

MIME-Version:1.0

From:cmecfdataquality@nmcourt.fed.us

To:cmecfdataquality@nmcourt.fed.us

Bcc: Jill_Peterson@nmcourt.fed.us, Mary_B_Anderson@nmcourt.fed.us, daviswf@nmbankruptcy.com, doloress@modrall.com, drv@modrall.com, jgarcia@nmbankruptcy.com

Message-Id:<808067@nmcourt.fed.us>

Subject:02-01244-s Order on Motion For Summary Judgment

Content-Type: text/html

*****NOTE TO PUBLIC ACCESS USERS*** You may view the filed documents once without charge. To avoid later charges, download a copy of each document during this first viewing.**

U.S. BANKRUPTCY COURT

New Mexico

Notice of Electronic Filing

The following transaction was received from jeb entered on 9/15/2006 at 9:31 AM MDT and filed on 9/15/2006

Case Name: HomeLoan.com,Inc. v. Loughborough et al

Case Number: [02-01244-s](#)

Document Number: [79](#)

Docket Text:

Memorandum Opinion and Order Denying Defendant's Motion For Summary Judgment (Related Doc # [63]) (jeb)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:j:\ace\x.pdf

Electronic document Stamp:

[STAMP bkecfStamp_ID=1021991579 [Date=9/15/2006] [FileNumber=808065-0]

[ba300739cc2428ec6bdfdc4c9b3ab37386f19d109d528665f49848ee46579158bb4

b81d9facb6af5222b7aa5ed23c6a039ee3221e713d00a7400776e8e1152]]

02-01244-s Notice will be electronically mailed to:

William F Davis daviswf@nmbankruptcy.com, jgarcia@nmbankruptcy.com

Douglas R Vadnais drv@modrall.com, doloress@modrall.com

02-01244-s Notice will not be electronically mailed to:

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

LORACA INTERNATIONAL, INC. and
LEXUS COMPANIES, INC., and
CALUMET SECURITIES, and
HOMELoAN.COM, INC.
Debtors.

No. 11-02-12925 SA

HOMELoAN.COM, INC.,
Plaintiff,

v.

Adv. No. 02-1244 S

WILLIAM LOUGHBOROUGH and
PHILIP R. DOEPFNER,
Defendants.

**MEMORANDUM OPINION AND ORDER DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendant's Motion for Summary Judgment (doc 63), Plaintiff's Response (doc 69) and Defendant's Reply (doc 73). For the reasons set forth below, the Court finds that the Motion is not well taken and should be denied.

JURISDICTIONAL ISSUE

The Court has, sua sponte, determined whether it has the jurisdiction to enter this Memorandum Opinion and Order in this non-core proceeding, as opposed to referring it to the United States District Court under Fed.R.Bankr.P. 9033¹. A denial of a summary judgment motion is not a final order. See, e.g., Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1250-51 (10th Cir. 1992) (Denial

¹All statutory and rule references are to the Bankruptcy Code and Rules as they existed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

of summary judgment is not appealable nor is it a judgment; it is merely a determination that genuine issues of material fact exist.) (Citations omitted.)

This is a non-core proceeding². 28 U.S.C. § 157(c) (1) provides:

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(Emphasis added.) Courts considering whether a bankruptcy court has jurisdiction to enter a non-final, interlocutory order in a non-core proceeding have uniformly ruled that they do. One-Eighty Investments, Ltd. V. First Int'l Bank of San Antonio, N.A. (In re One-Eighty Investments, Ltd.), 72 B.R. 35, 36 (N.D. Ill. 1987) ("Courts that have considered the precise issue of the scope of Section 157(c) (1) have concluded that only final orders need be entered in non-core proceedings by an Article III judge.") (Citation omitted.) See also, e.g., Castro v. Perez (In re Castro), 919 F.2d 107, 108 (9th Cir. 1990) (It is inappropriate

²In an earlier dispositive motion the Court issued Proposed Findings of Fact and Conclusions of Law pursuant to 28 U.S.C. 157(c) (1) and Fed.R.Bankr.P. 9033. One proposed conclusion was that this adversary proceeding is non-core. The United States District Court adopted those Findings and Conclusions. (doc 21).

to request district court review of non-final determinations.); Commerce Industry Ins. Co. V. E.I. Du Pont De Nemours & Co. (In re Malden Mills Indus., Inc.), 277 B.R. 449, 455 (Bankr. D. Mass. 2002) ("The jurisdictional line is clear: non-final orders [in non-core proceedings] are entered in this Court without report to the District Court; final orders may only be entered by the District Court.") The Court agrees with these cases, and finds that it does have jurisdiction to enter this non-final order in this non-core proceeding.

SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The movant must establish 1) the lack of a genuine

disputed material fact, and 2) entitlement to judgment as a matter of law. The Court must also draw all legitimate inferences in the nonmovant's favor, and must not weigh the evidence. Bell v. FDIC (In re Collins Securities Corp.), 145 B.R. 277, 282 (Bankr. E.D. Ark. 1992).

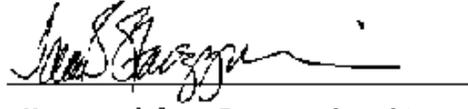
"Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248. All that is required to defeat a summary judgment motion is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the differing version of the truth. Id. at 249. In this case, the Court finds many facts are disputed by Plaintiffs, and the Court finds that, on this record, summary judgment should be denied.

DISPUTED FACTS

The Court's job in a summary judgment motion is not to weigh the evidence or judge the facts. Based upon Plaintiff's response to Defendant's Motion, the Court finds genuine disputes as to the following proposed undisputed facts: 3, 6, 10, 12, 17, 18, 20, 21, 22, 25, 27, 28, 30 and 40. The Court also finds that proposed undisputed facts 31 through 39 are legal conclusions that should be determined by the Court after hearing the evidence.

ORDER

IT IS ORDERED that Defendant's Motion for Summary Judgment is denied.

A handwritten signature in black ink, appearing to read 'James S. Starzynski', is written over a horizontal line.

Honorable James S. Starzynski
United States Bankruptcy Judge

copies to:

William F Davis
PO Box 6
Albuquerque, NM 87103-0006

Douglas R Vadnais
PO Box 2168
Albuquerque, NM 87103-2168

Philip R. Doepfner
600 One Lincoln Centre
5400 LBJ Freeway
Dallas, TX 75240