

**Dated: June 28, 2005**  
**The following is ORDERED:**



  
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**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re

SAMUEL L. SMITH and SHIRLEY A. SMITH,  
  
Debtors.

Case No. 04-27082-L  
Chapter 13

Samuel L. Smith and Shirley A. Smith,  
Plaintiffs,  
  
v.  
Citifinancial Mortgage Company, Inc.,  
Defendant.

Adv. Proc. No. 04-00360

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**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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BEFORE THE COURT is the motion of Citifinancial Mortgage Company, Inc. ("Citifinancial"), filed February 28, 2005, for summary judgment on claims asserted by the Debtors in the Complaint Seeking to Avoid and Set Aside a Foreclosure Sale as a Preference and Reinstate Mortgage. Citifinancial asserts three grounds for its motion: (i) the Debtors have no right to cure a default and reinstate a mortgage once foreclosure occurs; (ii) the Debtors lack standing to bring

the complaint; and (iii) the Debtors cannot satisfy the elements of 11 U.S.C. § 547(b) demonstrating that the prepetition foreclosure sale was a preferential transfer. The Court heard oral argument on the motion on May 24, 2005. For the following reasons, the motion is **GRANTED**. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

## I. FACTS

The following facts were presented by Citifinancial in the Affidavit of Steve Smith, a Vice President for Citifinancial, and were not disputed by the Debtors. The Debtors were indebted to Citifinancial f/k/a Associates Home Equity Services for an obligation secured by a deed of trust upon their residence located in Millington, Tennessee. The Debtors defaulted in the obligation to make payments to Citifinancial, and Citifinancial caused a substitute trustee to be appointed who gave notice of her intent to sell the real estate in order to pay the debt owed to Citifinancial pursuant to a power of sale reserved in the deed of trust. Following publication of notice of the sale for three consecutive weeks, a sale was conducted on May 5, 2004. Citifinancial was the only and successful bidder at the sale, submitting a bid of \$41,900.00. A Substitute Trustee's Deed was prepared and recorded on May 5, 2004.

On May 7, 2004, the Debtors filed a voluntary petition pursuant to Chapter 13 of the United States Bankruptcy Code. In their schedules, the Debtors listed a debt to Citifinancial in the amount of \$56,607.96, and listed the current market value of their interest in the real property at \$56,000.00. Nevertheless, the parties have stipulated for purposes of this proceeding that the value of the property as of the petition date was \$68,000.00. This value is based upon a "Broker's Price Opinion" obtained by Citifinancial in anticipation of foreclosure.

The Debtors filed their “Complaint to Avoid Foreclosure Sale as a Preference and Reinstate Mortgage” on May 13, 2004. They bring their complaint pursuant to sections 522(h), 547(b) and 1322(b)(5) of the Bankruptcy Code. The complaint recites that the property is valued at \$56,000.00, and that the Debtors owed at the time of foreclosure a principal balance of \$50,961.41. Subsequently, as the result of discovery, the Debtors have revised their position concerning the value of the property to \$68,000.00. The Debtors also amended their claim of homestead exemption, reducing their claim from \$7,500.00 to \$100.00 on March 30, 2005.

## **II. STANDARD FOR CONSIDERING MOTION FOR SUMMARY JUDGMENT**

Federal Rule of Civil Procedure 56(c), as incorporated by Federal Rule of Bankruptcy Procedure 7056, governs motions for summary judgment in adversary proceedings in bankruptcy. Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). When a court reviews a motion for summary judgment, “the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party.” *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The non-moving party must present enough evidence to show that there is a genuine issue of material fact in order to prevail. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990). “A mere scintilla of evidence is insufficient; ‘there must be evidence on which the jury could reasonably find for the [non-movant].’” *In re Morris*, 260 F.3d 654, 665 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Summary judgment should be entered “against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

### III. ANALYSIS

The Debtors seek to avoid the transfer of their property to Citifinancial pursuant to section 522(h). That section provides:

The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if –

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

11 U.S.C. § 522(h). The chapter 13 trustee has not attempted to avoid the transfer to Citifinancial, and the Debtors have attempted to claim a homestead exemption in the property. The parties have not stipulated that the Debtors would have been entitled to claim this exemption had they owned the property when their petition was filed, but Citifinancial admits that the property was the Debtors’ residence prior to sale, and the Debtors were living in the property as their residence when the petition was filed.

Citifinancial argues that the Debtors lack standing to avoid the transfer because the transfer was complete prior to the filing of their petition. This argument is unfounded. Section 522(h) clearly anticipates that the debtor who may take advantage of that section is one who “could have exempted the property,” if it were property of the estate (by virtue of being recovered by the trustee in bankruptcy). In many cases, a debtor will not have an ownership interest in property the transfer of which is subject to avoidance by a bankruptcy trustee, precisely because the property has been

transferred prior to the filing of the petition. If the section were read as Citifinancial suggests, it would offer no remedy to most bankruptcy debtors. The Debtors have standing to file a complaint pursuant to section 522(h).

The relief provided to the Debtors pursuant to section 522(h) is limited however. Pursuant to that section, a debtor may only avoid a transfer of property *to the extent that* they could have exempted the property had the trustee avoided the transfer. The homestead exemption provided by Tennessee law is limited to \$7,500 for persons who jointly own and use real property as their principal residence. *See* Tenn. Code Ann. § 26-2-301. This is the limit of relief that could be provided to the Debtors under section 522(h).

The Debtors seek much greater relief than this, however. The Debtors' seek to recover the property itself and to "reinstate" their home mortgage. The Debtors want the court to treat the foreclosure sale as if it never happened, and want to be permitted to cure the defaults in their payments through their Chapter 13 plan pursuant to section 1322(b)(5). The foreclosure sale was complete and title to the real property was transferred to Citifinancial on May 5, 2004, however, two days before the Debtors filed their Chapter 13 petition. The Debtors concede that there was no defect in the sale. Once a foreclosure sale is complete, a debtor loses the ability to cure any economic default and reinstate the terms of a mortgage pursuant to section 1322(b)(5). *Federal Land Bank v. Glenn (In re Glenn)*, 760 F.2d 1428, 1435 (6th Cir. 1985). In Tennessee, a non-judicial foreclosure sale is complete when consideration is given for the transfer and the statute of frauds is satisfied in accordance with Tennessee Code Annotated § 29-2-101. *See Wayne v. First Tennessee Bank, N.A.*, Adv. Proc. No. 01-1090, slip op. at 23 (Bankr. W.D. Tenn. May 24, 2002); *In re Johnson*, 213 B.R. 134 (Bankr. W.D. Tenn. 1997), *modified on reh'g* by 215 B.R. 988 (Bankr.

W.D. Tenn. 1997). Consideration was given by Citifinancial in the form of a credit bid in the amount of \$41,900.00, and a written memorandum of the oral sale was made on May 5, 2005, in the form of the Substitute Trustee's Deed, which satisfies the statute of frauds.

Once the sale was complete, the Debtors lost the ability to cure the default in their mortgage. At most, if the Debtors were able to establish that the foreclosure sale was a preferential transfer pursuant to section 547(b), they would be entitled to a judgement against Citifinancial in the amount of \$7,500.00.

In order to establish their right to recover under section 522(h), the Debtors must show that the sale could have been avoided by a bankruptcy trustee. In general, a trustee may avoid any transfer of an interest of a debtor in property –

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made –
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if –
  - (A) the case were a case under Chapter 7 of [title 11];
  - (B) such transfer had not been made;

(C) such creditor received payment of such debt to the extent provided by the provisions of [title 11].

11 U.S.C. § 547(b). The Trustee must establish each of these elements by a preponderance of the evidence. 11 U.S.C. § 547(g); *In re Fred Hawes Organization, Inc.*, 957 F.2d 239, 242 (6th Cir. 1992).

Although there is no per se rule that a properly conducted foreclosure sale can never be avoided as a preferential transfer, a foreclosure sale may not be set aside as a *fraudulent transfer* when the sale is conducted in conformity with state law and is non-collusive. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). This is so because, “a fair and proper price . . . is the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure law have been complied with.” *Id.* For the same reason, other courts have held that secured creditors who acquire real estate at regularly conducted, non-collusive foreclosure sales do not receive a voidable preference, even where the value of the property theoretically exceeds the value given. *See, e.g., Rambo v. Chase Manhattan Mtg. Corp. (In re Rambo)*, 297 B.R. 418 (Bankr. E.D. Pa. 2003); *In re Ehring*, 900 F.2d 184, 188-89 (9th Cir. 1990); *In re Pulcini*, 261 B.R. 836, 843-45 (Bankr. W.D. Pa. 2001); *Matter of Park North Partners, Ltd.*, 85 B.R. 916 (Bankr. N.D. Ga. 1988).

For a creditor to receive a preferential transfer, the transfer must enable the creditor to receive more than the creditor would have received under a theoretical Chapter 7 distribution had the transfer not been made. In the event of a Chapter 7 case, fully secured creditors may be expected to receive the full amount of their claims. The Debtors argue that Citifinancial received more than this because the value of the property exceeded the amount of the debt owed to Citifinancial at the time of foreclosure. No appraisal was made of the property. The Debtors rely instead upon the

stipulation that, for purposes of determining its bid price, Citifinancial assumed a value for the property of \$68,000.00. The best indication of value, however, is the price received at the foreclosure sale. *See Rambo*, 297 B.R. at 431; *Cottrell v. United States (In re Cottrell)*, 213 B.R. 378, 383 (Bankr. M.D. Ala. 1996) (value received at foreclosure establishes the “forced sale” price that a trustee would be expected to receive in a “forced sale” in bankruptcy). It is based upon the value actually received at a regularly conducted, non-collusive foreclosure sale, rather than upon an opinion of value, that the court must make its analysis of whether Citifinancial received more than it would have received in a hypothetical Chapter 7 case.

As the result of the regularly conducted, non-collusive foreclosure sale, Citifinancial received property valued at \$41,900.00. This amount is less than the amount owed to Citifinancial. The Debtors have failed to establish one of the elements necessary to the success of their cause, and Citifinancial has established that it is entitled to judgment as a matter of law.

#### IV. CONCLUSION

For the foregoing reasons, the Defendant’s Motion for Summary Judgment is **GRANTED**, and the complaint is **DISMISSED**.

cc: Debtors/Plaintiffs  
Attorney for Debtors/Plaintiffs  
Defendant  
Attorney for Defendant