

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Augusta Division**

In the matter of:)
TALMADGE COOK)
KATHRYN COOK)
(Chapter 7 Case 97-12629))

Adversary Proceeding

Number 98-1011

Debtors)

TALMADGE COOK)
KATHRYN COOK)

Plaintiffs)

v.)

BOARDWALK PROPERTIES, INC.,)
a corporation, and JERRY BURSON,)
individually and as assignee of THIRTEEN)
CERTAIN LAND TRUSTS et al.,)

Defendants)

FILED
at 8 O'clock & 52 min A M
Date 7/13/99

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia *JB*

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed a petition for bankruptcy protection under Chapter 13 on September 30, 1997, and converted the case to Chapter 7 on January 9, 1998. They filed this complaint on January 21, 1998, alleging that the Defendants violated the automatic stay by transferring property of the estate to a third party. Defendants filed this Motion for Summary Judgment on February 1, 1999, and Plaintiffs responded on February 25, 1999. A hearing was held in Augusta, Georgia, on March 5, 1999. Pursuant to Bankruptcy Rule 7052, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In April of 1996, Debtor began negotiating with Defendant Jerry Burson, as agent for Defendant Boardwalk Properties, Inc., for the sale of thirteen rental properties Debtor owned. On August 22, 1996, Burson signed a Promissory Note for \$28,300.00. That same day, Debtors signed trust documents which transferred the thirteen subject properties into thirteen separate land trusts, naming Debtors as the beneficiaries and designating D. Houston as the Trustee. (Pls.' Ex. A). Simultaneously, Debtors signed a document entitled "Assignment of Beneficial Interest and Land Trust," assigning their beneficial interest in the thirteen trusts to Defendant Jerry Burson. (Pls.' Ex. B). Burson then signed a document which appointed D. Houston as Trustee. (Pls.' Ex. C). All trust documents were recorded on September 3, 1996, in the Richmond County Clerk's Office.

The promissory note came due on or before October 22, 1996. Debtors made demands for payment thereafter, which Burson refused. Debtors then filed a complaint in the Superior Court of Richmond County on December 23, 1996. (Pls.' Ex. D). As a result of that litigation, an order was entered on January 21, 1997, awarding control of all future rents to Debtors, effectively removing control of the property from Burson, Boardwalk Properties, and the thirteen land trusts:

That temporary restraining order is hereby issued to defendants enjoining them and restraining them from collecting or receiving rents on the described premises, alienating or encumbering the subject premises or . . .

The Defendant was properly served with a copy of this Complaint . . .

The Order issued by this Court on the 23rd of December 1996 shall remain in full force and effect until further Order of this Court.

(Pls.' Exs. E, F).

Debtors filed their bankruptcy case under Chapter Thirteen on September 30, 1997. On November 26, 1997, Daniel Houston, as Trustee of the thirteen land trusts, sold properties located at 117 Greene Street and 1429 Heard Avenue to Larry Lokuta. (Pls.' Exs. M, N, O).

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(c). All evidence must be considered "in the light most favorable to the non-moving party." Rollins v. Tech-South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the movant carries its burden, the burden then shifts to the nonmoving party to introduce "significant, credible evidence sufficient to show" that there is a genuine issue

of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991).

Defendants contend that they are entitled to summary judgment because the two properties sold to Larry Lokuta were not property of the estate; therefore, Defendants contend, the sale of the property could not violate the automatic stay as a matter of law. Defendants, as the moving party, bear the burden of showing that no genuine issue of material fact exists. I find that Defendants have failed to meet this burden, and that the motion must therefore be denied.

Central to this motion is the issue of service of process of the Superior Court complaint. Defendants contend that the Superior Court order is not binding upon them because they were not served with the complaint. This Court must give the same effect to the Superior Court judgment that it would have in the courts of the State of Georgia. 28 U.S.C. § 1738. Under Georgia law, a defendant in a lawsuit who challenges the sufficiency of service bears the burden of showing improper service. Hardin Constr. Group, Inc. v. Fuller Enterprises, Inc., 233 Ga. App. 717, 721, 505 S.E.2d 755, 759 (1998) (citing Patterson v. Coleman, 252 Ga. 152, 311 S.E.2d 838 (1984)).

Defendants stipulate to service of process upon Jerry Burson; however, Defendants dispute service of process upon Boardwalk Properties, Inc., a corporation. Georgia law permits service of process on a corporation through its president, other officer, or the Secretary of State, O.C.G.A. § 9-11-4(d), or through its registered agent, O.C.G.A. § 14-2-504.

Service upon a corporate officer must be made on him personally. See R.B. Clements v. Sims T.V. Inc., 105 Ga. App. 769, 125 S.E.2d 705 (1962). The issue presented is thus: did service of the superior court complaint on Jerry Burson also effectuate service upon Boardwalk Properties, Inc.?

Georgia law on this point is not clear-cut. On the one hand, the Georgia Supreme Court has upheld process where a corporation was sued but the return of service did not specify the defendant's name. Phillips v. Bond, 64 S.E. 456 (Ga. 1909). The Court in Phillips explained:

Suppose that the sheriff, in addition to the entry of service which he made in the present case, had added a statement that . . . the service that he had made upon the agent, as shown by the preceding portion of his entry, operated to perfect service upon the corporation, and that he declared it to have that legal effect, how much force would such a declaration on the part of the sheriff have added to the effect which the law gave to the service on the agent? . . . The corporation was sued, summoned, and a copy of the writ . . . was delivered to the person to whom the law required that it should be delivered in order that service might be 'perfected.' Why does this not perfect the service?

Id. at 458; see also Bodenheimer v. Fulton Nat'l Bank of Atlanta, 205 Ga. 829, 55 S.E.2d 357 (1949) (where one is sued in several capacities, service of notice in person is "tantamount to serving him in each of the capacities in which he is sued."). On the other hand, the Georgia Court of Appeals has more recently held that a "return of service of process on another party defendant [individual] is not proof of proper service of process on defendant [corporation] for [which] there is no return of service." All Risk Insur. Agency, Inc. v. Rockbridge Sanitation

Co., 319 S.E.2d 527 (Ga. App. 1984) (citing Greene v. First Lease, Inc., 263 S.E.2d 483 (Ga. App. 1979), *superseded by statute as recognized in* Montgomery v. USS Agri-Chemical Div., 270 S.E.2d 362 (Ga. App. 1980)).

The holdings seem to divide along the meaning of the Supreme Court's holding in Jones v. Bibb Brick Co., 120 Ga. 321, 48 S.E. 25 (1904), in which the Court stated:

If there is an entire absence of return, or if the return made is void because showing service upon the wrong person, or at a time, place, or in a manner not provided for by law, the court cannot proceed. If, however, the fact of service appears, and the officer's return is irregular or incomplete, it should not be treated as no evidence, but rather as furnishing defective proof of the fact of service. . . . If there has been service and a voidable or defective return, it may be amended even after judgment, so as to save that which has been done under service valid in fact but incompletely reported to the court. For in its last analysis it is the fact of service, rather than the proof thereon by the return, which is of vital importance.

Id. at 325, 27. The Court of Appeals treats a failure to specifically state the capacity of a corporate officer to accept service for a corporation as an "absence of return," whereas the Supreme Court in Bodenheimer treated the fact of service, rather than the language of the return, as controlling.

I hold that Defendant Boardwalk Properties, Inc., has not shown this Court that service of process upon it was insufficient as a matter of law. The law "requires service not simply for form or as a snare to trap litigants or to prevent an adjudication of a legal controversy,

but its sole purpose is to put the defendant on notice that he is being sued and afford him ample opportunity to be heard on any defense that he may wish to make thereto. Jones v. Jones, 209 Ga. 861, 862, 76 S.E.2d 801, 803 (1952). The parties stipulated that actual service was made upon Burson, the sole officer of the corporation, which required by Georgia statute. Defendant failed to produce the return of service to this Court in order to establish that service on Burson was inadequate to bind him, personally, and the corporation. Thus Defendants failed to negate the inference that actual service on Burson was sufficient to bind both Burson and Boardwalk. Because service is deemed effective, by the terms of the Superior Court order Debtors continued to hold at least an equitable interest, as beneficiaries of the land trusts, which became property of the estate at filing.

Defendants argue that even if any interest in the land trusts became property of the estate, Burson and Boardwalk cannot be held accountable for the actions of the trustee, D. Houston, in selling the land out of trust. Defendants base this argument on the fact that Houston was never served with the superior court complaint and thus is not bound by Judge Overstreet's order. Even assuming that service was not properly made on the thirteen land trusts,¹ any action taken with respect to, or any control exerted over, the proceeds of the sale to Mr. Lokuta by Defendants would violate the provisions of both Judge Overstreet's Order and the automatic stay

¹ Georgia law provides for service on a trust as follows:

Persons having claims against the estate may enforce the same by action against the trustee or trustees thereof in like manner as actions against corporations, and service thereof may be perfected by serving the trustee or trustees, if residents of this state, and if not, by publication.

O.C.G.A. § 53-12-54.

and would be void. Thus any alleged defect in service on the Trusts is insufficient to deprive this Court of jurisdiction over alleged violations of the automatic stay by Burson and Boardwalk. A final issue of material fact remains with respect to the exercise of control by Defendants over both the proceeds of the sales to Mr. Lokuta and the proceeds of rent checks made out to Mrs. Cook and allegedly cashed by Boardwalk. (Pls.' Exs. H, I).

ORDER

Based on the foregoing, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment by Defendants is hereby DENIED. The clerk is directed to set this matter for a formal pre-trial.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 9th day of July, 1999.