UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 99-63391
	)	
JOHN INSELY GROSSCUP	)	CHAPTER 7
CONNIE MARIE GROSSCUP,	)	
Debtors.	)	ADV. NO. 00-6002
	)	
JOSIAH L. MASON, TRUSTEE,	)	JUDGE RUSS KENDIG
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN INSLEY GROSSCUP, et al.,	)	
Defendants.	)	**MEMORANDUM OF DECISION**

This cause is before the court upon the cross-motions for summary judgment filed by the plaintiff, Josiah L. Mason, the Chapter 7 trustee in bankruptcy, ("plaintiff") and the defendant, First Plus Financial ("defendant"). Accordingly, the court must decide if either party is entitled to summary judgment as a matter of law or if a genuine issue of material fact warrants a trial on the merits. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. §157(b)(2)(K). The following constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), made applicable to this proceeding through Fed. R. Bankr. P. 7056, which provides in part that:

> [t]he judgment sought shall be rendered 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.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if

there is a material dispute over the facts, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit has recognized that *Liberty Lobby*, *Celotex* and *Matsushita* effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street*, 886 F.2d at 1479 (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. *Street*, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street*, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting *Street*, 886 F.2d at 1478).

D I S C U S S I O N

Facts

The debtors, John Insley Grosscup and Connie Marie Grosscup (hereinafter collectively "debtors") filed their voluntary petition for relief under Chapter 7 of Title 11 of the United States Code on October 26, 1999. Among their scheduled assets, the debtors included their residence, valued at $70,000.00. The debtors claimed their homestead exemptions totaling $10,000.00 pursuant to Ohio Revised Code §2329.33(A)(1). The debtors' scheduled obligations included a first mortgage against their home in favor of First Merit Bank ("First Merit") in the amount of $46,000.00 and a second mortgage in favor of the defendant in the amount of $51,000.00.

The plaintiff commenced this adversary proceeding by filing a "Complaint To Determine Liens," alleging that the estate's assets included the debtors' residence and that the defendants, First Merit, First Plus, and the Richland County Treasurer ("treasurer"), may hold interests in the property. For its answer, First Merit asserted its interest in the property based upon an open-end mortgage deed. First Merit claimed a valid first lien on the property, subject to real estate taxes claimed by the treasurer. The treasurer answered, admitting all allegations, save those concerning the validity of the two mortgages, and asserting its statutory lien, representing the 1999 real estate taxes on the property, as the first and best lien on the property. In its answer, the defendant admitted all allegations, save those relating to the validity of First Merit's mortgage, and asserted its interest in the property based upon its mortgage deed, asserting that the lien remained a valid lien on the property.

The plaintiff's motion for summary judgment alleged that the defendant has no interest in the debtors' property and that based upon the pleadings and depositions filed herein that there is no genuine issue as to any material fact concerning the defendant's claim. The plaintiff alleged that the defendant's mortgage was defective because only one person witnessed the debtors' signatures to the mortgage and therefore the mortgage was invalid, was not entitled to be recorded and was not a lien on the property. In further support of his motion, the plaintiff filed the depositions of the four persons whose signatures appear on the mortgage, including Connie M. Grosscup, John I. Grosscup, Kathy Justice and Amy Karl, and filed copies of documents received by Amy Karl from the defendant which were exhibits to the deposition transcript of Ms. Karl.[1]

The debtors both testified that they each signed the defendant's mortgage at their Richland County home, at their kitchen table, and in the presence of only one witness, Amy Karl. (*Deposition of Connie Grosscup, pg. 4, lns. 15, 24, pg. 5, ln. 1, pg. 5, lns. 11-15*) (*Deposition of John Grosscup, pg. 5, lns. 12-20, pg. 6, lns. 5-6, pg. 6, lns. 7-8*) Further, the debtors both testified that Kathy Justice, the purported second witness to the mortgage, was not present when

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[1] The defendant's mortgage, attached to the plaintiff's motion for summary judgment as "Trustee's Exhibit 1," appears valid on its face and includes both debtors' signatures, Kathy Justice's signature as a witness and Amy Karl's signature as both a witness and as a notary public.

the debtors signed the mortgage. (*Deposition of Connie Grosscup, pg. 5, lns. 16-17; Deposition of John Grosscup, pg. 6, lns. 3-4*)

Kathy Justice admitted that she did not see the debtors sign the mortgage (*Deposition of Kathy Justice, pg. 5, lns. 4-6*); in fact, she testified that she signed the mortgage as a witness outside the debtors' home, at her place of employment and without the debtors present. (*Deposition, pg. 4, lns. 5-13*) Ms. Justice testified that she signed the mortgage at the request of her friend and co-worker, Amy Karl, because Ms. Karl needed a second witness signature on the mortgage. (*Deposition, pg. 4, lns. 18-23*) Ms. Justice indicated she had signed other documents under similar circumstances, where she had not seen the individuals sign the subject documents. (*Deposition, pg. 5, lns. 17-18, pg. 6, lns. 1-9*)

Ms. Karl testified that she visited the debtors' home alone and that no other witness was present when the debtors signed the mortgage. She confirmed that Kathy Justice was not present when the debtors signed the mortgage, (*Deposition, pg. 12, lns. 17-20, pg. 14, lns. 11-13, pg. 16, lns. 13-15*), but rather that Ms. Justice signed the mortgage later at her place of employment. (*Deposition, pg. 14, lns. 3-8*) Ms. Karl testified that after she met with the debtors, she returned the documents to the defendant, via overnight delivery, only to have the debtors' documents, as well as those documents relating to a different closing she'd handled, returned by the defendant for the addition of a second witness signature. The defendant contacted Ms. Karl and indicated that they "found out that Ohio law requires witnesses on mortgages," asking her to have both sets of documents witnessed, but failed to instruct her to have the respective borrowers execute the documents again. (*Deposition, pgs. 13-14*) Ms. Karl asked her friend and coworker to sign as a witness, although Ms. Justice did not see the respective borrowers sign any documents. Ms. Karl testified that she did not always have mortgages witnessed when the borrowers signed (*Deposition, pg. 11, lns. 8-16*) and indicated that she had followed this practice previously. (*Deposition, pg. 14, lns. 19-24, pg. 15, lns. 1-5*)

The defendant's motion for summary judgment alleged that there existed no genuine issues of material fact and that the defendant was entitled to a judgment as a matter of law. The defendant argued further that then current Ohio law did not require a mortgage to be acknowledged in the presence of two witnesses, and therefore the defendant's mortgage was valid. Finally, the defendant argued that even if Ohio law required its mortgage to be executed in the presence of two witnesses, that the defendant's mortgage was nevertheless valid.

The defendant alleged that "[b]oth parties are in agreement regarding the facts." (*Defendant's motion, pg. 1, ¶2*). In its supporting memorandum, the defendant acknowledged the debtors' testimony, namely that the debtors signed the mortgage in the presence of a sole witness, Amy Karl (*Memorandum, pg. 3, ¶1*) and that an additional witness signature was added to the document subsequently. (*Memorandum, pg. 3, ¶3*) Finally, the defendant alleged that since the execution of its mortgage, the debtors had made their regular monthly mortgage payments and that at no time had the debtors refused to make such payments or chosen to refute the existence of the mortgage.

The defendant argued that the recently enacted Ohio Revised Code §5301.234 completely reversed Ohio precedent concerning mortgage executions and that the statute applied, both retroactively and prospectively, to any recorded mortgage, including that executed by the debtors. Further, the defendant argued that the mortgage was still binding upon the debtors, even if defective under Ohio Revised Code §5301.01 as being improperly witnessed.

In his response to the defendant's motion, the plaintiff argued that Ohio Revised Code §5301.234 could not be applied retroactively, and therefore would not apply to the subject mortgage as it was executed and recorded prior to the statute's effective date. The plaintiff maintained that the validity of the debt owing from the debtors to the defendant was not the issue before the court, but rather that the validity of the defendant's security interest was the issue. The plaintiff conceded that the defendant may have a valid unsecured claim in the debtors' estate, but that the plaintiff has the ability to avoid the defendant's alleged security interest in the exercise of his avoidance powers under 11 U.S.C. §544.

Analysis

The plaintiff asserts that the subject mortgage is defective because its signing was not acknowledged in the presence of two witnesses as required by O.R.C. §5301.01.[2] The plaintiff asserts further that the mortgage is invalid as against a bona fide purchaser for value or a judgment lien creditor with an unsatisfied execution, allowing the trustee to avoid the mortgage under 11 U.S.C. §544 as it was not perfected at the date of the filing of the debtor's petition.[3] As the trustee challenges the validity of mortgage, he bears the burden of proof. *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76 (B.A.P. 6th Cir. 1999).

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2 Ohio Revised Code Section 5301.01 provides: "A deed, mortgage, land contract as referred to in division (B)(2) of Section 317.08 of the Revised Code, or lease of any interest in real property and a memorandum of trust as described in division (A) of Section 5301.01 of the Revised Code shall be signed by the grantor, mortgagor, vendor or lessor in the case of a deed, mortgage, land contract, or lease or shall be signed by the settlor and trustee in case of a memorandum of trust. The signing shall be acknowledged by the grantor, mortgagor, vendor, or lessor, or by the settlor and trustee, 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 grantor, mortgagor, vendor or lessor, or by the settlor and trustee, before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor who shall certify the acknowledgment and subscribe his name to the certificate of the acknowledgment."

3 11 U.S.C. §544(a) provides:
(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of 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
(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
(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.

Mortgage Execution under O.R.C. §5301.01

Ohio courts have consistently held that a mortgage which is attested to by only one witness is invalid. *Wright v. Franklin Bank,* 59 Ohio St. 80, 51 N.E. 876 (Ohio 1898)*; In re: Hofacker,* 34 B.R. 604 (S.D. Ohio 1983).

In *Coshocton National Bank v. Hagans,* 40 Ohio App. 190, 178 N.E. 330 (Ct. App. Ohio 1931) the court addressed a dispute as to the validity of a mortgage, which mortgage the court found to be facially valid and held "[the mortgage] carries with it a presumption of validity, and in order to destroy its effect as a mortgage, it must be shown to be defective by the contesters, and by a preponderance of the evidence." The attesting witnesses and the notary in *Hagans* could not remember the exact mortgage closing, but testified they never affixed their signatures to a mortgage unless all was in good order and the court said this was all that could be expected under the circumstances and their positive statement about the inflexible rule must be taken with great consideration. *Id*., at 192.

The *Hofacker* court amplified the manifest requirement that two attesting witnesses sign a mortgage, holding that the mortgage, which was defective under Ohio law for want of two attesting witnesses' signatures, was binding only as between the parties and not as to the trustee in bankruptcy as a hypothetical lien creditor. *Hofacker, supra*, at 607. Further, the court noted that an Ohio statute authorizing courts to give full effect to an instrument containing an omission, defect, or error could not be used to cure a defect in a mortgage consisting of its failure to be properly witnessed by two witnesses. *Hofacker, supra*, at 606.

It is well settled that under Ohio law an improperly executed or otherwise invalid mortgage is not entitled to be recorded, does not serve as constructive notice either of its existence or its contents to subsequent mortgagees and is not binding on a trustee standing in the capacity of a hypothetical judicial lien creditor. *Citizens National Bank in Zanesville v. Denison,* 165 Ohio St. 89, 133 N.E. 2d 329 (Ohio 1956); *Wayne Building & Loan Co. v. Hoover,* 12 Ohio St.2d 62, 231 N.E.2d 873 (Ohio 1967); *Logan v. Kingston National Bank (In re: Floater Vehicle, Inc.),* 105 B.R. 420 (S.D. Ohio 1989); *Bash v. Check (In re: Check),* 129 B.R. 492 (N.D. Ohio 1991).

The Presence of the Second Witness

The mortgage at issue is facially valid, bearing the signatures of two attesting witnesses and a notary public. Therefore, the issue facing the court is whether the evidence presented by the plaintiff is sufficient to establish that the mortgage was improperly executed, for want of a second

witness, and therefore invalid. The trustee offers the testimony of the mortgagors and the testimony of the purported witnesses to the mortgage.

There exists a growing body of precedent in this district holding that the uncorroborated testimony of mortgagor(s) alone that a mortgage was improperly executed for want of a second witness is insufficient to overcome credible, contrary evidence offered by mortgagees' representatives. (Citations omitted). However, in *Bash v. Lepelley (In re Lepelley)*, 233 B.R. 802 (Bankr. N. D. Ohio 1999), the mortgagors, challenging the validity of a facially valid mortgage, testified that only one other person appeared in their home for the closing. The sole witness known to the debtors, who also served as the notary public, testified for the plaintiff-trustee and confirmed that she was the only witness present. She testified further that where a second witness was not available for a closing, she was trained to return to the office for an attestation by one of the title company principals. The court noted that in the face of contradictory testimony and poor recollection, that ". . . greater weight should be given to the Debtor's awareness and recollection of who attended a mortgage execution in their own home." *Id.*, at 807. The court noted that of even greater import was the notary public's testimony that she was alone with the debtors at the time of the signing.

The court finds that there is no genuine issue as to a material fact and that the subject mortgage was improperly executed under O.R.C. §5301.01 because only one witness, Amy Karl, was present when the debtors signed the mortgage. The court finds the debtors' testimony, including their recollection of the events surrounding the execution and their recognition of the sole witness, to be entirely credible and uncontroverted by the defendant. Further, the court finds the testimony of Ms. Karl, and the testimony of the other purported witness, Kathy Justice, that Ms. Justice was not present when the debtors signed the mortgage, to also be credible and uncontroverted. Accordingly, this mortgage is invalid and may be avoided by the exercise of the plaintiff's strong-arm powers under 11 U.S.C. §544.

The Retroactive Application of O.R.C. §5301.534

The defendant argues that Ohio Revised Code §5301.234 applies to this proceeding, providing the defendant with an irrebuttable presumption of validity with respect to its mortgage.[4] It is well settled in this district that O.R.C. §5301.234, enacted on March 31, 1999, and effective on June 30, 1999, applies only prospectively, and not retroactively, to any executed and recorded mortgages. *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76 (B.A.P., 6th Cir.

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[4] (A) Any recorded mortgage is irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage, unless one of the following applies:
(1) the mortgagor, under oath, denies signing the mortgage.
(2) the mortgagor is not available, but there is other sworn evidence of a fraud upon the mortgagor.
(B) Evidence of an actual or alleged defect in the witnessing or acknowledgment on the mortgage is not evidence of fraud upon the mortgagor and does not rebut the presumption that a recorded mortgage is properly executed.
(C) The recording of a mortgage is constructive notice of the mortgage to all persons, including without limitation, a subsequent bona fide purchaser or any other subsequent holder of an interest in the property. An actual or alleged defect in the witnessing or acknowledgment on the recorded mortgage does not render the mortgage ineffective for the purposes of constructive notice.

1999); *Helbling v. Ducksworth (In re Ducksworth)*, 1999 WL 970273 (Bankr. N.D. Ohio 1999); *Eisen v. Allied Bancshares Mortgage Corp., LLC (In re Priest)*, 2000 WL 821379 (Bankr. N.D. Ohio 2000). Accordingly, as this mortgage was executed on February 23, 1998, and recorded on April 23, 1998, the statute does not apply to this mortgage, and therefore the defendant may not avail itself of the irrebuttable presumption of validity.

C O N C L U S I O N S

The court finds that there is no material dispute concerning the facts in this case. Indeed the parties agree as to the facts and the defendant controverts no facts advanced by the plaintiff. The court finds that the plaintiff has offered a properly supported motion for summary judgment and has offered sufficient evidence to meet his burden of proof. The court finds that the mortgage in this case was defectively executed under O.R.C. §5301.01, for want of two attesting witnesses, and that the mortgage may be avoided by the trustee under 11 U.S.C. §544.

The court finds that the defendant has failed to make a showing sufficient to establish any element essential to its case and that the defendant has failed to present affirmative evidence to direct the court's attention to specific portions of the record upon which it relies for any genuine issue of fact relating to its claim. The court finds that the defendant is not entitled to judgment as a matter of law and that it may not avail itself of the irrebuttable presumption under O.R.C. §5301.234.

An appropriate order shall enter.

_/s/ Russ Kendig 5/30/01___
RUSS KENDIG
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 99-63391
	)	
JOHN INSELY GROSSCUP	)	CHAPTER 7
CONNIE MARIE GROSSCUP,	)	
Debtors.	)	ADV. NO. 00-6002
	)	
JOSIAH L. MASON, TRUSTEE,	)	JUDGE RUSS KENDIG
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN INSLEY GROSSCUP, et al.,	)	
Defendants.	)	**ORDER**

For the reasons set forth in the accompanying Memorandum of Decision, the court finds that the trustee's motion for summary judgment is well taken and the same should be, and hereby is, **GRANTED**. The court finds that the defendant's motion for summary judgment is not well taken and the same should be, and hereby is, **DENIED**.

IT IS THEREFORE ORDERED that the open-end mortgage held by First Plus Financial, recorded at Volume 590 Page 707 of the real property records for Richland County, Ohio, is invalid as a lien against the residential real estate of the debtors, John Insley Grosscup and Connie Marie Grosscup, located at 21 West Whitney Avenue, Shelby, Ohio, as to plaintiff and all persons claiming rights from plaintiff.

_/s/ Russ Kendig 5/30/01___
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of May, 2001, the above Order was sent via regular U.S. Mail to:

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_____
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