SIGNED this 2 day of July, 2013.

John T. Laney, III
Chief United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	)	
	)	CASE NO.: 11-40125- JTL
ALICIA GREGG,	)	
	)	CHAPTER 7
Debtor.	)	
___________________________________	)	
	)	
WALTER KELLEY, TRUSTEE,	)	ADVERSARY PROCEEDING
	)	NO.: 11-4047
Plaintiff,	)	
	)	
vs.	)	
	)	
DENNIS SPECIALE,	)	
	)	
Defendant.	)	
___________________________________	)	

Memorandum Opinion

I. Procedural History

This matter comes before the Court on the trustee's Motion for Summary Judgment and Evidentiary Objections and Motion to Strike. The Court heard oral arguments on the summary judgment motion on February 28, 2013. The Court took the matter under advisement. After the hearing, the trustee objected to all of the statements and exhibits the defendant used to oppose the summary judgment motion. The Court heard oral arguments on the evidentiary objections on May 9, 2013. The Court also took that matter under advisement For the reasons set forth below, the Court will deny the trustee's Motion for Summary Judgment, and the Court will sustain in part and overrule in part the trustee's Evidentiary Objections and Motion to Strike.

II. Summary Judgment Standard[1]

Under Federal Rule of Civil Procedure 56(a),[2] "The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Substantive law identifies which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if a reasonable trier of fact could return judgment for the non-moving party." Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) (citing Liberty Lobby, 477 U.S. at 248); see also Calero-Cerezo v. U.S. Dept. of Justice, 355 F.3d 6, 19 (1st Cir. 2004) ("A 'genuine' issue is one that could be resolved in favor of either party, and a 'material fact' is one that has the potential of affecting the outcome of the case.").

---

[1] The Court would normally discuss the case's factual history at this point but because the Court's ruling on the evidentiary objections is potentially dispositive and because this basis information about summary judgment helps frame the Court's analysis of the objections, the Court will discuss summary judgment first and the evidentiary objections second.

[2] Federal Rule of Bankruptcy Procedure 7056 applies Federal Rule of Civil Procedure 56 to adversary proceedings.

When ruling on a motion for summary judgment, he Court "must view all evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in its favor." Info. Systems & Network Corp. v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002). The Court must draw all justifiable inferences in favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). The Court is not to make any findings of fact—"the court may not weigh the evidence to resolve factual disputes, make credibility determinations, or choose which inferences to draw from the facts." 11 Moore's Federal Practice, § 56.24 (Matthew Bender 3d ed.). To survive a motion for summary judgment, the nonmoving party cannot rely on unsupported or conclusory allegations and denials but must put forth specific facts, supported by the record, showing a genuine issue of material fact exits. See, e.g., Liberty Lobby, 477 U.S. at 248-49.

III. Evidentiary Objections

The trustee objected to all statements of fact made in the defendant's briefs in opposition to the summary judgment motion and to all exhibits attached to those briefs for not having been presented through a competent witness's affidavit or authenticated. The trustee objected, for the same reasons, to a post-hearing document (and attached exhibits) the defendant filed purporting to be an addendum clarifying statements he made at the hearing. The trustee also objected to, for reasons explained below, an affidavit of Janice Greer filed to oppose the trustee's motion.

A. Statements of Fact in the Defendant's Briefs

The trustee's objection to all statements of fact in the defendant's briefs is overbroad. The defendant's answer is verified, and verified pleadings are treated the same as affidavits on motions for summary judgment. E.g. Lantac, Inc. v. Novell, Inc. 306 F.3d 1003, 1019 (10th Cir. 2002); Hart v. Hairston, 343 F.3d 762, 765 (5th Cir. 2003) ("On summary judgment, factual allegations set forth in a verified complaint may be treated the same as when they are contained in an affidavit."). Moreover, the defendant

filed an affidavit of the debtor. The trustee did not object to either the verified answer or the debtor's affidavit. Statements in the defendant's briefs supported by the verified answer and by the debtor's affidavit are not objectionable on the basis that they unsupported by a competent witness's affidavit. The Court, however, will not consider any statements of fact unsupported by the pleading or the affidavit.

B. Exhibits Attached to the Briefs

Before the 2010 amendments to the Federal Rules of Civil Procedure, Rule 56 arguably required that all documents submitted to support or oppose a summary judgment be authenticated. See, e.g., Ellis v. Kilgore, 27 F.3d 562 (table), 1994 WL 320223, at *1 (4th Cir. 1994) ("The party opposing a motion for summary judgment may not merely rest on its pleadings but must demonstrate sufficient evidence, properly authenticated under Rule 56(e), which would be sufficient to support a jury verdict in its favor."); Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 ("We have repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment."). Many courts recognized an exception for "when there is no dispute as to the document's authenticity and it is apparent the document can be reduced to admissible, authenticated form at trial." 11 Moore's Federal Practice § 56.92[3] (Matthew Bender 3d ed.); see also Rowell v. BellSouth Corp. 433 F.3d 794, 800 (11th Cir. 2005) ("On motions for summary judgment, we may consider only that evidence which can be reduced to an admissible form."); U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc., 296 F. Supp. 2d 1322, 1327 n.2 (In a case involving an unauthenticated bill of lading, the Court stated, "Documents must generally be properly authenticated to be considered at summary judgment, unless it is apparent that those documents can be reduced to admissible, authenticated form at trial."); Lexington Ins. Co. v. Western Pa. Hosp., 423 F.3d 318, 329 n.6 (3rd. Cir. 2005) ("Our Court has not precluded reliance on unauthenticated documents to oppose a motion for summary judgment, so long as they are ultimately reducible to admissible evidence.) At least one court extended this

exception to statements by a pro se litigant that were unsupported by an affidavit. See Hollingshead v. Windley, 2008 WL 4809221, at *3 n.12 (S.D. Ala. 2008) ("The Court recognizes, of course, that many of plaintiff's factual representations in her summary judgment submission are not set forth in affidavit form. Notwithstanding this technical infirmity, the Court will consider plaintiff's factual assertions for Rule 56 purposes in light of her *pro se* status and the well-established rule that evidence should be considered on summary judgment if it appears that it can be reduced to admissible form at trial.").

Those cases were decided under former Rule 56. The language relied on for the authentication requirement, in former subsection (e), was omitted in the amended Rule 56.[3] The Court notes that many post-amendment opinions on summary judgment—without acknowledging the amendments—still cite pre-amendment case law to for current authentication requirements. See, e.g., Jimena v. Standish, 2013 WL 223131, at *1 (9th Cir. 2013) (citing an opinion from 2002, the court stated, "Unauthenticated documents cannot be considered in a motion for summary judgment.").

The majority of the opinions this Court has read from courts construing current Rule 56, however, state the amendments eliminated the authentication requirement and replaced it with a requirement that evidence be presentable in admissible form at trial. As one court put it,

> Newly revised Rule 56 of the Federal Rules of Civil Procedure governs the procedure by which the court must review objections to the admissibility of evidence presented in connection with a motion for summary judgment. In some respects, the 2010 amendment to Rule 56 works a sea change in summary judgment procedure and introduces flexibility (and consequent uncertainty) in place of the bright-line rules that are obtained previously. Former Rule 56(e) contained an unequivocal direction that documents presented in connection with a summary judgment motion must be authenticated:

[3] Before 2009, Rule 56(e) stated, "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served forthwith." The 2009 version stated, "If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit."

> If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit.
>
> FED. R. CIV. P. 56(e)(1) (2009 version). Relying on this language, the United States Court of Appeals for the Sixth Circuit routinely held that unauthenticated documents could not be used to support a motion for summary judgment. *See, e.g., Moore v. Holbrook,* 2 F.3d 697, 698–99 (6th Cir.1993). As recently as 2009, the Court of Appeals stated that unauthenticated documents do not meet the requirements of Rule 56(e) and must be disregarded. *Alexander v. CareSource,* 576 F.3d 551, 558–59 (6th Cir. 2009).
>
> These authorities must be read carefully, however, in light of the 2010 amendments to Rule 56, which eliminated the unequivocal requirement that documents submitted in support of a summary judgment motion must be authenticated. Rather, the amended Rule allows a party making or opposing a summary judgment motion to cite to materials in the record including, among other things, "depositions, documents, electronically stored information, affidavits or declarations" and the like. FED. R. CIV.P. 56(c)(1)(A). If the opposing party believes that such materials "cannot be presented in a form that would be admissible in evidence," that party must file an objection. FED. R. CIV.P. 56(c)(2). Significantly, the objection contemplated by the amended Rule is not that the material "has not" been submitted in admissible form, but that it "cannot" be. The comments to the 2010 amendments make it clear that the drafters intended to make summary judgment practice conform to procedure at trial. "The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike." FED. R. CIV. P. 56 (2010 Advisory Committee comments). The revised Rule therefore clearly contemplates that the proponent of evidence will have the ability to address the opponent's objections, and the Rule allows the court to give the proponent "an opportunity to properly support or address the fact," if the court finds the objection meritorious. FED. R. CIV. P. 56(e)(1). Thus, the amendment replaces a clear, bright-line rule ("all documents must be authenticated") with a multi-step process by which a proponent may submit evidence, subject to objection by the opponent and an opportunity for the proponent to either authenticate the document or propose a method to doing so at trial.

Foreward Magazine, Inc. v. OverDrive, Inc., 2011 WL 5169384, at *2 (W.D. Mich. 2011).

This is a reasonable interpretation of current Rule 56 given the new language, the omission of the old language, and the policy behind summary adjudication of minimizing time and expense when the outcome of a case is obvious or depends only on matters of law. Thus under current Rule 56, an objection cannot be based solely on evidence not being authenticated—the objection must be that evidence *cannot* be presented in admissible form, not that the evidence *has not* been presented in admissible form. See, e.g., Slate v. Byrd, 2013 WL 1103275, at * 2 (M.D.N.C. 2013) ("Because [defendant] has not filed an objection contending that the cited material '*cannot be* presented in a form that would be admissible in evidence,' no basis exists for the Court to decline consideration of the material at issue.").

The trustee has objected that the defendant's exhibits lack authentication. The trustee does not contend that the exhibits cannot be presented in admissible form. Under current Rule 56, the trustee's objection must be overruled.

C. Post-Hearing Addendum

The trustee objects to all statements in this document and all attached exhibits for the same reasons as above. At the hearing on the objections, the Court stated it would view the addendum only as argument and not as evidence. The Court will not consider any statements in the addendum that are unsupported by the record.

The trustee did not object to the attached exhibits as untimely. The Court has considerable discretion in determining whether it will accept untimely evidence. "The Supreme Court has held that it is never an abuse of discretion for a district court to exclude untimely evidence when a party fails to submit that evidence pursuant to a motion, as Rule 6(b) expressly requires."[4] Fleisher Studios, Inc. v. A.V.E.L.A., Inc., 654 F.3d 958, 966 (9th Cir. 2011) (citing Lujan v. Nat'l Wildlilfe Fed'n, 497 U.S. 871, 895-

[4] Bankruptcy Rule 9006(b) contains language nearly identical to that of Federal Rule 6(b). Bankruptcy Rule 9006(b) states that "when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion … on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

98 (1990)). And absent objections, the Court can make post-hearing submissions part of the record. See, e.g., El Paso Apparel Group, Inc. v. Konigsbert Wolf & Co., (*In re* El Paso Apparel Group, Inc.), 288 B.R. 757, 763 (W.D. Tex. 2003) .

This case has been pending since October 13, 2011. Discovery was to be completed by September 27, 2013, but the trustee required motions to compel against both the defendant and the debtor to complete discovery. The motion for summary judgment has been pending since January 14, 2013, and the Court heard arguments on the motion on February 28. The exhibits to the addendum (a copy of a letter the defendant wrote to a third-party and a copy of deed granting the defendant an interest in property at issue) have presumably been in his possession the entire time. Bankruptcy Rule 9006(b) requires a motion and an excusable reason, neither of which the defendant has given the Court. Throughout the course of this case, the defendant has remarked numerous times that he works on the road and lives out of state and thus cannot do things as quickly as he would like to. He did not offer that excuse in this instance, nor would that have been excusable neglect—these documents should have been filed with his other supporting documents, and the defendant did not explain why they were not. The Court will exclude these exhibits from the summary judgment record.

The Court acknowledges that pro se parties are given leeway on certain matters. The same reason for a late filing given by a pro se party and a represented party might be excusable neglect for the former and not for the latter. But at some point the leeway given to a pro se party conflicts with a clean administration of the case. The trustee consented to, and even filed on the defendant's behalf, two motions to extend the time to answer the trustee's complaint. The stated reason for both extensions was that the defendant needed time to find a lawyer. After the two extensions, the defendant opted to continue pro se. At the multiple hearings and status conferences the Court has held on this case, the defendant has intimated that the debtor, his mother, is doing the legwork in the case—the defendant has said that his mother is "handling the paperwork," filing everything for him,

and signing his name on litigation documents. The debtor even tried to speak for the defendant at one of the hearings, but the Court reminded her that only a licensed attorney could represent the defendant in Court. The debtor and defendant think that the debtor's general power of attorney over the defendant extends to litigation matters. See Def's Evid. Obj. ¶ 2, ECF no. 48 ("The March 4 'Addendum' letter to the Court does in fact bear the signature of Dennis D. Speciale's facsimile signature of the person who has his Power of Attorney for any litigation and other legal matters regarding property in Dennis D. Speciale's possession and in his name. … All his legal issue are handled by telephone by his representative in order to file timely responses to the Court, exercising the Power of Attorney given to his representative.").

The debtor's heavy involvement in this case is natural. The important matters hinge on her intent and solvency, so the defendant should be expected to rely on the debtor's help. But powers of attorney for litigation matters are held only by attorneys licensed to practice law, and representing others before this Court also requires admission to practice in the United States District Court for the Middle District of Georgia. The Court does not know exactly to what extent the debtor has handled the defendant's case, but the debtor is clearly riding a fine line between giving the defendant necessary information and the unauthorized practice of law. The defendant was given two extensions of time to find an attorney. The defendant chose his mother—not a lawyer—to help with his case, with the predictable results of late filings, discovery delays and attendant motions to compel, inadmissible evidence, irrelevant evidence, and miscomprehension of legal arguments and litigation practice in general. The Court will exclude the exhibits in part because they were filed late with no excuse, but also in part to pull the reigns in on a case that is getting sloppy.[5]

[5] As will be discussed later, the trustee also filed late evidence, the record contains obvious and unexplained holes, and there are many legal issues neither party has raised.

D. Affidavit of Janice Greer

The trustee also objects to the affidavit of a Janice Greer, a family friend, attached to the defendant's brief opposing the motion for summary judgment. The affidavit states that both the debtor and defendant have good reputations in the community, are honest and trustworthy, and that the debtor has always had money and has always paid her debts. The trustee objects to the affidavit, alleging that (1) the affiant does not state a basis for knowing the debtor has always had money and always paid her debts, (2) the statements regarding the debtor's finances are based on technical or other specialized knowledge that the affiant is not an expert on, (3) the affidavit contains hearsay, and (4) the affidavit contradicts statements in the defendant's briefs.

Whether knowledge a consumer debtor's ability and propensity to pay bills is technical or specialized knowledge does not matter. The statements are inadmissible for a number of reasons not having to do with the expert witness rules. The statement the trustee takes most issue with is, "[The debtor] always had money and always paid her debts." Aff. Janice Greer ¶ 4, Ex. 8, A-2, ECF no. 39. The only stated basis for that knowledge is knowing the debtor. See id. ¶ 1. Merely knowing a person does not give one knowledge of that person's finances. Short of constant vigilance over all of the debtor's accounts, the affiant would not know whether the debtor always had money; short of knowing all of the debtor's bills and personally watching the debtor pay each bill when it came due, the affiant would not know if the debtor always paid her bills. At the hearing on the trustee's objections and in the posthearing addendum, the defendant explained that the affiant knows the debtor well and has personally seen the debtor pay bills. The basis for an affiant's personal knowledge cannot be made by anyone other than the affiant, nor can it be made during oral argument, nor can it be made in a posthearing "clarification." That basis must be stated by the affiant, in the affidavit. See Fed. R. Civ. P. 56(c)(4). And even if that basis was in the affidavit, having seen the debtor pay a few bills does not give one the knowledge necessary to make the broad claim the affiant did.

Because the affidavit does not state a basis for personal knowledge of the debtor's ability and propensity to pay bills, the Court will sustain the trustee's objection.

The Court will sua sponte exclude the affidavit's statements regarding the debtor's and defendant's character. The defendant has not explained how this character evidence is admissible. Character is not in issue (i.e., character is not an element of the cause of action and a good character is not a defense to the trustee's claims), and neither the defendant's nor the debtor's character has been impeached in a way that would allow rehabilitation.[6] See Fed. R. Evid. 404; Fed. R. Evid. 608. Fraud allegations, on the surface, put character in issue and attack credibility. But "in a civil suit based on fraud, the reputation of the defendant is not in issue." Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969). Although the allegations here involve the debtor rather than the defendant, the principle is the same—the trustee need not prove anything about the debtor's character in a fraudulent conveyance action, and the defendant cannot use the debtor's good character as a defense to the action. And a fraud-based cause of action is not character-impeachment evidence. Only after the debtor's or defendant's reputation for untruthfulness has been attacked with evidence of a dishonest reputation can the defendant support his and the debtor's character for truthfulness. See Fed. R. Evid. 608. Moreover, the Court is not supposed to weigh credibility on summary judgment, so any such evidence by either party would not be considered even if otherwise admissible.

Because the Court has ruled all potentially relevant statements in the affidavit inadmissible based on the foregoing, the Court will not discuss the trustee's other objections to the affidavit.

[6] The trustee has obliquely attacked the defendant's and debtor's character for untruthfulness by alleging that the defendant's signatures on multiple filings do not match his signatures on notarized documents and by alleging that the debtor is the person signing for the defendant. At the hearing on the trustee's evidentiary objections, the defendant explained that his mother has power of attorney to sign for him on all legal documents. Regardless, the trustee's accusations were not evidence but rather allegations, and they did not pertain to anyone's reputation. Moreover, the affidavit was filed *before* the trustee's allegations and thus could not possibly rehabilitate anything.

E. The Trustee's Late-filed Affidavit of Terry Wu

On April 29, 2013, the trustee filed an affidavit of Terry Wu, Vice-President of CSC Employee's Federal Credit Union, who is one of the debtor's creditors. Attached to the affidavit were fifty-eight pages of exhibits. No explanation accompanied the affidavit and exhibits, but they were presumably in support of the trustee's motion for summary judgment, filed on January 14 and heard on February 28. Bankruptcy Rule 9006(d) states, "When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time." As noted earlier, Bankruptcy Rule 9006(b) allows the Court to enlarge the time for a party to complete certain acts even after the time has already expired, but it should be done on a motion explaining excusable neglect.

The affidavit is dated February 15, 2003—after the trustee's motion for summary judgment but thirteen days before the hearing and two-and-a-half months before it was filed. The trustee did not move the court to consider late-filed evidence, and the trustee did not explain why it was filed late. The Court will exclude the affidavit and exhibits from the summary judgment record.

IV. Undisputed Matters

The trustee seeks to avoid the debtor's transfer of two tracts of land in Marion County to her son Dennis Speciale. One tract comprises 27.822 acres at 174 Buffalo Road, Box Springs, Georgia. The other tract comprises 9.277 acres at 191 Buffalo Road, Box Springs, Georgia.

The 27.822-acre tract is part of a 37.822-acre tract, with ten acres of the larger tract carved out for the debtor's home. Those ten acres are not subject to avoidance and are not at issue. The debtor conveyed the 27.822 acres to the defendant via a quitclaim deed dated February 16, 2007. The defendant admits the conveyance was not for valuable consideration. The deed was recorded on November 19, 2007.

The debtor conveyed the 9.277-acre tract via a quitclaim deed dated December 7, 2006. This deed was also not recorded until November 19, 2007, and the defendant also admits that the conveyance was not for valuable consideration. The defendant conveyed this property to a third party via a quitclaim deed dated July 27, 2007, and recorded November 19, 2007. The third party conveyed the property back to the defendant via a quitclaim deed dated October 1, 2012, and recorded October 29, 2012. The trustee does not allege these transfers were not for valuable consideration or otherwise sham transfers. Although the record is not fully developed on this matter, it appears the third party could not afford the payments on the promissory note and simply deeded the property back in lieu of payments.

Beyond these basic facts, the record contains many disputed questions (genuine and not genuine) of fact (material and immaterial), many unraised issues, and obvious gaps of potentially dispositive facts.

V. Conclusions of Law

The trustee seeks to avoid the real estate transfers pursuant to § 544(b)(1) of the bankruptcy code, which allows a trustee to avoid any transfer of a debtor's property that a creditor with an allowable unsecured claim would be able to avoid under state law.[7] The trustee claims that the transfers are avoidable under Georgia's Uniform Fraudulent Transfers Act, O.C.G.A. §§ 18-2-70 et seq., because the transfers are fraudulent under O.C.G.A. § 18-2-74(a)(1), O.C.G.A. § 18-2-74(a)(2), or O.C.G.A. § 18-2-75(a). Section 18-2-74(a)(1) states that a transfer of property is fraudulent as to a creditor if the debtor transferred it "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." Section 18-2-74(a)(2)(B) states that a transfer is fraudulent if made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer" and the debtor "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts

[7] Section 544(b)(1) is more complicated than the Court's explanation here, but because the debtor and the defendant are pro se, the Court will distill code sections to their relevant aspects.

beyond his or her ability to pay as they became due." Section 18-2-75(a) states that a transfer is fraudulent if the debtor made the transfer without receiving a reasonably equivalent value in exchange and "the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer." The trustee has the burden of demonstrating both (1) the existence of a creditor holding an allowable unsecured claim and (2) the creditor's right to avoid a transfer under state law. See generally 6 Collier on Bankruptcy ¶ 544.06.

A. Whether a Creditor Holding an Allowable Unsecured Claim can Avoid Under State Law

1. The Existence of a Qualifying Creditor

Section 544(b)(1) requires the existence of a creditor with an allowable unsecured claim that was also a creditor on the transfer date.[8] The trustee points to Alonzo Gregg and seven credit card claimants as holding allowable unsecured claims. Whether Alonzo Gregg is a creditor whose shoes the trustee can step into will be discussed later in this Opinion. The defendant does not dispute that the seven credit card claimants hold allowable unsecured claims (although the defendant has not expressly admitted that they hold allowable unsecured claims), nor does the defendant dispute that these creditors were also creditors as of the transfer date.[9] There is no genuine dispute over these matters because the defendant has admitted as much by default. The debtor listed the creditors in her Schedule F and did not list any of the liabilities as disputed. Nor did she object to any of the creditor's proofs of claim; under § 502, all filed proofs of claim are deemed allowed if not objected to. Moreover, the trustee's Statement of Uncontested Facts notes both the existence of the creditors at the time of the transfers and the debtor's inclusion of them on her Schedule F, and attached credit card statements establish that the debtor

---

[8] Section 544(b)(1) also allows the trustee to step into the shoes of certain unsecured surety and guaranty claimants holding claims that are not allowable. That part of § 544(b)(1) is not pertinent to this case.
[9] The exact date of the transfers is disputed, but as discussed below, there is no genuine issue of material fact on this dispute.

owed these creditors money as of the transfer date. See Trustee's Smt. Unc. Facts ¶¶ 40-54 & Ex. 12-20, ECF no. 37. The defendant denies each of the trustee's paragraphs on these points but only to the extent that the attached statements do not reflect subsequent payments to the creditors. See Def.'s Resp. Smt. Unc. Facts ¶¶ 40-54, ECF no. 39.[10] The defendant did not dispute that these creditors hold allowable unsecured claims or that the creditors were not creditors as of the transfer dates or anytime thereafter.

Having concluded that there is no genuine dispute over whether a creditor holding an allowable unsecured claim exists, the Court will now discuss whether the transfers are avoidable under state law.

2. Right to Avoid Transfers Under State Law

Georgia's Uniform Fraudulent Transfers Act gives certain creditors the right to avoid fraudulent transfers. See O.C.G.A. §§ 18-2-70 et seq. As noted above, the trustee seeks to avoid the transfers at issue under O.C.G.A. §§ 18-2-74(a)(1), 18-2-74(a)(2), and 18-2-75.

A preliminary issue is the date of the transfers. The parties do not dispute the deeds' execution dates and recording dates. They disagree over when the "transfers" occurred. The trustee argues the transfers occurred on November 19, 2007—when the deeds were recorded—while the defendant argues the transfers occurred on December 7, 2006, and February 16, 2007—the date the deeds were executed. The issue is important for several reasons. The debtor's (in)solvency is determined as of the transfer date. Moreover, Georgia's four-year statute of limitations on avoidable transfers is implicated. See O.C.G.A. § 18-2-79. The defendant has not argued that the trustee's action is time-barred, but if the defendant is correct about the transfer dates, the action to avoid the transfers would have been filed more than four years after the transfers. The trustee filed

[10] The defendant does not allege that any of the accounts were paid down to $0.00 after the transfers. Even assuming every credit card account was at some point paid to zero after the transfers, the trustee could still step into their shoes if the creditors were owed money as of the petition date. Paying an open-ended, revolving loan down to zero does not does not terminate the lender's ongoing creditor status. See, e.g., Silverman v. Sound Around (*In re* Allou Distribs., Inc.), 392 B.R. 24, 34 (Bankr. E.D.N.Y. 2008).

this adversary proceeding on October 13, 2011, which is more than four years past February 2007 and December 2006 but less than four years after November 19, 2007.

The Bankruptcy Code also contains a statute of limitations on avoidance actions. The Bankruptcy Code's statute of limitations and the O.C.G.A.'s statute of limitations must be read together. Section 546(a) of the Bankruptcy Code states,

> (a) An action or proceeding under section 544 … of this title may not be commenced after the earlier of—
>
> (1) the later of—
>
> (A) 2 years after the entry of the order for relief; or
> (B) 1 year after the appointment or election of the first trustee … if such appointment or election occurs before the expiration of the period specified in subparagraph (a); or
>
> (2) the time the case is closed or dismissed.

"The majority of courts addressing the issue have held that as long as the applicable state's limitations period has not expired prior to the petition date, the trustee can bring a fraudulent conveyance action under § 544(b) within the time limitations set forth in § 546(a)." Richardson v. Preston (*In re* Antex, Inc.), 397 B.R. 168, 174 (B.A.P. 1st Cir. 2008). The debtor filed her Chapter 7 case on February 11, 2011. The debtor executed the deed transferring the 27.822 acres at 174 Buffalo Road on February 16, 2007. Even under the defendant's definition of "transfer," an action to avoid this transfer would not be time-barred. Section 546(a) of the Bankruptcy Code extends O.C.G.A. § 18-2-79's limitations period if the debtor files before the four-year period is up, and here, the debtor filed five days before the state limitations period would have run under the defendant's definition of "transfer." But the December 2006 transfer would not be avoidable under the defendant's definition because February 11, 2011, is more than four years after December 2006. Unfortunately for the defendant, the O.C.G.A. disagrees with his definition.

Section 18-2-76 of the O.C.G.A., titled "When transfer is made," states, "For the purposes of this article,"—Article 4 of Title 18, Chapter 2, is the Uniform Fraudulent Transfers Act, so "for the purposes of" fraudulent transfers—"(1) A transfer is made: (A) With respect to an asset that is real property … when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an asset that is superior to the interest of the transferee." O.C.G.A. § 18-2-76(1)(A). It is difficult to rewrite this section such that a layperson could understand the significance because the subject matter is inherently legal, but the Court will try to explain in plain English. If Buyer transfers the same parcel of real property to two different buyers, First Buyer and Second Buyer, *for the purposes of determining whether the transfer to First Buyer is fraudulent to creditors*, the transfer to First Buyer is made when Second Buyer cannot get cut off First Buyer's rights to the real property. A buyer of real property protects usually its rights in the property—to ensure that a second buyer from the seller cannot acquire a greater interest in the property—by recording the transfer in the real property records of the county in which the property is located. When the transfer of a particular piece of real property between Seller and First Buyer is recorded, any future buyers of the land are put on constructive notice that First Buyer is now the owner and that Seller cannot transfer any rights to the land superior to those of First Buyer. Because of this constructive notice, Second Buyer cannot acquire an interest in the real property that is superior to the interest of First Buyer.

So in the usual case, the good faith purchaser (Second Buyer in the above example) cannot acquire an interest that is superior to the transferee (First Buyer) when the transfer (between Seller and First Buyer) is recorded. The transfer is deemed made, for the purposes of determining whether the transfer is fraudulent as to creditors, when the transfer is recorded. The moment of transfer is fixed by law at the moment the

transfer is recorded.[11] Here, the transfers to the defendant were recorded on November 19, 2007, and so the transfers were made on November 19, 2007. The debtor and defendant may disagree with the law, but the law has its justifications, such as clarifying when the statute of limitations begins to run, encouraging creditors and buyers to record their interests, and discouraging secret transfers.

The Court will now discuss whether the transfers of November 19, 2007, are avoidable under state law.

a. O.C.G.A. § 18-2-74(a)(1)

Under Georgia law, a transfer is fraudulent if made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." O.C.G.A. § 18-2-74(a)(1). Absent a debtor admitting to the requisite intent, intent can only be proved inferentially by looking at the circumstances under which a transfer was made. Section 18-2-74(b) lists "badges of fraud"—suspicious circumstances that often accompany fraudulent transfers—the Court may consider when determining actual intent.

Uncontested facts reflect the following badges of fraud.

- O.C.G.A. § 18-2-74(b)(1)—"The transfer … was to an insider." The defendant is the debtor's son.
- O.C.G.A. § 18-2-74(b)(2)—"The debtor retained possession or control of the property transferred after the transfer." The property at 174 Buffalo Road surrounds the debtor's home on three sides; the property at 191 Buffalo Road is across the street from the debtor's home. The defendant lives in North Carolina and does not appear to use or occupy the property.
- O.C.G.A. § 18-2-74(b)(3)—"The transfer … was … concealed." The deeds purporting to transfer the property were prepared and executed long before they were recorded. The deed transferring the property at 174 Buffalo Road was

[11] A transfer of real property can be "so far perfected" in other ways not applicable here.

executed February 16, 2007, and was not recorded until November 19, 2007. The deed transferring the property at 191 Buffalo Road was executed December 7, 2006, and was not recorded until November 19, 2007.

- O.C.G.A. § 18-2-74(b)(4)—"Before the transfer was made … the debtor had been sued or threatened with suit." The debtor sued her husband for divorce, and her husband countersued. The record does not contain a date for when the ex-husband initiated the counterclaim, but the judgment of divorce was entered on August 21, 2007, and became final on November 20, 2007.
- O.C.G.A. § 18-2-74(b)(8)—"The value of the consideration received by the debtor was [not] reasonably equivalent to the value of the asset transferred." The defendant admits the transfers were not made for reasonably equivalent value.
- O.C.G.A. § 18-2-74(b)(10)—"The transfer occurred shortly before or shortly after a substantial debt was incurred." The debtor lost the divorce counterclaim and the divorce court awarded the ex-husband a substantial amount of property, including the two parcels of real estate at issue.

The defendant, in his verified answer, states that the transfers were not made with the intent to hinder, delay, or defraud. Def.'s Answer ¶ 12, ECF no. 13. Under existing case law, this might be sufficient to deny summary judgment on avoidability under § 18-2-74(a)(1). "Ordinarily, summary judgment should not be granted in cases where motive, intent, subjective feelings, and reactions are to be searched." Trucks, Inc. v. United States, 234 F.3d 1340, 1342 (11th Cir. 2000) (quoting Rogers v. Evans, 792 F.2d 1052, 1059 (11th Cir. 1986)); see also Gillespie v. Sand-Rock Transit, Inc., 292 Ga. App. 661, 661, 665 S.E. 2d 385, 385 (2008) ("It is a longstanding rule in this state that certain issues of fact, such as solvency and intent, are for the jury in actions to set aside a fraudulent transfer, including the alleged fraudulent transfer of real estate."). The Court need not determine, however, whether a mere denial of a third party's intent is sufficient. The record contains other evidence that the debtor did not have the requisite intent.

Both the debtor and the defendant, from the outset, have claimed that the properties belonged to the defendant and that the debtor was merely returning the properties. The debtor and defendant state that the defendant transferred the properties to the debtor to keep the properties safe from the defendant's then-wife, who had allegedly been fraudulently signing the defendant's name to various legal instruments. These statements are supported by the record. The debtor states, in her affidavit, that "Defendant, Dennis D. Speciale and Debtor, Alicia Lee Gregg transferred these properties several times between themselves during Defendant's six (6) years engagement in the military when Defendant was station in Foreign Countries … since the initial purchase in 1996-1997 when Defendant was stationed at Ft. Benning, GA and the properties in question were purchased. The last transfer questioned by the Trustee was to keep the properties out of the hands of Defendant's former wife who had forged his name on several legal documents." Aff. Alicia Lee Gregg ¶ 12, ECF no. 14. The affidavit also states, at ¶ 10, that the defendant transferred the properties to the debtor via quitclaim deeds recorded February 22, 2005, an allegation the defendant also makes in ¶¶ X, XI, and XII of the defendant's verified answer. The defendant's Motion to Deny Plaintiff's Motion for Summary Judgment contains exhibits supporting these contentions. See Mot. Den. Summ. J. Ex. 1A-5, 1A-6. Exhibit 1A-5 is a deed dated February 18, 2005, and recorded December 19, 2005, transferring the property at 174 Buffalo Road from the defendant to the debtor. Exhibit 1A-6 is another deed, executed and recorded on the same dates above, transferring the property at 191 Buffalo Road from the defendant to the debtor.

Attached to the trustee's summary judgment motion are copies of deeds establishing that the debtor, alone, received the properties in 1996 and 1998 and transferred them to the defendant November 19, 2007. See Mot. Summ. J. Ex. 2, 5, 6, 7, ECF no. 37. The defendant's evidence establishes that the defendant transferred the property to the debtor in 2005—that is, that the defendant owned the property at some

point before the 2007 transfers. The transfers back and forth for no consideration raise a question of fact over who actually owns the properties. The Court will discuss the larger implications of this question later in this Opinion. Right now the Court wants to stress that even if no question of actual ownership existed, the mere fact that the debtor *thought* she was returning property that was not hers is sufficient to preclude avoiding the transfers under § 18-2-74(a)(1). The record contains evidence from which the Court can conclude the debtor considered the property the defendant's. A genuine issue of material fact over intent exists.

The 2005 and 2007 transfers are, of course, not the entire discussion. But the record contains inadmissible and conflicting evidence over who originally paid for the properties and the pre-2005 transfers to the defendant. The defendant claims that both he and debtor paid for the properties. See Mot. Den. Summ. J. ¶¶ 9, 10. This is somewhat supported by his verified answer, which alleges that the defendant has owned the properties since 1996. See Def.'s Answer ¶¶ X, XI. That is the same year the debtor was deeded the property. But no other evidence supports the claim that the defendant paid for the properties. In the record's timeline of transfers, the chronologically first transfers—the ones establishing how the debtor came to initially own the properties—show only the debtor as the transferee and as having paid for the properties, suggesting the debtor was the sole original owner. The defendant's inadmissible post-hearing addendum attempts to clarify the confusion. It alleges the debtor purchased the property at 174 Buffalo Road in her name only because the defendant was overseas and was not available to sign for the property. To the addendum the defendant attached a copy of a deed dated October 29, 1996 (the same day the debtor received the property), in which the debtor transfers 50% of her interest in 174 Buffalo Road to the defendant. That deed and the statements in the addendum, while helpful for the Court's general understanding of events are inadmissible on this matter. The record is also contradictory on when the defendant came to own both properties. The defendant's verified answer claims the defendant has owned both

properties since 1996, which appears to conflict with other evidence showing the debtor, alone, was originally transferred the property at 191 Buffalo Road in 1998.

Both sides are at fault for the incomplete chronology of events. The trustee made no mention of the 2005 transfers or any earlier transfers, nor has the trustee responded to the defendant's evidence and argument that the land actually belongs to the defendant. The defendant, for his part, has fallen into the typical pro se trap of not understanding what is and is not important in a lawsuit, particularly rules of procedure, substantive law, getting the facts straight, and being able to support those facts with admissible evidence. The issue over intent is sufficient to deny summary judgment as to avoidance under O.C.G.A. § 18-2-74(a), but the conspicuous gaps in the record alone would preclude summary judgment.

b. O.C.G.A. § 18-2-74(a)(2)[12]

A creditor can also avoid a transfer made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer … and the debtor … [i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due."[13] The deeds were recorded on November 19, 2007, one day before the judgment of divorce—which awarded interests in the properties at issue to the debtor's ex-husband—became final. The trustee argues that the divorce judgment created a substantial debt and that when the debtor transferred the properties to her son, she believed or reasonably should have believed that she would not be able to pay the debt incurred in the judgment.

As the statutory language indicates, this test for fraudulent transfers contains both a subjective component and an objective component. The trustee can attempt to prove either the debtor actually believed she would incur debts she would not be able to pay or

[12] The same issue over who actually owns the property exists. As stated earlier, the Court will discuss that later in this Opinion, but the Court will discuss the existence of other genuine issues of material fact.
[13] The defendant admits the transfers were not for valuable consideration, and so the Court will not discuss the value the debtor received in exchange.

she reasonably should have believed she would incur those debts. The Court reiterates its hesitance to decide subjective matters such as intent and belief on summary judgment.

The defendant claims the debtor did not know about her ex-husband's counterclaim until she received the final judgment in the mail because her lawyers did not inform her. See Mot. Den. Summ. J. ¶¶ 30-32. Without knowing about the counterclaim until the she knew about the final judgment, the debtor could not have known on November 19 about the liability the final judgment created on November 20. The debtor's ignorance of the counterclaim and adverse judgment, however, is not supported by either the debtor's affidavit or the defendant's verified answer. Both are silent on the debtor's awareness of the counterclaim. Statements of fact must be supported by some type of sworn statement (e.g., a verified pleading or an affidavit) or an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746. See Fed. R. Civ. P. 56(c)(4).

However, the defendant argues—and the record supports—that the debtor thought she was merely returning properties she believed to belong to the defendant. She might turn out to be wrong about who actually owned the properties, but that is irrelevant when looking at whether she transferring the property would result in debts she could not pay. This issue is complicated by the lag between when the deeds were executed and when they were recorded. Absent evidence showing otherwise, it is unreasonable to assume the debtor was unaware on November 19, 2007, of a counterclaim and a loss on that counterclaim in a divorce proceeding she initiated.[14] But on a motion for summary judgment, where the Court must give all reasonable inferences to the nonmoving party, the Court cannot assume the debtor believed she would lose the counterclaim in December 2006 and February 2007, when she executed the deeds. Yes, the transfer is

---

[14] The divorce judgment states that the debtor filed the divorce action. See Mot. Summ. J. Ex. 11-pg 2. The judgment became final on November 20, but the counterclaim was filed on June 27, 2007, and ex-husband was awarded a judgment on August 21, 2007. See id. Ex. 11. The Court will not assume 3-4 months is insufficient time to receive notice of the counterclaim and its disposition.

deemed made on November 19, 2007, but requisite state of mind and knowledge must coincide with when a debtor deeds the property to someone else, not when that someone else decides to record the transfer. The Court cannot deem facts known or beliefs held on one date to be known or believed on an earlier date. The evidence that the debtor thought she was returning property belonging to the defendant raises a question of fact about the debtor's subjective belief.

A transfer can also be fraudulent under O.C.G.A. § 18-2-74(a)(2) if the debtor reasonably should have believed she would incur debts she could not pay as they came due. The Court's reluctance to decide on summary judgment issues involving mental state and knowledge does not apply here because what the debtor should have known does not depend on the debtor's credibility regarding what she actually knew. See Norfolk S. R.R. Co. v. Basell USA, Inc., 512 F.3d 86, 96 (3rd Cir. 2008) ("[A] court should be reluctant to grant a motion for summary judgment when the resolution of the dispositive issue requires a determination of state of mind, for in such cases much depends upon the credibility of witnesses testifying as to their own states of mind, and assessing credibility is a delicate matter best left to the fact finder.").

This is an unusual case. This is not a case where a debtor transferred property and incurred a debt unrelated to the transferred property. Here, the property transferred literally is the debt incurred. The debtor and defendant claim the property belongs to the defendant. And the debt was a result of a judge's determination of asset division in a divorce—the debtor did not voluntarily take on new liabilities. Foreseeability of the debt and the inability to pay it might be an easier issue on summary judgment in a more typical fraudulent transfer case. What the debtor should have reasonably believed is judged as of the date she deeded the properties to the defendant. How is the Court supposed to determine what the debtor reasonably should have believed months before the counterclaim was filed? Was it clear the debtor could lose the properties even without the counterclaim? Even if it was clear, the debtor claims the property belongs to her son.

The Court cannot say whether that claim is true (the Court does not even know), untrue but reasonable to believe, untrue and unreasonable to believe, or a pretense to try to keep the property in the family. If the property is the defendant's, the debtor cannot "owe" it to anyone. Even if the Court could say for certain that the property was the debtor's, the Court cannot now say that believing it belonged to the defendant is unreasonable. Therefore, a genuine issue of material fact exists over what the debtor believed or reasonably should have believed.

c. O.C.G.A. § 18-2-75(a)[15]

Under O.C.G.A. § 18-2-75(a), a transfer is fraudulent "if the debtor made the transfer … without receiving a reasonably equivalent value in exchange for the transfer … and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."[16] What the debtor thought or believed about who owned the property does not matter—if the debtor owned the property and transferred it for less than reasonably equivalent value when the debtor was insolvent, or became insolvent because of the transfer, the transfer is avoidable.

"A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." O.C.G.A. § 18-2-72(a). ." See also Word v. Stidham, 271 Ga. App. 435, 436-37, 609 S.E. 2d 651, 653 (2004) ("A debtor is insolvent when, after a conveyance, property left or retained by him is not ample to pay his existing debts."). The trustee did not introduce evidence of the sum of the debtor's debts or of the sum of the debtor's assets as of the transfer date, nor did he argue that the sum of the debts were greater than the sum of the assets as of the transfer date. Rather, the trustee relies on O.C.G.A. § 18-2-72(b), which creates a presumption of insolvency for a debtor who is generally not paying debts as they come due.

[15] Again, the same issue over ownership exists, and the Court postpones discussion.
[16] As noted, the defendant does not dispute that the debtor received less than reasonably equivalent value.

Georgia case law on this subsection is unhelpful in determining what "generally not paying debts as they become due" means, and case law from other states construing identical language is likewise sparse. See, e.g., Asarco LLC v. America's Mining Corp., 396 B.R. 278, 399 n.140 (S.D. Tex. 2008) ("There is relatively little case law on this section; therefore, the cases cited in this section come from courts across the country."). This section is based on § 2 of the Uniform Fraudulent Transfers Act (U.F.T.A.). Comment (2) to § 2 of the U.F.T.A. states, "Section 2(b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code." Other courts have looked to case law discussing § 303(h)(1) of the Bankruptcy Code in analyzing the presumption of insolvency under fraudulent transfer law. See, e.g., Ash v. Moldo (*In re* Thomas), 2006 WL 6811032, at *7 (B.A.P. 9th Cir. 2006) ("The UFTA borrows this test from § 303(h)(1) of the Bankruptcy Code. The comment refers to case law under this section and implies that an inquiry under [the state law presumption of insolvency] would be analogous to an inquiry under § 303(h)(1)."). This Court will do the same. For the presumption of insolvency under § 303(h)(1), "[t]he courts apply a flexible totality of the circumstances test in determining whether a debtor is 'generally not paying' his debts, which focuses on the number of unpaid claims, the amount of the claim, the materiality of nonpayment and the overall conduct of the debtor's financial affairs." *In re* Knight, 380 B.R. 67, 74 (Bankr. M.D. Fla. 2007) (citing Concrete Pumping Serv., Inc. v. King Constr. Co. (*In re* Concrete Pumping Serv., Inc.) 943 F.2d 627, 630 (6th Cir. 1991)).

The trustee argues that the debtor was not paying credit cards as they became due because the debtor had several past due accounts and incurred late fees. The exhibits to the trustee's supporting brief include several of the debtor's credit card statements from the periods before and after the transfers. See Br. Supp. Mot. Summ. J. Ex. 12-20, ECF no. 40. The Court will examine each of the statements.

- Exhibit 12 is a NMTW Community Credit Union Visa card statement with a statement closing date of 06/21/2007, a balance of $11,703.60, a minimum payment due of $464.00, and a past due amount of $229.00. No payments on the balance were made during the statement period. Exhibit 18-pages 1 and 2 are a statement for the same card with a statement closing date of 10/23/2007 (four months after the last statement and a month before the transfers), a balance of $243.96, a minimum payment due of $10.00, and no past due amount. The debtor made a payment of $2,582.92 during the statement period. These exhibits establish that in the four months between these two statements, the debtor reduced the balance by over $11,459.64. Exhibit 18-pages 3 and 4 are a statement for the same card with a statement closing date of 11/21/2007. The 10/23 statement showed a minimum payment due of $10.00, and the 11/21 statement shows a payment of $100.00, or ten times the minimum due. These exhibits do not support the trustee's contention that the debtor was generally not making payments that became due.
- Exhibit 13 is a CSC Employees Federal Credit Union Visa card statement with a closing date of 07/16/2007, a balance of $3849.56, a minimum payment due of $154.00, and a past due amount of $146.00, for a total payment due of $300.00. The debtor made no payments during the statement period. Exhibit 20-page 1 is a statement for the same card with a closing date of 11/16/2007, a balance of $2812.55, a minimum payment due of $113.00, and no past due amount. The debtor made a $50.00 payment during the statement period. Exhibit 20-page 2 is a statement for the same card with a closing date of 12/16/2007. The immediately preceding statement showed a minimum payment due of $113.00, and the debtor had payments or credits totaling $910.56, of which $886.55 were direct payments. These exhibits do not support the trustee's contention that the debtor was generally not making payments that became due.

- Exhibit 14 is a Discover card statement with a closing date of 10/4/2007, a balance of $7,978.78, and a minimum payment due of $312.00. The statement says the account is past due, but it does not say how much of the minimum due is attributable to the amount past due. The debtor had payments and credits totaling $98.95, but the entire amount appears to be a return credit. Exhibit 17 is a statement for the same card with a closing date of 11/4/2007, a balance of $7,663.02, and a minimum payment due of $154.00. The preceding statement showed a minimum payment due of $312.00, and the debtor made payments totaling $400.00 during the statement period. These exhibits do not support the trustee's contention that the debtor was generally not making payments that became due.
- Exhibit 15 is a Mariott Rewards Visa card statement with a closing date of 11/01/2007, a balance of $3287.71, and a minimum payment due of $65.00. The account is not past due. The debtor made payments totaling $614.14 during the statement period. This exhibit does not support the trustee's contention that the debtor was generally not making payments that became due.
- Exhibit 16 is a Home Depot Discover card statement with a closing date of 10/24/2007, a balance of $582.92, and a minimum payment due of $0.00. The lack of minimum payment appears to be because the debtor was in a six-month no-interest–no-payment period. This exhibit does not support the trustee's contention that the debtor was generally not making payments that became due.
- Exhibit 19-pg 1 is a Capital One Visa business card statement with a closing date of 09/03/2007, a balance of $214.75, a minimum due amount of $10.00, and with no past due amount. The debtor made a payment of $100.00 during the statement period. Exhibit 19-pg 2 is a statement for the same card with a closing date of 01/03/2008, a balance of $642.99, a minimum payment due of $19.00, and no past due amount. The debtor made a payment of $25.00 during the statement period.

These exhibits do not support the trustee's contention that the debtor was generally not paying debts as they became due.

In the light most favorable to the defendant, these exhibits show that the debtor was paying her creditors more than they were entitled to. The trustee also argues that the debtor was not paying debts as they came due under the divorce judgment. This argument has several problems.

First, the credit card creditors and the debtor's ex-husband are not the only creditors the debtor had at the time of the transfer, and so the Court cannot weigh the totality of the circumstances. The trustee's Statement of Uncontested Facts, at ¶ 12, and Defendant's Response to Trustee's Statement of Uncontested Facts, at ¶ 12, establish the existence one more creditor, Wells Fargo Bank, N.A., the debtor had at the time of the transfer. This creditor holds a mortgage on property not at issue. The payment or nonpayment of mortgage payments (which tend to be large) is essential to weighing the totality of the circumstances. Moreover, now the Court is concerned other creditors exist,

Second, the Court does not know the total amount coming due that the debtor was not paying, nor does the Court know how that compares to the amounts the debtor was paying. This would require information on all creditors (or at least the creditors comprising the vast majority of debt), amounts coming due each month, what the debtor paid, and what the debtor did not pay. But the Court does not have that. What the Court has is superficial analysis of insufficient evidence.

Third, the trustee appears to be relying on nonpayment of a single creditor as generally not paying debts as they become due. The trustee argued that the debtor was not paying credit cards as they became due, but the evidence showed that the debtor was in fact paying each of the seven credit cards as they became due. That leaves the debtor's ex-husband as the sole creditor. The Court has found authority holding that not paying a single creditor can be "generally not paying" even when smaller debt are being paid. See *In re* Kreidler Imp. Corp., 4 B.R. 256 (Bankr. Md. 1980) (single creditor whose claim

constituted 97% of debtor's debt). Perhaps other opinions exist supporting this point that the Court has not read. But the Court does not now have to decide whether a single creditor is sufficient or how many percent of the total debt a single creditor must comprise. The Court does not have enough information about the debt to the ex-husband, to decide this issue. The divorce judgment creates obligations for the debtor other than the transfer of the Buffalo Road properties. The judgment also orders the transfer of 100% of a Hawaii timeshare and 100% of real estate in New Mexico. The Court does not know whether the debtor transferred these properties to Alonzo Gregg, and if so, what proportion of the total obligation has been satisfied. And whether or not the debtor has satisfied these other obligations, the Court still does not know what percentage of the debtor's total debt comes from the divorce judgment obligations.

Fourth, if the defendant is the rightful owner of the properties, the divorce court was not aware, and the court's division of property almost certainly would have been different had the court known the debtor did not own those assets. Assuming the court was being equitable in the division, the debtor having two fewer substantial assets would have likely resulted in a smaller liability, if any. This could be grounds for the debtor to petition the court for a re-division. Perhaps the time for that has passed. The Court is faced with a complicated set of facts and little guidance from the parties, so the Court can only speculate.

The Court is not convinced it should be, on ruling on this motion, weighing the totality of the circumstances. The Court fears that is exactly the type of evidentiary analysis prohibited by Rule 7056. However, the Court need not weigh anything. The trustee has submitted evidence establishing that the debtor was not only paying credit card creditors but paying more than she was obligated to. The trustee is left with a single creditor who was not paid. But the trustee concentrates on only a portion of the unpaid debt, and the Court does not know if that portion is large or small compared to the rest of the debt and compared to the debtor's total debt. This evidence is insufficient to raise the

presumption of insolvency. A genuine issue of material fact over the debtor's solvency exists.

Because genuine issues of material fact exist under each section of the O.C.G.A. the trustee relies on, the Court will deny summary judgment.

VI. Unaddressed Issues

The Court has deferred discussion of what would ordinarily be preliminary matters. There are several reasons for this. The issues already discussed are simpler and easier to resolve, and the Court's ultimate ruling does not depend on the following discussion. Moreover, these are complex issues, both factual and legal, neither party has raised and coming to conclusions would be unfair—maybe impossible—until the parties have addressed them. Finally, discussing these issues later rather than earlier makes for a more organized and thus readable opinion.

A. Whether the Debtor Owned the Properties

The debtor and defendant both claim that the defendant is the true owner of the properties. As noted earlier, the defendant's ownership of the properties before the 2007 transfers and the reasons for the transfers and re-transfers are supported in the record. See Aff. Alicia Lee Gregg ¶ 12; Def.'s Answer ¶¶ X, XI, XII; Mot. Den. Summ. J. Ex. 1A-5, 1A-6. The trustee has not responded to this argument.

If the defendant is the true owner, the debtor could not have transferred these properties within the O.C.G.A.'s definition of "transfer." "Transfer" is defined with reference to "asset." See O.C.G.A. § 18-2-71(12) ("'Transfer' means every mode … of disposing of or parting with an asset …."). Section 18-2-71(2) defines "asset" as "property of the debtor." If the defendant is the true owner of the properties, they are not "property of the debtor" and thus not an "asset" of the debtor—and the debtor could not have "transferred" the property.

Furthermore, the uncertainty over ownership raises questions over whether the two parcels of real estate are property of the estate, or more specifically, whether the

properties would be property of the estate if the transfers were avoided. Implicit in the trustee's avoidance powers is that transfers sought to be avoided involve estate property. See, e.g., Baumgart v. Laurie (*In re* Laurie), 2011 WL 3879507 (Bankr. N.D. Ohio 2011) ("[S]uch property is not property of the estate. As a result, such an interest is not treated as an interest of the debtor in property for purposes of fraudulent transfer avoidance.") (citation omitted).

Most cases appear to hold that the determination of whether certain property is property of the estate is a question of law. See, e.g., Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 242 (3rd Cir. 2001). A few opinions suggest that the issue is a question of fact. The Eleventh Circuit Court of Appeals, for example, has obliquely referred to the determination as a question of fact. See, e.g., Southtrust Bank of Ala., N.A. v. Thomas (*In re* Thomas), 883 F.2d 991, 994-96 (11th Cir. 1989) (reviewing determination that mobile home was estate property for clear error); See also Barry v. Hialeah Miami Springs Med. Fund, 184 B.R. 611, 612 (S.D. Fla. 1995) ("Although governed by a rule of law, 11 U.S.C. § 541, the determination of whether a particular asset is "property of the estate" involves a question of fact.") (citing *In re* Thomas, 883 F.2d at 995-97).

Whether a question of law or of fact or a mixed question, in this instance the record reveals a disputed, genuine question of material fact the Court must resolve. The defendant and the debtor claim that the property was always the defendants and that debtor merely held legal title to protect the property from the defendant's ex-wife. Moreover, the defendant claims that he helped pay for the properties. The defendant and debtor essentially claim (but have not argued) that the debtor never held a beneficial interest in the property—whether because the debtor held the property in constructive trust or resulting trust for the defendant. The existence of a trust is a question of fact. See, e.g., Browning v. Peyton, 918 F.2d 1516, 1522 (11th Cir. 1990) ("[I]t is evident that there remains questions of fact regarding Browning's claims for unjust enrichment and for a

constructive trust."); United States v. 1419 Mount Alto Rd., Rome, Floyd Cnty., Ga., 830 F. Supp. 1476, 1482 (N.D. Ga. 1993) ("Ultimately the existence of a constructive trust is a question of fact."). As a matter of law, property of the estate does not include property the debtor has no equitable interest in. Section 541(d) of the Bankruptcy Code states that property "becomes property of the estate … only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." So if the debtor did not hold an equitable interest in the properties transferred, those properties would not be property of the estate.

Section 53-12-130 of the O.C.G.A. states, "A resulting trust is a trust implied for the benefit of the settlor or the settlor's successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property under any of the following circumstances: … (3) A purchase money resulting trust … is established." Under O.C.G.A. § 53-12-131(a), "A purchase money resulting trust is a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property." Thus if Buyer pays money to Trustee to purchase real property with legal title in Trustee's name and Buyer did not intend the Trustee to also have a beneficial interest, a resulting trust is implied in favor of Buyer.

The defendant states in his verified answer, "Defendant admits that the transfers … were not made for valuable consideration as property was already Defendant's since 1996 and was being returned to him due to fraudulent use of Defendant's name and forged signature by former spouse." Def.'s Answer ¶¶ X, XI. Exhibit A-1 to the answer is a copy of the deed transferring the property at 191 Buffalo Road from the defendant to the debtor in 2005, and Exhibit B-1 to the answer is a copy of the deed transferring the property at 174 Buffalo Road from the defendant to the debtor in 2005. The defendant has not introduced evidence that he paid any part of the purchase price. Rather, the defendant states in several filings that both he and the debtor paid for the land. See Def.'s

Resp. Trustee's Smt. Unc. Facts ¶¶ 9, 10, ECF no. 39; Def.'s Suppl. Br. Resp. Trustee's Suppl. Br. 2-3, ECF no. 44. The Court acknowledges that those statements are not evidence. The defendant has, in essence, asserted that a resulting trust in his favor was created when he paid some (unknown amount) of the purchase price and the land was titled in the debtor's name. But a crucial fact—that the defendant paid for the property—is not in evidence. Therefore no genuine issue of material fact is raised by the defendant's unsupported statement that he paid for the property.[17]

However, the record does contain evidence raising an issue of fact about another type of implied trust. Section 53-12-132(a) of the O.C.G.A. states, "A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." As the "or otherwise" language indicates, a constructive trust need not arise via fraud. See, e.g., Kelly v. Johnston 258 Ga. 660, 661, 373 S.E. 2d 7, 9 (1998) ("A constructive trust arises with respect to property the title to which was acquired by fraud, or where although acquired originally without fraud, it is against equity that the title should be retained by the one who holds it.").

As discussed above, the record contains evidence that the properties belong to the defendant. The debtor's and defendant's sworn statements claim as much, statements buttressed by copies of deeds showing that the properties were in the defendant's name years before the transfers at issue. Moreover, the deeds convey the properties to the debtor for no consideration, and that conveyance, coupled with the sworn statements explaining why the defendant transferred the properties to the debtor (to protect the property from the defendant's wife), can lead can lead a reasonable jury to conclude that the defendant never intended to convey beneficial interests and that a constructive trust

[17] Of course, this does not mean that the defendant cannot raise this issue at trial.

arose. The outcome might be different at trial, when the Court can weigh the evidence and assess credibility, but on summary judgment the Court must accept the nonmovant's evidence.

B. A Third Party Not Before the Court Might Have Been a Bona Fide Purchaser as of the Date the Trustee Filed this Avoidance Action

The trustee's statement of uncontested facts and accompanying exhibits, as well as the defendant's thereto, establish the following. On July 27, 2007, the defendant executed a deed transferring his interest in 191 Buffalo Road to a third party, the Goodmans. That deed was recorded on November 19, 2007. In exchange for the property, the defendant received a promissory note obligating the Goodmans to pay $80,000. The Goodmans transferred the property back to the defendant via a quitclaim deed dated October 1, 2012, and recorded October 29, 2012. An attachment to the deed transferring the property back to the defendant states that the quitclaim deed is given in satisfaction of the promissory note. The trustee does not argue—nor is there evidence supporting—that these transfers were sham or calculated to fabricate a defense based on an intervening bona fide purchaser, nor does the trustee argue that the consideration was for less than reasonably equivalent value. Thus the Court will assume the Goodmans were bona fide purchasers for value.

The trustee filed this avoidance action on October 13, 2011—roughly a year before the defendant reacquired the property at 191 Buffalo Road. The complaint did not mention that the defendant did not actually own one of the properties sought to be recovered from the defendant. Nor did the defendant think to mention this. The first time this was brought to the Court's attention was in the trustee's motion for summary judgment, filed January 14, 2013, and it was mentioned merely as a stepping stone in establishing that the defendant *now* owns the property.[18] The trustee does not appear to

---

[18] As discussed later, the defendant denies that he currently owns the property at 191 Buffalo Road.

consider this a problem for his case, and the defendant has not asserted any defenses based on nonownership of the property.

This is not a case where the defendant received property subject to an avoidance action, sold the property to a bona fide purchaser, and reacquired the property before the trustee sought to recover the property. In that case, the trustee would likely still have a cause of action. Although the Court has not exhaustively researched this particular issue in the context of an avoidance action, a transferee probably cannot elude avoidability of the original transfer from the debtor merely by reacquiring the property from a bona fide purchaser. A similar rule exists in other contexts. See, e.g, Indep. Coal & Coke Co. v. United States, 274 U.S. 640, 647 (1927) ("It is ancient and familiar learning that one who fraudulently procures a conveyance may not defeat the defrauded grantor or protect himself from the consequences of his fraud by having the title conveyed to an innocent third person. … [T]he wrongdoer may not reacquire it free of the obligation which equity imposes on one who despoils another of his property by fraud or a breach of trust.").

Here, the trustee sued on a cause of action to recover real estate the defendant did not own at the time of filing and continued to not own until a year after the action was filed. If the trustee wishes to argue that doing so is proper without having first dismissed the cause of action as to this piece of real estate, or whether § 550(a) allows the trustee to seek the value of the transferred property under these circumstances, the Court is willing to listen. But the Court cannot grant summary judgment in an avoidance action seeking recovery of real estate the defendant did not own when the action was filed.

Complicating matters is the defendant's denial that he currently owns the 9.277 acres at 191 Buffalo Road. The trustee's Statement of Uncontested Facts states, at ¶ 23, "Defendant is the current owner of the 9.277 acres." The defendant, in response, states, "Defendant is not the current owner of the 9.277 acres." Def.'s Resp. Trustee's Stm. Unc. Facts ¶ 23. The defendant did not introduce evidence establishing that someone else owns the property. To make matters easier on himself, and the Court, the defendant should

have introduced something admissible—a sworn statement that he does not own the property; a copy of the deed transferring the property to someone else; an affidavit of the current owner—establishing someone else to be the owner. The trustee did not respond to the defendant's denial, leaving the Court in yet another awkward situation. The Court is asked to decide whether to grant summary judgment in an avoidance action where the defendant did not own the property at the time the action was filed and the defendant denies current ownership of the property. But the defendant has offered no evidence showing someone else owns it. Indeed, the defendant has defended the action as if he does own the property.

If the transfer of the property at 191 Buffalo Road is to be avoided in this action, the trustee must convince the Court that avoidance is proper notwithstanding the defendant's nonownership as of the date the trustee filed this action. If the defendant wants avoid taxing the Court's patience, the defendant will be more forthcoming with what is going on with this property.

C. Issues Pertaining to Alonzo Gregg

The debtor's ex-husband, Alonzo Gregg, was awarded 100% of the property at 174 Buffalo Road and 20% of the property at 191 Buffalo Road in a divorce judgment dated August 21, 2007, and which became final on November 20, 2007. See Mot. Summ. J. Ex. 11. The Court wants to raise issues regarding the nature of Alonzo Gregg's interest in the real estate at issue and whether he is an unsecured creditor whose shoes the trustee can step into.

1. Whether the Trustee Can Assert Claims Personal to a Creditor

The trustee argues that Alonzo Gregg is an unsecured creditor because he never recorded the judgment in Marion County. Moreover, the trustee argues he can step into the shoes of Alonzo Gregg because § 544(b) "empowers a trustee to bring causes of action that are personal to a particular creditor." For this latter proposition, the trustee

cites Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339 (7th Cir. 1987).

The issue in Koch Refining (and its progeny) was who—between creditors and a bankruptcy trustee—has standing to bring alter ego claims against a bankrupt company's fiduciaries. The issue was not the ability of a trustee to bring actions personal to a particular creditor. To the extent that the alter ego cases can be analogized to the issues facing the Court, Koch Refining says the opposite of what the trustee claims: "However, the trustee has no standing to bring *personal* claims of creditors. … A trustee may maintain only a general claim." Id. at 1348-49 (emphasis in original). The Court could not find any cases standing for the proposition that a bankruptcy trustee can bring an avoidance action that belongs to a particular creditor. The Court suspects such cases do not exist. Any property recovered would be for the benefit of all creditors of the estate, not a particular creditor. See 11 U.S.C. 550(a) ("[T]o the extent that a transfer is avoided under section 544 … the trustee may recovery, for the benefit of the estate, the property transferred …."). Property recovered and handed over to Alonzo Gregg would not be for the benefit of the estate but rather for the benefit of one creditor of the estate. And to the extent the trustee would want to distribute the value of the property for the benefit of all creditors, the cause of action would inherently not be personal to Alonzo Gregg. Moreover, the Court views this argument—that Alonzo Gregg has the personal right to recover this property—as somewhat self-defeating. If Alonzo Gregg has a personal right to recover this property, then Alonzo Gregg is by definition not an unsecured creditor whose shoes the trustee can step into.

This issue is potentially unimportant. The trustee has multiple other creditors that satisfy § 544(b)'s requirements, so the trustee does not need derivative standing from Alonzo Gregg. But the trustee is invited to persuade the Court otherwise if he can find authority stating the trustee can bring an avoidance action personal to a creditor.

2. Whether Alonzo Gregg Holds an Allowable Unsecured Claim

Section 544(b)(1) states that any transfer must be avoidable under applicable law "by a creditor holding an unsecured claim that is allowable under section 502 of this title." Alonzo Gregg has not filed a proof of claim. Implicit in § 502 is that proof of a claim must be filed before the Court can consider whether the claim is allowable: "A claim or interest *proof of which is filed* under section 501 of this title, is deemed allowed …." § 502(a) (emphasis added). Moreover, Bankruptcy Rule 3002(a) states, "An unsecured creditor … must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005." The only exception potentially applicable here is Rule 3004, which allows the debtor or trustee to file a proof of claim on the creditor's behalf.[19] Neither the debtor nor the trustee has filed a proof of claim on Alonzo Gregg's behalf. With no proof of claim, Alonzo Gregg does not hold an allowable claim, and he is not a creditor entitled to distribution. See 9 Collier on Bankruptcy ¶ 3002.01 ("A creditor who must file a claim pursuant to Rule 3002(a) will be unable to participate in any distribution in the case if there is a total failure to file.").

However, the Court is concerned that Alonzo Gregg has not received notice of the debtor's bankruptcy case. The debtor did not include her ex-husband on any of her schedules of creditors, and he was not on the creditor mailing matrix, so Alonzo Gregg did not get notice from the clerk's office about the bankruptcy case. When the trustee determined the estate might have property to distribute, the trustee sent a Notice of Need to File Proof of Claim Due to Recovery of Assets to creditors,[20] but the Certificate of Notice (ECF no. 25 in the main case) does not list Alonzo Gregg as a recipient of the notice. Nor does Alonzo Gregg appear on any of the notices in this adversary proceeding.

---

[19] Section 501(c) of the Bankruptcy Code likewise permits this: "If a creditor does not timely file a proof of such creditor's claim, the debtor or trustee may file a proof of such claim."

[20] The debtor's Chapter 7 was originally a no-asset case. Scheduled creditors were sent a notice stating as much, and the notice also stated that it was unnecessary to file proofs of claim and that further notice would be given if sufficient assets become available. Such notice is authorized by Bankruptcy Rule 2002(e).

If Alonzo Gregg did not have actual notice of the bankruptcy case, the bar claims date does not apply to him, and he can file a tardy claim. See, e.g., IRS v. Hildebrand (*In re* Hildebrand), 245 B.R. 287, 290 (M.D. Tenn. 2000) ("Where neither actual nor constructive notice is given, the bar date … is not effective."); In re Chapman, 265 B.R. 796, 809 (Bankr. N.D. Ill. 2001) ("These notice requirements are mandated by the principle of due process which applies equally to bankruptcy cases and non-bankruptcy cases under our system of jurisprudence."). But if Alonzo Gregg had actual notice (e.g., the debtor told him she was filing bankruptcy) in time to file a proof of claim, he is not relieved of his obligation to file a proof of claim. Actual notice, even without official notice, is sufficient to sustain the obligation to timely file a proof of claim. See, e.g., *In re* Bobby L. Edwards, 2010 WL 3807161, at *3 (Bankr. M.D. Ala. 2010) ("The failure to receive 'official notice' does not relieve the creditor of his obligation to timely file a proof of claim where, as here, he has actual notice of the bankruptcy filing.").[21]

But the Court knows nothing about what notice Alonzo Gregg received about the debtor's Chapter 7. He might not know anything. The Court has no authority to enlarge the time to file proofs of claim in Chapter 7 cases, even for excusable neglect. See Bankruptcy Rule 9006(b)(3) ("The court may enlarge the time for taking action under Rule[] … 3002(c) … only to the extent and under the conditions stated in those rules."). As other courts have likewise pointed out, the "excusable neglect" language in Rule 9006(b) is not in Rule 3002. See, e.g., *In re* marchFIRST, Inc., 573 F.3d 414, 417 n.1. However, the Code and the Rules allow certain creditors to file late proofs of claim.

Section 502(a) states that filed proofs of claim are deemed allowed absent an objection. Section 502(b)(9) states that if an objection is made, the court shall allow the

[21] The situation could also be that Alonzo Gregg had actual notice of the no-asset case but not of the found assets, and thus he did not know he needed to file a proof of claim. The Court has seen authority ruling that a creditor having actual knowledge of a bankruptcy case has the burden to have itself added to the case's mailing matrix on file with the clerk's office, and "[i]f the creditor fails to do so, then it cannot be heard later to complain that it did not receive notice of the claims bar date." Schlant v. FDIC (*In re* P & L Credit & Collection Servs., Inc.), 248 B.R. 32, 36 (W.D.N.Y. 2000). This Court rules nothing now because the issue is not before the Court.

claim "except to the extent that" the "proof of claim is not timely filed." Section 502(b)(9) goes on to explain that tardily filed proofs of claim are allowed to the extent permitted under §§ 726(a)(1), (2), and (3). Section 726 sets the priority scheme for distributing Chapter 7 estate property to creditors. Under § 726(a)(2), claims whose proofs have been tardily filed are treated the same as timely filed claims if the creditor did not have notice or actual knowledge of the case in time to timely file—both the timely filed and the tardily filed claims receive distributions second in line behind priority claims. Section 726(a)(3) also allows distribution to unsecured claims whose proofs were tardily filed. This subsection covers tardily filed proofs of claim when the creditor *did* have notice in time to timely file a proof of claim, but these claims are lower in the distribution priority, receiving distributions third in line after priority claims and claims whose proofs were timely filed (or untimely filed due to lack of notice). See 11 U.S.C. §§ 726(a)(1)-(3).

Alonzo Gregg can still file a proof of claim for an allowable unsecured claim. His place in the distribution line depends on whether he had notice of the bankruptcy in time to file a timely proof of claim, but place in the distribution scheme does not matter to whether he holds an allowable unsecured claim. All this is moot, however, until he files proof of his claim.

As noted above, the Code and Rules allow a trustee or debtor to file a proof of claim on a creditor's behalf. See 11 U.S.C. § 501(c); Fed. R. Bankr. P. 3004. Ostensibly, the trustee could file an unsecured a proof of claim that would be deemed allowed absent an objection, and even if objected to, the claim would be allowed to the extent permitted under § 726 as explained above. But § 726(a)(2)(C)(i) and § 726(a)(3)—the subsections governing the two kinds of untimely filed proofs of claim (untimely due to lack of notice and untimely despite notice)—refer to proofs of claim filed "under section 501(a)." Section 501(a) states, "A creditor or an indenture trustee may file a proof of claim." Section 726(a)(2)(C)(i) and § 726(a)(3) do *not* cover proofs of claim filed by the debtor

or the trustee, which are filed pursuant to § 501(c), not § 501(a). Thus claims whose proofs are tardily filed by a debtor or trustee are not entitled to distribution. A more thorough explanation of the interplay of these code sections is seen in Drew v. Royal (*In re* Drew), 256 B.R. 799, 804-05 (B.A.P. 10th Cir. 2001):

> Although §§ 502(b)(9) and 726(a)(3) mean that in chapter 7 cases, claims filed tardily by creditors are nevertheless to be paid from the estate prior to distribution to the debtor, a careful reading of §§ 501 and 726(a) indicates that claims filed tardily by a chapter 7 trustee are not entitled to be paid under the distribution scheme established by the Code. Claims filed timely by creditors are second in the scheme. *See* § 726(a)(2)(A). Those filed tardily by creditors are second if the creditor had no notice of the case but filed in time to permit payment of the claim, *see* § 726(a)(2)(C), but otherwise are third, *see* § 726(a)(3). It is important to note that the tardily-filed claims placed in the distribution scheme are only those filed under § 501(a)—that is, by creditors and indenture trustees. Claims filed under § 501(c)—that is, by the trustee or the debtor—are second in the scheme, but only if they are filed timely. No provision is made for the payment of claims filed tardily under § 501(c). Since the notice of a possible dividend was mailed to creditors in April 1998, giving them ninety days (or until July 1998) to file claims, under Rule 3004, the Trustee's period to file timely claims expired in August 1998. He did not file the twenty-seven claims for creditors until January 2000, clearly making them tardy and not eligible for payment under any provision of § 726(a). Consequently, on the Debtors' objection, the claims should have been disallowed under § 502(b)(9).
>
> …
>
> We note that other considerations also support our interpretation of the Code and Rules. The legislative history of § 501(c) states:
>
> > The purpose of this subsection is mainly to protect the debtor if the creditor's claim is nondischargeable. If the creditor does not file, there would be no distribution on the claim, and the debtor would have a greater debt to repay after the case is closed than if the claim were paid in part or in full in the case or under the plan.
>
> S.Rep. No. 95–989, at 61 (1978); H.R.Rep. No. 95–595, at 352 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5847, 6307–08. This indicates that Congress did not intend for trustees to file claims on behalf of all creditors listed in a debtor's schedules. Nothing in this case suggests any of the claims the Trustee filed were nondischargeable.

Thus the trustee cannot make Alonzo Gregg's claim allowable by filing the proof of claim. Section 502(a) deems filed proofs of claim allowed, but even assuming the debtor would not object, the claim would not be entitled to distribution because § 726 (a) does not provide for distributions on tardily filed proofs of claim filed under § 501(c). A claim not entitled to distribution is not allowable.

3. Nature of Alonzo Gregg's Interest in the Real Estate

Putting aside whether Alonzo Gregg holds an allowable claim, the Court is unsure whether any claim filed by Mr. Gregg would be unsecured. The Court will not discuss this too deeply because of how undeveloped the record is and because this discussion is not necessary to deny the motion for summary judgment, but the Court wants to raise issues the parties should consider going forward.

The divorce judgment grants Alonzo Gregg a lien on the debtor's 80% interest in 191 Buffalo Road to secure the debtor's obligations under the divorce judgment. A foreign judgment, however, cannot bind Georgia real property until the judgment has been domesticated and recorded on the general execution docket of the county the land is located in. See NationsBank, N.A. v. Gibbons, 226 Ga. App. 610, 612, 487 S.E.2d 417, 419 (1997); O.C.G.A. § 9-12-80; O.C.G.A. § 9–12–83.

It is true that the debtor did not contest ¶ 25 of the trustee's Statement of Uncontested Facts ("Other than a Lis Pendens filed by the Plaintiff Trustee, there is no lien or claim filed of record in Marion County against the 9.277 acres."), and thus the Court arguably can conclude that Alonzo Gregg has not recorded the judgment. But the Court cannot give much weight to the trustee's statements nor to the debtor's responses about this property. As discussed, record reflects much uncertainty about the 9.277 acres. The trustee apparently did not know that this land has been transferred out of the defendant's name twice, and the defendant simultaneously (1) asserts he does not currently own the land and (2) does not contest that anyone other than the trustee has a claim on the land. Based on the insufficiency of the record on this property, the Court

cannot assume or conclude anything about Alonzo Gregg's status as a secured or unsecured creditor.

Again, the Court is not concluding anything about what interest, if any, the debtor's ex-husband has in the real property. The record is incomplete, and no party has raised the issue, so it would be premature to decide anything as a matter of law. For the parties' benefit, however, the Court would like to point out case law discussing the nature of the interest in property awarded in a divorce judgment: Farrow v. Farrow (*In re* Farrow), 116 B.R. 310 (Bankr. M.D. Ga.) (Laney, J.) (award of half of husband-debtor's military benefits was spouse's sole and separate property; alternatively, husband held the benefits in constructive trust for the wife); McGraw v. McGraw (*In re* McGraw), 176 B.R. 149 (Bankr. S.D. Ohio 1994) ("[W]hen a Debtor fails to turn over property divided under a domestic relations court order, that property may be subject to a constructive trust or equitable lien in favor of the spouse."); Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990) (ordered share of pension plan gave rise to a constructive trust relationship). These cases suggest that Alonzo Gregg's interest in the property might be such that the property would not be estate property if the transfers were avoided.

The Court would also like to point out that in general, unrecorded deeds are superior to all interests except those of bona fide purchasers for value. See, e.g., Ivey v. Transouth Fin. Corp. (*In re* Clifford), 566 F.2d 1023, 1026, 1027 (5th Cir. 1978) ("An unrecorded deed of bargain and sale is postponed only to later bona fide purchaser for value without notice. … It is clear … that Georgia law grants priority to an unrecorded security deed over a subsequent judgment lien."). Assuming solvency and lack of fraud, an unrecorded deed is superior to a subsequent judgment lien. See, e.g., Pharr v. Pharr, 206 Ga. 354, 360, 57 S.E. 2d 177, 181 (1950) ("A bona fide sale of property, not made to hinder, delay, or defraud creditors is not rendered invalid because of the vendor may have been insolvent at the time. A voluntary deed from a husband to his wife, executed and delivered in good faith and at a time when he was entirely solvent, passes title to the wife,

and the lien of a judgment subsequently obtained against the grantor did not attach to the property thereby conveyed, although such judgment was rendered before the deed was recorded."). Moreover, if an implied trust relationship arose between the debtor and defendant, the divorce judgment would not cut off the defendant's rights to the property. See, e.g., City Nat'l Bank of Miami v. Gen. Coffee Corp. (*In re* General Coffee Corp.), 828 F.2d 699, 707 (11th Cir. 1987) ("[A] constructive trust beneficiary prevails over all subsequent takers of the trust property except bona fide purchasers."). So it could be the case that the divorce judgment ordered a transfer of property that the debtor could not transfer.

The Court repeats that it is not concluding anything substantive about what property interests the various parties have. The Court is confronted with an incomplete record, numerous and complex legal issues, and no arguments from either side. The Court is merely raising potentially dispositive issues that neither party has raised and directing the parties to relevant case law.

VII. Conclusion

The Court will deny the trustee's Motion for Summary Judgment, and the Court will sustain in part and overrule in part the trustee's Evidentiary Objections and Motion to Strike. The Court will enter an order in accordance with this Memorandum Opinion.