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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
RANDY RICHARDSON, JEAN
RICHARDSON, dba R.K., RICHARDSON
CONSTRUCTION,
Debtors.

Case No. 92-5-0650-MM

JEROME ROBERTSON, Trustee,
Plaintiff,

Adversary No. 935028

vs.
PACIFIC WESTERN BANK,
Defendant.

MEMORANDUM OPINION

INTRODUCTION

Before the court is Pacific Western Bank's motion to Dismiss for Failure to State a Claim Upon Which Relief may be granted or in the alternative, for Summary Judgment.

FACTS

Debtors Randy and Jean Richardson filed a voluntary Chapter 7 petition in January 1992. The debtors included their single family residence in Saratoga, California on Schedule A, the list of the

1 debtors' real property, which was attached to the petition. They also listed the residence in Schedule
2 C, the list of the debtors' exemptions, asserting a claimed homestead exemption of \$75,000. Pacific
3 Western Bank (PWB) held a \$150,000 deed of trust on the home. Before the bankruptcy, PWB
4 demanded as part of a refinance that the debtors pay off one \$25,000 unsecured note and provide
5 security for a separate \$25,000.00 loan.

6 The debtors scheduled on their Statement of Financial Affairs a preferential payment of
7 \$25,000 to PWB in the year prior to the petition date. In May 1992, the debtors filed a preference
8 action against PWB to avoid the deed of trust on the residence. The adversary proceeding was
9 subsequently dismissed.

10 The trustee mistakenly believed that the \$25,000.00 transfer referenced in the Statement of
11 Financial Affairs was the same transfer that the Debtors had sued to avoid. Believing that the debtors
12 had no equity in the property in excess of their claimed homestead exemption, the trustee filed a
13 report of no distribution, and the case was closed. The case was reopened in November 1992 when
14 the trustee realized that there were two separate prepetition transfers to PWB and that, in fact, there
15 may be assets in the estate available for distribution to creditors. The trustee commenced this
16 preference action to recover the \$25,000 payment to PWB.

17 In January 1993, PWB filed the first motion to dismiss and summary judgment motion on the
18 ground that the trustee had irrevocably abandoned the preference actions against PWB when the case
19 was closed. This Court denied the motion stating that knowledge of one preferential transfer to
20 Pacific Western Bank was not sufficient to place the trustee on notice that there had been two
21 separate transfers, so the claim was not abandoned.

22 The trustee thereafter amended the complaint to include a claim to set aside the \$25,000 deed
23 of trust on the debtors' home and a claim for damages for PWB's willful failure to provide a Payoff
24 Demand Statement under Cal. Civ. Code § 2943. The present motion brought by PWB asserts that
25 the additional preference claim was irrevocably abandoned when the case was closed. It also seeks
26 dismissal of the claims asserted by the trustee in the amended complaint, or alternatively, summary
27 judgment.

28

1 **I. The Trustee Has Standing To Bring This Adversary Proceeding.**

2 As a preliminary matter, counts three, four, five, and six of the First Amended Complaint are
3 filed under sections in the Bankruptcy Code which allow the trustee to avoid certain transfers made
4 by the debtor. 11 U.S.C. §§ 547, 548(a), 550(a) and 551. Therefore, the trustee is the party in
5 interest who has standing to bring this adversary proceeding.

6
7 **II. Summary Judgment is Proper.**

8 Summary judgment is proper where there is no issue of material fact such that the movant is
9 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the burden of
10 clearly establishing the lack of any triable issue of fact by the record properly before the court. 6
11 James W. Moore, et al., Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985). The respondent's version
12 of the facts must be accepted, and all inferences from the underlying and undisputed facts are to be
13 drawn in favor of the respondent. Bishop v. Wood, 426 U.S. 341 (1976); see also, Cekotex Corp. v.
14 Catrett, 477 U.S. 317 (1986). The showing must evidence both the lack of an issue of material fact
15 and that the moving party is entitled to judgment as a matter of law.

16
17 **A. No Issues of Material Fact Exist.**

18 There is no issue of material fact. All parties agree that the residence was listed in the debtors'
19 schedules, and that a transfer of \$25,000 to PWB, which the trustee believed to be the deed of trust,
20 was also scheduled. During the bankruptcy, the trustee did not seek to set aside the deed of trust or
21 otherwise attempt to administer the asset before the case was closed. There are no facts to indicate
22 that the deed of trust was concealed from the trustee. Therefore, as to the transfer of the deed of
23 trust to PWB, there is no issue of material fact.

24
25 **B. The Bank Is Entitled to Judgment as a Matter of Law.**

26 Section 554(c) provides that property scheduled under § 521 that is not otherwise
27 administered at the time of the closing of a case is abandoned to the debtor. Only unabandoned and
28 unadministered property which was not scheduled remains property of the estate pursuant to §

1 554(d). Property which is scheduled but not administered is deemed abandoned. 4 Collier on
2 Bankruptcy §§ 554.02-554.03. p. 554-13 (15th ed.1993). When a trustee knowingly abandons the
3 property of the estate, that abandonment is generally deemed to be irrevocable. In re Bryson, 53 B.R.
4 3, 4 (Bankr. M.D. Tenn. 1985).

5 There are two exceptions to the rule of irrevocability of abandonment. In re Bryson, 53 B.R.
6 at pp 4-5. First, property is not deemed abandoned where it is not scheduled by the debtor. Second,
7 if the property was concealed from the trustee or the trustee's knowledge of the existence of the
8 property is mere suspicion, property is not deemed abandoned. Id.

9 In this case, the transfer of the deed of trust to PWB was listed in the debtors' schedules.
10 Although there was confusion since there were actually two transfers of \$25,000, the trustee
11 understood the scheduled transfer to refer to the deed of trust. The trustee was aware of the transfer
12 of the deed of trust during the bankruptcy but chose not to pursue avoidance before moving to have
13 the case closed. The fact that the case is reopened does not revoke abandonment of the trustee's
14 claim.

15 Therefore, summary judgment should be granted with respect to the claim against PWB to
16 avoid the deed of trust.

18 III. Dismissal Under Rule 12(b)(6) is Inappropriate

19 For a defendant to prevail on a motion to dismiss under Rule 12(b)(6), it must appear beyond
20 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to
21 relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Only where the pleading under attack fails to
22 meet the liberal requirement of Rule 8(a) for a short and plain statement of the claim showing that the
23 pleader is entitled to relief would the pleading be subject to dismissal under Rule 12(b)(6). 5A
24 Wright & Miller, Federal Practice and Procedure § 1356 (West 1990).

25 Here, count 7 of the amended complaint alleges that PWB willfully failed to provide a Payoff
26 Demand Statement under Cal. Civ. Code § 2943. The pleading is sufficient on its face. If necessary,
27 the trustee may seek leave to amend the complaint to plead additional facts in support of its claim.
28 Therefore, PWB's motion to dismiss pursuant to 12(b)(6) is inappropriate and should be denied.

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CONCLUSION

For the foregoing reasons, PWB's motion motion for summary judgment should be granted with respect to the trustee's claim to avoid the deed of trust; dismissal is denied with respect to the trustee's claim for damages alleging willful violation of Cal. Civ. Code § 2943.

DATED: UNITED STATES BANKRUPTCY JUDGE