

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

IN RE:)	CASE NO. 01-50006
)	
ROBERT & JANICE McCRACKEN,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
LYDIA SPRAGIN, TRUSTEE,)	ADVERSARY NO. 01-5284
)	
PLAINTIFFS,)	JUDGE MARILYN SHEA-STONUM
)	
v.)	
)	
THIRD FEDERAL SAVINGS, <i>et al.</i>)	ORDER GRANTING
)	DEFENDANTS NATIONAL CITY
)	BANK'S AND KEYBANK'S
DEFENDANTS.)	MOTIONS FOR SUMMARY
)	JUDGMENT

This matter comes before the Court on the Motion for Summary Judgment filed by Defendant KeyBank National Association (“KeyBank”) on January 8, 2002, the Motion for Summary Judgment filed by Defendant National City Bank (“National City”) on January 23, 2002 and the Trustee’s Memorandum in Opposition to the Defendants’ Motions for Summary Judgment, filed on February 6, 2002.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984 and is determined to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E) and (K) over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b).

The Trustee's Complaint in this matter alleges that the mortgage instruments by which Third Federal Savings and Loan of Cleveland ("Third Federal"), KeyBank and National City claim their interests in the debtors' real property were not executed in accordance with the laws of the state of Ohio and as such were not entitled to be recorded pursuant to Ohio Rev. Code § 5301.25. She further asserts that since these mortgages allegedly were not witnessed by two persons, as required by Ohio Rev. Code § 5301.01, the mortgages were not perfected, permitting avoidance of the mortgages pursuant to § 544(a) of the Bankruptcy Code. KeyBank and National City contend that even if the mortgages were improperly executed, the Trustee cannot step into the shoes of a *bona fide* purchaser as permitted by § 544(a)(3) because she had constructive notice of the mortgages pursuant to Ohio's *lis pendens* statute, Ohio Rev. Code § 2703.26, as the Sixth Circuit BAP held in *Treinish v. Norwest Bank Minnesota, N.A. (In re Periandri)*, 266 B.R. 651 (6th Cir. BAP 2001).

I. FACTS

On October 1, 1992 the debtors, Robert G. and Janice M. McCracken, executed and delivered to Third Federal a promissory note in the amount of \$74,000.00, which was filed for record on October 22, 1992 in the Medina County Recorder's office. On October 9, 1996, the debtors executed and delivered to KeyBank a promissory note in the

amount of \$33,000, which was filed for record in the Medina County Recorder's Office on October 17, 1996. In addition, National City is the holder of two notes secured by mortgages recorded with the same Recorder's Office on October 30, 1996, one in the amount of \$38,662.70 and another in the amount of \$25,000.00. On April 16, 1998, MP Star Financial obtained a judgment against the debtors in the Cuyahoga County Court of Common Pleas in the amount of \$68,827.83. The debtors defaulted on the obligations that are secured by the KeyBank mortgage and on February 15, 2000 KeyBank brought a Complaint in Foreclosure (the "Complaint") in the Medina County Court of Common Pleas.

On October 23, 2000 the Medina Court granted KeyBank an order and judgment in foreclosure (the "Order"). The legal description of the debtors' real property was set forth in both the Complaint and the Order.¹ In the Complaint KeyBank asserted that "Third Federal Savings and Loan Association, National City Bank, MP Star Financial, Inc., General Electric Capital Corporation, Creditrust Corporation, First Select Corporation and John Burke, Medina County Treasurer may claim an interest in and to the subject premises." Complaint at ¶ 10.² In the Order the Medina Court held that KeyBank had the "second and best lien against the subject premises subject only to real estate taxes

¹ "The general rule is that in order for *lis pendens* to apply to a particular piece of property in any kind of action, that property must be specifically identified or described in the pleadings. . . . Ohio follows the general rule. In every case where *lis pendens* has been recognized the petition has described particular property." *Domino v. Domino*, 99 N.E.2d 825, 828 (Ohio Ct. Com. Pl. 1951).

² KeyBank's Motion for Default Judgment against the debtors, General Electric Capital Corporation and Huntington National Bank was granted by the Medina Court in its October 23rd Order, the Court stating that these entities had not answered KeyBank's Complaint. However, Huntington National Bank did not appear as a named defendant on the Complaint.

and assessments and the first mortgage of Defendant Third Federal Savings & Loan Association of Cleveland.” Order at 3. The Court further found that National City had the third and the fourth best interests against the same premises, that MP Star Financial, Inc. had the fifth best interest, Creditrust Corporation had the sixth best interest, First Select Corporation had the seventh best interest and National City had the eighth best interest. Order at 3-4.

On January 3, 2001 the debtors filed their chapter 7 petition. The Trustee filed her Complaint in this adversary proceeding on July 24, 2001 alleging that the mortgages of MP Star Financial, Inc., KeyBank, and Third Federal were not properly executed and therefore, unrecorded under Ohio law.³ She asserted that because the mortgages were unrecorded, she could step into the shoes of a *bona fide* purchaser pursuant to § 544 and avoid the mortgages. On August 2, 2001 the trustee filed an Amended Complaint substituting the two mortgages of National City for the mortgage of MP Star Financial, Inc., and contending that National City’s mortgages were also not properly executed and therefore were unrecorded.⁴ She contended that because of the ineffective executions and pursuant to her “strong-arm” powers she could avoid National City’s mortgages as well as those of KeyBank and Third Federal.

On August 17, 2001, Third Federal filed its Answer stating that the trustee could not step into the shoes of a *bona fide* purchaser because she had constructive notice of its

³ This Complaint was captioned *Spragin v. MP Star Financial, et al.*

⁴ The Amended Complaint was captioned *Spragin v. Third Federal Savings, et al.*

interest, presumably due to the Order.⁵ On August 31, 2001, National City filed its Answer also contending that the trustee had constructive notice of its interest and was therefore barred from asserting *bona fide* purchaser status by the Ohio *lis pendens* statute. On September 4, 2001, KeyBank filed its Answer and Counterclaim asserting the same defense.

In their Motions for Summary Judgment KeyBank and National City each contend that the Medina County Order put the trustee on constructive notice based on the Ohio *lis pendens* statute and that such notice bars the trustee from invoking her “strong-arm” powers pursuant to § 544.

II. SUMMARY JUDGMENT

A court shall grant a party’s motion for summary judgment “if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy* at 285; *Boyd v. Ford Motor Co.*, 948 F.2d 232, 235 (6th Cir. 1991).

The trustee states in her Memorandum in Opposition that there is a material fact at issue and that is whether the mortgages actually were defective. Pursuant to the Sixth

⁵ For purposes of this Order, this Court deems this statement to be a defense based on the application of Ohio’s *lis pendens* statute.

Circuit BAP's holding in *Periandri*, this fact is not material. The BAP stated that

Whether the mortgage was defectively executed under Ohio Rev. Code § 5301.01 is not before this panel, since the grant of summary judgment precluded a determination of that issue. The effect of defective recording of a mortgage in Ohio is not an issue before us. *See Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1027-28 (6th Cir. 2001) (“At the time that the Zaptocky’s filed for bankruptcy Ohio law provided that an improperly executed mortgage does not put a subsequent bona fide purchaser on constructive notice.”) As the Sixth Circuit’s statement indicates, effectively recording of mortgages is one form of constructive notice . . .

At issue in this appeal is whether Ohio’s *lis pendens* statute . . . provides another form of constructive notice . . .

Periandri, 266 B.R. at 654.

The BAP decided the issue in the affirmative, indicating that an actual determination of whether there were two witnesses present at the signing was immaterial when considering whether the trustee had constructive notice of the interests.

II. ISSUE AND ANALYSIS

The sole issue in this matter is whether Ohio’s *lis pendens* statute, Ohio Rev. Code § 2703.26, provides a form of constructive notice and, if so, whether its effect in this case is to deprive the trustee of *bona fide* purchaser status. This exact issue, on all fours, was appealed to the Sixth Circuit BAP in *Periandri*. The BAP, in a well reasoned and detailed opinion, held that the Ohio *lis pendens* statute was a form of constructive notice “to all the world, including any hypothetical bona fide purchaser” existing on the petition date and as such precluded the trustee from avoiding that interest.

IV. CONCLUSION

This Court agrees with the analysis and holding of *Periandri*. Accordingly the Motions for Summary Judgment filed by KeyBank and National City are GRANTED. In addition, the Court finds that the trustee is barred from asserting her avoidance powers against the interest of Third Federal based upon the analysis of *Periandri*.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of March, 2002, the foregoing **ORDER GRANTING SUMMARY JUDGMENT** was sent via regular U.S. Mail to:

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