NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 12-080

Bankruptcy Case No. 11-42759-MSH
Adversary Proceeding No. 11-04137-MSH

ALBERT J. PORST, JR.,
Debtor.

ALBERT J. PORST, JR.,
Plaintiff-Appellant,
v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2006-M1,
ARGENT MORTGAGE CO. LLC, ABLITT SCOFIELD, P.C., and CITI RESIDENTIAL LENDING, INC.,
Defendants-Appellees.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

Before
Lamoutte, Haines, and Deasy,
United States Bankruptcy Appellate Panel Judges.

Sara Discepolo, Esq., on brief for Appellant, Albert J. Porst, Jr.
Gregory Blase, Esq., Phoebe Winder, Esq., on brief for Appellees,
Citi Residential Lending, Inc. and Argent Mortgage Co. LLC.
Stephen Gordon, Esq., and Todd Gordon, Esq., on brief for Appellee Ablitt Scofield, P.C.
Thomas Looney, Esq., Howard Brown, Esq., and Hale Yazicioglu, Esq. on brief for Appellee Deutsche Bank National Trust Company, as Trustee for Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2006-M1.

November 20, 2013

Deasy, U.S. Bankruptcy Appellate Panel Judge.

The debtor, Albert J. Porst, Jr., appeals the October 4, 2012 orders: (1) granting the motions to dismiss of Deutsche Bank National Trust Company, as Trustee for Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2006-M1, Ablitt Scofield P.C., Citi Residential Lending Inc., and Argent Mortgage Co. LLC (respectively hereinafter, Deutsche Bank, Ablitt, Citi, and Argent); and (2) denying the debtor's motion for summary judgment. For the reasons set forth below, we **AFFIRM.**

BACKGROUND

A. Factual Background

In 1992, Frances Porst, the debtor's mother, created a trust that provided her with a life estate in any trust property, upon her death a similar life estate for the debtor, and upon his death the termination of the trust and a distribution to the designated remainderman. In addition to being the grantor and sole lifetime beneficiary of the trust, Mrs. Porst was also the sole trustee. Article VII, Section A provided, in part, that the trustee "shall have and may exercise the following powers: (1) To sell . . . all or any part of the trust property, real and personal, at public or private sale, for such consideration and upon such terms . . . as she deems advisable . . . ." Article XI provided that the grantor retained the right "to amend or revoke this instrument at any time by delivering to the Trustee a written instrument signed and acknowledged by the Grantor." Mrs. Porst transferred her home to the trust in 1992.

As grantor, trustee, and beneficiary, Mrs. Porst executed an invalid trust revocation on August 19, 2003.[1] Both on that date and in 2004, Mrs. Porst, as trustee, executed deeds transferring the property to the debtor for $1.00. These two deeds were notarized and filed with

[1] Although the bankruptcy court addressed this issue and the parties raised it in their appellate briefs, we need not address it as the debtor now acknowledges that the revocation was invalid.

the registry of deeds in July 2010 and June 2004, respectively. The debtor's mother died in May 2005. In April 2006, the debtor granted Argent a mortgage on the property to secure a note for $75,000.00. The boilerplate language of the mortgage provides that the debtor "covenants that [he] is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property. . . ."

The debtor filed for relief in June 2011.[2] Deutsche Bank filed a proof of claim, attaching the note, mortgage, and a copy of the assignment of the mortgage from Argent to Deutsche Bank. The notarized assignment is dated January 15, 2009, and is signed by a vice president of Citi. The assignment references a power of attorney which was recorded on April 11, 2008.

In October 2011, the debtor filed a multi-count complaint against the appellees. After dismissing several counts, the debtor pursued Counts I, V, and VI. By Count I, the debtor sought a determination under 11 U.S.C. § 506(d) that Deutsche Bank was not a secured creditor. As grounds, the debtor asserted that because the transfer of the property from the trust to the debtor was invalid due to the trustee's lack of authority to transfer title, he was not the owner of the property at the time of the mortgage, and therefore the mortgage was void. By Count V, the debtor sought relief under Mass. Gen. Laws ch. 93A (the Massachusetts Consumer Protection Act) and Mass. Gen. Laws ch. 93, § 49 (the Massachusetts Fair Debt Collection Act) because Deutsche Bank, Citi, and Ablitt knew or should have known that the debtor could not have mortgaged the property as a life tenant and that the assignment was invalid. Lastly, by Count VI, the debtor sought relief against Ablitt and Deutsche Bank for negligent infliction of emotional distress due to the steps they took to foreclose on the property.

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[2] On Schedule A, the debtor disclosed that he held the property in fee simple, it had a fair market value of $188,100.00, and that it was not subject to a secured claim. On Amended Schedule A, the debtor listed his interest in the property as contingent.

The defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7012. The debtor opposed the motions and filed a motion for partial summary judgment as to Count I. The bankruptcy court granted the motions to dismiss, denied the motion for summary judgment, and entered a Judgment for the defendants. In its corresponding memorandum of decision,[3] the bankruptcy court indicated that the facts were not in dispute and explained that it drew them from the complaint, documents incorporated therein by reference, and documents of public record or susceptible to judicial notice.

With respect to Count I, after addressing the revocation issue, the court explained why it rejected the debtor's three grounds for claiming that the transfer of the property from the trust to him was ineffective. First, the trustee did not breach her fiduciary duty when she sold the property to the debtor for $1.00 because the trustee of a revocable trust does not have the same fiduciary duty as a trustee of an irrevocable trust.[4] Second, the court explained that the transfer was not void due to insufficient compensation for the trustee as the trust's compensation provision was not applicable. Lastly, the court rejected the argument that the sale was void because it involved the family home given that the argument was not supported by the provisions of the trust and was similarly belied by the debtor's own actions.[5] The court rejected the debtor's argument under Count V, premised on state consumer protection laws, because the

[3] Porst v. Deutsche Bank Nat'l Trust Co. (In re Porst), 480 B.R. 97 (Bankr. D. Mass. 2012).

[4] The court noted that neither the mother's creditors nor the contingent remainderman of the trust raised this issue and that the debtor, who was the beneficiary of the transfer, raised it only to shield himself from a note and mortgage that he "freely undertook."

[5] In his motion for partial summary judgment, the debtor asserted that the sale of the "family home" violated the terms of the trust. We do not discuss the issue herein as the debtor did not raise it on appeal. See, e.g., Mountain Peaks Fin. Servs., Inc. v. Shepard (In re Shepard), 328 B.R. 601, 604 (B.A.P. 1st Cir. 2005) (explaining failure to brief argument constitutes waiver).

mortgage was not void and the assignment was valid under Massachusetts law. With respect to Count VI, the court rejected the debtor's argument regarding the assignment because it determined the assignment was valid.

The debtor appealed.

JURISDICTION

A panel may consider appeals from final orders. 28 U.S.C. § 158(a)(1). An order granting a motion to dismiss an adversary proceeding is a final order. Gonsalves v. Belice (In re Belice), 480 B.R. 199, 203) (B.A.P. 1st Cir. 2012). Although an order denying summary judgment is typically not a final order, it is appropriate to consider the appeal of such an order when it is evident that the litigation has ended. See, e.g., Pro Fin., Inc. v. Spriggs (In re Spriggs), 219 B.R. 909, 911 (B.A.P. 10th Cir. 1998). Thus, the Panel has jurisdiction to consider this appeal.

STANDARD OF REVIEW

Orders dismissing a complaint and denying summary judgment are subject to *de novo* review. See, e.g., Banco Santander de P.R. v. López–Stubbe (In re Colonial Mortg. Bankers Corp.), 324 F.3d 12, 15 (1st Cir. 2003); Buckeye Ret. Co. v. Swegan (In re Swegan), 383 B.R. 646, 649 (B.A.P. 6th Cir. 2008).

In considering a motion to dismiss, a court must "accept all well-pleaded facts as true, draw reasonable inferences in favor of [the debtor], and affirm only if the averments in the complaint augur no hope of recovery under any theory set forth therein." Gonsalves v. Belice (In re Belice), No. MB 10-030, 2011 WL 4572003, at *4 (B.A.P. 1st Cir. March 7, 2011) (explaining vague, meager, or conclusory allegations are insufficient).[6] A court must grant a

[6] When ruling on a motion to dismiss, a court may consider facts and documents that are incorporated into the complaint or incorporated by reference and also matters of public record and susceptible to judicial notice. Perra v. Bank of Am. Corp. (In re Perra), No. 12-4054, 2013 WL 2250243, at *3 (Bankr.

motion for summary judgment if the applicable pleadings demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In re Swegan, 383 B.R. at 652.

DISCUSSION

I. Count I (11 U.S.C. § 506(d))

The debtor brought this count under 11 U.S.C. § 506(d) which provides, with inapplicable exceptions, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." The bankruptcy court rejected the three arguments the debtor offered in support of this count. On appeal, the debtor addresses only one of those arguments: whether the bankruptcy court erred in ruling that the trustee did not breach her fiduciary duty when she sold the property to the debtor for $1.00.[7]

In his brief, the debtor argues that the bankruptcy court erred in ruling that the trustee had the authority to convey the property for de minimis consideration as the conclusion was contrary to Clune v. Norton, 28 N.E.2d 229 (Mass. 1940). At oral argument, the debtor supported his argument by alternating between the terms of the trust, specifically the power of sale, and a different case, Phelps v. State St. Trust Co., 115 N.E.2d 382 (Mass. 1953). Deutsche Bank counters that because the terms of the trust authorized the trustee to sell the property and because the trust was revocable, the debtor's arguments are meritless. Deutsche Bank also contends that

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D. Mass. May 22, 2013). The debtor does not argue that the bankruptcy court exceeded these parameters.

[7] In his opening and reply briefs, the debtor supports his breach of fiduciary duty by adding arguments that he did not raise before the bankruptcy court. For example, he contends that the sale of the property was an impermissible attempt to revoke the trust. He made similar attempts at oral argument, for example, contending that the sale was a revocation by implication. As the debtor raised these for the first time on appeal, they are not properly before us. See, e.g., Aja v. Fitzgerald (In re Aja), 441 B.R. 173, 178 (B.A.P. 1st Cir. 2011) (ruling arguments not raised before bankruptcy court are waived on appeal).

the principles of Massachusetts trust law, such as estoppel, consent, and ratification, prevent the entity who has received the benefit of the transfer from thereafter complaining.

In Clune, the Supreme Judicial Court ruled that the power of sale contained in an irrevocable trust "conferred no authority upon the trustee to give the trust estate away." 28 N.E.2d at 231. In Phelps, it ruled that a revocable trust could only be revoked or amended "in strict conformity to its terms." 115 N.E.2d at 383. The debtor contends that either pursuant to these cases or the power of sale, quoted above, Mrs. Porst had no authority to gift the property and therefore breached her fiduciary duty when she sold it to him.[8]

The bankruptcy court rejected the applicability of Clune, given the trust therein was irrevocable. Instead, the court found persuasive a number of decisions wherein the state court ruled that a trustee/settlor of a revocable trust owes no fiduciary duty to a contingent or remainder beneficiary prior to the interest vesting.[9] Applicable federal and state decisions support the conclusion that Mrs. Porst did not breach her fiduciary duty by transferring the property, as there were no vested beneficiaries to whom she owed the duty other than herself.

For example, in Markham v. Fay, 74 F.3d 1347 (1st Cir. 1996), the First Circuit reviewed a lower court ruling which held a tax lien on an individual's property extended to the assets of a trust of which she was sole trustee, settlor, and one of three beneficiaries. Her sister was the remainder beneficiary. Id. at 1356. The trust gave the trustee broad powers such as the ability to revoke and amend in whole or in part. Id. at 1357. The court recognized that under state law

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[8] At oral argument the debtor attempted to bolster this argument by citing to inapplicable cases such as Merchants' Trust Co. v. Russell, 157 N.E. 338, 339 (Mass. 1927) (ruling beneficiary violated terms of will when he gifted property to son).

[9] See, e.g., Brundage v. Bank of Am., 996 So. 2d 877, 882 (Fla. Dist. Ct. App. 2008) (ruling no duty owed remainder beneficiaries of revocable trust prior to settlor's death); Moon v. Lesikar, 230 S.W.3d 800, 803 (Tex. App. 2007) (ruling the same); see also Rhodehamel v. Rhodehamel, No. C07-0081Z, 2008 WL 249042, at *11 (W.D. Wash. Jan. 29, 2008) (relying in part on Moon, court explained, without deciding, that non-settlor/co-trustee may have fiduciary duty even though settlor/trustee would not).

such broad powers left the assets of the trust vulnerable to the reach of creditors, citing for support State St. Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 770 (Mass. App. Ct. 1979). The court also recognized that despite broad powers, a trustee continues to hold a fiduciary duty to beneficiaries. 74 F.3d at 1358. That said, however, the court wrote that even if the trustee in the case exercised her discretion and used the trust property for her own benefit, it doubted a court would conclude she had violated her fiduciary duty "because the trust instruments as a whole do not limit her discretion or define the other beneficiaries' interests in income and principal." Id. It went on to explain that because the beneficiaries' right to take under the trust was dependent upon the "exercise or non-exercise of powers held by" the trustee, under Massachusetts law their interests would not have vested.[99] Id. at 1359; see also Braunstein v. Beatrice (In re Beatrice), 277 B.R. 439, 448 (Bankr. D. Mass. 2002) (explaining, on similar facts, beneficiaries' interests had not vested because debtor/settlor could terminate trust or add or eliminate beneficiaries), aff'd, 296 B.R. 576 (B.A.P. 1st Cir. 2003).

In this case, the terms of the revocable trust gave Mrs. Porst broad powers. At the time of the transfer, she was the only trustee and beneficiary and owed no fiduciary duty to the contingent beneficiaries whose interests had not yet vested. Accordingly, we agree that she did not breach a fiduciary duty when she sold the property to the debtor and conclude that the debtor could not prevail on this count.[10]

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[99] In support, the court cited to Old Colony Trust Co. v. Clemons, 126 N.E.2d 193 (Mass. 1955) (ruling contingent beneficiaries' interest in trust did not vest until death of settlor of revocable trust). Courts in Massachusetts have reaffirmed this holding. See, e.g., Canter v. Comm'r of Pub. Welfare, 668 N.E.2d 783, 787 (Mass. 1996) (explaining contingent beneficiary of revocable trust holds "mere expectancy"); New England Phoenix Co. v. LaFauci, No. 10-02030, 2012 WL 845600 (Mass. Super. Ct. Jan. 25, 2012) (ruling because trustee/settlor of revocable trust had unlimited power to eliminate all other interests, trust assets available for creditors).

[10] Having so ruled we need not reach the issue of whether the debtor's mother violated the terms of the power of sale by selling the property for $1.00 or whether doctrines such as consent or estoppel prevent the debtor from raising the issue. See, e.g., Saggese v. Kelley, 837 N.E.2d 699, 705 (Mass. 2005) ("[T]he beneficiary in a fiduciary relationship may ratify conduct that otherwise would constitute a breach of

II. Count V (Mass. Gen. Laws ch. 93A and ch. 93, § 49)

By Count V, the debtor sought to hold Deutsche Bank, Citi, and Ablitt liable under Mass. Gen. Laws ch. 93A and ch. 93, § 24, because they knew the mortgage, note, and assignment were invalid. On appeal, the debtor contends that the bankruptcy court erred in rejecting the grounds which he asserted in support of his claim under Mass. Gen. Laws ch. 93A: (1) Deutsche Bank could not foreclose given that it was not the holder of both the note and mortgage; and (2) the assignment was invalid.[11] Turning to the Massachusetts Debt Collection Act, the debtor asserts that bankruptcy court erred in ruling that the statute did not apply based on its conclusion that the mortgage was valid.

With respect to the debtor's first argument under Mass. Gen. Laws ch. 93A, the debtor relies on Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1130-31 (Mass. 2012) (ruling mortgagee could exercise sale power only if it held mortgage and note, or acted on note holder's behalf). The Supreme Judicial Court explained, however, that Eaton is only applicable to cases for which there was a mandatory notice of sale given after the date of the decision, June 22, 2012. Id. at 1133. For this reason, federal courts in Massachusetts have thus far declined to adopt the limited number of state court cases that have applied an exception to the prospective application of Eaton. See, e.g., Lindsay v. Wells Fargo Bank, N.A., No. 12-11714-PBS, 2013 WL 5010977, at *1 (D. Mass. Sept. 11, 2013) (declining to follow two state court cases which applied Eaton retroactively as federal case was not procedurally identical); Koufos v. U.S. Bank,

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fiduciary duties, provided the requisite disclosure has been made."); Reynolds v. Remick, 127 N.E.2d 653, 658 (Mass. 1955) (ruling if "beneficiary consents to an act by the trustee which would constitute a breach of trust toward the beneficiary, the beneficiary cannot hold the trustee liable for the consequences of the trustee's acts.").

[11] The debtor did assert a third argument in support of her claim under Mass. Gen. Laws ch 93A, that the mortgage was void because the trust was the owner of the property at the time of the mortgage and the debtor had no authority to grant a mortgage. Given our earlier discussion, there is no merit to this argument.

N.A., No. 12-cv-10743-DJC, 2013 WL 1189502 (D. Mass. Mar. 21, 2013) (declining to apply Eaton retroactively). Given the applicable guidance from the Massachusetts district court and the fact that there is no suggestion in this case that the mandatory statutory notice of sale was given after June 22, 2012, the holding in Eaton in inapplicable to this case.

The debtor's second argument is that the assignment is invalid. Initially, the debtor supported this argument with the assertion that Argent had sold its assets before the assignment or, if it hadn't, the power of attorney Argent granted Citi did not authorize Citi to assign mortgages and the signature on the document was not from an employee or authorized agent of Citi. In his responses to the motions to dismiss, the debtor did not press his argument regarding the power of attorney, but added that the assignment was invalid for lack of a proper acknowledgement by the notary.[12]

The bankruptcy court ruled that the assignment from Argent to Deutsche Bank, via Citi, was valid based upon cases such as Rosa v. Mortg. Elec. Sys., Inc., 821 F. Supp. 2d 423, 430 (D. Mass. 2011) ("an assignment may still be binding . . . if the signatory purported to be an officer of the entity holding title to the mortgage and the assignment was executed before a notary public."). It further ruled that because a defect in the assignment would not void the mortgage and because the debtor was a party unrelated to the assignment, the debtor lacked standing. See, e.g., Nickless v. Bayview Loan Servicing, LLC (In re Richard), 460 B.R. 355, 358 (Bankr. D. Mass. 2011) (ruling even if the assignment were invalid, the mortgage would not be void).

On appeal, the debtor does not address his underlying issues regarding the assignment; rather, he contends that it was error of the bankruptcy court to rule he lacked standing, citing for

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[12] We note that bankruptcy courts in this circuit have rejected similar arguments with respect to the same power of attorney. See, e.g., In re Samuels, 415 B.R. 8, 21 (Bankr. D. Mass. 2009); In re Almeida, 417 B.R. 140, 149-50 (Bankr. D. Mass. 2009).

support the subsequently issued case of Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 291 (1st Cir. 2013) ("We hold, therefore, that a mortgagor has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgagee."). In Culhane, the court specified that "a mortgagor has standing to challenge a mortgage assignment as invalid, ineffective, or void (if, say, the assignor had nothing to assign or had no authority to make an assignment to a particular assignee)." Id. The court also addressed and rejected the same subsidiary arguments that the debtor made herein regarding the execution of the assignment. Id. at 294.

The documents that the parties have provided reveal that Argent authorized Citi to assign the mortgage pursuant to a recorded power of attorney, and Citi assigned the mortgage pursuant to an assignment that was properly notarized by an officer of Citi. Based upon these facts and our conclusion with respect to Eaton, we agree with the bankruptcy court that the debtor could not prevail on his claim for relief under Mass. Gen. Laws ch. 93A. Having rejected these grounds and because the debtor relied upon these in seeking relief under Mass. Gen. Laws ch. 93, § 49, we also conclude that the bankruptcy court did not err in ruling that the debtor could not prevail on Count V under this statute.

III. Count VI (Negligent Infliction of Emotional Distress)

The debtor asserted that he was entitled to prevail on this count because Deutsche Bank and Ablitt had failed to ascertain whether Deutsche Bank held a mortgage at the time Ablitt commenced foreclosure proceedings.

The bankruptcy court recognized the cause of action elements and went on to state that a plaintiff must show a duty of care as there can be no negligence where there was no duty.[13] The

[13] Under Massachusetts law, a plaintiff must prove the following in order to recover on a claim for negligent infliction of emotional distress: (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomology; and (5) that a reasonable person would have

court also explained that a mortgagee owes a duty to act in good faith and use reasonable diligence to protect the mortgagor in the context of foreclosure. The court granted dismissal of this count because it had already ruled that the basis upon which the debtor brought the count was invalid. Having concluded that the bankruptcy court did not err in rejecting the debtor's arguments with respect to the mortgage and assignment, we similarly conclude that the court did not err in granting the request to dismiss this count.

IV. Denial of Partial Summary Judgment as to Count I

The debtor contends that the bankruptcy court erred in denying summary judgment given that it erroneously ruled that the assignment was valid. Based upon the foregoing, we again reject the debtor's arguments.

CONCLUSION

For the reasons discussed above, the averments in the complaint augur no hope of recovery under any theory set forth therein, and the pleadings demonstrate there is no genuine issue as to any material fact. Therefore, the debtor was not entitled to judgment as a matter of law. Accordingly, we **AFFIRM** the orders granting the motions to dismiss and denying the motion for summary judgment.

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suffered emotional distress under the circumstances of the case. Sullivan v. Boston Gas Co., 605 N.E.2d 805, 807 (Mass. 1993) (citation omitted).