**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF VERMONT**

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**In re:**
**Lauren Jo Chase,**
**Debtor.**

**Chapter 13 Case**
**# 02-10582**

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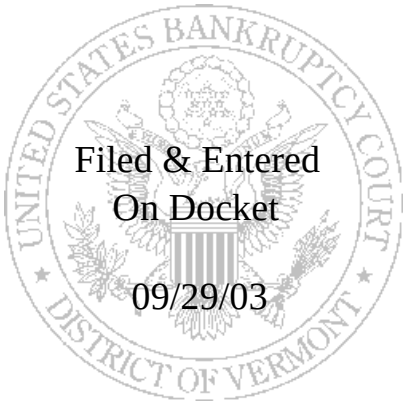
**Jan M. Sensenich,**
**Chapter 13 Trustee,**
**Plaintiff,**
**v.**
**Robert Molleur,**
**Defendant.**




**Adversary Proceeding**
**# 02-1054**

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*Appearances:*

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| *Jan Sensenich, Esq.* | *Gleb Glinka, Esq.* | *Oliver Twombley, Esq.* |
| *White River Junction, VT* | *Cabot, VT* | *Montpelier, VT* |
| Pro Se *Chapter 13 Trustee* | *Attorney for Debtor* | *Attorney for Defendant* |

## ORDER
### DENYING DEFENDANT'S MOTION TO DISMISS ADVERSARY PROCEEDING AND SETTING A TRIAL DATE ON THE MERITS OF TRUSTEE SENSENICH'S COMPLAINT

On February 21, 2003, Defendant Robert Molleur filed a motion to dismiss the instant adversary proceeding, including a memorandum of law. See doc #10. Plaintiff Chapter 13 Trustee has filed opposition to that motion, also supported by a memorandum of law. See doc #15. This Court has jurisdiction over the instant adversary proceeding pursuant to 28 U.S.C §§ 157 and 1334. For the reasons set forth below the Motion to Dismiss is denied, and the parties are directed to appear at the Federal Courthouse in Burlington, Vermont, on October 27, 2003, at 9:30 AM for a trial on the merits.

The facts are not in dispute. The Plaintiff has agreed that the Defendant's recitation of the facts is accurate. Therefore, the Court adopts the Defendant's recitation of the facts for purposes of deciding this Motion. Prior to the bankruptcy filing, the Defendant mortgagee: (1) held a valid first mortgage on the Debtor's real estate in Danville, Vermont; (2) had brought a strict foreclosure action in state court against Debtor's property; (3) had obtained a judgment; and (4) procedurally, was in the redemption period. One day before the expiration of the redemption period, the Debtor filed her chapter 13 bankruptcy petition. This Court confirmed the Debtor's plan which provided that the Debtor should pay the secured claim of the Defendant in the negotiated and discounted settlement amount of $105,000, within sixty days of the petition

filing date. The Order of Confirmation provided that the Defendant would be entitled to relief from stay to complete the foreclosure pending in state court in the event of nonpayment within the sixty day period. The Debtor did not pay the claim of the Defendant, and accordingly, this Court granted relief from stay. Thereafter, the matter proceeded to completion in the state court strict foreclosure proceeding. Subsequently, the Defendant obtained a Certificate of Non-Redemption from the state court and caused it to be recorded in the Danville land records.

Prior to the bankruptcy filing, and in anticipation of the Debtor obtaining bank financing to buy out the mortgage claim of the Defendant, the Debtor obtained an appraisal from Harold Dresser, which estimated the fair market value of the property at $207,000.00.[1] When the bank financing failed to materialize prior to the expiration of the state court foreclosure redemption period, the Debtor filed the instant proceeding in Bankruptcy Court. The Defendant has obtained an independent appraisal of the property from Kettinger Appraisal Service (licensed by the State of Vermont) which estimates the fair market value of the subject property at $135,000.

The Plaintiff initiated the instant adversary proceeding alleging that the state court foreclosure proceeding, which vested title in the Defendant by virtue of the Certificate of Non-Redemption, violates 9 V.S.A. § 2289 (a) and 11 U.S.C. § 548(a)(1) constituted a fraudulent transfer as against the creditors of the Debtor's bankruptcy estate to the extent the value of the property exceeded the debt owed to the Defendant.[2] The Defendant filed the instant Motion to Dismiss alleging that the Complaint fails to state a cause of action upon which relief can be granted.

The question of whether the Defendant is entitled to prevail on his motion is determined by reference to FED. R. BANKR. P. 7012(b)(6) (invoking FED. R. CIV. P. 12(b)(6)) which provides that the Motion shall be treated as one for summary judgment and disposed of in accordance with FED. R. CIV. P. 56. Therefore, the Court must accept the allegations of the Complaint as true and must view the allegations in the light most favorable to the Plaintiff. See Hishon v. King & Spaulding, 467 U.S. 69 (1984). Herein, counsel for the Defendant filed a letter specifically reciting that all parties agreed that they wished to have the Court decide the Motion based upon the filed memoranda of law. See doc. #11. Since this does not violate the spirit of Rule 12(b)(6), the Court will do so.

In the context of a Rule 12(b)(6) motion, the issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff has plead a cause of action sufficient to entitle it to offer evidence in support of its

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[1] The Town of Danville assessed the tax value of the property at $79,500.00.

[2] The Defendant and Debtor have stipulated the amount due as of the date of the Chapter 13 filing is $105,000.

claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The party making a motion to dismiss must meet a heavy burden because such a motion runs contrary to the strong institutional bias in American jurisprudence to have matters decided on their merits. See Baker v.Cuomo, 58 F.3d 814, 818 (2d Cir.1995). Moreover, in analyzing a plaintiff's allegations in order to make a Rule 12(b)(6) ruling, a court must read the complaint generously, see Leslie Fay Cos. v. Corp. Prop. Assocs. 3 (In re Leslie Fay), 166 B.R. 802, 807 (Bankr. S.D.N.Y. 1994), and draw all reasonable inferences in favor of the pleading party. See Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994), cert. denied, 513 U.S. 816 (1994).

Taking the above-recited facts as true, and construing them and the Complaint in the light most favorable to the Plaintiff, the Court finds that there is a cause of action raised by the Complaint. It should be initially noted that this raises a unique question of law not previously addressed either by the state courts of Vermont or this Court. Additionally, on the merits, the Canney[3] decision, upon which the Defendant relies for the premise that the Debtor is not entitled to reinstate the mortgage through a chapter 13 case, was clarified by the district court decision in Taylor v. Vermont Housing Finance Agency (In re Taylor), No.: 1:02-cv-214, slip op. (D. Vt. Dec. 3, 2002) (doc. #35 in Case #02-10695). In Taylor, the district court ruled that, indeed, a debtor may reinstate a mortgage through a chapter 13 plan as long as the debtor's equity of redemption has not expired. Moreover, the cases cited by the Trustee persuade the Court that there is a valid cause of action raised by the Complaint. Of particular probity is the case BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), where the United States Supreme Court held that a properly conducted, non-collusive foreclosure sale at auction could not be avoided by a Trustee under § 548(a), for the price brought at such a sale established the reasonable value of the property, but limited its holding to circumstances where there has been a duly conducted sale, excluding "other foreclosures and forced sales . . . " Id. at 537, n.3. Here, the Trustee Plaintiff has raised a colorable argument that when there has been no sale, such as in this case where a strict foreclosure occurred, the transfer may be for less than a reasonably equivalent value. Therefore, this foreclosure may be vulnerable to a claim under § 548(a) by the Trustee for the difference between the amount due the mortgagee and the fair market value of the collateral. See, e.g., In re Sherman, 223 B.R. 555 (B.A.P. 10th Cir. 1998) (permitting the debtor-in-possession to avoid a tax sale with no competitive bidding as a fraudulent transfer). Moreover, in the absence of cases decided under the Vermont foreclosure statute, there are cases decided under Connecticut's strict foreclosure law which may be relied upon as analogous. The Connecticut Bankruptcy Court has held that property transferred to the mortgagee in a properly conducted strict foreclosure was not immune from avoidance as a fraudulent transfer because strict foreclosure does not involve a public sale. See In re Fitzgerald, 237 B.R. 252, 265-66 (Bankr. D. Conn. 1999).

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[3] Canney v. Merchants Bank, 284 F.3d 362 (2d Cir. 2002).

Thus, the Court finds that the Plaintiff has plead sufficient allegations to defeat the Motion to Dismiss; the Plaintiff is entitled to a trial on the merits and, in particular, on the question of the value of the subject property. Therefore,

IT IS HEREBY ORDERED that Defendant Robert Molleur's Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED THAT the parties are to appear on **October 27, 2003, at 9:30 AM at the United States Bankruptcy Court in the Federal Building in Burlington, Vermont**, to proceed with a trial on the merits.[4]

IT IS FURTHER ORDERED THAT the parties shall file a Joint Pre-Trial Statement by 4:00 PM on October 20, 2003, which shall include a list of all witnesses to be called and all exhibits they seek to admit into evidence, and identify the issues to be addressed and any evidentiary disputes anticipated.

**SO ORDERED**.

September 29, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge

[4] The Court has set aside three hours for this matter; counsel should appear at 9:00 am to mark exhibits and finalize stipulations as to the exhibits.