THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 97-51678
	)	
VERIA LEE HODO,	)	CHAPTER 7
Debtor.	)	
	)	Adversary No. 98-5035
KATHRYN A. BELFANCE,	)	
TRUSTEE,	)	JUDGE MARILYN SHEA-STONUM
Plaintiff	)	
	)	ORDER DETERMINING
v.	)	INVALIDITY OF LIEN
	)	
BANK ONE, et al.,	)	
Defendants	)	

This matter is before the Court on the Amended Complaint to Sell and For Determination and Validity of Liens filed by Kathryn A. Belfance, Trustee (the "Trustee") and the Answer and Cross-Claim filed by Bank One (the "Bank"). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

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I. FACTS

A. The Bank's Alleged Lien

On June 16, 1997, Veria Lee Hodo (the "Debtor") filed for relief under chapter 7. On the filing date, the Debtor held a half-interest in real property located at 726 Seward Avenue, Akron, Ohio (the "Property"). Her ex-husband, John Earl Hodo, allegedly holds the other half-interest in the Property.

In her Schedules, the Debtor stated that the Bank has a claim in the amount of $26,800, which is fully secured by a second mortgage against the Property. Schedule D to the Debtor's Schedules of Assets and Liabilities. On August 28, 1997, the Bank filed a proof of claim asserting that the Bank holds a secured claim in the amount of $27,868.82 plus 12.5% interest. Despite the representations made in the Debtor's Schedules and the Bank's proof of claim, the Bank has failed to produce the promissory note or a copy of the promissory note signed by the Debtor in favor of the Bank. As a result, the Trustee contends that the Bank does not have a valid lien against the Property. In an adversary proceeding, the Trustee has sought the Court's determination as to the validity of the Bank's lien.[1]

B. The Testimony and Evidence Produced at the Trial

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[1] On April 6, 1998, the Trustee served a notice of the proposed sale of the Property for the sum of $50,000 free and clear of all liens and encumbrances. On May 27, 1998, the Court authorized the sale of the Debtor's interest in the Property. The Order authorizing the sale of the Property provided that "[a]ll third party interests or liens of any kind shall transfer to the proceeds resulting from the sale, and . . . a final determination as to the validity, priority and amount of said liens or third party interests shall be determined by the Court upon notice and hearing to all parties."

At the trial on the Trustee's Amended Complaint, the Debtor and the Debtor's ex-husband testified that they do not recall whether or not they signed a promissory note payable to the Bank. Irma Peterson, a branch manager of Bank One, testified that she was present when the Debtor and her ex-husband executed the relevant loan documents. However, Ms. Peterson did not recall the event with any specificity and did not testify as to the terms of the Note.

The Bank has not produced an executed copy of a security agreement relating to the alleged Note. The Open-End Mortgage which the Bank submitted does not provide the terms of the Note, but merely states that the "maximum amount of loan indebtedness, exclusive of interest thereon, . . . which is secured hereby shall not at any time exceed $25,000.00." [Exhibit A]. The account statement, entitled "Customer History," which the Bank produced at trial does not state the terms of the Note and contains extensive insurance premium charges for which the Bank provided no supporting documentation. [Exhibit C].

II LAW

A. The Applicable Sections of the Bankruptcy Code

Section 506(d) of the Bankruptcy Code provides in pertinent part that "to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . ." 11 U.S.C. § 506(d).

Section 502 of the Bankruptcy Code governs the determination of the allowance of claims. The section provides in pertinent part:

(a) A claim or interest, proof of which is filed under section 501 of this

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> title, is deemed allowed, unless a party in interest . . . objects.[2]
>
> (b) . . . [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that -
>
> > (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

11 U.S.C. § 502(d).

In In re Nelson, 206 B.R. 869 (Bankr. N. D. Ohio 1997), this Court explained that:

> The proof of claim is considered *prima facie* evidence of the validity and the amount of the claim. Bankruptcy Rule 3001(f). . . . [T]he objector bears the initial burden of presenting evidence sufficient to overcome the presumption of validity given to the proof of claim. Once sufficient evidence is presented to overcome the presumption, the burden shifts to the claimant to prove the validity and amount of the claim by a preponderance of the evidence. Collier on Bankruptcy ¶ 502.02[2][f].

The Trustee did not file a document specifically designated as an objection to the Bank's claim under 11 U.S.C. § 502. The Trustee filed, instead, an action to determine the validity of the Bank's lien. However, a "'complaint to determine the extent or validity of the claim or the lien securing it . . . is a form of request for disallowance of the claim'" as contemplated by 11 U.S.C. § 506(d)(1). Smiley v. Associates Financial Services, 26 B.R. 680, 683 n. 7 (Bankr. D. Kan. 1982), *quoting* 3 Collier on Bankruptcy ¶ 506.07 at 506.12 (15th ed. 1980). See also In re Shumate, 42 B.R. 462, 466 (Bankr. Tenn. 1984).

Nelson, 206 B.R. at 878. The admitted absence of a promissory note executed by the Debtor in favor of the Bank overcomes the *prima facie* validity of the Bank's secured claim. Therefore, the Bank now has the burden of proving the validity of the secured claim asserted in its proof of claim.

B. The Applicable State Law

The Court must apply state law in determining whether the Bank holds an enforceable secured claim. In re Perrysburg Marketplace Co., 208 B.R. 148, 157 (Bankr. N.D. Ohio 1997). See also Federal Deposit Ins. Corp. v. Houde, 90 F.3d 600, 604 (1st Cir. 1996); DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank, 69 F.3d 1398 (8th Cir. 1995); Resolution Trust Corp. v. Love, 36 F.3d 972, 974 (10th Cir. 1994); Resolution Trust Corp. v. Maplewood Investments, 31 F.3d 1276, 1293-94 (4th Cir. 1994).

The pertinent statute with respect to this matter is Ohio Revised Code ("ORC") § 1303.38, which provides in part that a person seeking enforcement of a lost instrument "must prove the terms of the instrument and the person's right to enforce the instrument." ORC § 1303.38(B). The Bank must establish its right to recover under the Note by a preponderance of the evidence. Household Finance Corp. v. Johnson, 56 Ohio App. 2d 14 (1978).

C. The Bank's Failure to Establish a Secured Claim

Applying ORC § 1303.38, the Bank must prove the terms of the alleged Note. At trial the Bank presented no evidence of what the parties had agreed was to be the principal amount of the Note, nor was there any evidence of the agreement of the parties, if any, on the rate of interest. In marked contrast to creditors who have established their right to recover under a lost promissory note, the Bank has not produced a copy of the Note or

any other documentation which demonstrates the terms of the Note. See Perrysburg Marketplace Co., 208 B.R. at 158 (holding that copies of note evidenced terms of lost note); Gutierrez v. Bermudez, 540 So.2d 888, 890 (Fla. App. 1989)(held that mortgageee, who identified copies of original note and mortgage, proved terms of note); Central Nat'l Bank v. Bernstein, 15 Conn.App. 90, 544 A.2d 239, 240 (1988)(held that photostatic copies of originals proved the terms of the instrument); First Fed. Sav. and Loan Assoc. v. Chicago Title and Trust Co., 155 Ill.App.3d 664, 108 Ill.Dec. 126, 127, 508 N.E.2d 287, 288 (1987)(granting judgment on note where mortgagor did not dispute that copies were complete and accurate); and Guaranty Bank and Trust Co. v. Dowling, 4 Conn.App. 376, 494 A.2d 1216, 1219 (1985)(concluding that copy of lost promissory note provided sufficient evidence of existence of original where defendant offered no evidence that copy was not accurate and did not dispute terms of promissory note). Absent the production of evidence establishing critical terms of the Note, such as the interest rate, the basis for including on-going insurance premiums, finance and late charges, as set forth in the account statement which the Bank produced [Exhibit C], or even the principal amount outstanding, the Bank is not entitled to enforce that instrument. Therefore, this Court holds that the Bank has not satisfied the requirements for enforcing a lost instrument under ORC § 1303.38(B).

The Bank contends that it need not satisfy the provisions of ORC § 1303.38 because the mortgage alone establishes its right to a secured claim. However, although a properly recorded mortgage may establish a lien against property, the mortgagor must establish the amount of the indebtedness secured by the mortgage in order for that lien to have any effect. See, e.g., New England Savings Bank v. Bedford Realty Corp., 238 Conn. 745, 680 A.2d 301 (1996)(holding that secured creditor could present reliable

evidence of amount of debt other than the original promissory note for purpose of obtaining judgment of strict foreclosure under mortgage; "[i]n pursuing the remedy of strict foreclosure, [the secured creditor] or its assignee nevertheless will have to establish the amount of the debt [owed]"), *cited in* Perrysburg Marketplace Co., 208 B.R. at 159 (holding that secured creditor's "failure to produce the original note does not prevent [the secured creditor] from presenting other evidence in proof of the debt") . Given that the Bank has not only failed to produce an original promissory note but also has failed to provide the Court with sufficient evidence of the terms of the alleged Note so that the amount owed to the Bank by the Debtor and secured by the mortgage could be ascertained, the Bank has not established that it is the holder of a secured claim.

In accordance with 11 U.S.C. § 502, because the Bank has failed to meet its burden of proof to enforce a lost instrument under ORC § 1303.38(B) and has not established the amount of the indebtedness secured by its mortgage, the Bank's secured claim is unenforceable under state law. Therefore, pursuant to 11 U.S.C. § 506(d), the Bank does not have a valid lien against the Property.

In light of this holding, the Court is not aware of any unresolved issues regarding the validity, priority and amount of any liens or third party interests, i.e., the Debtor's ex-husband's alleged half-interest, with respect to the Property. Therefore, the Trustee shall submit an order to the Court which provides for the distribution of the proceeds arising from the sale of the Property to the holders of allowed secured claims and third party interests.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

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DATED: 11/17/98