

THIS OPINION IS NOT INTENDED FOR PUBLICATION.

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

IN RE:)	CASE NO. 01-51341
)	
MICHAEL & FELICIA LUCAS,)	CHAPTER 7
)	
DEBTOR(S))	
)	
MARC GERTZ, TRUSTEE,)	ADVERSARY NO. 01-5293
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
MICHAEL LUCAS, ET AL.)	
)	
DEFENDANT(S).)	MEMORANDUM OPINION

This matter comes before the Court on the chapter 7 trustee’s complaint to determine the validity, priority or extent of certain mortgages. The Court held a trial in this matter on June 24, 2002. Appearing at the trial were Mark Young, counsel for plaintiff-trustee, and Kathryn Williams, counsel for defendant, Bank One, N.A. (“Bank One”). During the trial, the Court received evidence in the form of exhibits and in the form of testimony from Michael Lucas; Felecia Lucas; Joyce Walker and Brian Kutz. At the conclusion of the trial, the Court took the matter under advisement.

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)(K) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C.

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§1334(b). Based upon testimony and documentary evidence presented at trial, the arguments of counsel, the pleadings in this adversary proceeding and the related chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

BACKGROUND

1. On April 12, 2001, Michael and Felecia Lucas filed a joint, voluntary chapter 7 bankruptcy petition.

2. On their Schedule A - Real Property, debtors listed real property located at 31 Bittman Street, Akron, Ohio (the "Property").

3. On their Schedule D - Creditors Holding Secured Claims, debtors listed three mortgages on the Property: A first mortgage in the amount of at \$65,270.40 held by Bank One, a second mortgage in the amount of \$9,137.00 held by The Money Store and a third mortgage in the amount of \$2,000.00 held by Milan Dubravcic.

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 3, 2001, the chapter 7 trustee initiated this adversary proceeding against debtors, Bank One and The Money Store. Through his complaint the chapter 7 trustee alleges that the mortgage instruments through which Bank One and the Money Store claim

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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 he can avoid both mortgages for the benefit of the bankruptcy estate pursuant to §544 and §551 of the Bankruptcy Code.

6. On September 21, 2001, plaintiff-trustee filed a motion seeking default judgments against debtors and The Money Store for their failure to answer or otherwise respond to the complaint. An Order granting default judgments against both debtors and The Money Store was entered on October 15, 2001.

7. The mortgage at issue in the trial of this matter (the “Mortgage”) was executed by debtors at the Property. The Mortgage was executed in favor of Mortgage Lenders USA, Inc. (“Mortgage Lenders”), was dated December 8, 1998 and was filed with the Summit County Auditor on December 14, 1998. Also on December 14, 1998 the Mortgage was assigned by Mortgage Lenders to Bank One and that assignment was filed with the Summit County Auditor on August 11, 1999.

8. The first page of the Mortgage bears a stamp with the name and address of Prospect Title Agency, Inc. (“Prospect Title”). The signature page on the Mortgage bears the signatures of both debtors as “borrowers” and debtors do not dispute that they signed the Mortgage. That signature page also includes two signatures under the header “Witnesses,”

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one reading “Brian J. Kutz” and the other “Joyce L. Walker.” The Mortgage also bears the signature and stamp of Brian J. Kutz as a notary public of the State of Ohio.

9. Joyce Walker is a personal friend of the debtors whom they have known for approximately three years.

10. Brian Kutz was, at the time the Mortgage was executed, an employee of Prospect Title. While employed by Prospect Title, Mr. Kutz’s duties included closing loans on behalf of mortgage lenders and the majority of those closings occurred in the mortgagors’ homes.

DISCUSSION

Plaintiff-trustee alleges that, despite there being signatures of two witnesses on the Mortgage, only one individual was actually present when debtors executed that document.¹ If plaintiff-trustee can prove that allegation, then the mortgage was not validly executed under Ohio law and he could be entitled to avoid the mortgage pursuant to §544(a) of the Bankruptcy Code. *See Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020 (6th Cir. 2001). Because a facially valid mortgage bears a strong presumption of validity, plaintiff-trustee must prove his case by clear and convincing evidence. *See id.* at 1025-26. Clear and convincing evidence is “that measure or degree of proof which will produce in the mind of the

¹ Interestingly, although plaintiff-trustee contends that one witness was present during the execution of the Mortgage, none of the pleadings on file in this adversary proceeding (including the parties’ stipulations) identify who exactly that one witness was.

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trier of facts a firm belief or conviction as to the allegations sought to be established.” *Hobson v. Eaton*, 399 F.2d 781, 784 at n.2 (6th Cir. 1968) (citation omitted).

Debtors executed the Mortgage at the Property which, at the time of execution, was where they resided.² Because a “home closing” is usually an extraordinary event for consumers, it might be expected that these debtors would remember the events surrounding execution of the Mortgage, especially which individuals were present in their home for such an unusual event. *See Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1026 (6th Cir. 2001). However, in this particular case neither debtor had very clear recollections.

During her testimony, Felecia Lucas indicated that she could not remember whether or not her husband was present when she executed the Mortgage. Nor could she clearly recall whether or not Joyce Walker was present. During his testimony, Michael Lucas could not remember when it was that he signed the Mortgage. Although both debtors testified that a “heavy set” man with “dark hair” came to their home twice in relation to the loan from Mortgage Lenders, neither could recall whether or not those visits had to do with execution of the loan application or execution of the Mortgage.

Joyce Walker testified that she does not recall signing the Mortgage. However, she also testified that such lack of recollection could be due to an illness which affects her

² During the trial, debtors testified that they no longer reside at the Property.

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memory.³ Brian Kutz testified that he could not specifically recall signing the Mortgage but that during his two and one-half years of employment with Prospect Title he closed between three and four mortgages a day, sometimes six days per week. Mr. Kutz verified that it was his signature that appeared on the Mortgage both as a witness and as a notary and he also testified that, consistent with Prospect Title's company policy, he would never notarize a mortgage unless two witnesses were present at the closing.

Although a notary's testimony that he always adhered to an inflexible rule is to be given "great weight," that evidence is not necessarily conclusive. *See Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1026 (6th Cir. 2001) (citation omitted). What gives the Court pause in this particular case is the testimony of both debtors that, prior to his appearance in Court on the day of trial, they had never before seen Mr. Kutz. Although these debtors were unable to recall many particulars surrounding execution of the Mortgage, both appeared to be truthful throughout their testimony and, given that they both recalled the "heavy set" and "dark haired" man being at their home in connection with the loan from Mortgage Lenders, it would stand to reason that they would also recall Mr. Kutz being in their home if, in fact, he had been there. However, given that all the testifying witnesses could not clearly recall what transpired when the Mortgage was executed and given that the Mortgage is valid on its face, plaintiff-trustee has failed to present sufficient proof to enable this Court to form a firm

³ At the conclusion of her testimony, Ms. Walker spontaneously uttered that, upon further review, she was not sure that the signature on the Mortgage was even hers because "she never makes her 'k' and 'l' that way." After comparing the signature on the Mortgage with the signature on Ms. Walker's state identification card (a copy of which was entered into evidence as a Court exhibit), the Court could not detect any notable discrepancy between the two.

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belief or conviction that only one witness was present. Plaintiff-trustee has not met the clear and convincing standard with the evidence presented at trial.

CONCLUSION

Based upon the foregoing, the Court finds that plaintiff-trustee has not carried his burden of proof in this case. Having determined the issues in this proceeding, the Court will enter a separate order consistent with these findings of fact and conclusions of law.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 7/23/02