

IT IS SO ORDERED.

Dated: 01:37 PM September 10 2009

  
MARILYN SHEA-STONUM *ESP*  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:	)	
	)	
JOHN J. BERGMAN AND SHELLEY E.	)	
BERGMAN,	)	Case No. 08-54674
	)	
Debtors,	)	CHAPTER 7
	)	
	)	
HAROLD A. CORZIN, TRUSTEE	)	Adversary No. 09-5034
Plaintiff,	)	
	)	JUDGE MARILYN SHEA-STONUM
v.	)	
	)	
BANK OF AMERICA NATIONAL	)	Memorandum Opinion
ASSOCIATION, <i>et al</i> ,	)	
	)	
Defendants,	)	
	)	

I. PROCEDURAL BACKGROUND

Plaintiff-Trustee, Harold A. Corzin (“Trustee”), through counsel, initiated this adversary

proceeding against Bank of America, N.A. (“BOA”), John and Shelly Bergman (“Debtors”), Citimortgage, Inc. (“Citi”), and Summit County seeking an order: (1) allowing the Trustee to avoid the mortgage granted on the Debtors’ real property, 67 Schaefer Street, Akron, OH 44311 (the “Real Property”) to Argent Mortgage Company, LLC and assigned to BOA, as Trustee for Certificate holders of Bear Stearns Asset Backed Securities I, LLC, Asset Backed-Certificates Series 2006-HE2 (the “Mortgage”); and (2) requiring each named defendant to assert whatever interests they may have in the Real Property. This matter is before the Court on the following documents: Motion for Summary Judgment filed by the Trustee (the “Motion”) [docket # 27], the Response of BOA to the Trustee’s Motion (the “Response”)[docket #29], the Trustee’s Reply [docket #30] and Supplemental Briefs filed at the request of the Court [docket #33 and #34].

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

## **II. STIPULATED FACTS**

The following facts are not in dispute and are the subject of Joint Stipulations filed by the Trustee and BOA [docket #26]:

1. The Trustee’s claims in this adversary proceeding are within the core matter jurisdiction of the Bankruptcy Court.
2. On December 19, 2008, the Debtors, filed a petition in the United States Bankruptcy Court for the Northern District of Ohio seeking relief under chapter 7 of title 11 of the United States Code (the “Debtors’ Case”), and relief was ordered on that date.
3. The Plaintiff is the Trustee in Bankruptcy for the Debtors.

4. At the time of the commencement of the Debtors' Case, the Debtors were the joint owners of certain real property located at 67 Schaefer Street, Akron, Ohio 44311, which is more fully described as follows:

Situated in the City of Akron, County of Summit and State of Ohio: And known as being part of Lot No. 18 in Frank Schaefer's Section Allotment, as the same is numbered and delineated upon the recorded Plat thereof, of records in Plat Book 7, Page 5, Recorders Office, Summit County, Ohio and more particularly described as follows:

Beginning at the Southwest corner of said lot; thence Easterly along the South line of said lot a distance of 48.5 feet to a point; thence Northerly and parallel to the West line of said lot and the East line of Mangold Street a distance of 105 feet to a point on the North line of said lot to the Northwest corner thereof; thence Southerly along the West line of said Lot and East line of Mangold Street a distance of 105 feet to the place of beginning, together with the South 7 feet of a 14 foot alley (formerly known as Schaefer Court) which was vacated by ordinance 1949-129. Be the same more or less, but subject to all legal highways.

Permanent Parcel No. 68-38822 (the "Real Property").

5. There is a mortgage of record on the Real Property granted to Argent Mortgage Company, LLC, dated July 27, 2005, and filed with the Recorder of Summit County, Ohio on August 1, 2005 (the "Mortgage").

6. The copy of the Mortgage, Exhibit A, is authentic and admissible in this adversary proceeding.

7. The Mortgage was assigned to Mortgage Electronic Registration Systems, Inc. ("MERS"), on or about August 1, 2005. An accurate copy of the Corporate Assignment of Mortgage, was filed with the Recorder of Summit County, Ohio on January 17, 2007 ("Assignment I"). Exhibit B.

8. The copy of the Assignment, Exhibit B, is authentic and admissible in this adversary proceeding.

9. The Mortgage was subsequently assigned to BOA, on or about February 3, 2009. An accurate copy of the Assignment of Mortgage, which was filed with the Recorder of Summit County, Ohio on February 9, 2009, Exhibit C, (“Assignment II”). BOA presently holds the Mortgage.

10. The copy of Assignment II is authentic and admissible in this adversary proceeding. Exhibit C.

11. The notary acknowledgment (the “Acknowledgment”) on page 15 of the Mortgage does not identify the names of the persons who signed the Mortgage, and does not identify the Debtors by name.

12. The above-named parties do not dispute that the Debtors signed the Mortgage, and that a member of the notary public was present when the Debtors signed the Mortgage. However, the Trustee disputes whether the Acknowledgment on page 15 of the Mortgage complies with the requirements of Ohio law regarding acknowledgments, whether the Mortgage is valid and enforceable under Ohio law, and whether the Mortgage was eligible to be recorded. BOA disputes whether the Mortgage can be avoided by the Trustee under 11 U.S.C. § 544.

### **III. FINDINGS OF FACT**

In addition to the foregoing stipulations the Court makes the following findings of fact:

1. The Mortgage was executed on, what appears to be, a pre-printed or typed form. Exhibit A.

2. The Acknowledgment is on page 15 and is as follows:

On this 27<sup>th</sup> day of July 2005, before me a Notary Public in and for said County and State, personally appeared

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the individual(s) who executed the foregoing instrument and acknowledged that he/she/they did examine and read the same and did sign the foregoing instrument, and that the same is his/her/their free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

3. The Acknowledgment includes the notary's seal and signature. Exhibit A.
4. There are initials on the bottom left hand corner of the Acknowledgment page. The initials appear to be those of the Debtors.

#### **IV. DISCUSSION**

##### ***A. Summary Judgment Standard***

The Court shall grant a movant's 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 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 seeking summary judgment bears the initial burden of production by demonstrating the absence of any genuine issue of material fact, but the ultimate burden of demonstrating that an issue of fact remains for trial lies with the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Once the moving party satisfies its burden, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Fed. R. Bankr.

P. 7056(e). When considering a motion for summary judgment the Court should “construe all reasonable inferences in favor of the non-moving party.” *Hamilton v. Starcom Mediavest Group*, 522 F.3d 623, 627 (6th Cir. 2008). The material facts in this case are not disputed. The issues before the Court are solely questions of law. Therefore, the Court may appropriately address whether or not summary judgment should be granted.

### ***B. Law and Argument***

#### **1. 11 U.S.C. §544(a)(3) and Ohio Mortgage Execution Law**

The principal issue before the Court is whether or not the Trustee may avoid the Mortgage for the benefit of the bankruptcy estate. The Trustee maintains that the Mortgage was not properly acknowledged, according to Ohio law, and is therefore avoidable pursuant to the Trustee’s rights as a bona fide purchaser under 11 U.S.C. § 544(a)(3). BOA maintains that the acknowledgment of the Mortgage substantially complies with Ohio law and that the execution of the Mortgage is valid.

In Ohio, a bona fide purchaser takes priority over a defectively executed mortgage if the bona fide purchaser does not have actual or constructive knowledge of the mortgage. *Zaptocky v. Chase Manhattan Bank (In re Zaptocky)* 250 F.3d 1020, 1027 (6th Cir. 2001). A mortgage that is improperly executed in Ohio is not entitled to be recorded. *Stubbins v. Chase Home Fin. LLC(In re Robinson)*, 403 B.R. 497, 501 (Bankr. S.D. Ohio 2008). A recorded, but defectively executed mortgage is treated as though it was not recorded and does not give a bona fide purchaser constructive notice of the mortgage. *Mortgage Elec. Registration v. Odita*, 159 Ohio App. 3d 1, 822 N.E. 2d 821, 825 (Ohio Ct. App. 2004); *Thames v. Asia’s Janitorial Serv.*, 611 N.E.2d 948, 954 (Ohio Ct. App. 1992). In bankruptcy, the trustee has the rights of a bona fide

purchaser “without regard to any knowledge of the trustee.” 11 U.S.C. § 544(a)(3).

Accordingly, the Trustee may avoid a mortgage that was defectively executed, regardless of his actual knowledge of the mortgage. *Zaptocky*, 250 F.3d at 1027.

A mortgage is properly executed in Ohio, if its signing is acknowledged by the mortgagor, “before a judge or clerk of court of record . . . or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgment and subscribe the official’s name to the certificate of the acknowledgment.” O.R.C. § 5301.01. A certificate of acknowledgment will be recognized if it contains the words “acknowledged before me” or their substantial equivalent. O.R.C. § 147.541. The term “acknowledged before me” means that:

- (A) The person acknowledging appeared before the person taking the acknowledgment;
- (B) He acknowledged he executed the instrument;
- (C) In the case of: (1) A natural person, he executed the instrument for the purposes therein.

O.R.C. § 147.541. Ohio recognizes the following form of acknowledgment for “an individual acting in his own right,”

State of.....  
County of .....  
The foregoing instrument was acknowledged before me this (date) by  
(name of person acknowledged)  
(Signature of person taking acknowledgment)  
(Title or rank)  
(Serial number, if any)

O.R.C. § 147.55(A). Other forms of acknowledgment are not precluded by the recognition of the above form. *Taylor v. Kemp*, 2005 Ohio 6787, P38 (Ohio Ct. App. 2005).

## 2. Validity of Acknowledgment

The Trustee maintains that the Acknowledgment is defective because it does not include the names of the Debtors. BOA's position is that the Acknowledgment substantially complies with Ohio's acknowledgment requirement because the Debtors' initials appear at the bottom of the acknowledgment page of the Mortgage.

Under Ohio law, an acknowledgment is defective if it does not contain the name of the individual or individuals who are acknowledging their signatures. In *Smith's Lessee v. Hunt*, the Supreme Court of Ohio determined that a mortgage was invalid because the name of the person who acknowledged his signature was not included in the acknowledgment clause. 13 Ohio 260 (1844). *Smith's Lessee* is still good law and has been followed in a number of more recent decisions.<sup>1</sup> The absence of the Debtors' names on the acknowledgment clause is not a defect that can be overcome through the doctrine of substantial compliance. *Bozman v. Universal I Credit Union, Inc. (In re Bozman)*, 365 B.R. 824 (Bankr. S.D. Ohio 2007) (allowing the trustee to avoid a mortgage where the mortgage document did not contain an acknowledgment).

A mortgage execution is valid if it substantially complies with O.R.C. § 5301.01. In order to determine whether or not a mortgage execution substantially complies with the Ohio code, a reviewing court should look at "the nature of the error and the balance of the document to determine whether or not the 'instrument supplies within itself the means of making the

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<sup>1</sup> See, e.g., *Helbling v. Mortg. Elec. Registration Sys., Inc. et al (In re Cala)*, 2008 Bankr. LEXIS 1451 (Bankr. N.D. Ohio 2008) (finding that a mortgage acknowledgment was invalid because it was missing the name of one of the mortgagors); *Reiser v. Fifth Third Mortg. Co. (In re Wahl)*, 2009 Bankr. LEXIS 1756 (Bankr. S.D. Ohio June 30, 2009) (holding that a mortgage acknowledgment was invalid because the acknowledgment clause did not reference the debtor husband).

correction.’’ *Menninger v. First Franklin Fin. Corp. (In re Fryman)*, 314 B.R. 137, (Bankr. S.D. Ohio 2004) (quoting *Dodd v. Bartholomew*, 44 Ohio St. 171, 5 N.E. 866 (1886)). There are several cases where the incorrect name was used in the acknowledgment space and the courts still determined that the acknowledgment substantially complied with the law.<sup>2</sup> The Court has found no Ohio cases where a blank acknowledgment was considered to be in substantial compliance. Again, BOA’s contention that the presence of the Debtors’ initials at the bottom of the page bring the Acknowledgment in substantial compliance with Ohio law is unsupported by any Ohio case law.

In *Drown v. Countrywide Home Loans, Inc. (In re Peed)*, the Bankruptcy Court for the Southern District of Ohio examined two mortgage acknowledgments that did not include the debtor’s name in the acknowledgment. 403 B.R. 525, 536 (Bankr. S.D. Ohio 2009). The mortgages in question contained the debtor’s initials at the bottom of some of the pages of the mortgages, but not the acknowledgment pages. *Id.* The court stated that the absence of the debtors’ initials on the acknowledgment pages bolstered the conclusion that the acknowledgments in that case did not substantially comply with Ohio’s acknowledgment requirements. *Id.* BOA cites this reasoning and argues that the presence of the Debtors’ initials on the acknowledgment page in this case brings the Acknowledgment within substantial compliance with O.R.C. § 5301. The court in *Peed*, however, specifically noted that even if the

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<sup>2</sup>See, e.g., *Dodd v. Bartholomew*, 44 Ohio St. 171 (1886) (holding that the acknowledgment in question was not defective where the acknowledgment contained the names Charles B. Clark and Mary Clark, when the grantors were actually Charles A. Clark and Mary Clark); *Mid-American Nat’l Bank & Trust Co. v. Gymnastics Internat’l*, 6 Ohio App. 3d 11 (Ohio Ct. App. 1982) (holding that the acknowledgment substantially complied even though a corporation’s name was listed in the acknowledgment instead of those of the individuals acknowledging on behalf of the corporation); *Administrator of Veterans Affairs v. City Loan Co.*, 1985 Ohio App. LEXIS 6607 (Ohio App. Dist. 1985) (finding that an acknowledgment that incorrectly contained name of mortgagee instead of mortgagor did not make the mortgage execution defective).

initials of the mortgagor appeared on the acknowledgment pages, the acknowledgments still would not have substantially complied because the initials would not have been in the acknowledgment clause. *Peed*, 403 B.R. at 536 (quoting *Cala v. Mortgage electronic Registration Systems, Inc. (In re Cala)*, 2008 Bankr. LEXIS 1451 at \*6 (Bankr. N.D. Ohio 2008)). In this case, the Debtors' initials appear at the bottom of every page of the Mortgage, including the Acknowledgment page. The Debtors' initials are clearly not part of the Acknowledgment clause. The Debtors' names should be within the Acknowledgment clause. The Acknowledgment does not comply with Ohio law; therefore, the Mortgage is defectively executed and shall be treated as though it was not recorded.

It is not for the bankruptcy courts to cure documentation issues, such as a blank mortgage acknowledgment, that have been identified by Ohio case law for well over one hundred and fifty years. *See Smith's Lessee*, 13 Ohio 260 (1844). Mortgage lenders and the individuals they employ to document mortgages must pay particular attention to long standing documentation requirements. Those lenders who fail to do so must suffer the consequences of execution mistakes. The Ohio Legislature took action after the decision in *Zaptocky v. Chase Manhattan Bank (In re Zaptocky)*<sup>3</sup> to provide relief to lenders with respect to the witness requirement for a validly executed mortgage. O.R.C. § 5301.01 (B)(1)<sup>4</sup>. That statutory change did not, however,

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<sup>3</sup> 250 F.3d 1020 (6th Cir. 2001) (determining that the bankruptcy trustee could avoid the mortgage in question because it was witnessed by only one witness and was not validly executed according to Ohio law.)

<sup>4</sup> Prior to 2002, Ohio required the signing of a mortgage be witnessed by two people in order for the mortgage to be considered validly executed. The Ohio Legislature deleted the two witness requirement from the Ohio Code. It also amended O.R.C. § 5301.01 to include language that provided that, if a mortgage was defective due to a failure to comply with the witness requirement, it would be deemed properly executed, unless a signature was obtained by fraud. § 5301.01(B)(1)(b) also states that if one of these mortgages was recorded, it would provide constructive notice to a bona fide purchaser, despite the witness defect.

provide absolution to mortgage lenders to ignore the other execution requirements under Ohio law.

### 3. The Assignment and Constructive Notice

BOA asserts that, even if the Mortgage is not entitled to be recorded, the Trustee has constructive notice of the Mortgage via Assignment I, which was duly recorded.<sup>5</sup> There is at least one Ohio case which supplies guidance with respect to this issue. In *Mellon Mortgage Co. v. Jones*, the Ohio Tenth District Court of Appeals noted that an assignment of a land contract did not provide constructive notice to a bona fide purchaser of the vendee's interest because the land contract was not entitled to be recorded. 54 Ohio App. 2d 45, 47-48 (Ohio Ct. App. 1977). Prior to 1961, land contracts were not entitled to be recorded in Ohio and the land contract at issue in *Mellon* was recorded in 1959. *Id.* at 47. In *Mellon*, the court noted that,

Since the land contract was not entitled to be recorded, any mortgage for the vendee's interest thereunder is also not entitled to be recognized for constructive notice as the instrument by which the contract is assigned or mortgaged stands necessarily upon the same grounds. *See Churchill v. Little* (1872) 23 Ohio St. 301. The reason, of course, is that the latter document would be outside the chain of title. Recognition of such a stray document would frustrate the purposes of the recording act. *Id.* at 47-48.

In the matter at hand, the Mortgage was not entitled to be recorded; therefore, according to *Mellon*, Assignment I, which falls after the Mortgage in the chain of title<sup>6</sup>, does not provide

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<sup>5</sup> Assignment II is not at issue because it was recorded after the Debtors filed for bankruptcy and would not have provided notice to the Trustee.

<sup>6</sup>

The definition of chain of title is:

[T]he successive conveyances commencing with the patent from the government or some other source and including the conveyance to the one claiming title. . . . An instrument which is recorded, but which cannot be traced back to the original grant because some previous instrument connecting it to the chain of title is unrecorded, lies outside the chain of title . . . . The chain of title can be traced using the grantor-grantee index maintained by the local record of deeds, and in order for the recorded instrument to be effective as against subsequent purchasers and creditors, it must operate to give notice to those looking through the grantor-grantee index. . . . A . . . stray instrument which merely appears in other indices, such as the tract index, does not operate to give constructive notice. . . .

constructive notice to a bona fide purchaser.

The Court also finds persuasive *Lyon v. Franklin Mortg. Funding (In re Shannon)*, a bankruptcy case from the Eastern District of Kentucky, which dealt with a factual scenario similar to the one in this case. 343 B.R 585 (Bankr. E.D. Ky. 2006). Under Kentucky law, as well, a defectively executed mortgage is not entitled to be recorded. *Id.* In *Shannon*, the court determined that an assignment of a defectively executed mortgage did not provide constructive notice or inquiry notice to a bona fide purchaser because the assignment fell outside the chain of title. *Shannon* 343 B.R at 598. Assignment I would be considered to be outside the chain of title because there is “no prior conveyance or instrument of record to link it to the chain of title.” *Id.* Ohio follows the doctrine of chain of title and thus the holding in *Shannon* is persuasive authority with respect to this issue. See *Mellon*, 54 Ohio App. 2d at 47. Applying the reasoning found in *Mellon* and *Shannon*, the Court holds that Assignment I is outside the chain of title and does not provide constructive or inquiry notice to the Trustee.

## V. CONCLUSION

Based on the foregoing, the Trustee’s Motion for Summary Judgment is well taken. The Trustee may avoid the Mortgage held by BOA. A judgment entry consistent with this opinion shall be separately entered.

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cc: via electronic mail

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*Lyon v. Franklin Mortg. Funding (In re Shannon)*, 343 B.R 585, 589 (Bankr. E.D. Ky. 2006) (quoting *Olsen v. Bank One NA (In re Bruder)*, 207 B.R. 151, 157 (N.D. Ill. 1997)).

Robert Barr, counsel for the Trustee  
Amelia Bower, counsel for BOA  
Scott Ciupak, counsel for BOA  
Phyllis Ulrich, counsel for Citimortgage, Inc.  
Marvin Evans, counsel for John Donofrio, Summit County Auditor  
Harold Corzin, Trustee

via U.S. Mail  
John and Shelly Bergman