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IT IS SO ORDERED.



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

Dated: March 21, 2012

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re	:	
	:	
<b>BOBBY J. THOMPSON</b>	:	Case No. 09-10876
	:	Chapter 7
Debtor	:	Judge Hopkins
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<b>RICHARD D. NELSON, TRUSTEE</b>	:	
	:	Adversary Case No. 10-1183
Plaintiff	:	
	:	
vs.	:	
	:	
<b>U.S. BANK NATIONAL ASSOCIATION, ET AL.</b>	:	
	:	
Defendants	:	
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**MEMORANDUM OF DECISION ON ORDER  
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This is an action to avoid an alleged preferential transfer pursuant to 11 U.S.C. § 547(b), filed by the chapter 7 trustee Richard D. Nelson ("Trustee"). The parties filed cross-

motions for judgment on the pleadings, which the Court converted to cross-motions for summary judgment. See Docs. 33, 36 & 43. The cross-motions are now ripe for decision.

### FACTS

The Debtor owns an interest in real property located at 2689 Leslie Lee Court, Hamilton, Ohio ("Property"). The Property is jointly owned by the Debtor and Samantha Tino, who is not a debtor in this case. The Defendant, U.S. Bank, N.A. ("USB"), holds a June 7, 2006 mortgage that encumbers Ms. Tino's interest. The Debtor did not sign USB's mortgage and is not named as a grantor therein.

USB filed a foreclosure action in state court. Lis pendens attached on June 13, 2008. On December 13, 2008, the state court entered a foreclosure decree. Among other things, the decree reformed USB's mortgage to include the Debtor as a grantor, encumbering his interest in the Property.

The Debtor filed a chapter 7 petition on February 23, 2009.

### ISSUE

The issue presented is whether the encumbrance of the Debtor's interest in the Property, pursuant to the reformation of USB's mortgage, constitutes a preferential transfer that is subject to avoidance by the Trustee.

### ANALYSIS

A transfer of a debtor's property interest to a creditor within the ninety days preceding bankruptcy may be subject to avoidance if the transfer resulted in preferential treatment of the creditor. See 11 U.S.C. § 547(b).

USB argues that the reformation of the mortgage did not result in a "transfer" for purposes of § 547(b). The Court disagrees. However, the transfer is not subject to avoidance because it occurred outside of the ninety-day preference period.

#### 1. Transfer

The encumbrance of the Debtor's interest in the Property, by the foreclosure decree's reformation of USB's mortgage, constitutes a "transfer" under § 547(b). See *Olsen v. J.P. Morgan Chase Bank, N.A. (In re Woods)*, Adv. No. 09-2080, 2011 WL 281032, at \*2 (Bankr. W.D. Mo. Jan. 25, 2011)(reformation of deed of trust by foreclosure judgment constitutes a transfer under § 547(b)).

## 2. Time of Transfer

Under Ohio law, the reformation of the mortgage relates back to the execution date of the mortgage, except with respect to a bona fide purchaser. See *Hitesman v. Donnel*, 40 Ohio St. 287 (1883); see also 13A Ohio Jur. 3d Cancellation and Reformation of Instruments § 87 (2012); 69 Ohio Jur. 3d Mortgages and Deeds of Trust § 192 (2012). However, for purposes of § 547(b), the timing of a "transfer" is governed by 11 U.S.C. § 547(e)(2), which provides in relevant part:

For purposes of this section . . . a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time[; or]

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days[.]

The transfer of an interest in real property is perfected "when a bona fide purchaser of such property . . . cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A).

### A. Date of Perfection

In the foreclosure proceeding, lis pendens attached on June 13, 2008. Lis pendens cuts off the rights of a bona fide purchaser. *Beneficial Ohio, Inc. v. Ellis*, 121 Ohio St. 3d 89, 91 (2009). Therefore, the attachment of lis pendens perfected the transfer of the mortgage from the Debtor to USB on June 13, 2008.

### B. Date Transfer "Takes Effect Between The Transferor and the Transferee"

There is no record of an intervening bona fide purchaser between the June 7, 2006 execution of the mortgage and the June 13, 2008 perfection. Consequently, the reformation of the mortgage took "effect between the transferor and the transferee," in the words of § 547(e)(2)(A), on the June 7, 2006 execution date. See *Hitesman*, 40 Ohio St. 287.

### C. Date of Transfer Under § 547(b)

Because perfection occurred more than 30 days after the transfer took effect between the Debtor and USB, the transfer is deemed to have occurred on June 13, 2008, for purposes of § 547(b). See § 547(e)(2)(B).

D. Transfer Outside of Ninety-Day Preference Period

The Debtor filed his chapter 7 petition on February 23, 2009. Therefore, the transfer of his interest in the Property, on June 13, 2008, occurred more than ninety days prior to the petition date.

CONCLUSION

For the foregoing reasons, the Defendant's summary judgment motion (Doc. 33) will be **GRANTED**, the Plaintiff's summary judgment motion (Doc. 36) will be **DENIED**, and the Plaintiff's amended complaint (Doc. 28) will be **DISMISSED**.<sup>1</sup> An order to this effect will be entered.

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<sup>1</sup> The amended complaint also seeks: (1) a declaratory judgment that the Property is unencumbered; or alternatively (2) avoidance of the mortgage under 11 U.S.C. § 544(a)(3). These actions were raised in the original complaint and rejected by the Court's previous Order Denying Motion For Summary Judgment (Doc. 22).