

IT IS SO ORDERED.

Dated: 04:15 PM February 16 2011



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

IN RE:)	CASE NO. 10-50302
)	
ROBERT JOHN KUHN,)	CHAPTER 7
)	
DEBTOR(S))	JUDGE MARILYN SHEA-STONUM
)	
ROBERT S. THOMAS, II, TRUSTEE,)	ADVERSARY NO. 10-5065
)	
PLAINTIFF(S),)	
)	
vs.)	
)	
ROBERT JOHN KUHN, ET AL.)	MEMORANDUM OPINION
)	
DEFENDANT(S).)	

This matter comes before the Court on a complaint filed by the chapter 7 trustee ("Plaintiff-Trustee") to determine the validity, priority and extent of liens on certain real property. A trial in this matter was held on December 20, 2010 during which evidence was presented in the form of exhibits as well as testimony from Robert Kuhn, defendant-debtor, and from Terrance Michael Blackley, a notary public and former employee of Lakeside Title & Escrow Agency, Inc.. 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. This matter 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 testimony and evidence presented at the trial, the arguments of counsel, pleadings in this adversary proceeding and defendant-debtor's main chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In June 2006, Robert Kuhn was the sole title owner of real property located at 7778 Crocker Road in Valley City, Ohio (the "Property").

2. Terrance Blackley has been a notary public in the State of Ohio since at least June 2006. Mr. Blackley was employed by Lakeside Title & Escrow Agency, Inc. ("Lakeside") from 2002 until December 2006.

3. Sometime on or about May 3, 2006, Mr. Kuhn and Peter Loken entered into a purchase and sale agreement regarding the Property. Pursuant to that agreement the purchase price for the Property was set at \$659,900 and Lakeside was identified as the closing/escrow agent for the transaction. At the time that the purchase and sale agreement was entered into the Property was encumbered by mortgages to Option One Mortgage and JPMorgan Chase Bank.

4. NovaStar Mortgage, Inc. ("NovaStar") was selected by Mr. Loken to provide the primary financing for his purchase of the Property. In exchange for a \$593,910 loan, Mr. Loken executed a mortgage in favor of NovaStar. The Bank of New York Mellon, a named defendant in this proceeding, is successor in interest to NovaStar.

5. As of June 29, 2006, NovaStar deposited \$601,451.68 with Lakeside to fund Mr. Loken's purchase of the Property. On June 29, 2006, closing instructions were forwarded from

NovaStar to Lakeside. Pursuant to those closing instructions, the mortgage to NovaStar was to be recorded in a first lien position prior to the disbursement of the loan proceeds.

6. On or about June 30, 2006, Mr. Blackley went to the Property to facilitate execution of a deed to transfer title to the Property from Robert Kuhn to Peter Loken.

7. During that meeting Mr. Kuhn signed a “General Warrant Deed” (the “Deed”) regarding the Property in favor of Peter Loken. Also during that meeting Mr. Blackley, as notary, signed a notary acknowledgment. That notary acknowledgment sets forth, in part, the following:

BE IT REMEMBERED, That on this 30 day of June, 2006, before me the subscriber, a Notary Public in and for said County, personally came, Vito Vento and Concetta Vento, the Grantor(s) in the foregoing deed, and acknowledged the signing thereof to be his [sic] voluntary act and deed, for the purpose mentioned therein.

Mr. Kuhn and his wife jointly purchased the Property from Vito Vento and Concetta Vento in the winter of either 1999 or 2000. Pursuant to their divorce, Mr. Kuhn’s ex-wife quit claimed title to the Property to Mr. Kuhn.

8. The Deed was never filed with the Medina County Recorder and the whereabouts of the original of that document was never located in discovery.

9. Several HUD-1 Settlement Statements were prepared in connection with the sale of the Property. Pursuant to one of those Settlement Statements, Peter Loken was to make a deposit of \$75,858.40. Mr. Loken never provided that deposit. Instead, Mr. Blackley withdrew \$77,922.46 from the funds provided to Lakeside by NovaStar and used those funds to obtain a certified bank check purporting to be from Peter Loken to Lakeside for the deposit.

10. Mr. Blackley's compensation at Lakeside was comprised of salary plus commission. His commission was based on a percentage of the title insurance issued in a transaction. Mr. Blackley withdrew the NovaStar funds to create the deposit check from Mr. Loken to Lakeside in order to facilitate the sale of the Property and, thus, receive a commission on the deal. Mr. Blackley had engaged in this type of behavior on more than this one occasion.

11. From the funds provided to Lakeside by NovaStar, the mortgage held by Option One was paid in full and the \$105,000 balance was remitted to Mr. Kuhn. From those funds Mr. Kuhn paid \$29,000 to Peter Loken and used the remainder as follows: \$36,000 was used as a down payment to purchase another residence located at 3176 Pioneer Way in Medina, Ohio; \$26,000 was paid to his ex-wife; \$4,000 was used to pay attorney fees; and \$10,000 was used to pay for living expenses.

12. No funds were paid to JPMorgan Chase Bank and NovaStar never obtained a first lien on the Property.

13. On July 13, 2006, a "General Warrant Deed" regarding the Property was recorded with the Medina County Recorder (the "Recorded Deed"). The Recorded Deed identifies Robert Kuhn as grantor and Peter Loken as grantee. The Recorded Deed is dated June 30, 2006 and includes a signature on the signature line above Robert Kuhn's name. The Recorded Deed includes a notary acknowledgment that is signed by Terrance Blackley and sets forth, in part, the following:

BE IT REMEMBERED, That on this 30 day of June, 2006, before me the subscriber, a Notary Public in and for said County, personally came, Robert J. Kuhn II the Grantor(s) in the foregoing deed, and acknowledged the signing thereof to be his voluntary act and deed, for the purpose mentioned therein.

14. On December 27, 2006, a “Quit Claim Deed” regarding the Property was recorded with the Medina County Recordrd (the “Quit Claim Deed”). The Quit Claim Deed identifies Peter Loken as grantor and “Peter Loken a single man and Robert J. Kuhn II, a single man” as grantees. The Quit Claim Deed includes a notary acknowledgment that is signed by Peter Loken.

15. On the acknowledgment page attached to the Deed, the Recorded Deed and the Quit Claim Deed appears the following type-written information:

This information was prepared by:
The O’Brien Law Firm
Lakeside Title and Escrow Agency, Inc.
123 West Prospect Avenue
Cleveland, Ohio 44115
216-771-1272

16. On his Schedule A - Real Property, Mr. Kuhn indicates that he is joint owner of the Property with Peter Loken. He also lists the following under information under “Description and Location of Property:”

Lien:

1) Chase Mortgage: \$144,000

This is debtor home equity line of credit which was not paid off by Title Co. from proceeds of purchase

2) Saxon Mortgage \$600,000 (formerly NovaStar)

This is purchase money mortgage company. Intend to surrender

NOTE: Real estate was sold by debtor to Peter Loken 6/06. First mortgage of approximately \$418,000 was paid by Lakeside Title. Another \$140,000 was to have been paid on Home equity line of credit with [JPMorgan] Chase Bank, but was not. Debtor received approximately \$75,000. Litigation is pending in Medina Common Pleas Court . . . where Loken’s mortgage company (NovaStar) is foreclosing. Loken never made any payments on the loan. This matter is currently the subject of a criminal investigation. The targets of the investigation are believed to be Lakeside Title and Peter Lokens [sic]. Debtor has been named a defendant in the foreclosure. There are multiple cross-claims and counterclaims.

17. On his Schedule D - Creditors Holding Secured Claims, Mr. Kuhn lists “Chase Mortgage” as holding a \$144,000 claim secured by a mortgage on the Property and “Saxon

Mortgage” as holding a \$659,000 claim secured by a mortgage on the Property. Neither of these claims is listed as disputed.

DISCUSSION

In his complaint, Plaintiff-Trustee named four defendants (Robert Kuhn, Peter Loken, The Bank of New York Mellon and JPMorgan Chase Bank) and set forth two claims for relief, the first requiring defendants to set forth any claim in the Property and the second seeking to avoid any transfer of the Property from Mr. Kuhn to Peter Loken pursuant to 11 U.S.C. §§ 544 and 551. The Bank of New York Mellon filed an answer to Plaintiff-Trustee’s complaint as well as a cross-claim against Robert Kuhn and Peter Loken and a third party complaint against Lakeside alleging, *inter alia*, reformation of its mortgage on the Property, indemnity and/or contribution from Robert Kuhn and Lakeside if it is determined that it does not hold a mortgage on the Property and breach of fiduciary duty by Lakeside. Lakeside filed an answer to The Bank of New York Mellon’s third party complaint as well as a third party complaint against Terrance Blackley alleging conversion, gross negligence amounting to fraud, breach of fiduciary duty, civil conspiracy and entitlement to punitive damages.

Given the large number of ancillary issues raised by the cross-claim and the third party complaints, the parties agreed that the matters raised in Plaintiff-Trustee’s complaint should be addressed first. Accordingly, the December 20th trial was limited to whether Plaintiff-Trustee could successfully challenge the Recorded Deed pursuant to 11 U.S.C. §§ 544 and 551.

If the Recorded Deed is deemed to have validly conveyed title to the Property from Mr. Kuhn to Peter Loken, The Bank of New York Mellon would be entitled to claim an interest in the Property that is superior to any claim of the bankruptcy estate. *See generally, Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405 (Ohio 2006) (constructive trust may be imposed to avoid unjust enrichment

by a party who has acquired property by fraud or other wrong). If, however, the Recorded Deed is deemed to be defective, Plaintiff-Trustee could challenge it pursuant to § 544(a)(3) of the Bankruptcy Code which gives a trustee, as of the commencement of a bankruptcy case, the rights and powers of a bona fide purchaser of real property from the debtor. When a transfer of real property is avoided under § 544, it is preserved for the benefit of the estate. 11 U.S.C. § 551.

Plaintiff-Trustee contends that Mr. Kuhn's signature on the Recorded Deed is a forgery, that the notary did not acknowledge the signature of whoever did sign the Recorded Deed and that, therefore, the Recorded Deed is defective. Because the property at issue is located in Ohio, the efficacy of the Recorded Deed is governed by Ohio law. *Davis v. Ohio Federal Savings Bank, FSB (In re Haviaras)*, 266 B.R. 792, 795-96 (N.D.Ohio 2001), citing *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1024 (6th Cir. 2001). In Ohio there are three major prerequisites for proper execution of a deed conveying real property: (1) the deed must be signed by the grantor; (2) the signing must be acknowledged by the grantor before a notary public; and (3) the notary public must certify the acknowledgment and subscribe his name to a certificate of acknowledgment. Ohio Revised Code § 5301.01.

On its face, the Recorded Deed meets all the foregoing prerequisites and is, thus, presumptively valid. *Weaver v. Crommes*, 167 N.E.2d 661, 664 (Ohio Ct. App. 1959). See also *Terlecky v. Chase Home Finance (In re Sauer)*, 417 B.R. 523 (Bankr. S.D.Ohio 2009) (blank certificate of acknowledgment rendered mortgage facially invalid); *Logan v WMC Mortgage Corp. (In re Gray)*, 410 B.R. 270 (Bankr. S.D.Ohio 2009) (mortgage was facially invalid where notary public omitted mortgagor's name from certificate of acknowledgment). A presumptively valid deed cannot be set aside on the basis of fraud absent a showing of such fraud by clear and convincing evidence. *Willis v. Baker*, 79 N.E. 466, 469 (Ohio 1906); *Henkle v. Henkle*, 600 N.E.2d 791, 793-94

(Ohio Ct. App. 1991); *Augenstein v. Augenstein*, 737 N.E.2d 613, 619 (Ohio Ct. Com. Pl. 2000) citing *Household Fin. Corp. v. Altenberg*, 214 N.E.2d 667 (Ohio 1966). “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *Hobson v. Eaton*, 399 F.2d 781, 784 n.2 (6th Cir. 1968) citing *Cross v. Ledford*, 120 N.E.2d 118, 124 (Ohio 1954). Plaintiff-Trustee, as the party challenging the Recorded Deed, bears the burden of proof. *Weaver v. Crommes*, 167 N.E.2d 661, 665 (Ohio Ct. App. 1959).

To support his contention that Mr. Kuhn’s signature on the Recorded Deed is a forgery, Plaintiff-Trustee relies upon the testimony of Robert Kuhn and Terrance Blackley. As the trier of fact, this Court must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 88 (6th Cir. 1993); FED. R. BANKR. P. 8013. “Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.” *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

On direct examination, Mr. Kuhn stated that he remembers signing the Deed on June 30, 2006 and that Mr. Blackley was present for and acknowledged such signing. However, on cross-examination Mr. Kuhn was presented with his deposition in which he testified that he had no recollection of signing the Deed. He was unable to explain that prior, contradictory deposition testimony. As the cross-examination continued, Mr. Kuhn became less sure about exactly which documents he signed on June 30, 2006 ultimately stating “yes I do recall signing documents on June 30, I do not recall specifically the [Deed].”

As for the Recorded Deed, Mr. Kuhn testified on direct examination that he does not remember ever signing that document. He also testified that he could not identify the signature that appears above his type-written name on the Recorded Deed, that he never authorized anyone to sign that document on his behalf and that he only recalls signing one deed (the Deed) on June 30, 2006. Upon cross-examination, however, Mr. Kuhn acknowledged that his signature appears on several other documents related to the sale of the Property (i.e., several settlement statements and an “Acknowledgment of Receipt of Settlement Statement”) but testified that he had no independent recollection of signing any of those documents.

Plaintiff-Trustee also relies upon the testimony of Mr. Blackley who, on direct examination, claimed to have a clear recollection of his June 30, 2006 meeting with Mr. Kuhn and claimed to know exactly which documents were signed at that meeting. Mr. Blackley did not indicate that the meeting with Mr. Kuhn was in any way remarkable nor did he explain why he remembered it so clearly. He also testified that, although the acknowledgment attached to the Recorded Deed bears his signature and notary stamp, he does not recall witnessing the signing of the Recorded Deed and he has no idea how the acknowledgment page got attached to that document. Mr. Blackley further testified, however, that he never executed a notary acknowledgment for a blank deed. When asked on cross examination how many deeds he acknowledged since June of 2006, Mr. Blackley could not give even an estimated answer. Notwithstanding his complete inability to recall the number of deeds he acknowledged in the last four years, Mr. Blackley reiterated that he clearly recalled the June 30, 2006 meeting where Mr. Kuhn signed the Deed.

Although the grantor signatures on the Deed and the Recorded Deed do not look the same and although Mr. Kuhn testified that he did not sign the Recorded Deed, such testimony is not clear and convincing evidence that the signature on the Recorded Deed is a forgery given that Mr. Kuhn was

unequivocal in his testimony that he always intended to transfer the Property to Peter Loken and that a deed need not be actually signed by the grantor to be effective.

[T]he signature of the grantor, though essential to a valid deed, need not be in the grantor's own handwriting. He or she may execute the deed either on his or her own, or with the assistance of another person, so long as there is evidence that the grantor comprehended and desired the execution of the deed.

35 OHIO JUR. 3D *Deeds* § 25 (2010). Additionally, the credibility of Mr. Kuhn's direct testimony that he does not recall ever signing the Recorded Deed is strained by the fact that he gave contradictory testimony regarding signing the Deed and was unable to remember signing several other documents in relation to the transaction that he did, in fact, sign. More significantly, Mr. Kuhn has already benefitted financially from the transaction and could do so again if the Recorded Deed is found to be defective. Should it be determined that The Bank of New York Mellon has no interest in the Property and should the Property be sold for a price that exceeds the total of any lien held by JPMorgan Chase Bank and the unsecured claims in his bankruptcy case¹ (plus interest), Mr. Kuhn would assert a right to receive the excess funds. *See* 11 U.S.C. § 726(a)(6).

The evidence presented via Mr. Blackley's testimony also does not rise to the level of clear and convincing evidence that the signature on the Recorded Deed is a forgery. Although Mr. Blackley testified that he did not properly acknowledge the signing of the Recorded Deed, such testimony is not credible given that he could not even estimate the number of deeds he has acknowledged in the past four years yet claims to clearly remember an unremarkable transaction that occurred in June of 2006. *Contra, e.g., In re Zaptocky*, 250 F.3d 1020, 1026-27 (6th Cir. 2001)

¹ In its answer to Plaintiff-Trustee's complaint, JPMorgan Chase Bank sets forth that it is currently due and owing \$139,967.74, plus interest, and that such amount is secured by a valid lien in the Property. The claims register in Mr. Kuhn's bankruptcy case indicates that, to date, unsecured claims in the amount of \$115,096.09 have been filed. On Schedule A of his bankruptcy petition, Mr. Kuhn indicates that the current value of the Property is \$659,000.

(debtor's testimony was credible and sufficient to invalidate a mortgage which appeared valid on its face given that the event at issue - a home refinancing - was an extraordinary and, thus, memorable event). Moreover, the credibility of Mr. Blackley is severely strained by his admission to improperly using loan proceeds that lenders deposited with Lakeside to obtain deposit checks in order to facilitate the sales of real property and increase his commission.

Mr. Kuhn's inconsistent testimony coupled with a financial motivation that would make him desire that Plaintiff-Trustee prevail in this case, makes this Court question his truthfulness. The Court also questions the truthfulness of Mr. Blackley given his improper use of lender funds for his own financial benefit. In short, the testimonial evidence relied upon by Plaintiff-Trustee to support his case falls far short of the clear and convincing standard he was required to meet.

CONCLUSION

Based upon the foregoing the Court finds that Plaintiff-Trustee has not met his burden of showing, by clear and convincing evidence, that the signature on the Recorded Deed was forged. Accordingly, the Court further finds that the Recorded Deed is not defective and that Plaintiff-Trustee cannot avoid it pursuant to 11 U.S.C. § 544. A entry denying Plaintiff-Trustee judgment on the second claim for relief set forth in his complaint, as well as an order setting a further pre-trial conference in this adversary proceeding, will be entered separately in this adversary proceeding.

#

cc (via electronic mail)

Michael J Moran	<i>as counsel for</i>	Plaintiff-Trustee
Mark H. Knevel	<i>as counsel for</i>	Robert John Kuhn
Andrew A Kabat	<i>as counsel for</i>	The Bank of New York Mellon
Clinton E. Preslan	<i>as counsel for</i>	JPMorgan Chase Bank
Joseph M. Romano	<i>as counsel for</i>	Lakeside Title and Escrow Agency, Inc.