

Filed 5/23/2001  
9:54 a.m.

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re:	)	Case No. 99-61988
	)	
GEORGE M. THARP and	)	Chapter 7
KAREN M. THARP,	)	
	)	Judge Russ Kendig
Debtors.	)	
	)	
ANNE PIERO SILAGY, TRUSTEE,	)	Adv. No. 00-6122
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OF DECISION</b>
	)	
GEORGE M. THARP, et al.,	)	
	)	
Defendants.	)	

Anne Piero Silagy, Trustee (hereinafter "Trustee") initiated this adversary proceeding with the filing of a complaint on September 13, 2000. Trustee seeks a determination of the nature of the parties' interests in the property located at 1500 9<sup>th</sup> Street, S.W., Canton. The Trustee also requests avoidance of the mortgage of Defendant United Companies Lending Corporation (hereinafter "U.C. Lending") on the property, relying on 11 U.S.C. § 544 and O.R.C. § 5301.25 as authority. The basis is Trustee's contention that the mortgage was not properly witnessed as required by O.R. C. § 5301.01. Defendants George and Karen Tharp (collectively "Debtors") and Defendant U.C. Lending filed answers to the complaint. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

## **I. ARGUMENTS PRESENTED**

Before the court is Defendant U.C. Lending's Motion for Summary Judgment, brought pursuant to Fed. R. Civ. P. 56, as incorporated into bankruptcy practice at Fed. R. Bankr. P. 7056. Defendant presents two arguments in the motion, both ultimately directed at establishing priority over the Trustee's interest in the property. In its first argument, Defendant challenges the ability of the Trustee to overcome the facial validity of the mortgage executed by the Debtors. For its second argument, Defendant posits that O.R.C. § 5301.234 operates to create a presumption of proper execution of the mortgage.

The Trustee alleges that whether the Debtors' execution of the mortgage was properly witnessed is a question of fact, thereby making summary judgment inappropriate. The Trustee challenges Defendant's interpretation of Ohio law with regard to the proof necessary to render the mortgage defective and further denies that O.R.C. § 5301.234 is applicable. Following the Trustee's response, U.C. Lending filed a reply which states that the § 5301.234 argument is moot. Thus, the only issue remaining for decision on the motion for summary judgment involves the acknowledgment of the mortgage in the presence of two witnesses.

## **II. FACTS**

The following are undisputed facts. George M. Tharp and Karen Marie Tharp are the joint debtors in this Chapter 7 case. On May 23, 1998, Mr. Tharp signed a note, in the amount of \$50,000, in favor of U.C. Lending. On the same day, both Debtors executed a mortgage, also in favor of U.C. Lending, secured by property located at 1500 9<sup>th</sup> Street, S.W., Canton, Ohio. Present at the signing of the mortgage was a representative of U.C. Lending, Teresa Simmons. Ms. Simmons signed the mortgage as a witness. The mortgage also bears the

signature of John Daugherty, who signed as a witness and also acknowledged the instrument in his capacity as a notary public. Whether Mr. Daugherty was actually present at the signing is disputed.

### III. DISCUSSION

The standard for summary judgment is governed by Fed. R. Civ. P. 56, as adopted by Fed. R. Bankr. P. 7056. The rule provides that a motion for summary judgment should be granted “forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, ‘the inferences to be drawn from the underlying facts contained in the [moving party’s] materials must be viewed in the light most favorable to the party opposing the motion.’ Adickes v. S. H. Kress and Co., 398 U.S. 144, 158-59 (1970) (quoting U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962)). If the evidence as presented “could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing First Nat’l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968)).

The moving party “bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thereafter, the nonmoving party must come forward and demonstrate the existence of genuine issues of material fact. The nonmoving party cannot merely rely on the pleadings or a

mere scintilla of evidence to demonstrate the existence of such facts, but instead must specifically set forth evidence sufficient to demonstrate the existence of disputed material facts. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex, 477 U.S. at 324; Cities Serv., 391 U.S. at 288. Only facts which could conceivably impact the outcome of the litigation are material. See Liberty Lobby, 477 U.S. at 248.

Ohio Revised Code § 5301.01 governs the execution of mortgages and states, in relevant part:

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 acknowledgment.

The mortgage at issue bears the signatures of Debtors, signatures by two witnesses, and an acknowledgment by a notary and is therefore facially valid under Ohio law. The issue raised in this motion is whether, when a notary has acted in the capacity of notary and witness, the same evidentiary standard should be applied to the notary acknowledgment and the witness acknowledgment. Based on the separate nature of each capacity, the court finds that two different standards apply. See also Suhar v. Burns (In re Burns), Case No. 98-42868, Adv. No. 99-4003 (Bankr. N.D. Ohio Jan. 6, 2000) (J. Bodoh).

#### **A. Acknowledgment by Notary**

With regard to the acknowledgment, Ohio law provides that “the testimony of a mortgagor, standing alone, is insufficient in law to overcome a certificate of acknowledgment and the affirmative testimony of the notary himself.” Society Nat’l Bank v. Andrasic, 1986

WL 398, \*2 (Ohio App. 9 Dist. 1986) (citing Paramount Fin. Co. v. Berk, 88 Ohio Law Abs. 419 (Ohio App. 8 Dist. 1962)). *See also* White v. East Ohio Gas Co., 1938 WL 6780, \*3 (Ohio App. 9 Dist. 1938); Mack v. Edelstein, 1 Ohio Law Abs. 391 (Ohio App. 8 Dist. 1923). The Sixth Circuit Bankruptcy Appellate Panel has recognized the existence of this rule of law in Ohio. *See* Simon v. Chase Manhattan Bank (In re Zaptocky), 232 B.R. 76, 80 (B.A.P. 6<sup>th</sup> 1999).

Here, the only testimony on defective acknowledgment comes from the mortgagors. Mr. Tharp testified at deposition that he did not recall anyone notarizing his signature. Defendant's Exh. C at 16. Mrs. Tharp stated that she did not remember a notary coming to her home or meeting Mr. Daugherty, but remembered only Ms. Simmons being present. Defendant's Exh. D at 17-19. Contradicting the deposition testimony of debtors is Mr. Daugherty's conclusory affidavit that he was present. Defendant's Exhibit E, ¶ 4. These facts are analogous to those of Paramount. In Paramount, the only testimony provided of defective acknowledgment was offered by the mortgagors, while the notary submitted an affidavit to the contrary. Paramount, 88 Ohio Law Abs. at 788. The court held the testimony was insufficient to overcome the notary's certificate. This Court is in agreement with that holding.

Although a facially valid notarial acknowledgment may be disproved by clear and convincing evidence, *see, e.g.*, State ex rel. Humble v. Brown, 52 Ohio St.2d 9, 12 (1977), the above line of cases establish that mortgagor testimony alone is not clear and convincing evidence of an improper notarial acknowledgment. Instead, the mortgagor testimony needs to be satisfactorily corroborated. *See, e.g.*, White v. East Ohio Gas, 30 Ohio Law Abs. 275 (1938). The Court points out that noticeably absent from this record is any testimony from Ms.

Simmons, the only other party known to be present at the execution of the mortgage.

**B. Witness of the Mortgage**

Separate from the acknowledgment by the notary is the requirement of attestation by two witnesses. Defendant advances the argument that a facially valid witness must also be disproved by clear and convincing evidence, and that the testimony of the mortgagors alone is insufficient as a matter of law to overcome a facially valid mortgage bearing the signature of two witnesses. The court disagrees.

The testimony of the mortgagors, when credible, is sufficient to rebut the presumption of validity, even in the absence of corroboration. *See, e.g., Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76 (B.A.P. 6<sup>th</sup> 1999); *Baumgart v. Ford Consumer Fin. (In re Salamone)*, 231 B.R. 628 (Bankr. N.D. Ohio 1999); *Suhar v. Burns (In re Burns)*, Case No. 98-42868, Adv. No. 99-4003 (Bankr. N.D. Ohio Jan. 6, 2000). The courts disagree, however, on whether the evidentiary standard to be applied is the “clear and convincing” standard or the “preponderance of the evidence” standard. Following *In re Burns*, we agree that the appropriate standard is that of a preponderance of the evidence. *See Burns* at 8-11; *also see Coshocton Nat’l Bank v. Hagans*, 40 Ohio App. 190 (Ohio Ct. App. 1931) (finding mortgage valid on its face is presumed valid and that a defect must be shown by a preponderance of the evidence).

While some courts rely on *Ford v. White*, 45 Ohio St. 1 (1887), and its progeny for the proposition that a facially valid mortgage can be overcome only by clear and convincing evidence, we find this reliance is misplaced. We read *Ford* to only require clear and convincing evidence when the notarial acknowledgment is challenged. The higher standard

reflects the deference to be given to the signed acknowledgment of a notary public. When the propriety of the witness signatures is at issue, the same deference is not owed the witness. The Court concludes that testimony by the mortgagors can defeat the presumption of validity of a mortgage when the allegation is that the instrument was not properly witnessed.

Turning to the present motion, the Court determines, based on the record, that a question of fact exists as to whether the signing was acknowledged in the presence of two witnesses. The conflict between debtors' deposition testimony and the affidavit of Mr. Daugherty clearly presents a question of material fact. Further, the credibility of the debtors and Mr. Daugherty is of paramount import in this proceeding, and cannot be weighed on a motion for summary judgment. The Court therefore denies the motion for summary judgment.

#### **IV. CONCLUSION**

Defendant is correct that the mortgagors testimony, standing alone, cannot defeat the certification by the notary public. We do not find, however, that the Trustee is precluded from challenging the execution of the mortgage based on an improper acknowledgment in the presence of two witnesses. These are separate requirements. Defendant's motion for summary judgment is denied.

An order in accordance with this decision will issue immediately.



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RUSS KENDIG  
U.S. BANKRUPTCY JUDGE

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

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	)	Judge Russ Kendig
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ANNE PIERO SILAGY, TRUSTEE,	)	Adv. No. 00-6122
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER</b>
	)	
GEORGE M. THARP, et al.,	)	
	)	
Defendants.	)	

Dated at Canton, Ohio this \_\_\_th day of May, 2001.

For the reasons set forth in the accompanying Memorandum of Decision, the Court finds that Defendant U.C. Lending has failed to demonstrate the absence of genuine issues of material fact. Disputed is whether the mortgage signed by debtors in favor of U.C. Lending was properly acknowledged in the presence of two witnesses as required by O.R.C. § 5301.01.

Accordingly, Defendant's motion for summary judgment is hereby **DENIED**.

So ordered.



\_\_\_\_\_  
RUSS KENDIG  
U.S. BANKRUPTCY JUDGE



**CERTIFICATE OF MAILING**

Copies of the within Memorandum of Decision and Order were mailed on this \_\_\_th day of May, 2001 to:

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