

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO**

In Re:)	
)	CHIEF JUDGE RICHARD L. SPEER
Franklin L. Simms)	
and)	Case No. 00-3138
Victoria M. Simms)	
)	
Debtor(s))	(Related Case: 99-33264)
)	
John J. Hunter, Trustee)	
)	
Plaintiff(s))	
)	
v.)	
)	
ContiMortgage Corp., et al.)	
)	
Defendant(s))	

DECISION AND ORDER

In the above captioned adversary complaint, the Plaintiff, John J. Hunter, Trustee of the Debtors' bankruptcy estate, seeks to avoid a mortgage interest the Defendant, ContiMortgage Corporation, holds against the Debtors' residence. On this complaint, the Plaintiff filed a Motion for Summary Judgment, Memorandum in Support, and Reply; and the Defendant filed a Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment.

The statutory authority upon which the Plaintiff relies for his cause of action is 11 U.S.C. § 544(a)(3), which permits a bankruptcy trustee to avoid any transfer of property of the debtor, or an obligation incurred by the debtor, that would have been avoidable by a bona fide purchaser of the property under state law. In support of his compliance with this section, the Trustee argues that in contravention to O.R.C. § 5301.01, the mortgage granted by the Debtors to the Defendant was not properly executed under Ohio law, and thus was not entitled to be recorded pursuant to O.R.C. §§ 5301.23(A) & 5301.25(A). Specifically, the Plaintiff argues that the execution of the Defendant's

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mortgage did not comply with Ohio law because “there was only one (1) witness present at the time of execution of the [Defendant’s] mortgage” (Plaintiff’s Memorandum in Support of Motion for Summary Judgment, at pg. 4).

In opposition thereto, the Defendant has raised a number of legal defenses. However, before the merits of these defenses may be reached, the Court must find, in accordance with the standard set forth for a summary judgment motion under Bankruptcy Rule 7056,¹ that the Plaintiff, as the moving party, has met his burden of establishing that there does not exist in this case any genuine issues of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). A genuine issue of material fact will be found to exist if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party. *Eppler v. Ciba-Geigy Corporation*, 860 F.Supp. 1391, 1393 (W.D.Mo. 1994). In making this determination, the record of the case must be viewed in the light most favorable to the Defendant as the nonmoving party, while at the same time giving the Defendant the benefit of all reasonable inferences. *Anderson v. North Dakota State Hosp.*, 232 F.3d 634, 635 (8th Cir. 2000).

Under Ohio law, a mortgage which appears on its face to have been properly executed is afforded a presumption of validity. *Helbling v. Williams (In re Williams)*, 240 B.R. 884, 887 (Bankr. N.D.Ohio 1999); *Ford v. Osborne*, 45 Ohio St. 1, 4, 12 N.E. 526 (1887); *Paramount Finance Co. v. Berk*, 179 N.E.2d 788, 788 (Ohio App.1962). To overcome this presumption, the Plaintiff presented to the Court affidavits in which both of the Debtors state that only one other person was present at the time the mortgage held by the Defendant was executed. According to the Plaintiff, these affidavits are sufficient, as a matter of law, to meet his burden of showing that the Mortgage held by the Defendant was improperly executed.

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This Rule provides in relevant part that: A movant will prevail on a motion for summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

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In support of its assertion, the Plaintiff cites to *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76 (B.A.P. 6th Cir. 1999), where the Bankruptcy Appellate Panel for the Sixth Circuit—in a similar case involving the supposed improper witnessing of a mortgage—affirmed the bankruptcy court’s finding that as between the debtors’ testimony and the testimony of the individual representing the mortgage holder, the debtors’ testimony regarding the presence of only one witness was more persuasive. In making this assertion, the Trustee cited to the following language of the *In re Zaptocky* opinion:

while the Debtors and Mr. Williams all gave credible testimony, ‘the Debtors’ credibility was more persuasive on the issue of who was present at the Debtors’ home for the closing signatures’ *Simpson v. Zaptocky (In re Zaptocky)*, 231 B.R. 260, 264 (Bankr. N.D. Ohio 1998). The court essentially determined that the Debtors’ affirmative testimony that no person by the name of Taylor Lloyd was present in their home at the time the mortgage was executed overcame any presumption of validity of the document

Id. at 81. After reviewing the overall context of this statement, however, it is the conclusion of this Court that the *Zaptocky* decision does not stand for the proposition that under all circumstances a debtor’s testimony regarding the improper execution of a mortgage must be taken over the testimony given by an individual associated with a financial institution. Instead, a review of the Court’s holding in *Zaptocky* merely shows that the Court was applying the “clearly erroneous” standard to the bankruptcy court’s “findings of fact” as is mandated by Bankruptcy Rule 7052. Specifically, the Court in *Zaptocky* stated, “[t]he bankruptcy court’s account of the evidence is plausible in light of the record viewed in its entirety, where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.” *Id.* (internal quotations and citations omitted). Thus, the Court in *Zaptocky* was not creating an absolute rule that a debtor’s testimony regarding the improper execution of a mortgage can never be successfully rebutted, but was instead merely giving deference to the bankruptcy court’s position as the trier-of-fact. Accordingly, under *Zaptocky*, this Court is not required to take, as absolute, the statements made by the Debtors in their affidavits; a position which obviously makes a great deal of sense, as in many instances those statements made by a debtor, in an affidavit, do not stand up to cross-examination at trial.

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With regards to the Plaintiff's assertion that its mortgage was improperly executed under Ohio law, the Defendant, in addition to raising certain legal defenses thereto, has denied the Plaintiff's account of the factual circumstances surrounding the execution of its mortgage. In particular, a review of the Defendant's pleadings shows that it has denied, in its Answer, the Plaintiff's allegation that its mortgage was not properly executed in accordance with Ohio law. In addition, the Defendant, in its Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment, states that the Plaintiff's Motion is "based on an *alleged* witnessing defect in the mortgage." (Defendant's Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment at pg. 2). At no time during the pendency of this case has the Defendant recanted these assertions.

After considering the Defendant's position against the affidavits contra submitted by the Plaintiff, the Court finds that as the mortgage at issue in this case appears to be facially valid, the Defendant's position seems reasonable. To put it simply, with the evidence this Court now has before it, a reasonable jury could return a verdict for either Party. Accordingly, for this reason, the Court cannot find that the Plaintiff has met his requisite burden to sustain his Motion for Summary Judgment. In this regard, however, one additional point needs to be made: The Defendant, in its Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment, intimates that it agrees with the Plaintiff's account of events. Specifically, the Defendant states to the Court that:

For purposes of this opposition, Contimortgage does not dispute the jurisdiction of the Court, the Plaintiff's capacity as Trustee or that there exist any material factual issues regarding the witnessing of the Debtor's mortgage.

Thus, given this statement, the Defendant will be afforded the opportunity to stipulate to the improper execution of its mortgage, at which time the Court will proceed to address the legal defenses raised by the Defendant. Otherwise, the Court holds that the factual issues regarding the execution of the Defendant's mortgage must be resolved prior to reaching any decision concerning the legal defenses put forth by the Defendant.

Accordingly, it is

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ORDERED that the Motion for Summary Judgment submitted by the Plaintiff, John J. Hunter, Trustee, be, and is hereby, DENIED.

It is **FURTHER ORDERED** that the Defendant, ContiMortgage Corporation, be permitted to submit a stipulated entry regarding the improper execution of its mortgage within fourteen (14) days from the entry of this Order.

It is **FURTHER ORDERED** that this matter be, and is hereby, set for Trial on Tuesday, March 13, 2001, at 10:30 A.M., in Courtroom No. 1, Room 119, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

Dated:

Richard L. Speer
Chief Bankruptcy Judge