

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33042

PAMELA LEE BARZALY
f/d/b/a EMOTION ALLEY

Debtor

ANN MOSTOLLER, CHAPTER 7 TRUSTEE

Plaintiff

v.

Adv. Proc. No. 02-3197

WENDY STRELITZ, WELLS FARGO BANK
MINNESOTA, NATIONAL ASSOCIATION,
as Trustee, ALBERT P. OCUTO,
GLORIA A. OCUTO, and
PAMELA LEE BARZALY

Defendants

NOTICE OF APPEAL FILED: September 24, 2004

DISTRICT COURT No.: 3:04-CV-521

DISPOSITION: 1. Order Dismissing Appeal entered by United States District
Judge Thomas A. Varlan on April 12, 2005.

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Defendants

MEMORANDUM

APPEARANCES: LACY, MOSELEY & CROSSLEY, P.C.
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Attorneys for Albert P. Ocuto and Gloria A. Ocuto

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, Ann Mostoller, Trustee, seeking (1) to determine the validity of liens, (2) to recover funds paid to the Defendant, Wells Fargo Bank, Minnesota (Wells Fargo), and (3) a declaratory judgment regarding the validity of a release recorded post-petition. On January 13, 2003, the Defendants, Albert P. Ocuto and Gloria A. Ocuto (the Ocutos), filed an Answer and Counterclaim, denying the Plaintiff's allegations and by way of a counterclaim, seeking an order compelling the Plaintiff to release a Deed of Trust encumbering the real property that is the subject of this adversary proceeding. The Plaintiff filed her Answer to Counterclaim of Defendants Albert P. Ocuto and Gloria A. Ocuto on January 24, 2003, denying that she is required to file and pay the costs of recording any release. Wells Fargo filed its Answer to the Complaint on April 14, 2003, also denying the Plaintiff's allegations.¹

Motions for summary judgment were filed by the Plaintiff, Wells Fargo, and the Ocutos. On February 4, 2004, the court entered an Order granting in part and denying in part the Plaintiff's motion, dismissing Wells Fargo from the adversary proceeding, and finding that only two issues remained for trial, those raised in the Ocutos' counterclaim: (1) whether any debt owed by the Defendant Wendy Strelitz (Ms. Strelitz) to the Debtor, if it actually existed, has been satisfied; and (2) whether, if any debt has been satisfied, the Plaintiff must provide the Ocutos with a release of the Deed of Trust to clear their title on the real property at issue.

Additionally, on December 2, 2003, the Plaintiff filed an Application for Judgment by Default as to the Defendants Wendy Strelitz and Pamela Barzaly. The proof does not establish that the Plaintiff is entitled to any affirmative relief against these Defendants and the Application for Judgment

¹ On May 12, 2003, the Plaintiff filed an Amended Complaint, seeking to avoid a preferential and/or fraudulent transfer between the Debtor and the Defendant, Wendy Strelitz, pursuant to 11 U.S.C.A. § 547 (West 1993 & Supp. 2004) and/or 11 U.S.C.A. § 548 (West 1993 & Supp. 2004). The Ocutos filed their Answer and Counterclaim to the Amended Complaint on May 15, 2003, again making the same denials and counterclaim. Those issues are no longer before the court.

by Default will accordingly be denied. The Plaintiff's action, as to these Defendants, will be dismissed.

The trial on the two remaining issues was held on September 8, 2004. The record before the court consists of twenty-one exhibits introduced into evidence, along with the testimony of Ms. Strelitz, Pamela Barzaly, and Timothy W. Jones, an attorney.²

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (K), and (O) (West 1993).

I

The following facts are undisputed. In 1999, the Debtor owned real property located at 524 Asa Street, Sevierville, Tennessee (the Real Property). On January 12, 1999, she executed a General Warranty Deed, transferring the Real Property to Ms. Strelitz, which was recorded with the Sevier County Register of Deeds on January 12, 1999. *See* TRIAL EX. 1. In connection with this conveyance, Ms. Strelitz executed a \$200,000.00 Promissory Note (Promissory Note) in favor of the Debtor. *See* TRIAL EX. 16. Ms. Strelitz also executed a Deed of Trust (the Barzaly Deed of Trust) dated January 12, 1999, to secure the Promissory Note, which was recorded with the Sevier County Register of Deeds on June 28, 2000, and provided Ms. Barzaly with a first mortgage on the Real Property. *See* TRIAL EX. 2.

On November 3, 2000, the Debtor executed a Release of the Barzaly Deed of Trust which was never recorded with the Sevier County Register of Deeds. The court, in its Order and Memorandum on Motions for Summary Judgment filed on February 4, 2004, found that, under the

² The testimony of Ms. Barzaly and Mr. Jones was introduced by deposition. Procedural questions surrounding the admissibility of Ms. Barzaly's testimony are discussed *infra* at Part II, pages 5-7.

Tennessee recording statutes, this release was non-binding on third parties without notice including the Plaintiff. Additionally, a Release dated January 5, 1999, executed by the Debtor, was recorded with the Sevier County Register of Deeds on April 23, 2002. In its February 4, 2004 Order and Memorandum, the court found that this release was invalid on its face and not binding on any party.

The Debtor filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on June 12, 2001, and the Plaintiff was duly appointed as Trustee. She thereafter initiated foreclosure proceedings against the Real Property pursuant to the Barzaly Deed of Trust, and scheduled a foreclosure sale for April 5, 2002. After receiving notice of the foreclosure sale, Ms. Strelitz faxed a letter to the Plaintiff on March 6, 2002, advising that she had sold the Real Property for \$280,000.00 in January 2002, and in fact, on January 12, 2002, Ms. Strelitz conveyed the Real Property to the Ocutos. By virtue of this sale, another Deed of Trust in favor of New Century Mortgage Corporation, which was subsequently assigned to Wells Fargo in the amount of \$238,000.00, was fully satisfied.

The Plaintiff filed the Complaint commencing this adversary proceeding on December 12, 2002, and pursuant to the court's February 4, 2004 Order, of the fourteen issues set forth in the parties' Pretrial Order entered on December 5, 2003, three primary issues remain before the court: (1) whether there was actually a debt between the Debtor and Ms. Strelitz; (2) if so, whether it has been satisfied in full or in part; and (3) whether the Plaintiff is required to record a release of the Barzaly Deed of Trust, thus clearing the title to the Real Property for the Ocutos.

II

Before considering the substantive issues, the court must address an unresolved procedural issue that arose at trial. As part of their case in chief, the Ocutos introduced into evidence the

testimony of Pamela Lee Barzaly through a deposition taken on October 13, 2003. The Plaintiff objected to this deposition testimony, arguing that the Debtor and the Ocutos are not adversaries, and thus, admitting the deposition violates Federal Rule of Civil Procedure 32(a)(2). The Plaintiff also argued that because the Ocutos did not disclose their intent to use the deposition at trial, pursuant to Federal Rule of Civil Procedure 26(a)(3), and because they could have subpoenaed the Debtor to appear at trial, the deposition testimony should not be allowed.

Whether to allow the deposition testimony is within the sound discretion of the court, and availability of the deponent for trial is immaterial. *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999). Rule 32(a) states, in material part:

(a) Use of Depositions. At the trial or upon the hearing of a motion . . . , any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were there present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(2) The deposition of a party . . . may be used by an adverse party for any purpose.

FED. R. CIV. P. 32(a)(2). Pursuant to Rule 26(a)(3)(B), intent to use a deposition at trial must be disclosed prior to trial. The Ocutos did not disclose their intention to use the Debtor's deposition prior to trial.

The Plaintiff first argued that the Debtor's deposition testimony should not be allowed because she and the Ocutos are not adversaries. The court, however, disagrees. Even though they are both Defendants in this adversary proceeding, they do not share the same interests, which by definition, means that they are adverse parties. The Plaintiff was present at the October 13, 2003 deposition, at which time her counsel conducted a seemingly thorough examination of the Debtor. The Ocutos' introduction of her deposition testimony does not violate Rule 32(a)(2).

In response to the argument that they failed to file a pretrial disclosure of their intention to use the Debtor's deposition at trial, the Ocutos argue that they listed the Debtor as a potential witness in their initial disclosures filed on May 19, 2003, putting the Plaintiff on notice. The court agrees that the Ocutos did not properly disclose their intention to use the October 13, 2003 deposition at trial; however, this failure to disclose does not prejudice the Plaintiff, and the deposition testimony will be allowed. The Plaintiff was present at the deposition, conducted a thorough examination of the Debtor, and was alerted by the Ocutos in their initial Rule 26(a) disclosures that the Debtor, a party to this adversary proceeding, was a potential witness. Therefore, the court will, in its discretion, overrule the Plaintiff's objection and admit into evidence the Debtor's October 13, 2003 deposition testimony.

III

The primary issue before the court is whether there was a valid debt between the Debtor and Ms. Strelitz. As an initial matter, the Barzaly Deed of Trust purporting to secure the \$200,000.00 Promissory Note indebtedness was acknowledged by a notary public authorized by the State of Tennessee and properly recorded with the Sevier County Register of Deeds. As such, there is a presumption under Tennessee law that the Barzaly Deed of Trust is based upon a valid debt. *See Limor v. Fleet Mortgage Group (In re Marsh)*, 12 S.W.3d 449, 453 (Tenn. 2000).

The validity of the Promissory Note itself is governed by Tennessee contract law. "It is well established that a contract can be express, implied, written, or oral, 'but an enforceable contract must result from a meeting of the minds in mutual assent to terms, must be based upon sufficient consideration, must be free from fraud or undue influence, not against public policy and must be

sufficiently definite to be enforced.’” *Thompson v. Hensley*, 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003) (quoting *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002)).

The Ocutos contend that the January 1999 transfer of the Real Property from the Debtor to Ms. Strelitz did not represent an actual sale of the Real Property, was not supported by fair consideration, and was merely the Debtor’s attempt to prevent her former spouse from reaching her assets.³ However, because the Promissory Note expressly states that Ms. Strelitz received value in exchange therefor, there is a presumption that the Promissory Note was based upon fair consideration. Furthermore,

[i]n expounding on the adequacy of consideration, the Tennessee Supreme Court has stated that it is not necessary that the benefit conferred or the detriment suffered by the promisee shall be equal to the responsibility assumed. Any consideration, however small, will support a promise. In the absence of fraud, the courts will not undertake to regulate the amount of the consideration. The parties are left to contract for themselves, taking for granted that the consideration is one valuable in the eyes of the law. *Danheiser v. Germania Sav. Bank & Trust Co.*, 137 Tenn. 650, 660-61, 194 S.W. 1094, 1096 (1917). Quoting the United States Supreme Court, the Tennessee Supreme Court went on to state that “[a] stipulation in consideration of \$1 is just as effectual and valuable a consideration as a larger sum stipulated for or paid.” *Id.* (quoting *Lawrence v. McCalmont*, 43 U.S. (2 How.) 426, 452, 11 L. Ed. 326 (1844)). Indeed, the consideration of love and affection has been deemed sufficient to support a conveyance. See *Thomas v. Hedges*, 27 Tenn. App. 585, 593, 183 S.W.2d 14, 17 (1944).

³ As an alternative argument, the Ocutos argue that although the Debtor and Ms. Strelitz structured the transaction as a sale, it was actually intended by the parties to effectuate a gift that Ms. Strelitz would repay only if she absolutely could afford to. However, in Tennessee,

the rule with reference to gifts inter vivos in this State to be that intention to give and delivery of the subject of the gift must clearly appear. Doubts must be resolved against the gift. There is no delivery unless the complete dominion and control of the gift is surrendered by the donor and acquired by the donee. The burden of proving that a gift was made is upon the donee.

Pamplin v. Satterfield, 265 S.W.2d 886, 888 (Tenn. 1954); see also *Brown v. Vinson*, 216 S.W.2d 748, 749 (Tenn. 1949) (“A gift *inter vivos* is not effective unless the complete dominion and control of the gift is surrendered by the donor and acquired by the donee.”). None of the evidence presented supports this theory, and in fact, Ms. Strelitz expressly denied that the transfer of the Real Property was intended as a gift.

McBee v. Nance, No. E2003-00136-COA-R3-CV, 2004 Tenn. App. LEXIS 61, at *11-12 (Tenn. Ct. App. Jan. 28, 2004); *see also Walker v. First State Bank*, 849 S.W.2d 337, 342 (Tenn. Ct. App. 1992) (“For there to be a consideration in a contract between parties to the contract it is not necessary that something concrete and tangible move from one to the other. Any benefit to one and detriment to the other may be a sufficient consideration.”).

Ms. Strelitz testified that she and the Debtor are best friends, having known each other since 1997. After the Debtor went through a hotly contested divorce in 1998, she sought to transfer the Real Property to Ms. Strelitz in order to keep her ex-husband from being able to take it from her and her children. Ms. Strelitz testified that she agreed to the transfer for several reasons, including establishing credit in her own name, but the primary reason was to get it out of the Debtor’s name and to keep it out of the hands of the Debtor’s ex-husband.

Ms. Strelitz and the Debtor hired an attorney, Timothy Jones, who advised them that to achieve the desired result, i.e., to place the Real Property out of the reach of the Debtor’s ex-husband, they had to make the transfer legitimate through a sale of the Real Property. Accordingly, the General Warranty Deed, the Promissory Note, and the Barzaly Deed of Trust were executed by Ms. Strelitz and/or the Debtor, and Ms. Strelitz testified that she paid the Debtor \$100.00 in earnest money. The Ocutos have questioned whether the Promissory Note was actually executed on January 12, 1999, but in her testimony, Ms. Strelitz emphatically stated that all of these documents were executed in January 1999, at the same meeting with Mr. Jones, and there is no proof to the contrary.

Under the terms of the Promissory Note, Ms. Strelitz was to pay the Debtor \$200,000.00 together with 7% interest for 180 months, translating to a monthly payment of \$1,797.66. With the exception of the \$100.00 earnest money, Ms. Strelitz made no payments on the Promissory Note, nor

did the Debtor ever make a demand for payment on the Promissory Note. The Debtor and her three children continued to live in the house with Ms. Strelitz and her two children following the transfer of the Real Property to Ms. Strelitz, who did not ask for or collect rent from the Debtor. The homeowners insurance, property taxes, and maintenance on the Real Property were paid for by Ms. Strelitz.

At trial, Ms. Strelitz testified that when she executed the Promissory Note, she did not have the ability to make the payments nor has she since had the ability to make the payments; however, she fully intended to try and pay the Debtor if her circumstances changed. Ms. Strelitz testified that she expected to make money working her joint business with the Debtor,⁴ investing, and saving, which she could then use to repay the Debtor. At trial, Ms. Strelitz acknowledged that the transaction with the Debtor “wasn’t about the money.” The Debtor’s deposition testimony confirms this sentiment.

As previously stated, under Tennessee law, any consideration given by Ms. Strelitz to the Debtor was sufficient to meet the consideration requirement necessary to create a valid promissory note. The consideration given does not have to be equal in value to the consideration received, nor must the consideration be monetary. The evidence reflects that Ms. Strelitz paid the Debtor \$100.00 in earnest money, executed the Promissory Note, and allowed the Debtor and her children to continue living in the house along with Ms. Strelitz and her family. As such, the court finds that the Promissory Note was sufficiently based upon adequate consideration.

⁴ In April 1999, Ms. Strelitz and the Debtor opened a card and gift shop called Emotion Alley, in which each was a 50% owner. The business was not successful, and it closed in June 2000.

Nevertheless, although supported by adequate consideration, the Promissory Note does not represent an enforceable outstanding debt owed by Ms. Strelitz to the Debtor. A debt is defined as “a sum of money due by certain and express agreement.” *Parker v. Savage*, 74 Tenn. 406, 408 (Tenn. 1880); *see also Parsons v. Am. Trust & Banking Co.*, 73 S.W.2d 698, 701 (Tenn. 1934) (“the term ‘debt’ is defined as including ‘any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent’”) (citations omitted); BLACK’S LAW DICTIONARY 403 (6th ed. 1994) (defining debt as “[a] fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.”).

“To be enforceable, a contract ‘must result from a meeting of the minds of the parties in mutual assent to [its] terms.’” *Fontaine v. WeeklyHomes, L.P.*, No. M2002-01651-COA-R3-CV, 2003 Tenn. App. LEXIS 571, at *4 (Tenn. Ct. App. Aug. 13, 2003) (quoting *Johnson v. Cent. Nat’l Ins. Co.*, 356 S.W.2d 277, 281 (Tenn. 1962)). Based upon the evidence presented, the court finds that the actual “meeting of the minds” between Ms. Strelitz and the Debtor consisted of the following intentions: (1) the Real Property would be transferred into Ms. Strelitz’s name to protect it from the Debtor’s former husband; (2) the transfer had to be “legal” to ensure its validity if challenged by the Debtor’s ex-husband; (3) although Ms. Strelitz executed the Promissory Note, and the Barzaly Deed of Trust was based thereon, the Debtor never intended to enforce the Promissory Note, and Ms. Strelitz never had a reasonable expectation of repaying it; and (4) the Debtor and Ms. Strelitz never intended for the Promissory Note to represent a debt for money.

Concerning the Promissory Note, Ms. Strelitz testified in an October 13, 2003 deposition as follows:

Q: . . . Now, do you recall any specific discussion about monthly payments, or quarterly payments, or any amount that would go from you to Ms. Barzaly?

A: No.

Q: Did you and Ms. Barzaly ever really discuss that when you were talking about transferring the property?

A: No.

Q: Was she expecting to receive, to the best of your knowledge, was she expecting to receive an amount of money from you each month?

A: No.

Q: Were you expecting to pay her an amount of money each month after this transfer?

A: No, no.

TRIAL EX. 18, at page 91, line 9 through line 23. In that same deposition, Ms. Strelitz gave the following additional testimony:

Q: . . . Would it be fair for me to characterize this as not really a loan but just a transfer of real estate from her, from Ms. Barzaly to you?

A: Uh-huh.

. . . .

Q: . . . It looks like there was a transfer from Ms. Barzaly to you. There were some documents that mentioned a debt, but it doesn't really sound like it was a debt; would that be fair?

A: That would be fair. The issue, the whole issue was getting the house out of her name. It really had – and I'm under oath and I have to be honest, it wasn't about the money at all. It was merely so that he [the Debtor's ex-husband] would not get his hands on anything that she owned. And we had to – you can't just transfer, you can't just say, here, I give this to you. It's got to be done legally. And we were advised and that's how it happened. There was no benefit. It was definitely not beneficial, certainly not to me. I didn't need, you know, any of these – this stuff done to me, but she was my best friend and I was out to help her and that's how it happened.

TRIAL EX. 18, at page 94, line 24 through page 95, line 22. At trial, Ms. Strelitz agreed that this prior testimony was correct, that the main reason the Debtor transferred the Real Property in January 1999

was to protect it from her former husband, and that unless she suddenly acquired the funds to do so, neither she nor the Debtor ever expected her to pay the Promissory Note.

Ms. Barzaly, testifying through her October 13, 2003 deposition, echoed those sentiments as follows:

Q: Before you all went to see the lawyer, was there ever any discussion about a note or setting this up as a sale?

A: Not until – no, we went – that’s why we went to Timothy [Jones], to find out what we had to do, how we had to do it.

Q: And after this was set up this way, did you really expect her to pay you monthly payments?

A: Only if something really wonderful happened in her life; other than that, no.

....

Q: After you had transferred the real property with Mr. Jones and the deed of trust had been signed and the property had been transferred to Ms. Strelitz, did you consider that you were owed something by Ms. Strelitz?

A: No.

Q: How did you view this deed of trust or this note, this \$200,000.00. I mean, what did you think that was?

A: A way to keep Simon [Ms. Barzaly’s former husband] from getting into it so easily. That’s how I was thinking.

Q: Where did the figure of \$200,000.00 come from?

A: Just a number.

TRIAL EX. 20, at page 49, line 11 through line 20; page 52, line 4 through line 23.

As both the Debtor and Ms. Strelitz acknowledged, “it wasn’t about the money.” TRIAL EX. 18, at page 95, line 13; TRIAL EX. 20, at page 53, line 12 through 13 (“Money was the last thing on my mind.”). In summary, there was never a debt owed to Ms. Barzaly by Ms. Strelitz. The transfer

of the Real Property was never anything more than a convenient method of placing the Real Property beyond the reach of Ms. Barzaly's ex-husband.⁵ This is further evidenced by the fact that the Debtor executed at least one valid Release of the Promissory Note. *See* TRIAL EX. 10. Although this Release is not binding on third parties such as the Plaintiff because it was not recorded, it buttresses the court's determination that the Debtor never intended that Ms. Strelitz repay the Promissory Note.⁶

IV

Even though the court determined, in its February 4, 2004 Order, that the Plaintiff holds a valid lien on the Real Property to the extent that an indebtedness exists, because the court finds that the Promissory Note does not represent an enforceable outstanding indebtedness, the Plaintiff is required to execute and record a release of the Barzaly Deed of Trust pursuant to Tennessee Code Annotated section 66-25-101, which states, in material part:

(a) When a debt secured by a mortgage, deed of trust, or by lien retained in a deed of conveyance of land or bill of sale, or other instrument, has been fully paid or satisfied, the mortgagee, transferee, or assignee of the mortgagee or the legal holder of the debt

⁵ Ms. Strelitz also testified that Ms. Barzaly transferred a subdivision lot to her for the same reason - to keep it out of the hands of Ms. Barzaly's ex-husband.

⁶ Additionally, although fraud was not raised by either the Plaintiff or the Ocutos, the court notes the presence of several "badges of fraud" or "any fact that throws suspicion on [a] transaction and calls for an explanation" with respect to the transfer of the Real Property from the Debtor to Ms. Strelitz. *Macon Bank & Trust Co. v. Holland*, 715 S.W.2d 347, 349 (Tenn. Ct. App. 1986). The presence of any of the following "badges of fraud" may evidence fraudulent intent:

(1) the transferor is in a precarious financial condition; (2) the transferor knew there was or soon would be a large money judgment rendered against him; (3) there was inadequate consideration given for the transfer; (4) the parties acted in secrecy or haste in carrying out the transfer; (5) there is a family or friendship relationship existing between the transferor and the transferee(s); (6) the transfer included all or substantially all of the transferor's nonexempt property; (7) the transferor retained a life estate or other interest in the transferred property; (8) the transferor failed to produce available evidence explaining or rebutting a suspicious transaction; and (9) there is a lack of innocent purpose or use for the transfer.

See Stevenson v. Hicks (In re Hicks), 176 B.R. 466, 470 (Bankr. W.D. Tenn. 1995) (citations omitted). In making this observation, the court does not imply that the transfer was fraudulent, nor does it make a determination thereof. The presence of these facts, however, gives further support to the court's finding that the Debtor and Ms. Strelitz did not intend for the Promissory Note to create a monetary debt upon which the Plaintiff may now execute.

secured by deed of trust or lien, who has received payment or satisfaction of the debt, must satisfy the record by a formal deed of release.

TENN. CODE ANN. § 66-25-101 (1993).

A judgment consistent with this Memorandum will be entered.

FILED: September 15, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

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Debtor

ANN MOSTOLLER, CHAPTER 7 TRUSTEE

Plaintiff

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MINNESOTA, NATIONAL ASSOCIATION,
as Trustee, ALBERT P. OCUTO,
GLORIA A. OCUTO, and
PAMELA LEE BARZALY

Defendants

J U D G M E N T

For the reasons set forth in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is, upon the court's determination that the \$200,000.00 Promissory Note executed by the Defendant Wendy Strelitz in favor of the Defendant Pamela Lee Barzaly on January 12, 1999, does not represent an outstanding enforceable indebtedness, ORDERED, ADJUDGED, and DECREED as follows:

1. The Plaintiff, Ann Mostoller, Trustee, shall, within ten (10) days, execute and record in the office of the Sevier County Register of Deeds a formal release of the January 12, 1999 Deed of Trust from Wendy Strelitz to Timothy W. Jones, Trustee, recorded on June 28, 2000, in Official Records

book 1081, pages 117-120, in the Office of the Register of Deeds for Sevier County, Tennessee. The Plaintiff shall certify her compliance within fourteen (14) days.

2. The Plaintiff's Application for Judgment by Default filed on December 2, 2003, requesting the entry of a default judgment against the Defendants Wendy Strelitz and Pamela Lee Barzaly, is DENIED.

3. The Complaint filed herein by the Plaintiff on December 12, 2002, as amended by the Amended Complaint filed on May 12, 2003, is, as to the Defendants Wendy Strelitz and Pamela Lee Barzaly, DISMISSED.

4. The Complaint filed herein by the Plaintiff on December 12, 2002, as amended by the Amended Complaint filed on May 12, 2003, is, as to the Defendants, Albert P. Ocuto and Gloria A. Ocuto, DISMISSED as to any issues not previously resolved by the court in the February 4, 2004 Order granting in part and denying in part the Plaintiff's Motion for Summary Judgment filed on December 16, 2003.

ENTER: September 15, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE