

THIS OPINION IS NOT INTENDED FOR PUBLICATION.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:) CASE NO. 00-53961
)
ALAN & VICTORIA COHEN,) CHAPTER 7
DEBTOR(S))
)
LYDIA SPRAGIN, TRUSTEE,) **ADVERSARY NO. 01-5306**
PLAINTIFF(S),)
) JUDGE MARILYN SHEA-STONUM
vs.)
)
COUNTRYWIDE HOME LOANS, ET)
AL.)
DEFENDANT(S).)

**ORDER (1) GRANTING SUMMARY JUDGMENT IN FAVOR
OF COUNTRYWIDE AS HOLDER OF A FIRST MORTGAGE
AND (2) PROVISIONALLY GRANTING SUMMARY JUDGMENT
IN FAVOR OF COUNTRYWIDE AS HOLDER OF A SECOND MORTGAGE**

This matter comes before the Court on a motion for summary judgment filed by Countrywide Home Loans (“Countrywide”) [docket #25] and responses thereto filed by debtors [docket #27] and by plaintiff-trustee [docket #29]. During a pre-trial conference in this adversary proceeding, counsel represented to the Court that the matter could be decided upon those pleadings alone.¹ Accordingly, the matter was taken under advisement.

¹ During this pre-trial conference the Court gave counsel for Countrywide an opportunity to file a reply to debtors’ and plaintiff-trustee’s responses by not later than May 10, 2002. No such pleading was filed.

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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 a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (K) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings on file in this adversary proceeding and debtors' main chapter 7 case, the Court makes the following findings of fact and conclusions of law.

BACKGROUND

1. On December 21, 2000, debtors filed a voluntary chapter 7 bankruptcy proceeding.

2. On their Schedule A - Real Property, debtors listed real property located at 2200 Twenty-Fourth Street, S.W., Akron, Ohio (the "Property").

3. On their Schedule D - Creditors Holding Secured Claims, debtors listed two mortgages on the Property: A first mortgage in the amount of at \$69,591.34 held by Countywide and executed in August 1991² and a second mortgage in the amount of \$20,826.01 held by Countrywide and executed in April 1998. Debtors did not list that either of those mortgages was in dispute.

² The first mortgage was originally executed by debtors as mortgagors and America's Wholesale Lender as mortgagee. Sometime thereafter that mortgage was purportedly assigned to Countrywide. Although none of the assignment documents are on file in the main chapter 7 case or this adversary proceeding, plaintiff-trustee and debtors have not challenged the purported assignment.

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4. On their Schedule C - Property Claimed as Exempt, debtors each claimed a \$5,000.00 homestead exemption in the Property pursuant to Ohio Revised Code §2329.66(A)(1). No objections to those claimed exemptions have been filed.

5. On August 20, 2001, the chapter 7 trustee initiated this adversary proceeding against debtors and against Countrywide as holder of both the first and second mortgages on the Property. Through her complaint the chapter 7 trustee alleges, *inter alia*, that the mortgage instruments through which Countrywide claims liens upon the Property were not executed in accordance with the requirements of the laws of the State of Ohio. Specifically, the chapter 7 trustee alleges that only one individual was present as a witness when debtors executed the first and second mortgages. Accordingly, the chapter 7 trustee contends that she can avoid both mortgages for the benefit of the bankruptcy estate pursuant to §544 of the Bankruptcy Code.

6. On September 19, 2002, debtors filed an answer to plaintiff-trustee's complaint and a cross-claim against Countrywide as the holder of both the first and second mortgages on the Property. Through their cross-claim, debtors also allege that Countrywide's mortgages were not executed in accordance with applicable Ohio law and, therefore, not entitled to be recorded under §5301.25 of the Ohio Revised Code. Debtors then contend that, because those mortgages were not entitled to be recorded, they are invalid and unenforceable against debtors.

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7. Countrywide has retained two separate counsel in this matter, one to represent its interests as holder of the first mortgage on the Property and one to represent its interests as holder of the second mortgage on the Property.

8. The motion for summary judgment was filed by Countrywide in its position as first mortgagee only and goes only to the matters raised against it in debtors' cross-claim.

DISCUSSION

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 v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In this case, there exists a genuine factual dispute as to how many people witnessed debtors' execution of the first and second mortgages. Through its motion for summary judgment Countrywide contends that, although such fact is disputed, it is not "material"

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because, regardless of the number of witnesses to the first mortgage, that mortgage is valid between the parties to that instrument. In their responses, debtors and plaintiff-trustee contend that summary judgment on debtors' cross-claim is not proper because the number of witnesses is an issue of "material" fact that must be decided before a determination can be made as to whether the first and second mortgages are enforceable between debtors and Countrywide.³

Pursuant to Ohio statutory law, any interest in real property must be signed by the mortgagor "and such signing must be acknowledged by the . . . mortgagor . . . in the presence of two witnesses who shall attest the signing and subscribe their names to the attestation." O.R.C. §5301.01 (Page's 1989).⁴ "The acknowledgment required by the statute is for the purpose of affording proof of due execution of the deed by the grantor, sufficient to authorize the register of deeds to record it." *Basil v. Vincello*, 553 N.E.2d 602, 606 (Ohio 1990). Such recordation acts as constructive notice to third parties that a lien exists on the property. Ohio Revised Code §5301.25(A) (Page's 1989); *Citizen Nat'l Bank in Zanesville v. Denison*, 133 N.E.2d 329, 332-33 (Ohio 1956), *citing* 7 Thompson on Real Property (Perm. Ed.), 416.

³ It is not entirely clear to the Court why plaintiff-trustee chose to file an opposition to Countrywide's motion for summary judgment given that (1) it essentially raises the same arguments as those raised by debtors and (2) plaintiff-trustee's position in this litigation seems unaffected by any ruling on this issue. Unless plaintiff-trustee is prepared to make an affirmative showing of how the filing of her opposition pleading could have benefitted the bankruptcy estate, she should not seek compensation for her counsel for fees he incurred in preparing such pleading.

⁴ This provision of the Ohio Revised Code was amended as of February 2, 2002 to change the requirement that two individuals witness a mortgagor's signature on a mortgage. In support of their arguments that the mortgage is invalid, debtors and plaintiff-trustee rely upon the version of §5301.01 that was in effect prior to February 2, 2002.

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Although an improperly executed mortgage may not be entitled to be recorded, “[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 in Zanesville v. Denison*, 133 N.E.2d 329, 332 (Ohio 1956). *See also Basil v. Vincello*, 553 N.E.2d 602, 606 (Ohio 1990).

The reasoning behind such a rule is to bind the parties to that which they intended. The purpose of [§5301.01] is to provide evidence of execution and authority for recordation. It is not to provide a way of escape for a party who later wishes to renege on his agreement.

Seabrooke v. Garcia, 454 N.E.2d 961, 964 (Ohio Ct. App. 1982). *See also Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76, 82-83 (6th Cir. B.A.P. 1999), *aff’d*, 250 F.3d 1020 (6th Cir. 2001).

What is most notable about debtors’ cross-claim and the oppositions to Countrywide’s motion for summary judgment is the lack of any allegation that debtors did not receive funds or the right to direct the recipient of the funds in exchange for their execution of the mortgages at issue or that the mortgages at issue were somehow procured by fraud. Instead, the only facts relied upon by debtors and plaintiff-trustee to support their argument that the mortgages may be invalid and unenforceable between debtors and Countrywide focus on the number of people who witnessed debtors’ signatures on the mortgages. Such focus is misplaced and evinces a basic misunderstanding of Ohio law regarding the binding effect of a mortgage on the initial parties to the agreement.

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In their opposition pleading, debtors acknowledge the Ohio Supreme Court's holding in *Citizen Nat'l Bank in Zanesville v. Denison* regarding the binding effect of a mortgage between the parties to the mortgage but then contend that "the law on this point in the state of Ohio is far from settled." See Debtors' "Response to Motion for Summary Judgment" [docket #27] at unnumbered pg. 3. In an effort to support this contention debtors cite to an unreported case from an Ohio appeals court⁵ which, despite the clear requirements of LOCAL BANKRUPTCY RULE 9013-2(d), debtors fail to attach a copy of to their opposition pleading.⁶ The Court was unable to locate this unreported case on either LEXIS or Westlaw and the excerpt which debtors' chose to set forth in their opposition to Countrywide's motion for summary judgment does not support the contention that Ohio law on this issue is "unsettled."⁷

⁵ The cite set forth in debtors' pleading is *Cuyahoga County General Health Dist. v. Lillie M. White and Carol Ann Yelonsky* (July, 1993), Case No. 68106, 8th District Court of Appeals of Ohio, Cuyahoga County. See Debtors' "Response to Motion for Summary Judgment" [docket #27] at unnumbered pg. 3.

⁶ That rule sets forth, as follows: "(d) Unreported Opinions. If an unreported opinion or an opinion available only through an electronic retrieval process is cited, *a copy of the opinion shall be attached to the brief or memorandum . . .* Failure to submit such attachments may be grounds for striking the pleading." See LOCAL BANKRUPTCY RULE 9013-2(d) (emphasis added).

⁷ The purported language from that unreported case that debtors cited is as follows:

In order for an equitable mortgage to be forthcoming, the agreement upon which the equitable mortgage is based must first be executed and recorded as prescribed by the real property statutes, specifically R.C. 5301.01 and .24. *Wright v. Franklin Bank*, (1898), 59 Ohio St. 80. The agreement at issue was not executed in compliance with the real property statutes. Accordingly, the trial court did not err in determining that an equitable mortgage did not arise.

See Debtors' "Response to Motion for Summary Judgment" [docket #27] at unnumbered pg. 3.

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As support for her contention that a defectively executed mortgage is somehow not binding between the parties to that agreement, plaintiff-trustee cites to *Langmede v. Weaver*, 60 N.E. 992 (Ohio 1901). See Plaintiff-Trustee’s “Memorandum in Opposition to Defendant’s Motion for Summary Judgment” [docket #29] at pg. 3.⁸ This case dealt with a challenge to the validity of a defectively executed lease of real property by a third party and not by the original lessor. A careful reading of that case reveals that it is on point with the Ohio Supreme Court’s later ruling in *Citizen Nat’l Bank in Zanesville v. Denison* regarding the binding effect of a conveyance of land on the parties thereto:

As between the original parties to a [mortgage], there is no difficulty in making the instrument effect the intended object; for equity would regard that as done which the parties agree to do. They intended it should operate as a valid encumbrance, and, so far as they are concerned, it must be treated as a sufficient mortgage.

Langmede v. Weaver, 60 N.E. 992, 996 (Ohio 1901), citing *White v. Denman*, 16 Ohio 59, 60 (Ohio 1847).

Plaintiff-trustee’s potential ability to avoid Countrywide’s mortgages derives from her status as a bona fide purchaser of the Property as of the commencement of debtors’ bankruptcy case. See 11 U.S.C. §544(a)(3). With that status and through the power granted her in §544(b) of the Bankruptcy Code, plaintiff-trustee is entitled to rely upon the protections afforded subsequent purchasers of real property set forth Ohio Revised Code §5301.01 and

⁸ Plaintiff-trustee also cites to *Cuyahoga County Health Dist. v. Lillie M. White and Carol Ann Yelonsky*, and also fails to attach a copy of this unreported decision to her opposition pleading.

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§5301.25(A). *See Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1023-24 (6th Cir. 2001). As the original parties to the mortgages at issue who do not dispute receiving the benefits of those agreements, debtors are not entitled to evoke such protections.

Because debtors do not dispute that they received funds in exchange for granting mortgages on the Property and because debtors do not contend that such mortgages were procured by fraud, the Court finds that debtors intended for those mortgages to operate as valid encumbrances, and, so far as they are concerned, the mortgages must be treated as binding and enforceable agreements. Even if only one person witnessed them signing the mortgages, the Court's holding would not change. Accordingly, the factual dispute as to how many witnesses were present is not "material" to whether or not the first mortgage is binding and enforceable as between debtors as mortgagors and Countrywide as mortgagee and summary judgment is proper.

Although Countrywide, in its position as holder of the second mortgage, did not also move for summary judgment on debtors' cross-claim, it is well established that if there is no genuine issue as to any material fact in a case, a federal court may enter summary judgment, *sua sponte*. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *K.E. Resources, Ltd. v. BMO Financial Inc. (In re Century Offshore Mgmt. Corp.)*, 119 F.3d 409 (6th Cir. 1997); *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485 (Bankr. S.D. Ohio 1989). This Court recognizes, however, that the entry of summary judgment in the absence of a motion seeking it should be exercised with great caution as the entry of summary judgment is subject to the requirements

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of due process. As such, the Court will provisionally enter summary judgment in favor of Countrywide as holder of the second mortgage on the Property so as to provide debtors with an opportunity to file a pleading explaining why such summary judgment should not be entered.

Based upon the foregoing, **IT IS HEREBY ORDERED:**

1. That the motion for summary judgment filed by Countrywide as holder of the first mortgage on the Property is hereby granted; and
2. That debtors' cross-claim against Countrywide as holder of the first mortgage on the Property is hereby dismissed.

IT IS FURTHER ORDERED:

1. That summary judgment in favor of Countrywide as holder of the second mortgage on the Property is hereby provisionally granted;
2. That debtors shall have until June 10, 2002 in which to file and actually serve upon Countrywide a pleading explaining why summary judgment should not be entered;
3. That if such explanatory pleading is timely filed, Countrywide shall have until June 24, 2002 in which to file a response; and

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4. That if debtors' explanatory pleading is not timely filed, the provisional portion of this order granting summary judgment in favor Countrywide as holder of the second mortgage on the Property shall automatically become final and debtors' cross-claim against Countrywide as holder of the second mortgage on the Property shall be dismissed.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 5/21/02