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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 98-14494
)	
LOIS O. BRITTON,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
<hr/>		
LAUREN HELBLING, TRUSTEE,)	Adversary Proceeding No. 98-1276
)	
Plaintiff,)	
)	
v.)	
)	
)	<u>MEMORANDUM OF OPINION</u>
)	
LOIS O. BRITTON, et al.,)	
)	
Defendants.)	
)	
<hr/>		
LAUREN HELBLING, TRUSTEE,)	Adversary Proceeding No. 98-1277
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	
LOIS O. BRITTON, et al.,)	
)	
Defendants.)	

The Chapter 7 Trustee, Lauren Helbling (the "Trustee"), filed these Adversary Proceedings to determine the validity, priority, and extent of liens and interests in two parcels of real property owned by the Defendant-Debtor Lois Britton. The Trustee also requests avoidance

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of mortgages held by Defendant Decision One¹ which encumber each of these properties and authority to sell the properties. The Court entered judgment by default against Ms. Britton and in favor of the Trustee in both Adversary Proceedings because Ms. Britton did not file an answer or otherwise appear. (Adv. No. 98-1276, Docket 13, Adv. No. 98-1277, Docket 17). A trial was held on May 13, 1999.

JURISDICTION

The Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K) and (N).

FACTS

Decision One holds mortgages on Ms. Britton's real property located at 2154 West 34th Street, Cleveland, Ohio and 422 East 123rd Street, Cleveland, Ohio (collectively, the "Mortgages"). Ms. Britton signed the Mortgages as the mortgagor. Each mortgage also bears (a) the signature of two witnesses, James Primeau and Giancarlo Miceli; and (b) an acknowledgment that Ms. Britton personally appeared and signed the mortgage, which acknowledgment is notarized by James Primeau. The Mortgages were recorded on December 17, 1996.²

The Trustee presented her case through the testimony of Ms. Britton, as if on cross-examination, and exhibits. Decision One offered the testimony of: (1) Marilyn Mannarino, the

¹ Stipulated Orders entered on November 20, 1998 provide that the name of the Defendants in these Adversary Proceedings shall be: Decision One Mortgage Company and BankBoston, N.A. (Adv. No. 98-1276, Docket 14); and Decision One Mortgage Company and ContiMortgage Corp. (Adv. No. 98-1277, Docket 15). For ease of reference, this Opinion will use "Decision One" to refer collectively to the remaining Defendants in each of the cases.

² See Stipulation of Facts. (Adv. No. 98-1276, Docket 27, Adv. No. 98-1277, Docket 27).

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President of Tower City Title Agency (“Tower City”); (2) Ms. Britton; (3) James Primeau, a former closing agent for Tower City; and (4) Giancarlo Miceli, a former employee of Tower City, and exhibits. Tower City handled the loan closings and disbursements with respect to both Mortgages.

Ms. Britton’s Testimony

Ms. Britton is a 73-year-old African-American woman.³ The only language she speaks is English. She purchased the East 123rd Street property in 1962 and lived there at the time the Mortgages were executed. Ms. Britton purchased the West 34th Street property in 1995. Her daughter and her grandson currently live there. Ms. Britton refinanced both properties through Equity Credit after her husband’s death in July 1995. She was not certain whether the Equity Credit transaction closed late in 1995 or in 1996. She testified that a woman came to her home and did the paper work for that refinancing.

Ms. Britton decided to refinance the properties again in 1996 at her daughter’s suggestion. She obtained the refinancing from Decision One and gave the Mortgages as security. Ms. Britton signed both Mortgages in her home on December 12, 1996 when the transactions closed. Ms. Britton was home alone at the time. She testified that one man came to her home in the afternoon so that she could execute the Mortgages. She described him as slightly bald, taller than herself, and very cordial and nice. The man spoke English without an accent. Ms. Britton testified that this was the only person present when she signed the Mortgages. They sat at her kitchen table and the man asked her to initial several pages and sign her name three different ways on each document. Each of the Mortgages does have initialed pages and her name written

³ While Ms. Britton’s race is not relevant to the substance of the Complaints, it is relevant to Mr. Miceli’s credibility, as discussed below.

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as three variations. At one point during the trial, Ms. Britton indicated that it was possible that Mr. Primeau was the man who came to her house, but she then decided on a closer viewing that he was not. Upon being shown a picture of Mr. Miceli, she said that she had never seen him and he had never been to her home.

Ms. Britton stated that she was angry to be involved in this lawsuit. She realizes that she would not have been required to participate in these proceedings if she had said either that there were two witnesses to her signing the Mortgages or that she did not remember. The Court found Ms. Britton's answers to all questions asked at trial to be straightforward, direct, and credible.

Mr. Primeau's Testimony

Mr. Primeau is average in height and has a receding hair line. He was employed by Tower City as a loan closer on December 12, 1996. He testified that he and Mr. Miceli came to Ms. Britton's home on the afternoon of December 12th. Mr. Primeau testified on cross-examination that Mr. Miceli accompanied him on a number of closings during his time with Tower City and that Mr. Miceli understood enough English and knew what he should do. Mr. Primeau stated that he told Ms. Britton that Mr. Miceli was a witness and Mr. Miceli then introduced himself. Mr. Primeau never explained to Ms. Britton that Mr. Miceli did not speak English. Mr. Primeau's answers to the Trustee's questions on cross-examination were at times cursory and indirect.

Mr. Primeau testified that he saw Ms. Britton sign the Mortgages and that he notarized them and also signed as a witness. He stated that Mr. Miceli also saw Ms. Britton sign the Mortgages and he then signed them as the second witness. Mr. Primeau estimated that they were in Ms. Britton's home for approximately 45 minutes. Mr. Primeau stated that Tower City had a policy which required the presence of a notary at all closings, to serve as the notary and a

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witness, as well as an additional person to serve as the second witness. He could not recall attending a closing when there had been only one witness.

Mr. Miceli's Testimony⁴

Mr. Miceli lives in Italy. His testimony was for the most part given in Italian and was translated by an interpreter. On the few occasions when he spoke in English, his accent was quite apparent. He is the nephew of Ms. Mannarino's husband; he got the job at Tower City because of his relationship to her. He worked for Tower City for about 18 months and during that time he witnessed more than one document signing per day. He was employed by Tower City on December 12, 1996.

Mr. Miceli testified that he drove with Mr. Primeau to Ms. Britton's home on that day. Mr. Primeau introduced him to Ms. Britton, but he did not speak to her. He witnessed Ms. Britton signing the Mortgages and then he signed them in her presence. He believes they were at Ms. Britton's home for about 45 minutes.

Mr. Miceli was able to describe the outside of Ms. Britton's home in some detail. However, he incorrectly described Ms. Britton as being white and did not recall various other things, including where Mr. Primeau's car was parked, the time of day, or the weather. Also, he was not certain whether he sat at the table with Ms. Britton and Mr. Primeau while the Mortgages were being executed.

He testified that he never witnessed a person's signature on a document without actually seeing the person sign the document.

⁴ Mr. Miceli's testimony was presented on videotape.

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Ms. Mannarino's Testimony

Ms. Mannarino testified that Tower City has established policies and procedures for loan closings which require that a notary close all loans and that a second witness must be present with the notary. These policies were emphasized at company meetings and training sessions and were in effect when the Britton transactions closed.

She stated that Mr. Miceli worked as a witness for Tower City and was paid per closing. He received a check for the Britton closings.

DISCUSSION

The Positions of the Parties

The Trustee and Decision One stipulated that the only factual dispute in these Adversary Proceedings is whether the Mortgages were properly witnessed by two witnesses as required by Ohio law.⁵ The Trustee asserts that the Mortgages were not signed in the presence of two witnesses as required by § 5301.01 and seeks to avoid them under 11 U.S.C. § 544. Decision One argues that the Mortgages are presumed to be valid and the presumption can only be overcome by clear and convincing evidence. Decision One denies that such evidence exists.⁶ The Trustee contends that her burden of proof is the lesser standard of preponderance of the evidence.

⁵ See Joint Pretrial Statements. (Adv. No. 98-1276, Docket 6; Adv. No. 98-1277, Docket 8).

⁶ Decision One argued in its Trial Brief that Ms. Britton's testimony standing alone is insufficient as a matter of law to overcome the notarized acknowledgment on the Mortgages. Decision One did not directly raise this in its arguments at trial. To the extent that this position is still being advanced, the Court notes that the issue was addressed in the Memoranda of Opinion and Orders entered in these Adversary Proceedings denying Decision One's requests for summary judgment. (Adv. No. 98-1276, Docket 33; Adv. No. 98-1277, Docket 35). It is not, therefore, necessary to consider the argument a second time.

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Ohio Revised Code § 5301.01

I.

Ohio Revised Code § 5301.01 requires that:

A . . . mortgage . . . shall be signed by the . . . mortgagor . . . The signing shall be acknowledged by the mortgagor . . . in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. The signing shall be acknowledged by the mortgagor before a . . . notary public . . . who shall certify the acknowledgment and subscribe his name to the certificate of the acknowledgment.

Ohio Rev. Code Ann. § 5301.01 (Banks-Baldwin 1998). To comply with this statute, the mortgagor must sign (1) in the presence of two witnesses who attest the signing; and (2) in front of a notary public who certifies the mortgagor's acknowledgment.⁷ Only properly executed mortgages may be recorded. Ohio Rev. Code § 5301.25 (A). If a defectively executed mortgage is recorded, it does not defeat the interest of a subsequent bona fide purchaser who takes without notice of the prior encumbrance. *Citizen's Nat'l Bank v. Denison*, 165 Ohio St. 89, 133 N.E.2d 329 (1956); *Amick v. Woodworth*, 58 Ohio St. 86, 50 N.E. 437 (1898).

II.

The only significant factual issue is whether Mr. Miceli attended the closing on December 12, 1996. Mr. Primeau and Mr. Miceli say he did; Ms. Britton says he did not. When Decision One's counsel was asked at closing argument whether his position is that Ms. Britton was lying, he answered that his position is that she has forgotten what happened and is mistaken.

To the contrary, the Court finds Ms. Britton's testimony to be entirely credible and persuasive. While there were some things that she did not remember, those lapses were not large

⁷ Recently enacted Ohio Revised Code § 5301.234 which provides for an irrefutable presumption of proper execution in certain circumstances is not yet effective according to its terms. As a result, it does not apply here. 1999 Ohio H.B. 163.

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in number, unusual in nature, or self-serving; they do not, therefore, change the Court's assessment of her credibility. Ms. Britton testified unequivocally that she signed the Mortgages with only one man present. She was not able to positively identify Mr. Primeau as the individual who came to her home. Her description of that man, however, was not inconsistent with Mr. Primeau's appearance at trial. Of greater importance is that Ms. Britton affirmatively testified that she had never seen Mr. Miceli and that he had never been to her home. Mr. Miceli's native language is Italian. The few words of English he knows are spoken with an obvious accent. It is unlikely that Ms. Britton would not recall being alone for 45 minutes with two men, one of whom spoke almost no English. If Mr. Miceli did in fact attend and introduce himself, as Mr. Primeau stated, Ms. Britton would be expected to remember that he spoke with a heavy accent. The closings took place in Ms. Britton's home, as opposed to an unfamiliar office setting, which leads the Court to believe that Ms. Britton would have been comfortable and able to remember accurately the circumstances surrounding this event. The Court also finds it significant that the testimony which Ms. Britton gave does not result in any benefit to her, which contributes to her credibility.

On the other hand, the testimony of Mr. Primeau and Mr. Miceli on this issue was not credible. Mr. Primeau's answers on cross-examination by the Trustee were cursory and his manner was not direct. Mr. Primeau stated that Mr. Miceli was present with him at the closing, but that he did not think it necessary to explain to Ms. Britton why Mr. Miceli could not speak English. The Court does not find that to be credible particularly in light of the amount of time the two men say they spent in the house. Also, Mr. Miceli was not able to recall many of the details regarding his visit to Ms. Britton's home. He did describe the outside of the home, but he did not recall that Ms. Britton is African-American and did not remember the time of day, where

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the car was parked, or the weather. He also did not remember where in the house the closing took place or whether he was seated during the transaction, even though it went on for 45 minutes. Finally, the Court notes that Mr. Miceli's testimony is not unbiased, as he is related by marriage to Ms. Mannarino. It is Ms. Mannarino's company that had the responsibility to close the loans according to Ohio law.

Decision One emphasizes that Tower City had a policy which required that two witnesses attend a closing and that Mr. Primeau was aware of that policy. While the existence of such a policy is relevant, it does not establish that Mr. Primeau in fact followed the policy in this case. Similarly, the payment to Mr. Miceli for the Britton closings is relevant, but it does not prove that he actually attended the closings.

The parties dispute the burden of proof which should be applied in the Court's decision on this matter. Decision One argues based on Ohio law that a clear and convincing standard of proof must be applied and the Trustee argues that the appropriate burden is a preponderance of the evidence. "Ohio law states that to be clear and convincing, the evidence must have more than simply a greater weight than the evidence opposed to it, and it must produce in the trier of fact's mind a firm belief or conviction about the facts to be proved or the truth of the matter." *In re Judicial Campaign Complaint Against Runyan*, 707 N.E.2d 580, 581 (S.Ct.1999). On consideration of the evidence, the Court finds by clear and convincing evidence based on Ms. Britton's testimony that she did not sign the Mortgages in the presence of Mr. Miceli and that her testimony overcomes any presumption under Ohio law that the Mortgages are valid. As the Trustee has proven her case by the higher standard, there is no need to decide whether a lesser degree of proof would have been sufficient.

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11 U.S.C. § 544

Section 544 (a) of the Bankruptcy Code gives a trustee the right and power to avoid certain transfers of a debtor:

- (a) The trustee shall have as of the commencement of the case, and without regard to any knowledge of the trustee or any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

* * *

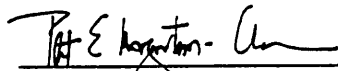
- (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3). A mortgage that is not properly witnessed under Ohio law may be avoided by a Chapter 7 Trustee in her status as a bona fide purchaser of real property under 11 U.S.C. § 544(b)(3). *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76 (B.A.P. 6th 1999). As the Mortgages were not witnessed in accordance with Ohio Revised Code § 5301.01, the Trustee may avoid them under § 544(a)(3).

CONCLUSION

For the reasons stated, judgment will be entered on the complaints in favor of the Plaintiff, Lauren Helbling, Trustee. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 9 June 1999



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Stewart Roll, Esq.
Lauren Helbling, Esq.

By: Joyce L. Gordon, Secretary
Date: 6/9/99

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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 98-14494
)
LOIS O. BRITTON,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Claren
)

LAUREN HELBLING, TRUSTEE,) Adversary Proceeding No. 98-1276
)
Plaintiff,)
)

v.)
)

JUDGMENT

LOIS O. BRITTON, et al.,)
)
Defendants.)
)

LAUREN HELBLING, TRUSTEE,) Adversary Proceeding No. 98-1277
)
Plaintiff,)
)

v.)
)

JUDGMENT

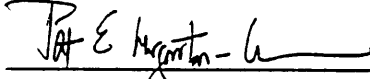
LOIS O. BRITTON, et al.,)
)
Defendants.)

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For the reasons stated in the Memorandum of Opinion issued this date, judgment is entered on the complaint in each of the captioned cases in favor of the Plaintiff, Lauren Helbling, Trustee.

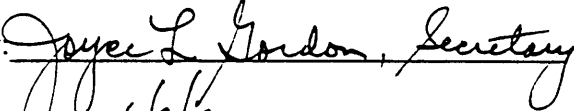
IT IS SO ORDERED.

Date: 9 Jun 1999



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Stewart Roll, Esq.
Lauren Helbling, Esq.

By:  Secretary

Date: 6/9/99

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