

**IT IS SO ORDERED.**

**Dated: 04:32 PM March 17 2010**



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

IN RE:	)	CASE NO. 07-53980
	)	
PATRICK J. CASSESE	)	CHAPTER 7
CAROL LYNN CASSESE,	)	
Debtors	)	JUDGE MARILYN SHEA-STONUM
_____	)	_____
	)	
HAROLD CORZIN, TRUSTEE,	)	<b>ADVERSARY NO. 09-5182</b>
Plaintiff,	)	
	)	
vs.	)	
	)	
BANK OF NEW YORK, AS TRUSTEE, et	)	
al.,	)	<b>MEMORANDUM OPINION RE: CROSS</b>
Defendants.	)	<b>MOTIONS FOR SUMMARY JUDGMENT</b>

This matter comes before the Court on (1) a motion for partial summary judgment filed by Plaintiff-Trustee [docket #44]; (2) a motion for summary judgment filed by defendant, The Bank of New York as Trustee for the Certificateholders of CWALT, Inc. Alternative Loan Trust 2006OC11, Mortgage Pass Through Certificates, Series 2006-OC11 (“Bank of NY”) [docket #45]; (3) Plaintiff-Trustee’s memorandum in opposition to Bank of NY’s motion for summary judgment [docket #46]

and (4) the parties' stipulations [docket #42]. 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) and (K) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the foregoing pleadings and the pleadings filed in debtor's main chapter 7 case the Court makes the following findings of fact and reaches the following conclusions of law.

### **I. STIPULATED FACTS AND MATTERS OF RECORD**

1. On or about July 25, 2006, Carol Cassese and her spouse, Patrick Cassese, signed a mortgage on property located at 2078 Glengary Drive, Akron, Ohio 44333 (the "Real Property") in favor of Mortgage Electronic Registration Systems, Inc., as nominee for First Ohio Banc & Lending, Inc. (the "Mortgage"). The Mortgage was filed with the recorder of Summit County, Ohio on September 19, 2007.

2. The Mortgage was assigned to the Bank of NY which presently holds the Mortgage.

3. The notary acknowledgment on page 14 of the Mortgage (the "Acknowledgment") does not identify the names of the persons who signed the Mortgage, and does not identify Carol or Patrick Cassese by name.

4. On March 24, 2008, Carol Lynn Cassese ("Debtor"), filed a petition in the United States Bankruptcy Court for the Northern District of Ohio seeking relief under chapter 7 of the Bankruptcy Code and relief was ordered on that date.

5. Plaintiff-Trustee is the trustee in Bankruptcy for Debtor.

6. On August 29, 2008, Debtor's case was administratively consolidated with the case of Debtor's spouse, Patrick J. Cassese (Case No. 07-53980). The cases were not substantively consolidated.

7. At the time of the filing of her case, Debtor was the owner of an undivided one-half interest in the Real Property.

8. Plaintiff-Trustee and the Bank of NY do not dispute that Debtor and her spouse signed the Mortgage and that a member of the notary public was present when Debtor and her spouse signed the Mortgage.

9. Attached to the stipulations are copies of the Mortgage (Exhibit A) and the assignment to Bank of NY (Exhibit B) which the parties stipulate are authentic and admissible in this Adversary Proceeding.

## **II. SUMMARY JUDGMENT STANDARD**

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. *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The material facts in this case are not disputed and the issues before the Court are solely questions of law. Therefore, the Court may appropriately address the parties' motions for summary judgment.

### III. DISCUSSION

Plaintiff-Trustee contends that the Acknowledgment does not comply with Ohio law thus rendering the Mortgage defective and subject to avoidance pursuant to §§ 544 and 551 of the Bankruptcy Code. The Bank of NY contends that, because the Acknowledgment substantially complies with Ohio law, the Mortgage was duly and properly recorded and Plaintiff-Trustee cannot avoid it for the benefit of the bankruptcy estate.

**A. 11 U.S.C. § 544(a)(3):** Pursuant to § 544(a)(3) of the Bankruptcy Code, Plaintiff-Trustee has the rights and powers of a bona fide purchaser of real property. This “strong arm” provision gives a bankruptcy trustee “the rights and powers of a bona fide purchaser of real property from the debtor if, at the time the bankruptcy is commenced, a hypothetical buyer could have obtained bona fide purchaser status.” *Owen-Ames-Kimball Co. v. Mich. Lithographing Co. (In re Mich. Lithographing Co.)*, 997 F.2d 1158, 1159 (6<sup>th</sup> Cir. 1993). Any transfer avoided under § 544(a)(3) of the Bankruptcy Code is preserved for the benefit of the estate. 11 U.S.C. § 551.

State law will determine the rights of a bona fide purchaser and the Mortgage provides that “the law of the jurisdiction in which the Property is located” (in this case, Ohio) shall govern. In Ohio, a bona fide purchaser of real property takes priority over the holder of 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 (6<sup>th</sup> Cir. 2001). Because a defectively executed mortgage is not entitled to be recorded, such a mortgage does not put a subsequent bona fide purchaser on notice even if filed in the land records where the real property is located. *Zaptocky v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1028 (6<sup>th</sup> Cir. 2001); *Amick v Woodworth*, 50 N.E. 437, 441 (Ohio 1898).

**B. Execution of the Mortgage:** A mortgage is deemed properly executed pursuant to Ohio law if it is signed by the mortgagor and the mortgagor acknowledges the signing “before a . . . notary public . . . who shall certify the acknowledgment and subscribe the official’s name to the certificate of the acknowledgment.” OHIO REV. CODE § 5301.01. A notary’s certificate of acknowledgment is required as proof of due execution and authority for recording the mortgage. *Logan v. WMC Mortg. Corp. (In re Gray)*, 410 B.R. 270, 280 (Bankr. S.D. Ohio 2009).

When certifying a mortgagor’s acknowledgment of the mortgage, the notary is certifying that:

(1) “[t]he person acknowledging appeared before him and acknowledged that he executed the instrument;” and (2) “[t]he person acknowledging was know to the [notary], or that the [notary] had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.” OHIO REV. CODE § 147.53. Although Ohio law provides statutory short forms of acknowledgment, *see* OHIO REV. CODE § 147.55, the use of a specified form is not required. A certificate of acknowledgment will be recognized in Ohio if it contains the words “acknowledged before me” or their substantial equivalent. OHIO REV. CODE § 147.541. The words “acknowledged before me” are deemed to mean:

- (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 stated; . . . ; and
- (D) The person taking the acknowledgment either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate.

OHIO REV. CODE § 147.541.

Notwithstanding a defect in a certificate of acknowledgment, a mortgage may be considered valid if its execution is found to substantially comply with Ohio law. *See, e.g., Stubbins v. Chase Home Fin. LLC (In re Robinson)*, 403 B.R. 497 (Bankr. S.D. Ohio 2008) (failure of acknowledgment clause to contain printed, typewritten or stamped name of notary and expiration date of notary's commission did not render mortgage invalid given that it was signed by mortgagors, initiated by mortgagors on every page and otherwise contained a properly signed certificate of acknowledgment); *Menninger v. First Franklin Fin. Corp. (In re Fryman)*, 314 B.R. 137 (Bankr. S.D. Ohio 2004) (error in acknowledgment clause which identified only one of two mortgagors as acknowledging mortgage before notary did not render mortgage defective where mortgage contained names of both mortgagors, both mortgagors initialed every page and use of the plural pronouns "they" and "theirs" made it clear that both mortgagors had acknowledged the instrument); *Mid-American Nat'l Bank & Trust Co. v. Gymnastics Int'l, Inc.*, 451 N.E.2d 1243 (Ohio Ct. App. 1982) (mortgage signed by corporate officers but including a certificate of acknowledgment identifying mortgagor as corporation was valid). When the certificate of acknowledgment in a mortgage wholly fails to identify the individuals who signed the document, substantial compliance with Ohio law cannot, generally, be found. *See, e.g., Geygan v. World Savings Bank. FSB (In re Nolan)*, 383 B.R. 391 (6<sup>th</sup> Cir. BAP 2008); *Drown v. Countrywide Home Loans, Inc. (In re Peed)*, 403 B.R. 525 (Bankr. S.D. Ohio 2009); *Drown v. GreenPoint Mortg. Funding, Inc. (In re Leahy)*, 376 B.R. 826 (Bankr. S.D. Ohio 2007). *Accord Gregory v. Ocwen Fed. Bank (In re Biggs)*, 377 F.3d 515 (6<sup>th</sup> Cir. 2004) (interpreting Tennessee law); *Rogan v. America's Wholesale Lender (In re Vance)*, 99 Fed. Appx. 25 (6<sup>th</sup> Cir. 2004) (interpreting Kentucky law).

The Acknowledgment at issue includes the notary's seal and sets forth the following:

State of OH  
County of Cuyahoga

The foregoing instrument was acknowledgment before me this 7-25-06 (date) of

(name of person(s) acknowledged).

/s/ Notary Public \_\_\_\_\_  
Notary Public

My commission expires: 2-19-2008

Nowhere in this Acknowledgment are the “names of the persons(s) acknowledged” set forth either specifically, *i.e.*, Patrick Cassesse and Carol Cassesse, or generally, *i.e.*, them, they or the mortgagors. Notwithstanding such a complete omission, Bank of NY argues that there is substantial compliance with Ohio law because (1) “[t]he Mortgage was initialed on each page and executed by Debtors”; (2) “[t]he Mortgage also was notarized in accordance with Ohio law on July 25, 2006”; and (3) “[o]n the same page as the acknowledgment clause appear the printed names and signatures of Mortgagors/Debtors.” Bank of NY Mot. for SJ at pg. 5. Such arguments must, however, fail.

As to its first argument the Court notes that the copy of the Mortgage attached to the parties’ stipulations and identified by the parties as authentic and admissible in this Adversary Proceeding does *not* contain *any* initials on *any* of its pages.<sup>1</sup> While some Courts have found that, when

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<sup>1</sup> On the top of page 1 of the Mortgage next to the pre-printed clause requesting that a copy of the filed document be returned to Fidelity National Title Group is an illegible scribble that could be someone’s initials. Given that such scribble was not specifically referenced by either party and is illegible the Court need not reference it any further.

considering the mortgage document as a whole, errors in a notary acknowledgment clause can be overcome by, *inter alia*, the mortgagors' initials on each page of the mortgage, *see, e.g., Fryman*, 314 B.R. at 139, such supplemental evidentiary support is simply not present in this case. Bank of NY's second argument must also fail because the stipulated facts recognize that the Acknowledgment does not fully comply with the requirements of Ohio law. If the Acknowledgment had, on its face, been proper, this particular matter would not be before the Court.

Although Bank of NY's last argument is, at first blush, somewhat more persuasive than the others, it too must fail because the mortgagors' signatures alone are simply not enough to support a finding of substantial compliance with the acknowledgment provisions of Ohio law. The primary purpose of a notary acknowledgment is to provide evidence that the persons signing the mortgage are indeed the persons from whom the obligation that is secured by the mortgage runs. The acts of a mortgagor acknowledging her signature on a mortgage and a notary certifying such acknowledgment are not purposeless formalities. They serve to verify the identity of the individual signing the mortgage and to establish a fraud-free system for recording the ownership of real property. *Gregory v. Ocwen Federal Bank (In re Biggs)*, 377 F.3d 515, 519 (6<sup>th</sup> Cir. 2004).

The Mortgage at issue is a pre-printed, standardized form. Accordingly, the proximity of the Acknowledgment to the signatures of Patrick and Carol Cassesse does not prove anything relative to the verification of the Cassesses as the actual mortgagors. The only thing that the Acknowledgment at issue evidences is that, at some point prior to the Mortgage being filed with the Summit County Recorder's Office, a notary placed his/her signature and seal on the document.<sup>2</sup>

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<sup>2</sup> In its Brief in Support of its motion for summary judgment Bank of NY also states that "[t]he acknowledgment clause *clearly identifies the mortgagors* as 'the individual(s) who executed the foregoing instrument.'" Bank of NY Mot. for SJ at pg. 9 (emphasis added). The Court is unclear, given the undisputed facts in this case, what basis counsel had in making this assertion.



#### **IV. CONCLUSION**

Based upon the foregoing the Court finds that the Mortgage was not executed in substantial compliance with Ohio law and, as such, was not entitled to be recorded. Accordingly, Plaintiff-Trustee in his status as a bona fide purchaser under § 544(a)(3) of the Bankruptcy Code takes priority over Bank of NY as the holder of the defectively executed Mortgage. Plaintiff-Trustee is further entitled to avoid the Mortgage for the benefit of the bankruptcy estate pursuant to § 541 of the Bankruptcy Code. Plaintiff-Trustee's motion for partial summary judgment is, therefore, granted and Bank of NY's motion for summary is denied. A Judgment Entry consistent with this Memorandum Opinion will be entered separately in this proceeding.

# # #

cc (via electronic mail):

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