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IT IS SO ORDERED.



Jeffery P. Hopkins
Jeffery P. Hopkins
United States Bankruptcy Judge

Dated: May 26, 2011

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re

BOBBY J. THOMPSON

Debtor

Case No. 09-10876
Chapter 7
Judge Hopkins

RICHARD D. NELSON, TRUSTEE

Plaintiff

Adversary Case No. 10-1183

vs.

**U.S. BANK NATIONAL
ASSOCIATION, ET AL.**

Defendants

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Before the Court is a summary judgment motion ("Motion") (Doc. 12) filed by the Plaintiff, chapter 7 trustee Richard D. Nelson ("Trustee"), and the briefs related to the Motion. See Docs. 12, 14, 15, 16 & 17.

The Trustee wants to liquidate the Debtor's interest in certain real property. One of the Defendants, U.S. Bank National Association ("USB"), claims to hold a lien on the property that is superior to the rights of the Trustee. This action seeks to resolve the dispute.

The property is jointly owned by the Debtor and Samantha Tino.¹ USB's mortgage does not include the Debtor as a grantor, nor did the Debtor sign the mortgage.² USB filed a prepetition foreclosure action against the Debtor and Ms. Tino.³ Lis pendens attached on June 13, 2008.⁴ On December 18, 2008, USB obtained a decree of foreclosure.⁵ The decree also reformed the mortgage to include the Debtor.⁶ The Debtor filed a chapter 7 petition on February 23, 2009.⁷

The parties have spilled much ink over the issue of whether the Trustee's complaint (Doc. 1) seeks relief under 11 U.S.C. § 544(a)(3) or declaratory judgment that the property is unencumbered. Currently, the Trustee cannot prevail under either theory. At present, the Debtor's interest is not unencumbered due to the reformation of the mortgage. Neither can the trustee avoid the lien under § 544(a)(3). See *Strang v. Beach*, 11 Ohio St. 283, 287 (1860) (purchaser with notice of reformed mortgage is bound by same).

The Trustee suggests that the reformation of the mortgage is a transfer that may be avoided under 11 U.S.C. § 547(b) "if necessary." See Doc. 15 at 4.⁸ But this issue is not currently before the Court because the complaint does not assert a claim under § 547(b).

Accordingly, the Motion is **DENIED**. The Trustee shall have until **July 15, 2011**, to file an amended complaint.⁹ USB shall file an answer to the amended complaint no later

¹ Doc. 12 at Ex. A.

² Doc. 12 at Ex. B; Doc. 14 at Ex. 1.

³ Doc. 14 at Ex. 1.

⁴ Doc. 14 at Ex. 2.

⁵ Doc. 14 at Ex. 2.

⁶ Doc. 14 at Ex. 2.

⁷ Case No. 09-10876 at Doc. 1.

⁸ In a subsequent brief, the Trustee states that he "is contemplating its necessity." See Doc. 17 at 4.

⁹ The new scheduling dates set forth in this paragraph were established at the May (continued...)

than **August 19, 2011**. The deadline for filing summary judgment motions is extended to **September 30, 2011**. The trial date is rescheduled for **January 4, 2012, at 10:00 a.m.**

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⁹(...continued)
26, 2011 status conference held in lieu of the original trial date. See Doc. 21.