

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 00-53817
)	
MICHAEL & PAMELA STEELE,)	CHAPTER 7
)	
DEBTOR(S))	
)	
HAROLD CORZIN, TRUSTEE,)	ADVERSARY NO. 01-5410
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	ORDER DENYING MOTION FOR
)	SUMMARY JUDGMENT
MICHAEL STEELE, <i>et al.</i>)	WITHOUT PREJUDICE AND
)	ABATING ADVERSARY
DEFENDANT(S).)	PROCEEDING

This matter comes before the Court on the Motion for Summary Judgment (the “Motion”) filed by defendant PCFS Financial Services (“PCFS”) on August 12, 2002, the Memorandum in Opposition filed by the trustee on August 21, 2002, and the Reply of PCFS filed on August 30, 2002. On August 30, 2002 PCFS also filed a Supplement to its Motion to which the trustee filed a Reply on September 6, 2002. On September 12, 2002, PCFS filed a Request for Hearing on the Motion.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core

proceeding pursuant to 28 U.S.C. § 157(B)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b).

I. UNDISPUTED FACTS AND BACKGROUND

The following facts are undisputed:

1. The debtors executed a mortgage in favor of PCFS on September 15, 1998.
2. The mortgage was filed in the Summit County Recorder's Office on September 21, 1998.
3. The debtors filed their chapter 7 petition on December 8, 2000.

In his Complaint in this matter the trustee alleges that the mortgage instrument was not executed in accordance with the laws of the state of Ohio, in that only one witness was actually present when the instrument was signed, and was thus not entitled to be recorded under Ohio Rev. Code § 5301.25. He further alleges that Ohio Rev. Code § 5301.234, which purported to create an irrebutable presumption that a recorded mortgage is properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment of the mortgage, unless the mortgagor, under oath, denies signing the mortgage or there is other sworn evidence of fraud, is unconstitutional. The Attorney General was not made a party to the adversary proceeding, but was served a copy of the Complaint by certified mail on December 31, 2001, in accordance with Fed. R. Civ. P. 4.1. On January 14, 2002 the Attorney General appeared and indicated that she desired to be notified if and when this Court made a determination that it would proceed to adjudicate the constitutionality of the statute.

PCFS contends that on the undisputed facts of this case, Ohio Rev. Code §

5301.234 controls pursuant to the ruling of the Ohio Supreme Court in *In re Stewart* (2002), 96 Ohio St.3d 67. In *Stewart* the Court stated that “former § R.C. 5301.234 can be applied to presume the validity of a mortgage in a bankruptcy case filed after the effective date of the statute when the mortgage at issue in the bankruptcy case was recorded before the statute’s effective date” which was June 30, 1999. PCFS contends that because the undisputed facts of this case fit this ruling, the recorded mortgage is irrebutably presumed to be properly executed and PCFS is entitled to summary judgment.

II. ANALYSIS

A. Ripeness of the Issue of Constitutionality of Ohio Rev. Code § 5301.234

Through his Complaint the trustee has sought declaratory judgment that Ohio Rev. Code § 5301.234 is unconstitutional. This Court has repeatedly stated that it would reach the issue of the constitutionality of a statute only if it is *the* only issue that would determine the case. That is not now the case in this lawsuit. The factual issue is whether or not there were two witnesses present at the time of the signing of the mortgage deed by the debtors. If two witnesses were present, the mortgage was properly executed under Ohio law and was entitled to recordation under Ohio Rev. Code § 5301.25. It would then be valid against the trustee and it would be unnecessary to address the issue of constitutionality of the statute. It is a well-established constitutional doctrine that federal courts should not pass on a constitutional question if it is possible to decide the matter without considering the constitutionality of the statute involved. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7 (1993); *Lyng v. Northwest Indian Cemetery Protective*

Assn., 485 U.S. 439, 445 (1988) (“A fundamental and long standing principle of judicial restraint requires that the courts avoid reaching constitutional questions in advance of the necessity of deciding them.”); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (“Prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision.”); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions on constitutionality . . . unless such adjudication is unavoidable.”). The constitutionality of the statute is not yet the sole issue on which this lawsuit can be determined and adjudication is not “unavoidable.” Thus, the Court will not address it at this time.

B. Procedural Posture of Ohio One-Witness Mortgage Cases

The Court also notes the awkward procedural posture of these one-witness mortgage cases. One case in the Northern District of Ohio, Western Division, captioned *Hunter v. First Union*, Case No. 01-1876, in Judge James G. Carr’s court, is scheduled to have appellate briefing completed by the end of September and hear oral argument in the middle of October. This Court understands that there may also be two bankruptcy judges in the Northern District of Ohio who have adversary proceedings where the constitutional issue is now being decided. This activity in other courts in this District further contributes to my current conclusion: judicial restraint and judicial economy dictate that this lawsuit not be adjudicated at this time.

III. CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment filed by PCFS is DENIED WITHOUT PREJUDICE pending the outcome of the cases in both the District Court and the Bankruptcy Court and the Request for Hearing is DENIED. This adversary proceeding is hereby abated until at least December 1, 2002.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of September, 2002, the foregoing Order was sent via regular U.S. Mail to:

Amelia A. Bower
Plunkett & Cooney, P.C.
100 East Broad Street, Suite 1400
Columbus, Ohio 43215

Michael J. Moran
234 West Portage Trail
PO Box 535
Cuyahoga Falls, Ohio 44221

Robert S. Thomas
One Cascade Plaza, Suite 900
Akron, Ohio 44308

Cynthia Roselle
Lerner Sampson and Rothfuss
PO Box 5480
Cincinnati, Ohio 45202

Jill Whitworth
Assistant Attorney General
101 East Town Street
Columbus, Ohio 43215

Darrell M. Pierre
Attorney General Revenue Recovery
101 E. Town Street, 2nd Floor
Columbus, Ohio 43215

Harold A. Corzin
304 N. Cleveland-Massillon Road
Akron, Ohio 44333

Marjorie H. Kitchell, *Law Clerk*