 003271739 to First South on May 14, 1996, John Hancock loaned Smith \$11,671.39 from the cash value of the policy on July 25, 2000. First South Bank did not approve of, consent to or receive notice of this loan. At the hearing on First South's motion for partial summary judgment, John Hancock admitted that it should not have made the loan to Smith on July 25, 2000, and that First South has priority over John Hancock with respect to policy number FV 003271739. First South also agreed that the actual cash value of the policy was \$757.32 on June 15, 2001.

Although the parties agreed that the July 25 ,2000, loan was in violation of First South's rights in the policy pursuant to its May 13, 1996, assignment, they did not present any evidence of several key facts. First, First South did not present proof as to when they learned of the July 25, 2000, loan. Second, First South failed to present any proof as to when they became entitled to the proceeds of policy number FV 003271739. Third, First South failed to present any evidence of the cash value of the policy on days other than June 15, 2001, nor did they ever inform the Court of the significance of that date. Finally, First South alleged that had the July 25, 2000, loan not been made by John Hancock, the cash value of the policy would have been \$12,428.71. John Hancock disputed this contention and asserted they were entitled to deduct certain fees and premiums from the cash value of the policy. John Hancock also alleged that the life insurance policy was a variable one which meant that the actual cash value of the policy would fluctuate from day to day.

"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).

In the case at bar, the parties are in agreement on two material facts:

1. First South Bank is entitled to priority over John Hancock with respect to policy number FV 003271739; and
2. John Hancock's loan to Smith on July 25, 2000, from the cash value of policy number FV 003271739 was in violation of First South's rights to the policy.

As a result of these stipulations, the Court finds that the issues of whether First South has priority over John Hancock and whether the July 25, 2000, loan entitles First South to damages from John Hancock are appropriate for decision under the summary judgment standard. Clearly, First South has priority over John Hancock with respect to policy number FV 003271739. It is also clear that John Hancock is liable to First South for damages as a result of the July 25, 2000, loan which was in violation of First South's rights under the May 13, 1996, assignment.

Despite these findings, the Court concludes that it is not appropriate to grant summary judgment on any of the other issues in this adversary proceeding. The facts that were presented to the Court on January 7, 2005, did not establish the issues of (1) when First South learned of the July 25, 2000, loan, (2) when First South was entitled to the proceeds of the policy, (3) what the value of the policy 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 policy. First South also failed to prove that it was entitled to a first priority position over any other parties. Although First South and John Hancock stipulated that Smith assigned policy number FV 003271739 to the Bank of Alamo on July 29, 1996, the B & H Investments on August 6, 1998, and to First Bank on April 7, 1999, neither First South nor John Hancock presented proof to the Court of these assignments. The parties also failed to produce any evidence of when John Hancock acknowledged those assignments. As a result, the Court finds that the issue of whether or not First South has priority over the Bank of Alamo, B & H Investments or First Bank cannot be decided for purposes of this summary judgment motion.

ORDER

It is therefore **ORDERED** that First South Bank's Motion for Partial Summary Judgment is

GRANTED AS FOLLOWS:

1. First South Bank has priority over John Hancock with respect to policy number FV 003271739;
2. John Hancock's July 25, 2000, loan to J. Lyle Smith in the amount of \$11,671.39 was in violation of First South Bank's rights in policy FV 003271739; and
3. John Hancock is liable to First South Bank for damages.

It is **FURTHER ORDERED** that First South Bank's Motion for Partial Summary Judgment is

DENIED AS FOLLOWS:

1. The issue of whether or not First South Bank has priority over the Bank of Alamo, B & H Investments and First Bank is reserved for trial; and
2. The issue of the amount of damages First South Bank 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 First South Bank" is **SUSTAINED** as follows:

1. The issue of whether or not First South Bank had priority over B & H Investments, Inc., Insouth Bank and Firstbank is reserved for trial.

Mailing List

Timothy Latimer, Attorney for Debtor

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

W. Neal McBrayer, Attorney for John Hancock Financial, Inc.

J. Brandon McWherter, Attorney for First South Bank

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David A. Riddick, Attorney for First Bank, Insouth Bank, West Tennessee Mortgage Services, Inc./Sadler Management Group, and B & H Investments, Inc.,

C. Jerome Teel, Attorney for Bank of Jackson

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