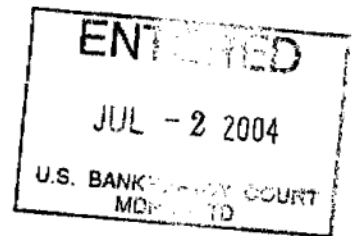


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION



IN RE:

Harold B. Bullard and Rhonda
W. Bullard,

Debtors.

Case No. 02-52968

Bruce Magers, Trustee in Bankruptcy,
for Harold B. Bullard and Rhonda
W. Bullard,

Plaintiff,

vs.

Harold A. Bullard and
Rhonda W. Bullard,

Defendants.

Ad. Proc. No.: 03-6106

ORDER GRANTING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the court on June 23, 2004, upon the Plaintiff's Motion for Summary Judgment. Robert E. Price, Jr., appeared on behalf of the Plaintiff and John A. Meadows appeared on behalf of the Defendants. This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b) which this court may hear and determine.

On October 31, 2002, Harold B. Bullard and Rhonda W. Bullard (the "Debtors") filed their voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Bruce Magers was duly appointed the Chapter 7 Trustee. On their Statement of Financial Affairs, the Debtors listed real property located on Helen Avenue, Mineral Springs, Forsyth County, North

Carolina (the "Real Property") as property held for another person, Harold A. Bullard. This Real Property had been conveyed to Rhonda Bullard and her son, Harold A. Bullard, a minor, on August 31, 1995, by Dorothy G. Rife (a widow), William C. Smitherman and wife, Joyce Smitherman (the "Grantors") via a gift deed.

The Trustee filed the present action on July 21, 2003 against Rhonda Bullard and Harold A. Bullard (the "Defendants"), seeking to sell the Real Property free and clear of the interest of the cotenant, with the cotenant's interest to attach to the proceeds. The issues currently before the court, upon the motion for summary judgment by the Trustee, are (1) whether the Defendants have established the existence of a trust on the Real Property, and (2) whether the Trustee is entitled to judgment authorizing him to sell the Real Property free and clear of the interest of the cotenant, with the cotenant's interest to attach to the proceeds.

The standard for summary judgment is set forth in Fed. R. Civ P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides that the movant will prevail on a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). See also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986). The movant has the initial burden of establishing that there is an absence of any genuine issue of material fact, and all reasonable inferences must be drawn in favor of the nonmoving party. Id.

Mrs. Bullard contends that the conveyance was intended as a gift to Harold A. Bullard alone and that her name was placed on the deed for the sole purpose of helping Harold A.

Bullard care for the Real Property, since he is a minor. The Defendants contend that because Mrs. Bullard holds the Real Property in trust for her son, Mrs. Bullard's interest in the Real Property did not become part of the bankruptcy estate.

The deed to the Real Property is a gift deed that simply lists the grantees as Rhonda Bullard and Harold A. Bullard. In North Carolina, if unmarried persons acquire property in land, it is presumed they acquire it as tenants in common. Glaspy v. Glaspy, 143 N.C. App. 435, 438, 545 S.E.2d 782, 785 (2001). The parol evidence rule provides that when parties have formally and explicitly expressed their contract in writing, that contract shall not be contradicted or changed by contemporaneous oral agreements. Gaylord v. Gaylord, 150 N.C. 222, 230, 63 S.E. 1028, 1032 (1909). The Grantors voluntarily and unambiguously conveyed the Real Property in fee simple to Mrs. Bullard and Harold A. Bullard. Therefore, the Debtors may not use parol evidence to establish an oral constructive trust on the Real Property.

The parol evidence rule does not bar evidence proving the existence of a resulting trust. Keistler v. Keistler, 135 N.C. App. 767, 522 S.E.2d 338 (1999) (citing Thompson v. Davis, 223 N.C. 792, 794, 28 S.E.2d 556, 558 (1944)). When one person furnishes the consideration to pay for land, but the title is taken in the name of another, a resulting trust is created in favor of the person who furnished the consideration. Id. In this case, the Real Property was given as a gift and no consideration was furnished. The facts do not support the imposition of a resulting trust. The court finds that Rhonda W. Bullard and Harold A. Bullard hold title to the Real Property as tenants in common, and, therefore, upon the filing of the bankruptcy petition, Mrs. Bullard's interest in the Real Property became part of the bankruptcy estate. The Trustee's motion for summary judgment is granted as to this issue.

Turning to the second issue presented, Section 363(h) provides:

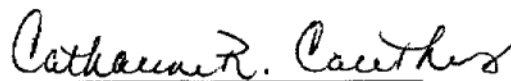
Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interest of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h). The Defendants deny that the conditions set forth in Section 363(h) are met. The Trustee has failed to satisfy his initial burden of establishing that there is an absence of any genuine issue of material fact as to the factors set forth in § 363(h). Therefore, the Trustee's motion for summary judgment authorizing him to sell the Real Property free and clear of the interest of the Harold A. Bullard, with Bullard's interest to attach to the proceeds, is denied.

It is so ORDERED.

This the 2 day of July 2004.



Catharine R. Carruthers
United States Bankruptcy Judge