

SO ORDERED,



Jason D. Woodard
Judge Jason D. Woodard
United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

In re:)	
)	
CARL JOSEPH MARASCALCO,)	Case No.: 19-13759-JDW
)	
Debtor.)	Chapter 7
<hr/>		
SUSAN DELOACH MARASCALCO,)	
INDIVIDUALLY, and AS EXECUTRIX)	
FOR THE ESTATE OF ELIZABETH)	
ANN DELOACH, as well as)	
REPRESENTATIVE OF DELOACH)	
REAL ESTATE, LLC)	
)	A.P. No.: 20-01005-JDW
Plaintiff,)	
)	
v.)	
)	
CARL JOSEPH MARASCALCO,)	
)	
Defendant)	

**MEMORANDUM OPINION AND ORDER DENYING MOTION FOR
SUMMARY JUDGMENT (A.P. DKT. # 12)**

This adversary proceeding is before the Court on the *Motion for Summary Judgment* (the “Motion”) (A.P. Dkt. # 12) filed by Susan Deloach Marascalco, individually, and as Executrix for the Estate of Elizabeth Ann Deloach, as well as representative of Deloach Real Estate, LLC (the “Plaintiff”) on April 7, 2020. The issue is whether ownership of a cabin in Philipp, Mississippi is held by Carl Joseph Marascalco (the “Debtor-Defendant”) or the Plaintiff. The Court has considered the evidence, briefs, and relevant law, and finds and concludes that there is a genuine issue of material fact as to whether the parties intended the cabin to remain permanently affixed to the Plaintiff’s real property or removeable by the Debtor-Defendant. Further development of the evidentiary record is necessary and, accordingly, the Motion (A.P. Dkt. # 12) is due to be denied.

I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 151, 157(a) and 1334, and the *United States District Court for the Northern District of Mississippi’s Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* dated August 6, 1984. This is a core proceeding as set forth in 28 U.S.C. § 157(b)(2)(A), (E), (G), and (O).

II. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹ The party seeking summary judgment bears the burden of demonstrating to the Court the absence of a genuine issue of material fact.² “As to materiality, the Supreme Court has [held] that ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.’”³ All reasonable doubt as to the existence of a material fact “must be resolved against the moving party,” here, the Plaintiff.⁴

III. FACTS⁵

In 2011, the Debtor-Defendant built a cabin on 800 acres owned by Deloach Real Estate, LLC.⁶ The cabin was constructed with the permission of

¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting former Fed. R. Civ. P. 56(c)); *see also* Fed. R. Civ. P. 56(c)(1). Federal Rule of Bankruptcy Procedure 7056 incorporates, without modification, Rule 56 of the Federal Rules of Civil Procedure.

² *Id.* at 323.

³ *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁴ *Kennett-Murray Corp. v. Bone*, 622 F.2d 887,892 (5th Cir. 1980) (quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980)).

⁵ To the extent any findings of fact are considered conclusions of law, they are adopted as such, and vice versa.

⁶ Deloach Real Estate, LLC was owned by Elizabeth Ann Deloach, who has since passed away. The Plaintiff is Elizabeth Ann Deloach’s daughter and appears before this Court in her individual capacity, as Executrix of Elizabeth Ann Deloach’s Estate, and as the Representative of Deloach Real Estate, LLC.

Elizabeth Ann Deloach, who was the owner of Deloach Real Estate, LLC and the Plaintiff's mother. The Debtor-Defendant and the Plaintiff were married for many years but divorced in 2016. The parties disagree on the remaining material facts.

The Plaintiff contends that the Debtor-Defendant “is not the legal owner of said cabin” (A.P. Dkt. # 1, ¶ 5). She further argues that “[t]here was no written or verbal agreement or lease, deed, contract or any other document. . . allowing [the Debtor-Defendant's] use of the. . . cabin.” *Id.* at ¶ 8. The Plaintiff admits that the Debtor-Defendant's use of the cabin post-divorce was “initially tolerated.” *Id.* at ¶ 9. However, Elizabeth Ann Deloach eventually requested, via letter, that he vacate the premises (A.P. Dkt. # 12, Ex. B). According to the Plaintiff, instead of vacating the cabin as requested, the Debtor-Defendant “mov[ed] the subject cabin from the property” without authorization (A.P. Dkt. # 1, ¶ 9). The Debtor-Defendant denies these allegations (A.P. Dkt. # 7, ¶¶ 5, 8, 9). He asserts in his *Response to Motion for Summary Judgment* (A.P. Dkt. # 18, p. 2) that “[t]he Plaintiff gave [him] permission to build the cabin on her land with the intent that the cabin be moveable by design, and thus remain the personal property of [the Debtor-Defendant].”

As shown below, intent matters here. Intent is generally difficult to discern at the summary judgment stage, but it is even more so here, where the

two people whose intent matters—Elizabeth Ann Deloach and the Debtor-Defendant—are silent. Elizabeth Ann Deloach has passed away and the Debtor-Defendant’s medical condition appears to have rendered him unable to testify (A.P. Dkt. # 7, p. 4). The Court is unable to make a factual determination at this stage of the adversary proceeding as to what these two individuals intended with respect to the cabin.

IV. CONCLUSIONS OF LAW

The State of Mississippi “long ago borrowed from England and accepted into [its] law the general rule that whatever is affixed to land becomes a part of the realty.”⁷ There are exceptions to the general rule, and “modifications of the rule have been made from time to time, from the pressure of peculiar circumstances.”⁸ A noteworthy exception is that “a building erected on the land of another by his consent or license does not become part of the realty, but remains the property of the person annexing it.”⁹ Moreover,

[W]here the landowner consents to the placing of a building on his land by another without an express agreement as to whether it shall become a part of the realty or remain personalty, an agreement will be implied that such building is to continue

⁷ *Simmons v. Bank of Mississippi*, 593 So. 2d 40, 42 (Miss. 1992) (citing *Stillman v. Hamer*, 8 Miss. 421, 422 (Miss. Err. & App. 1843) (“It is a maxim of the law of great antiquity, that whatever is fixed to the land is thereby made a part of the realty to which it adheres, becomes parcel of the freehold, and partakes of all its incidents and properties”).

⁸ *Terry v. Robins*, 13 Miss. 291, 294 (Miss. Err. & App. 1845).

⁹ *Connolly v. McLeod*, 52 So. 2d 473, 475–476 (Miss. 1951).

personal property, in the absence of any other facts or circumstances tending to show a different intention.¹⁰

When determining if property is a fixture or personal property, a court should consider “its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and other attending circumstances indicating the intention to make it a temporary attachment or a permanent accession to the realty.”¹¹ “Whether a fixture is considered real property or personal property depends primarily on the parties' intent.”¹²

Here, a genuine material dispute remains over the parties' intent at the time the cabin was constructed. Further inquiry is necessary.

V. CONCLUSION

This adversary proceeding will require a full trial to determine the intent of Elizabeth Ann DeLoach and the Debtor-Defendant at the time the cabin was constructed.¹³ Given that it appears witness testimony will likely come from sources other than those two individuals, the parties should be prepared to

¹⁰ *Id.* at 476.

¹¹ *Weathersby v. Sleeper*, 42 Miss. 732, 742 (Miss. Err. & App. 1869).

¹² § 55:3. Fixtures, 6 MS Prac. Encyclopedia MS Law § 55:3 (2d ed.) (citing *Lamar Corp. v. State Highway Com'n*, 684 So. 2d 601 (Miss. 1996)). *See e.g. Connolly*, 52 So. 2d 473 (citing *Workman v. Henrie*, 71 Utah 400, 266 P. 1033, 1035 (1928) (“[T]he intention of the person making the annexation [is generally] regarded the most important or controlling factor. . .”); *Weathersby*, 42 Miss. 732 (“[A]n article attached to the land may be a fixture or a chattel, according to the special agreement of the parties”).

¹³ *Kunin v. Feofanov*, 69 F.3d 59, 61 (5th Cir. 1995) (a court has discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed).

argue hearsay exceptions to allow that testimony. To further aid the parties in their trial preparation, the Court notes that any writings related to the cabin will likely be helpful in making the intent determination. Pictures of the cabin and the site will likewise be important. Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED that the Motion (A.P. Dkt. # 12) is **DENIED**.