UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

IN RE:	:	
	:	CASE NO. 99-71191
SGE MORTGAGE FUNDING CORPORATION,	:	CHAPTER 11
	:	
Debtor,	:	ADVERSARY PROCEEDING NO. 00-7013
	:	
SGE MORTGAGE FUNDING CORPORATION	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
ACCENT MORTGAGE SERVICES, INC., et al.	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

On July 13, 2001, the court held a hearing on Debtor's ("SGE") motion for summary judgment filed against the investor defendants ("Investors").[1] Several of the Investors filed response briefs. The Committee of Investors Holding Unsecured Claims ("Committee"), First Family Financial Services, Inc., Associates Financial Services of America, Inc., and Associates Home Equity Services, Inc., (collectively, "Associates") filed motions for partial summary judgment.[2] The Committee responded

[1] The Investors consist of approximately 544 entities which are named as defendants in this adversary proceeding. They include individuals, trusts, and retirement plans. (See Exh. "A", Doc. #567).

[2] The motions for partial summary judgment of the Associates and the

to SGE's motion in its brief in support of its own motion. At the conclusion of the hearing, the court took SGE's motion for summary judgment under advisement. After considering the parties' briefs, supporting documents, oral arguments, and the applicable statutory and case law, the court will grant SGE's motion for summary judgment.

FACTS

The prepetition debtor, SGE Mortgage Funding Corporation ("SGE"), was a residential mortgage broker licensed in Georgia. A large portion of SGE's business involved SGE's solicitation and origination of loans to potential borrowers desiring to obtain loans secured by real estate. SGE funded its mortgage loan origination business through cash investments made by entities such as the Investors. The transactions between SGE and the Investors were memorialized in a written contract ("Investor Contract"). (Doc. #559, Exh. "A").[3]

Each Investor Contract provided that the Investor would loan SGE a certain amount of money. SGE would utilize these funds in its lending business to individual borrowers. In return for the

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Committee were also heard on July 13, 2001. A separate memorandum opinion and order on those motions were entered on November 19, 2001. (See Docs. #677-78).

[3] The Committee and several of the Investors stipulate that Exhibit "A" contains some sample Investor Contracts which do not differ in any material respect from all of the Investor contracts entered into by SGE with each investor. (Id. Stipulations of Fact at ¶ 3). Although SGE agrees that all "known" transactions were memorialized into written contracts, SGE avers that there may exist Investor Contracts that do not mirror the language in the sample Investor Contracts. (See Doc. #605 at ¶¶ 3-5).

Investors' loan, SGE would pay the Investor a monthly amount based on an interest rate designated in the Contract. (Exh. "A" at ¶ 1).

Each Investor Contract also identified a specific borrower and loan which SGE represented that it had made using the Investor's funds. If for some reason, the loan to the borrower did not close, the Contract provided that the funds advanced to SGE by the Investor would either be returned to the Investor or the funds would be used for some other transaction. Upon closing the loan to the specific borrower identified, the Contract further provided that SGE would "transfer and assign all of its right, title, and interest in and to Borrower's Note and deed to secure debt to [the] [Investor]." (Id. at ¶ 5). This transfer and assignment was to be recorded in the county where the real estate was located. Although the loan documents were to remain the property of SGE, these documents were to serve "as collateral. . . for repayment of the debt owed by [SGE] to [the] [Investor]." (Id.). Moreover, the Contract required SGE to deliver the original documents to the Investor if the Investor so requested. Unless the Investor requested otherwise, SGE would serve as the servicing agent for the loan that SGE had made to the borrower with the Investor's funds. (Id. at ¶¶ 2-5).

After receiving funds from the Investors, SGE engaged in a classic Ponzi scheme. Upon closing a mortgage loan to an individual borrower, SGE would assign that loan to not only one

Investor, but many Investors. Like many Ponzi schemes, SGE used funds obtained from later Investors to pay the monthly principal and interest payments due to the earlier Investors.

Sometime after engaging in its fraudulent scheme, SGE sold a large amount of its loans to several consumer lending companies as bulk purchases. Many of these loans included those which SGE had "double-booked" to numerous Investors in its Ponzi scheme. After these bulk purchasers purchased these loans, they assumed all aspects of loan management.

On September 27, 1999, an involuntary petition under Chapter 7 of the Bankruptcy Code ("Code") was commenced against SGE. On December 10, 1999, this case was converted to a Chapter 11 case. On June 28, 2000, SGE as debtor-in-possession, filed this adversary proceeding to determine the validity, priority, and extent of the interest in the loans claimed by the Investors and the bulk purchasers. The Investors and several financial institutions were named as defendants.

On March 30, 2001, SGE served on the Investors, its First Request for Admissions ("Admissions"), First Interrogatories ("Interrogatories"), and First Stipulation of Fact ("Stipulation").[4] These discovery documents requested each Investor to provide information on any loans made by SGE to an

[4] The Stipulation served the purpose of giving the Investors the option of executing the Stipulation in lieu of responding to SGE's Request for Admissions and Interrogatories.

individual borrower in which the Investor claimed an interest. Specifically, the Admissions asked the Investor to admit that it did not have possession of any promissory note, transfer and assignment, or security deed. (See Doc. #460). In substance, the Stipulation mirrored the language in the Admissions. (See Exh. "F", Doc. #567). For each denial asserted in the Admissions, SGE's Interrogatories asked the Investor to explain the circumstances in which it obtained possession of the loan document. (See Doc. #461).

Only sixty-three of the 544 Investors responded to SGE's discovery. Of the sixty-three who did respond, forty-five Investors submitted responses to the Admissions and Interrogatories. (Exh. "B", Doc. #567; see also Docs. #486, #498-499, #506-507, & #520). The remaining eighteen executed the Stipulation. (Exh. "C", Doc. #567). Nearly all of the Investors who did respond refused to admit that they held a general unsecured claim against SGE. However, each responding Investor admitted or stipulated that it did not have possession of the original promissory notes.

On June 18, 2001, SGE filed its motion for summary judgment against the Investors. SGE asserts that the Uniform Commercial Code ("UCC") applies to the transactions between the Investors and SGE. Under the UCC, perfection of a negotiable instrument requires possession. Because the Investors do not have possession of the original promissory notes or security deeds,

SGE contends that the Investors have an unperfected security interest in the loans in which they claim an interest.

On July 2, 2001, the Committee responded to SGE's motion in its brief in support of its own motion for partial summary judgment. Although the Committee supports SGE's motion, the Committee disagrees that the UCC is the applicable law. The Committee asserts that the Georgia real estate recording statutes should govern the transactions between SGE and the Investors. Therefore, in addition to having possession of the original note, the Committee contends that the Investors must have a valid recorded assignment of the security deed in order to have a perfected interest in the loans.

On July 5, 2001, the Carlyle/Casko Investor entity ("Carlyle/Casko Investors")[5] filed their response to SGE's motion. Adopting the position of the Committee, the Carlyle/Casko Investors support SGE's motion for summary judgment. The Carlyle/Casko Investors also contend that the Georgia real estate recording statutes, not the UCC, is the applicable law. Contrary to SGE's contention, the Carlyle/Casko Investors assert that they did respond to SGE's Admissions and Interrogatories. However, the Carlyle/Casko Investors

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[5] This entity consists of approximately 100 individual investors who are present and former clients of Carlyle Wealth Planning, Inc. These individuals invested approximately $6,000,000.00 in the Casko Investment Company to fund the lending to individual borrowers. SGE was the "servicing agent" for the Carlyle/Casko investments. (See Doc. #559, Exh. "A").

acknowledge that they do not have possession of any of the loan documents.

On July 9, 2001, Investors James and Debra Mills ("Mills") filed their response to SGE's motion maintaining that the Georgia real estate recording statutes, not the UCC, are the applicable law. The Mills argue that SGE executed a transfer and assignment of the original security deed which they then recorded. Under the applicable recording statutes, the Mills maintain that recording the transfer and assignment is sufficient to perfect their interest. The Mills further insist that having possession of the original notes is not necessary to perfect their interest in the loans.

DISCUSSION

In dealing with motions for summary judgment, Federal Rule of Civil Procedure 56 is made applicable to adversary proceedings in bankruptcy cases by Federal Rules of Bankruptcy Procedure 7056. 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 judgment as a matter of law." FED R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Like a district court, a bankruptcy court must determine that there are no issues of material fact and accept all undisputed facts as true in order to

find that summary judgment is warranted as a matter of law. Gray v. Manklow (In re Optical Technologies, Inc.), 246 F.3d 1332, 1334 (11th Cir. 2001). An issue is "material" if it affects the outcome of the case under the applicable law. Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996).

Central to this motion is whether the UCC or the Georgia real estate recording statutes govern the transactions between SGE and the Investors. As already noted, the court entered a memorandum opinion and order addressing this very issue regarding the partial summary judgment motions of the Associates and the Committee. (See Docs. #677-78). In that opinion, the court held that the UCC applied to the transactions between SGE and the Associates. For the same reasons, the court finds that the UCC applies to the transactions between SGE and the Investors. Therefore, the sole issue remaining is perfection.

Under O.C.G.A. § 11-9-304(1), a security interest in negotiable instruments can be perfected only by possession. Based on the facts before the court, sixty-three Investors have admitted or stipulated that they do not have possession of the original loan documents. (See Exh. "B", Doc. #567; Exh. "C", Doc. #567; Docs. #486, #498-499, #506-507, & #520). Accordingly, the court finds that those Investors have an unperfected interest in the loans in which they claim an interest.

As to the remaining 481 Investors who did not respond to SGE's Admissions, Interrogatories, or Stipulation, the court

finds that SGE's Admissions are deemed admitted. Under Federal Rule of Civil Procedure 36 ("Rule 36"), made applicable to adversary proceedings through Federal Rule of Bankruptcy Procedure 7036, requests for admissions which are not answered within 30 days are deemed admitted. FED. R. CIV. P. 36(a). Furthermore, any admissions under this rule are "conclusively established" unless the court permits a withdrawal of the admission. FED. R. CIV. P. 36(b); United States v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir. 1992).

In a motion for summary judgment, deemed admissions from unanswered requests for admissions serve as "admissions on file." 2204 Barbara Lane, 960 F.2d at 129 (citing FED R. CIV. P. 56(c)). Similarly, failure to respond to requests for admissions will allow a court to enter summary judgment if the facts deemed admitted are dispositive. See Lucas v. Higher Education Assistance Foundation (In re Lucas), 124 B.R. 57, 58 (Bankr. N.D. Ohio 1991).

In this case, the deemed admissions by the Investors are dispositive. Under Georgia law, possession is required in order to perfect an security interest in negotiable instruments. Because the 481 Investors failed to respond to SGE's request asking them to admit that they do not have possession of any of loan documents, this fact is conclusively established. Therefore, the court finds that the remaining 481 Investors have an unperfected interest in the loans made by SGE.

CONCLUSION

The UCC is the applicable law to the transactions between SGE and the Investors. Regarding the issue of perfection, the court finds that all 544 Investors have an unperfected interest in the loans made by SGE. Based on the admissions on file, none of the Investors has possession of the original security deeds or promissory notes. Therefore, the court will grant SGE's motion for summary judgment.

An order in accordance with this Memorandum Opinion will be entered.

DATED this _____ day of December, 2001.

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JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE