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.

Guy R. Humphrey
United States Bankruptcy Judge

Dated: July 12, 2012

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: DANIELLE P. HARGROVE, *Debtor*	Case No. 12-30511 Adv. No. 12-3159
DANIELLE P. HARGROVE, *Plaintiff* v. WACHOVIA MORTGAGE CORPORATION ET AL., *Defendants*	Judge Humphrey Chapter 7

Memorandum Order Denying Plaintiff's
Motion for Default Judgment and Ordering Other Matters

Danielle P. Hargrove (the "Plaintiff") commenced this adversary proceeding by filing her **Complaint to Cancel the Invalid and Defective Mortgage Lien of Wachovia Mortgage Corporation and Wells Fargo, NA** (the "Complaint") on May 30, 2012 (doc. 1). The

Defendants failed to answer and on July 9, 2012 the Plaintiff moved for default judgment (doc. 6).

At the time she filed her Chapter 7 petition on February 8, 2012, the Plaintiff was the owner in fee of certain real property (the "Property") which she used as her residence. The Property has a fair market value of $203,150 according to the county auditor's website. Schedule D lists Bank of America as holding a mortgage on the Property with a balance of $157,202. It also lists a second mortgage held by Wells Fargo Home Mortgage, Inc., on which $40,907 is owed. Neither debt was scheduled as disputed. The Plaintiff apparently discovered prior to commencing this adversary proceeding that the second mortgagee is actually Wachovia Mortgage Corporation ("Wachovia"). The Plaintiff claimed a homestead exemption in the amount of $21,625.

The Plaintiff filed a Statement of Intention which indicated her desire to retain the Property and to reaffirm both mortgage obligations. The docket for the underlying bankruptcy case, however, does not reflect the filing of a reaffirmation agreement with respect to either mortgage. The Plaintiff received her Chapter 7 discharge on June 6, 2012 and is no longer personally liable for the two mortgage obligations.

On May 22, 2012 the Chapter 7 trustee filed a Report of No Distribution which certified that the estate had been fully administered. Because the Property was duly scheduled, it will be abandoned to the Plaintiff upon the closing of the underlying bankruptcy case unless otherwise ordered by the court. *See* 11 U.S.C. § 554(c). The bankruptcy case remains open due to the pendency of this adversary proceeding.

The Complaint seeks the cancellation of Wachovia's mortgage, the discharge of the Property from such mortgage, and an order directing the Defendants to take whatever action is needed to effect the cancellation of the mortgage. Absent from the Complaint, however, is the statutory or other legal basis for the relief demanded by the Plaintiff. Nevertheless, it is clear that the Plaintiff is asserting that the mortgage is defective because the acknowledgement clause contained within the mortgage does not satisfy the requirements for a valid acknowledgement under Ohio law.

The court notes at the outset that the Plaintiff cannot avoid the Wachovia mortgage under 11 U.S.C. § 522(f)(1)(A) as impairing her homestead exemption because the mortgage is not a "judicial lien." *See In re Rice*, 126 B.R. 189, 192 (Bankr. E.D. Pa. 1991). There are, however, at least three scenarios under which a mortgage lien might be avoided.

Under 11 U.S.C. § 522(h), a debtor may avoid a transfer of property, including a lien, to the extent that the debtor could have exempted such property under § 522(g)(1) in the event that the trustee had avoided such transfer if (1) the transfer is avoidable under § 544 or certain other sections of the Bankruptcy Code and (2) the trustee does not attempt to avoid the transfer. Section 522(g)(1), however, limits this avoidance power to involuntary transfers. Because the Plaintiff voluntarily executed the mortgage in favor of Wachovia, she

cannot utilize §522(h). *See Dickson v. Countrywide Home Loans (In re Dickson)*, 655 F.3d 585, 592 (6th Cir. 2011).

A debtor who is attempting to reorganize his or her debts may also be entitled under § 506(d) to "strip off" a junior mortgage when the senior mortgage exceeds the fair market value of the real property. There are two reasons why such a "strip off" is not available in this case. First, the Bank of America mortgage ($157,202) does not exceed the fair market value ($203,150) of the Property. Thus, the Wachovia mortgage is not wholly unsecured. Second, the Plaintiff proceeded under Chapter 7 of the Bankruptcy Code, and § 506 does not permit the "stripping off" of liens in a Chapter 7 case. *See Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555, 558-62 (6th Cir. 2003) (the prohibition of "strip downs" in Chapter 7 cases announced in *Dewsnup v. Timm*, 502 U.S. 410 (1992) applies equally to "strip offs").

Finally, a trustee may avoid a mortgage using his power under 11 U.S.C. § 544(a)(3) as a hypothetical bona fide purchaser of real property. *See Geygan v. World Savings Bank, FSB (In re Nolan),* 383 B.R. 391 (B.A.P. 6th Cir. 2008). The Plaintiff, of course, is not a trustee and as a Chapter 7 debtor would have no direct standing to bring an avoidance action under § 544(a)(3) unless the lien was involuntary which it was not. *See Smith v. Bank of New York,* 366 B.R. 149, 153 (Bankr. D. Colo. 2007). *See also Dickson* (chapter 13 debtor would have direct standing to seek avoidance of lien only if transfer was involuntary). The Court of Appeals for the Sixth Circuit has recognized the authority of a bankruptcy court to grant a creditor in a Chapter 7 case derivative standing to pursue an avoidance action. *See Hyundai Translead, Inc., v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.),* 555 F.3d 231, 240 (6th Cir. 2009). Similarly, the Bankruptcy Appellate Panel has recognized that a Chapter 13 debtor may be accorded derivative standing to bring an avoidance action under § 544. *See U.S. Bank N.A. v. Barbee (In re Barbee),* 461 B.R. 711, 715 (B.A.P. 6th Cir. 2011). A prerequisite for derivative standing, however, is that the creditor or debtor request the trustee to pursue the avoidance action and only if the trustee refuses may the creditor or debtor seek from the court the authority to proceed. In this case, there is no indication that the Plaintiff asserts derivative standing or that she first requested the trustee to bring the avoidance action. Moreover, there would be no reason for her to do so because any recovery by a trustee under § 544 would be for the benefit of the estate and not the debtor. S*ee* 11 U.S.C. § 550.

Under Ohio law, "[a] defectively executed conveyance of an interest in land is valid as between the parties thereto, in the absence of fraud." *Citizens Nat'l Bank v. Dennison,* 133 N.E.2d 329, 332 (Ohio 1956). The Complaint does not contain any allegations of fraud. Accordingly, the mortgage in question is valid as between the Plaintiff and Wachovia. While the acknowledgement clause in the Wachovia mortgage may not have substantially complied with the requirements for a valid acknowledgement under Ohio law, *see Nolan,* 383 B.R. at 395-96, without derivative standing, the Plaintiff cannot succeed in her avoidance action. *See Phelan v. Fleet Consumer Discount Co. (In re Rice),* 133 B.R. 722, 728 (Bankr. E.D. Pa. 1991).

Turning to the Plaintiff's motion, the court observes that default by a defendant does not automatically entitle a plaintiff to a default judgment. *See Columbiana County School Employees Credit Union, Inc. v. Cook (In re Cook),* 342 B.R. 384 (table), 2006 WL 908600 at *3 (B.A.P. 6th Cir. Apr. 3, 2006). Rather, the bankruptcy court must determine "whether the unchallenged facts constitute a legitimate cause of action." *Id.* (internal citations and quotation marks omitted). Because the facts alleged in the Complaint do not appear to state a valid avoidance claim, **the court denies the Plaintiff's motion for default judgment (doc. 6). It is further ordered that the Plaintiff may file a written brief within 30 days of the entry of this order addressing why this adversary proceeding should not be dismissed for failure to state a claim upon which relief can be granted. In the absence of such a filing, the court will dismiss this case without further notice or hearing, by separate order.**

IT IS SO ORDERED.

Copies to:

David M. Hollingsworth, PO Box 52, Enon, Ohio 45323 (Counsel for the Plaintiff)

Wachovia Mortgage Corporation c/o Prentiss-Hall Corporation System, 50 W. Broad Street, Suite 1800, Columbus, Ohio 43215

Wells Fargo Bank c/o CSC Lawyers Incorporating Service, 50 W. Broad Street, Suite 1800, Columbus, Ohio 43215

###