THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-19425
	)	
SYLVIA DENISE DUCKSWORTH,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
LAUREN A. HELBLING, TRUSTEE,	)	Adversary Proceeding No. 99-1040
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**MEMORANDUM OF OPINION**
	)	
SYLVIA DENISE DUCKSWORTH, et al.,	)	
	)	
Defendants.	)	

In this "one witness mortgage" case, the Chapter 7 Trustee is attempting under 11 U.S.C. § 544(a) to avoid a mortgage on the Debtor's house because the mortgage allegedly was not signed in the presence of two witnesses as called for by Ohio law.

Chapter 7 Trustee Lauren Helbling filed this Adversary Proceeding against the Debtor Sylvia Ducksworth and The Provident Bank[1] (Bank) seeking to set aside a mortgage granted by Ms. Ducksworth to the Bank and to sell the real property that is subject to that mortgage. The Bank denies any defects in the mortgage and argues that even if the mortgage is avoided, the Trustee must still recover the Bank's interest under § 550, in which case the Bank has a lien under § 550(e) that protects its position.

[1] The parties substituted The Provident Bank as the real party in interest in place of named defendant Advanta Mortgage Corporation. (Docket 29).

The Court ruled before trial that recently enacted Ohio Revised Code § 5301.234, which provides for an irrebutable presumption of proper mortgage execution in certain circumstances, does not apply retroactively to this case. *Helbling v. Ducksworth (In re Ducksworth),* 1999 WL 970273 (Bankr. N.D. Ohio September 10, 1999).[2]

Following trial, the parties filed additional memoranda. (Docket 42, 43, 44, 45, 46, 48). The Court, on notice to the parties, then held this matter in abeyance awaiting a ruling in the case of *In re Zaptocky,* which has now been decided by the Sixth Circuit Court of Appeals. *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020 (6th Cir. 2001). (Docket 49).

For the reasons discussed below, the Court finds that the mortgage was not executed in accordance with Ohio law and concludes that the Trustee is entitled to avoid it. Additionally, as this Court held in *In re Priest,* 2000 WL 821379 (Bankr. N.D. Ohio May 25, 2000), the mortgage avoidance is an adequate remedy in and of itself under these circumstances. Consequently, the Trustee is not required to recover the Bank's interest under § 550 and the defenses in that statute are not available to the Bank.

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).

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[2] In reaching that result, the Court was addressing the facts and arguments before it; i.e., whether the new statute applied where the mortgage was recorded and the bankruptcy case was filed before the statute became effective. Counsel apparently read the opinion more broadly, and so the Court issues this footnote to clarify the point.

FACTS

I.

The Bank holds a mortgage (Mortgage) on Ms. Ducksworth's residence at 17323 Stockbridge Avenue in Cleveland, Ohio (Property). The Mortgage bears: (a) the signature of Ms. Ducksworth as the mortgagor; (b) the signatures of two witnesses, Christopher Reynolds and Gerald Finan; and (c) an acknowledgment that Ms. Ducksworth personally appeared and signed the mortgage, which acknowledgment is notarized by Mr. Finan. The Mortgage was recorded on April 29, 1997. (Stipulation of Facts ¶ 2) (Docket 19). The significant factual issue is whether the two individuals who signed the Mortgage as witnesses to Ms. Ducksworth's signature were, in reality, present when she signed.

The Trustee, who argues that only one witness was there, presented her case through the testimony of Ms. Ducksworth and exhibits. The Bank, who claims that both witnesses were present, offered the testimony of: (1) Christopher Reynolds; (2) Ms. Ducksworth, as if on cross-examination; (3) Harold Toft, president and owner of First Service Title Agency, Inc. (First Service); and (4) Julie Wilder, a Bank representative, and exhibits. Ms. Ducksworth also testified on her own behalf.[3] Mr. Finan, whose name appears on the Mortgage as the notary and second witness, did not testify at trial and his absence was not explained.

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[3] A default judgment was entered against Ms. Ducksworth before trial. (Docket 11). She appeared at trial as a witness represented by counsel. Her counsel participated in witness examination, but waived argument. For that reason, the only arguments discussed in this Opinion are those advanced at trial by the Bank and the Trustee.

These findings of fact reflect the Court's weighing of the evidence and determining credibility. In doing so, the Court considered the witness' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52.

II.

Ms. Ducksworth's Testimony

Ms. Ducksworth holds a certificate in child care from Cuyahoga Community College and provides child care in her home. She originally financed her home purchase with Leader Mortgage (Leader). In April 1997, Leader had a first mortgage on the Property and American General Finance (AGF) held a second mortgage.

Ms. Ducksworth decided to refinance with the Bank to eliminate the second mortgage and reduce the interest rate she was paying. After some preliminary contacts, a man came to her house on April 24, 1997. He was caucasian, age 25-35, about five feet nine inches, with dark hair. Ms. Ducksworth sat at her kitchen table and signed a stack of documents relating to the refinancing. While she knew that she signed the Mortgage at that time, and other papers, she did not specifically recall most of the other items that she signed or initialed. She did remember a document that related to insurance where she supplied some information. She signed somewhere between 5 and 50 papers. The man gave her a very brief explanation about the papers and the meeting lasted about 15 minutes. There were no other people in her house that day.

During trial, Ms. Ducksworth observed Christopher Reynolds, one of the two men who signed the Mortgage as a witness. After doing so, she stated unequivocally that she had never

seen him before, he had not been to her home, and he was not present when she signed the Mortgage.

The Bank questioned Ms. Ducksworth's memory of that day, in part based on her deposition testimony. The deposition and trial testimony are consistent on the main point; i.e. that only one person watched her sign the Mortgage and it was not Mr. Reynolds. While there might appear to be some minor inconsistencies between the deposition and trial testimony on other issues, Ms. Ducksworth satisfactorily explained the discrepancies. She did give different answers on the question of whether she provided the Bank with a copy of her driver's license at the closing. This is a relatively minor point and, on balance, the Court does not find it to be significant. Having observed Ms. Ducksworth at trial, the Court finds that her answers to the questions asked were straightforward and credible, she had a clear memory of the kitchen table closing, and there was no motive established for her to be less than truthful.

Mr. Reynolds' Testimony

First Service served as closing agent for the transaction. At the time of this closing, Mr. Reynolds was employed by First Service as a courier, with responsibility for delivering checks, returning packages to lenders, and basically doing whatever needed to be done. He was also training at that time to close loans. His training consisted of in-office education and field experience where he observed other employees closing loans and served as a witness. He has no independent recollection of the Ducksworth closing, but he identified his signature on the Mortgage and said that he would not have signed it unless he saw Ms. Ducksworth sign it.

About two months after this closing, Mr. Reynolds became a loan closer. He testified as to his own practices when he serves as a closer, but he did not serve in that capacity at the Ducksworth closing and was not employed as a closer at the time that closing took place.

Mr. Reynolds is currently the closing manager for First Service.

Mr. Toft's Testimony

Mr. Toft has been the owner and president of First Service for about 12 years. In April 1997, company policy required two witnesses to attend each closing. He did not know of any closing conducted by Mr. Finan that did not have two witnesses, but he had no personal knowledge of the Ducksworth closing.

Ms. Wilder's Testimony

Ms. Wilder is a recovery supervisor at the Bank. She had some involvement with the loan when it was made, although she had no direct involvement with or knowledge about the closing at Ms. Ducksworth's home. When the loan was made, she instructed First Service to pay the debts owed to Leader and AGF so that the Bank would obtain a first mortgage to secure its loan. She was not aware of any deficiencies in the closing process when the loan closed and did not know of anyone at the Bank who had such knowledge at that time.

ISSUES

1. Was the Mortgage signed in accordance with Ohio law?

2. If the Trustee is entitled to avoid the Mortgage because it was not signed in accordance with Ohio law, is the Bank entitled to a lien under 11 U.S.C. § 550(e) for amounts paid by the Bank to the existing mortgage holders in connection with the refinancing?

DISCUSSION

I.

Ohio Revised Code § 5301.01

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 § 5301.01. To comply with this statute, the mortgagor must sign the mortgage (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. "If any one of these prerequisites is not met, the mortgage is not validly executed . . . ." *Simon v. Chase Manhattan Bank (In re Zaptocky),* 250 F.3d 1020, 1024 (6th Cir. 2001). 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 an interest without actual or constructive notice of the prior encumbrance. *Id.*; *Citizens 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).

The Bank argues that the Mortgage is conclusively presumed to be valid because it is signed by two witnesses and a notary, and Ms. Ducksworth's testimony that one of the witnesses was not actually present is not legally sufficient under Ohio law to overcome this presumption. The Sixth Circuit held to the contrary in *Zaptocky*: "[A] facially valid mortgage does bear a strong presumption of validity. However, Ohio courts have not explicitly established a per se

rule that precludes a party from relying solely on the mortgagor's testimony to establish that a mortgage has been improperly executed." *In re Zaptocky,* 250 F.3d at 1025. The Court will turn, then, to the question of whether the Mortgage was signed in the presence of two witnesses based on the evidence presented at trial.

II.

Did Ms. Ducksworth sign the Mortgage in the presence of two witnesses?

The Mortgage is presumed valid because it bears the names of two witnesses and is notarized. To overcome that, the Trustee must prove by clear and convincing evidence that only one witness attended the closing. *In re Zaptocky.* "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).

In resolving the dispute over who attended this closing, the Court starts with the premise that this is not a complicated factual situation. The question is simply: Did one person come to Ms. Ducksworth's house to close the loan or did two people come? Ms. Ducksworth testified from personal knowledge about the closing, with her testimony being unequivocal and convincing about who was and was not present. She said at both her deposition and at trial that only one person came to her house. Ms. Ducksworth did not know the name of that person, but she denied ever seeing Mr. Reynolds before the trial and her description of the man who came to her house does not fit Mr. Reynolds' description. Ms. Ducksworth, alone in her own home, let a stranger into her house to conduct business, which is an event that most people would remember.

She sat at her own kitchen table for about 15 minutes with that stranger. The Court believed her testimony that only one person came to her house for the closing and that person was not Mr. Reynolds.

No other witness testified as to what actually happened at the Ducksworth house. Mr. Reynolds testified that he has no memory of this closing. He was not a closer at the time of this event and so his testimony as to his later practice as a closer is not particularly helpful. The Court has considered his statement that he would not have signed his name if he hadn't been there, but does not find this convincing as to whether he actually attended this particular closing. In this regard, the Court also notes that Mr. Reynolds is employed by First Service as the closing manager and so he has some significant motivation to be biased in its favor. Mr. Finan, who was in charge of the closing and notarized Ms. Ducksworth's signature, did not testify. The testimony about First Service's policies is relevant, but it does not prove that any First Service employee actually followed the policy on the day in question. After considering and weighing all of the evidence, the Court finds by clear and convincing evidence that Mr. Reynolds did not attend the closing and that Ms. Ducksworth did not sign the Mortgage in the presence of two witnesses. This defect in the Mortgage gives the Trustee additional rights under the Bankruptcy Code.

III.

11 U.S.C. § 544

Bankruptcy Code § 544(a) 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 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 –

* * *

> (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). This statute allows a Chapter 7 trustee to avoid a mortgagee's interest in the debtor's property where the mortgage is not properly witnessed under Ohio law. *In re Zaptocky*, 250 F.3d at 1027-28. As the Mortgage was not witnessed in accordance with Ohio Revised Code § 5301.01, the Trustee may avoid it under § 544(a)(3).

IV.

11 U.S.C. § 550

The Bank argues that even if the Trustee may avoid the transfer, the Bank has a defense under Bankruptcy Code § 550(e). The availability of that defense hinges on whether it is enough for the Trustee to avoid the Bank's interest in the Property under § 544 or whether the Trustee is also required to recover the Bank's interest under § 550(a).[4] The Trustee argues that she does not have to recover the interest. The Bank contends that the Trustee must do so, which gives rise to

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[4] (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b) or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property[.]

[4] 11 U.S.C. § 550(a).

a defense under § 550(e) to the extent the Bank paid the existing mortgages at the time of refinancing.[5]

This Court has previously held that a trustee may avoid a transfer under § 544(a) as an independent remedy and that the trustee is not required to recover the avoided transfer under § 550 in order to bring the challenged interest into the estate. *In re Priest*, 2000 WL 821379 (Bankr. N.D. Ohio May 25, 2000). *Accord Hendon v. G.E. Capital Mortgage Servs., Inc. (In re Carpenter)*, ___ B.R.___, 2001 WL 1116932 , at *5 (Bankr. E.D. Tenn. August 13, 2001); *Wasserman v. Household Realty Corp. (In re Barkley)*, 263 B.R. 553, 565 (Bankr. N.D. Ohio 2001).[6] Based on that same reasoning, the Trustee is not required to recover the avoided interest in this case. Ms. Ducksworth's interest in the Property came into the Chapter 7 estate at the time of filing. The Bank's avoided interest (i.e. the Mortgage) is preserved for the estate under § 551. That preserved interest then becomes an asset of the estate under § 541(a)(4). When Ms. Ducksworth's interest is joined by the Bank's avoided interest, the Trustee holds the entire

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[5] (e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of –

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

11 U.S.C. § 550(e)(1).

[6] The Bank cites to *Bash v. Lepelley (In re Lepelley)*, 233 B.R. 802 (Bankr. N.D. Ohio 1999) to support a contrary conclusion. As this Court pointed out in *Priest*, however, the *Lepelley* court did not address the underlying issue of whether the trustee had to recover the avoided interest. When faced with that question, the *Lepelley* court cited *Priest* with approval. *In re Barkley*, 263 B.R. at 565.

interest in the Property and there is no need for the Trustee to recover the Bank's interest separately under § 550. As recovery is unnecessary, the defense provided by § 550(e) is not available to the Bank.

CONCLUSION

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

Date: 3 October 2001

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Stephen Hobt, Esq.
Amelia Bower, Esq.
Gerald Jackson, Esq.
Trish Lazich, Esq.

By: Joyce L Gordon, Secretary

Date: 10/3/01

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-19425
SYLVIA DENISE DUCKSWORTH,	)	Chapter 7
Debtor.	)	Judge Pat E. Morgenstern-Clarren
LAUREN A. HELBLING, TRUSTEE,	)	Adversary Proceeding No. 99-1040
Plaintiff,	)	
v.	)	
	)	**JUDGMENT**
SYLVIA DENISE DUCKSWORTH, et al.,	)	
Defendants.	)	

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that judgment on the Complaint is entered in favor of the Plaintiff Trustee and the mortgage held by Defendant The Provident Bank on the Debtor's residence at 17323 Stockbridge Avenue, Cleveland, Ohio is avoided under 11 U.S.C. § 544(a)(3).

Date: 3 Oct 2001

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Stephen Hobt, Esq.
Amelia Bower, Esq.
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