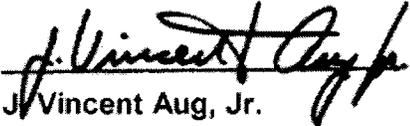


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: March 26, 2009


J. Vincent Aug, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Booker T. Betts
Linda M. Betts

Debtors

Case No. 08-11001

Chapter 13

Judge Aug

Margaret A. Burks, Trustee

Plaintiff

Adversary Case No. 08-1139

v.

Deutsche Bank National Trust Company, as
trustee for Long Beach Mortgage Loan Trust
2005-WL3

Defendant

**ORDER PARTIALLY GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGEMENT**

This matter is before the Court on the Plaintiff's Motion for Summary Judgment (Doc. 12) and Defendant's Memorandum Contra (Doc. 14).

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and the general order of reference entered in this district. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(F), (K) and (O).

The issues before the Court are whether the notary acknowledgment clause renders the mortgage defective under Ohio law allowing the trustee to avoid the mortgage under 11 U.S.C. §544 and whether the trustee can avoid the mortgage as a preference under 11 U.S.C. §547(b) because of the timing of the attachment of *lis pendens*. For the reasons set forth below, we find that the mortgage is defective under Ohio law. The mortgage is not avoidable by the trustee under 11 U.S.C. §544, but may be avoided as a preference under 11 U.S.C. §547.

Summary judgment is appropriate when the pleadings, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Bankruptcy Rule 7056.

The material facts are not in dispute. A mortgage was granted to Long Beach Mortgage Company on July 22, 2005 on the Debtors' property at 3811 W. Liberty Street, Cincinnati, Ohio to secure payment of \$43,200.00. The mortgage's notary acknowledgment clause fails to identify the parties who executed the mortgage before the notary. On January 25, 2008, Defendant filed a complaint in foreclosure in Hamilton County Court of Common Pleas, Case No. A08-00857, on this property. The Debtors filed Chapter 13 bankruptcy on March 3, 2008. *Lis pendens* in the foreclosure attached during the 90 days prior to the Debtors' bankruptcy filing. Plaintiff Trustee has filed this adversary asking that the mortgage be avoided as a preferential transfer because the mortgage was not properly executed under Ohio law.

For a mortgage to be properly executed, Ohio Revised Code §5301.01 requires a mortgage to be signed by the mortgagor which signing ". . . shall be acknowledged by the grantor . . . before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgment." A mortgage will also be valid if there

is substantial compliance with Ohio Revised Code §5301.01. *Mid-American Nat. Bank & Trust Co. v. Gymnastics International, Inc.*, 451 N.E.2d 1243 (Ohio Ct. App. 1982).

Ohio Revised Code §147.53 specifies that the person taking an acknowledgment “shall certify that: (A) The person acknowledging appeared before him and acknowledged he executed the instrument; [and] (B) The person acknowledging was known to the person taking the acknowledgment, or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.”

The notary acknowledgment clause in this case fails to identify the names of those appearing before the notary, therefore failing to certify the acknowledgment as required in Ohio. The acknowledgment clause does not meet the requirements of Ohio Revised Code §147.53 and the complete omission of the Debtors’ names from the notary acknowledgment clause causes the mortgage to not be in substantial compliance with Ohio Revised Code §5301.01. *See In re Leahy*, 376 B.R. 826 (Bankr. S.D. Ohio 2007)(stipulation by debtor that mortgage was signed in the presence of a notary did not alter the fact that the mortgage did not substantially comply with Ohio Revised Code §5301.01 because the notary acknowledgment clause omitted debtor’s name); *Smith’s Lessee v. Hunt*, 13 Ohio 260 (1844)(Supreme Court of Ohio held mortgage was defective where notary acknowledgment clause was blank as to sole grantor’s name); *In re Wheeler*, 2006 WL 1645214 (S.D. Ohio 2006)(omission of wife’s name from notary acknowledgment clause rendered mortgage defective as to wife’s interest).

The Defendant argues that although the Debtors’ names do not appear in the mortgage acknowledgment clause, the mortgage is in substantial compliance with Ohio law which should render the mortgage valid. The Court has found no caselaw which suggests that a mortgage can be rendered valid when the notary acknowledgment clause is blank. In fact, the caselaw leads this Court to only one conclusion - the blank notary acknowledgment clause renders the mortgage defective.

A bankruptcy trustee is considered a bona fide purchaser of the Debtors’ real estate and can avoid certain obligations on the property that are avoidable under state law pursuant to 11 U.S.C. §544. *In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006). Ohio law governs the question of whether Plaintiff has a perfected security interest that is superior to the trustee’s interest. *Id.* The blank notary acknowledgment clause in this case renders the mortgage defective, and therefore avoidable by the trustee under 11 U.S.C. §544(a). Under Ohio law, a bona fide purchaser may avoid an improperly executed mortgage only if he does not have actual or constructive notice of the transaction. *In re Zaptocky*, 250 D.3d 1020, 1026 (6th Cir. 2001). *Lis pendens*, however, codified at Ohio Revised Code §2703.26, “operates to provide constructive notice of the pendency of a suit concerning specifically described property and with it the knowledge, albeit deemed or imputed, of all claims against the property that might reasonably be discerned from an investigation into the circumstances of the litigation.” *In re Periandri*, 266 B.R. 651 (B.A.P. 6th Cir. 2001). Since *lis pendens* attached prior to the filing of the Debtors’ bankruptcy, Plaintiff is charged with constructive notice and loses her bona fide purchaser status in this case. She would not be able to pursue an avoidance action under 11 U.S.C. §544(a). *See In re Frost*, 384 B.R. 781 (Bankr. S.D. Ohio 2008).

The trustee, however, has brought this action to avoid this mortgage as a preference under 11 U.S.C. §547(b), which allows the trustee to avoid any transfer of interest of the debtor in property subject to five conditions. The first issue to be resolved is whether the defective mortgage in this case is a transfer of real estate that could be avoided as a preference, and, if so, when the transfer occurred. For purposes of 11 U.S.C. §547, a transfer is made at the time of perfection if the transfer is perfected more than 30 days after its creation. 11 U.S.C. §547(e)(2)(B); *In re Gruseck & Son, Inc.* 385 B.R. 799, 2008 WL 1756243 at 8 (B.A.P. 6th Cir. 2008). In addition, “a transfer of real property...is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee”. 11 U.S.C. §547(e)(1)(A).

The mortgage in this case is defective due to the blank notary acknowledgment clause. At the time the defective mortgage was recorded, a lien was not established that would have defeated a bona fide purchaser. *See In re Nolan*, 383 B.R. 391 (B.A.P. 6th Cir. 2008)(notary acknowledgment was defective and prevented recorded mortgage from providing constructive notice of mortgagee’s lien); *In re Collins*, 292 B.R. 842, 846 (Bankr. S.D. Ohio 2003)(mortgage must be properly executed for the recording to be effective.); *In re Land*, 289 B.R. 71, 74 (Bankr. N.D. Ohio 2003)(“[w]ithout proper execution, a mortgage’s recording is ineffective and the mortgage is ‘fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such ... instrument.’”). Once *lis pendens* attached during the foreclosure, sufficient notice finally existed to defeat a bona fide purchaser. As such, for purposes of a preference action under 11 U.S.C. §547(b) and pursuant to 11 U.S.C. §547(e)(1)(A), the mortgage was perfected when *lis pendens* attached. Since perfection of the mortgage occurred when *lis pendens* attached, well after the 30 days after the creation of the mortgage contract, the transfer was made at this time under 11 U.S.C. §547(e)(2)(B) and this transfer would be subject to avoidance. *See, e.g. In re Gruseck & Son, Inc.*, 385 B.R. 799, 2008 WL 1753243 (B.A.P. 6th Cir. 2008).

Defendant argues the Plaintiff should not be able to defeat the longstanding and established law of Ohio regarding *lis pendens* in order to avoid this mortgage as a preference under 11 U.S.C. §547. The policy behind *lis pendens* in Ohio is to maintain the status quo concerning rights to property during the pendency of litigation. *Cook v. Mozer*, 108 Ohio St. 30 (1923). *Lis pendens* is based on public policy and “[w]ithout it, every judgment and decree for specific property might be rendered abortive by successive alienations.” *In re Periandri*, 266 B.R. at 656 citing *Meek v. Clebaugh*, 16 Ohio App. 367, 1922 WL 1722 at 1 (Ohio Ct. App. 1922). The preference statute provides the power to avoid transactions in order to achieve two related bankruptcy goals: 1. the orderly distribution of assets and 2. the equality of distribution for similarly situated creditors. 4 Norton Bankr. L. & Prac. §66:1 (3d ed. 2009). The goals of each policy are not necessarily at odds. However, the Bankruptcy Code clearly defines the meaning and timing of perfection as it relates to avoidance of preferential transfers. The Court is not disregarding the doctrine of *lis pendens* as Defendant states. On the contrary, we must look to state law to determine who qualifies as a bona fide purchaser under the preference statute. *See* 11 USC §547(e)(1)(A).

The question is now whether the Plaintiff has shown that she is entitled to avoid this transfer as a preference as a matter of law. Plaintiff has the burden of proving avoidability of a transfer under 11 U.S.C. §547(b). 11 U.S.C. §547(g). To qualify as an avoidable preference, a transfer must “(1) benefit a creditor; (2) be on account of antecedent debt; (3) be made while the debtor was insolvent; (4) be made within 90 days before bankruptcy; and (5) enable the creditor to receive a larger share of the estate than if the transfer had not been made.” *In re Carled, Inc.*, 91 F.3d 811, 813 (6th Cir. 2006), *citing Union Bank v. Wolos*, 502 U.S. 151, 155 (1991).

The transfer of the mortgage in this case did benefit the Defendant because when the transfer occurred, the Defendant could then defeat a bona fide purchaser under Ohio law. The transfer was on account of an antecedent debt because the underlying debt was owed by the Debtors before the transfer was made. The Debtors are presumed to have been insolvent during the 90 days preceding the filing of the petition, which the Defendant has not rebutted. 11 U.S.C. §547(f). As explained above, the transfer was made within 90 days prior to the bankruptcy filing. The last condition that Plaintiff must satisfy is whether the transfer enabled to creditor to receive more than it would have had the transfer not been made.

Plaintiff purports that Defendant would receive more than if the transfer had not been made because the transfer would prefer Defendant over other unsecured creditors. Plaintiff has not provided any further evidence or law to show that she would be entitled to judgment as a matter of law on this issue.

As there is a genuine issue of material fact as to whether this transfer would allow the Defendant to receive more than it would have if the transfer had not been made pursuant to 11 U.S.C. §547(b)(5), this matter will be set for further hearing on this issue.

IT IS SO ORDERED.

Copy to:
Francis DiCesare, Esq.
Maria Mariano Guthrie, Esq.
U.S. Trustee