



**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed December 2, 2003.**

**United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE:	§	
	§	
LORI ANNE POWELL,	§	CASE NO. 03-30538-SAF-13
	§	
DEBTOR(S).	§	
_____	§	
JOSEPH CARL POWELL, JR.	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 03-3437
	§	
LORI ANNE POWELL, JOSEPH CARL	§	
POWELL, III, DALLAS COUNTY,	§	
CITY OF IRVING, CITY OF	§	
COPPELL, WINDSOR RIDGE HOME	§	
OWNERS ASSOCIATION and THOMAS	§	
POWERS, TRUSTEE	§	
DEFENDANTS.	§	

**MEMORANDUM OPINION AND ORDER**

In this adversary proceeding, Joseph Carl Powell, Jr. ("Carl Powell"), the plaintiff, seeks a determination of the validity, priority and extent of equitable purchase money liens on real property, or alternatively, the imposition of a constructive

trust on real property. On September 5, 2003, Carl Powell filed a motion for summary judgment against Lori Anne Powell, the debtor, and Thomas Powers, the standing Chapter 13 Trustee. Lori Powell and the trustee oppose the motion. The court conducted a hearing on the motion on October 15, 2003.

This adversary proceeding raises a core matter over which this court has jurisdiction to enter a final judgment. 28 U.S.C. §§ 157(b)(2)(K) and 1334.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts

showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

### **Factual Overview**

Carl Powell is the father of Joseph Carl Powell, III ("Joe Powell"). Joe and Lori were married on June 6, 1992, and separated on November 14, 2001. Joe and Lori's divorce proceeding began before Lori filed a petition for relief under chapter 13 of the Bankruptcy Code on January 9, 2003. Carl seeks a determination from the court that he holds a claim against Lori's bankruptcy estate totaling \$820,000, secured by an unavoidable first priority equitable lien on real property owned by Lori and Joe. The real property is located at 4549 Byron Circle, Irving, Dallas County, Texas 75036 and 606 Swan Drive, Irving, Dallas County, Texas 75019. Carl seeks alternatively to impose a constructive trust on the two properties. The summary judgment motion does not address the alternative constructive trust claim.

In April 1999 Carl wrote a check in the amount of \$15,500 payable to Ticor Land Title Co. In May 1999 Carl wrote another check in the amount of \$100,000 payable to Joe. Joe deposited the check in the amount of \$100,000 in an account held jointly in his and Lori's names. Also in April 1999 Carl wrote a check for \$20,000 made payable to Joe and a check for \$20,000 made payable to Lori. Those two checks were deposited in Joe and Lori's joint bank account. Joe and Lori purchased the lot at 4549 Byron

Circle in May 1999. The purchase price for the Byron Circle lot was \$155,000.00. In May 1999 a wire transfer of \$138,584.34 was made from Joe and Lori's joint bank account to Ticor Land Title to fund part of the purchase of the Byron Circle lot.

Carl wrote another check on February 6, 2001, in the amount of \$705,000.00 made payable to Joe. This check was deposited in a bank account held jointly in the names of Joe and Lori. On February 12, 2001, a cashier's check in the amount of \$703,074.25 was issued from the joint account of Joe and Lori to purchase property at 606 Swan Drive, the purchase price of which was \$705,000.00. Lori signed a promissory note in the amount of \$705,000 payable to Carl, but does not remember signing the particular \$705,000.00 note which Carl seeks to enforce in this adversary proceeding. On May 25, 2001, Joe signed a promissory note in the amount of \$705,000.00. Lori's signature appears to be on the note, but she questions whether she actually signed the note.

On March 5, 2002, Carl filed suit in District Court for Dallas County for judgment on the notes and seeking to establish liens on the Byron Circle and Swan Drive properties. With the filing of the lawsuit, a notice of lis pendens was filed against each property. Carl moved for summary judgment. Joe did not contest the motion. On June 11, 2002, the District Court of Dallas County entered summary judgment against Joe on the two notes in the amount of \$834,174.68, together with interest from that date at ten percent per year. Furthermore, on the same day,

the court entered an order severing the claims of Carl against Joe from the remainder of the suit.

### Discussion

Carl asserts that he loaned a total of \$820,000 to Joe and Lori as a community debt to be used to purchase a lot and a home. Carl asserts that he and Joe agreed that he would have liens against the properties purchased with the loans to secure its payment.

Carl asserts that the District Court of Dallas County concluded that the monetary award represented damages arising from money loaned by Carl as purchase money for two parcels of real property prior to the purchase of the property and confirmed Carl's lien against the properties. Carl further asserts that his lien on the properties may not be avoided by the standing Chapter 13 Trustee because his equitable lien is superior to claims of third parties, including judgment creditors. Carl argues that, under the doctrine of inquiry notice, the notice of lis pendens filed on March 25, 2002 and an abstract of judgment filed by Carl on July 8, 2002, renders his actual or equitable lien superior to the interest of any bona fide purchaser acquiring an interest in the properties after that date. As such, Carl argues that his equitable lien may not be avoided under 11 U.S.C. § 544.

Lori asserts that the transfers by Carl totaling \$820,000 were gifts and that no obligation exists to Carl and that he is not entitled to an equitable lien. Lori argues that even if the

transfers were intended as loans and not gifts, Carl would still not be entitled to an equitable lien.

To prevail, Carl must establish that he loaned the funds to Joe and/or Lori, with the intention to secure repayment by a lien on the property acquired with the funds. Carl concedes that he did not obtain a contractual lien on the property. He argues that the court should impose an equitable lien. Under Texas law, the court may impose an equitable lien if the parties intended that specific property secure payment of a debt. See Citizens Co-op Gin v. United States, 427 F.2d 692, 695 (5th Cir. 1970). There are genuine issues of material facts, however, precluding summary judgment. There is a genuine issue of whether Carl intended that the funds be a loan or a gift at the time of the transfers. There is a further genuine issue of material fact of whether, if loans, the parties intended that the acquired property secure payment of the loans.

Carl advanced the funds to his son and daughter-in-law during their marriage for them to acquire a vacant lot and a house. Carl did not make any demand for payments while Joe and Lori were together. While knowing how to obtain a mortgage, Carl did not ask for any deed of trust or mortgage to secure repayment of the funds. Carl did not commence litigation asserting that he had made secured loans until after Joe and Lori separated, with a protracted divorce proceeding ensuing.

On April 25, 1999, Joe signed a promissory note to pay Carl \$115,000. The note states that "[t]he loan is made to purchase a

lot in the Windsor Ridge Subdivision and is secured by same." The note does not contain a legal description of the property. Lori did not sign the note. Carl testified at deposition that he did not intend for Lori to sign the note. Carl and Joe did not execute a deed of trust. Carl understood that real estate purchase money loans would be secured by a deed of trust, recorded to give notice to third persons. Carl had no desire to give such a notice. Carl took no act to perfect a security interest. Carl also testified at deposition that he trusted his son to pay him back. On the other hand, there is summary judgment evidence suggesting that Carl intended that the note be paid by application of annual gifts from Carl and his wife, applied against the note. Thus, there is summary judgment evidence, construed in favor of the parties opposing the motion, to infer that Carl structured the transaction to avoid income taxes on excessive annual gifts.

On May 2, 1999, Carl wrote a check for \$100,000, payable to Joe. The check says in the memo line "loan." Joe deposited the check in his and Lori's joint account. Joe and Lori jointly purchased the property. They obtained joint title to the property. Carl argues that if he made a gift, the gift went to his son, and, therefore, the property acquired should be Joe's property. The summary judgment evidence belies that contention. While Carl wrote the check to Joe, Joe deposited the funds in his and Lori's joint, and therefore community, bank account, and they thereafter jointly purchased the property. There is summary

judgment evidence that Carl knew that the funds would be used to purchase community property.

On February 6, 2001, Carl wrote a check for \$705,000, payable to Joe. The check says on the memo line "loan." Joe deposited the check in his and Lori's joint account. Joe and Lori used the funds to purchase real property. They obtained joint title to the property. Carl had no discussions with Lori in February 2001 about executing a note for the \$705,000. Carl testified in his deposition that he expected that the funds had been paid on the same terms as the May 1999 check and note. Only Joe had executed that note.

Yet, three months later, Carl obtained a note from Joe and Lori. The summary judgment evidence does not establish why the parties executed that note and at that time. Lori contends that she does not remember signing the note. Lori's signature is inconsistent with Carl's testimony that the note would be on the same terms as the May 1999 note, which did not include Lori. According to his deposition, Carl does not recall what he said to Lori about the note in May 2001, except that he first asked Lori to sign the note on May 25, 2001.

On May 25, 2001, Joe and presumably Lori signed a promissory note to pay Carl \$705,000. The note states, "Interest annually. Principal when called, or when property sold. Secured by property at 606 Swan Drive." The note does not contain a legal description of the property. The parties did not execute a deed of trust. Again, Carl had no desire to obtain a deed of trust or

to record a notice of a security interest for third persons. Carl took no act to perfect a security interest. Joe and Lori had used the funds to purchase a house. Drawing inferences adverse to the party seeking summary judgment, if Joe and Lori intended to live in and raise their family in the house, the repayment terms may have been gratuitous. As with the earlier note, Carl made no payment demand until after Joe and Lori separated.

Carl contends that the state court judgment precludes further consideration of whether he holds a secured claim in this bankruptcy estate. Joe did not contest the entry of a summary judgment. In fact, in the summary judgment evidence before this court, Joe observes that he has a close family relationship with his father and he felt he should repay his father. The state court summary judgment provides a judgment in the amount of \$834,174.68 plus post-judgment interest rate of ten percent and states that:

[t]he Court finds that the sums for which actual damages are awarded hereby were loaned by Plaintiff to Defendant as purchase money for two parcels of real property, prior to the time that title or possession of those properties was acquired. The Court finds that a contractual lien exists against the following parcels of land: Lot 27, Block B of The Enclave at TPC Los Colinas Phase 2, an addition to the City of Irving, Dallas County, Texas, according to the plat thereof recorded in Volume 99029, Page 67, Map Records, Dallas County, Texas.

Lot 5R, Block H of Northlake Woodlands East Phase 6, an addition to the City of Coppell, Dallas County, Texas, according to the re-plat thereof recorded in Volume 87151, Page 3308 of the Map Records of Dallas County, Texas.

Summ. J. Against Joseph Carl Powell, III, June 11, 2002, Cause No. 02-02196, 162nd Judicial District Court, Dallas County, Texas.

The court first observes that Carl does not allege in this adversary proceeding that he holds a contractual lien on property of Lori's bankruptcy estate. To the contrary, he requests that this court impose an equitable lien with priority over the rights of the bankruptcy trustee. Furthermore, the state court severed Lori from the litigation. The state court's order of severance provides that "the claims of the Plaintiff asserted herein against Joseph Carl Powell, III and the Agreed Judgment rendered herein against Joseph Carl Powell, III be, and they are hereby severed from this action, be assigned cause number \_\_\_\_\_ [sic] and be styled Carl Powell, Plaintiff v. Joseph Carl Powell, III, Defendant." Order of Severance, June 11, 2002, Cause No. 02-02196, 162nd Judicial District Court, Dallas County, Texas.

When considering the preclusive effect of a state court judgment, the federal court looks "to the state that rendered the judgment to determine whether the courts of that state would afford the judgment preclusive effect." In re Gober, 100 F.3d 1195, 1200 n.2 (5th Cir. 1996). Because the judgment at issue here was rendered in Texas state court, the Texas rules of issue preclusion apply. "[C]ollateral estoppel 'bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.'" Id. at 1201

(quoting Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984). Texas law also provides that, before applying collateral estoppel, the court must determine that "the facts asserted in the second proceeding were fully and fairly litigated in the first, that the facts were essential to the judgment, and that the parties were cast as adversaries in the first action." Id. While the cause of action does not need to be the same for collateral estoppel to apply, the party asserting collateral estoppel must establish that "the issue is identical to an issue in the prior action." Goldstein v. Comm'n for Lawyer Discipline, 109 S.W.3d 810, 812 (Tex. App.--Dallas 2003).

Here, the issue in state court was not actually litigated with Lori as a party. Therefore, the court does not accord the state court judgment preclusive effect.

Carl argues that Joe's signature on the two notes binds the marital community. But, the issue is, "binds to what?" If Carl intended to apply annual gifts to pay the first note and if Carl intended that the second note only be paid if the parties some day sold their martial home, then did the signature bind the parties to a note or a gift arrangement? And, if a note, that does not in and of itself establish that the parties intended that the notes be secured by the real estate.

There are genuine issues of material fact presented by this summary judgment evidence. The court cannot resolve the litigation without a trial.

Carl contends that the equitable lien, with the pre-petition

lis pendens and abstract of judgment, would preclude the trustee's avoidance powers under 11 U.S.C. §§ 544, 547 and 548. Lori argues that if the state court judgment imposed a security interest on the land, the trustee could avoid that interest under 11 U.S.C. § 547(b). The trustee agrees with that position. The preference issue cannot be resolved on summary judgment. Furthermore, since the court cannot resolve the equitable lien issue on summary judgment, consideration of the impact of an equitable lien on the trustee's avoidance powers is premature.

**Order**

Based on the foregoing,

**IT IS ORDERED** that Carl Powell's motion for summary judgment is **DENIED**.

###END OF ORDER###