

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

IN RE:	)	CHAPTER 13
	)	
DAVID LAWRENCE McMANUS	)	CASE NO. 00-61895
and NERA MAE McMANUS,	)	
	)	JUDGE RUSS KENDIG
Debtors.	)	
-----	)	
DAVID LAWRENCE McMANUS,	)	ADV. NO. 01-6217
	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>MEMORANDUM OF DECISION</b>
EQUICREDIT CORPORATION	)	
OF AMERICA,	)	
	)	
Defendant.	)	

Plaintiff David Lawrence McManus (hereafter "Plaintiff") initiated this adversary proceeding by filing a complaint on December 19, 2001. In the complaint, Plaintiff alleged the residential mortgage between Debtors and Defendant was not executed in accordance with Ohio law because only one witness was present at Debtors' signing of the mortgage. Plaintiff requested the court find the mortgage void, thereby extinguishing Defendant's lien on Debtors' real property. Defendant answered the complaint, denied improper execution of the mortgage, and raised several affirmative defenses.

On May 30, 2002, Plaintiff filed a motion for summary judgment. In the motion, Plaintiff again alleges the mortgage was not properly executed. Affidavits of the Debtors, attesting only one witness was present when they signed the mortgage, are attached to the motion. Defendant filed a brief in opposition and a cross-motion for summary judgment on June 10, 2002. Attached to Defendant's brief are two affidavits: the affidavit of Ronald Tuckerman, who signed the mortgage as a witness and notary public, and the affidavit of Christopher Hughes, who signed the mortgage as a second witness. Defendant opposes the motion for summary judgment on two grounds. First, Defendant asserts questions of material fact exist, making summary judgment inappropriate. Second, Defendant argues Debtors have

no standing to avoid the mortgage in question. Plaintiff moved to strike Defendant's cross-motion for summary judgment as being untimely filed.

The court has jurisdiction of this proceeding pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(K). In accordance with Federal Rule of Bankruptcy Procedure 7052, the court's findings of facts and conclusions of law are set forth in this opinion.

## **FACTS**

Debtors are the record owners of residential real estate located at 1121 9<sup>th</sup> Street, S.W., Massillon, Ohio. On December 1, 1998, Plaintiff signed a note on an \$88,800.00 loan from EquiCredit Corporation of Ohio. As part of the agreement between the parties, Debtors executed an open-end mortgage to secure the note. Tower City Title Agency, L.L.C. handled execution of the mortgage.

A copy of the mortgage attached to Defendant's response demonstrates the mortgage is facially valid. Two witnesses signed the mortgage, as did Debtors. One of the witnesses also notarized the document. According to the affidavits introduced by Defendant, the witness-notary is Ronald Tuckerman and the second witness is Christopher Hughes.<sup>1</sup> Although neither witness can recall the particular signing, both state that it was company policy to have two witnesses present at a mortgage signing and that they followed company policy when mortgages were executed.

Debtors, in turn, attest in affidavits attached to Plaintiff's motion, that the mortgage was signed only in the presence of one witness. Debtors do not provide any further explanation or detail of events surrounding the signing.

On June 7, 2000, Debtors filed a petition for relief under Chapter 13 of the United States Bankruptcy Code. At the time the case was filed, a foreclosure proceeding was pending in the Stark County Court of Common Pleas. Plaintiff filed a complaint to set aside the mortgage on December 19, 2001, ultimately seeking to classify the debt between the parties as an unsecured obligation in Debtors' amended plan.

## **STANDARD OF REVIEW**

Motions for summary judgment are governed by Fed. R. Civ. P. 56, as adopted by Fed. R. Bankr. P. 7056. The rule provides a motion for summary judgment should be granted "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

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<sup>1</sup> The mortgage identifies the second witness, in print below the signature line, as "Christor Hughes."

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.

## **DISCUSSION AND ANALYSIS**

In the complaint, Plaintiff requested the court find the mortgage void and the property free and clear of any lien in favor of Defendant. No code provisions, bankruptcy rules, or cases were presented in support of the complaint. Similarly, the motion for summary judgment seeks to classify the debt between the parties as an unsecured debt resulting from the improper execution. Again, no legal basis for the relief requested is provided. On review of the matter, the court interprets Plaintiff’s complaint and motion for summary judgment to be an action to avoid the mortgage, pursuant to 11 U.S.C. § 544, based on the alleged defective execution under Ohio Revised Code § 5301.01.

### **1. Debtors’ Standing to Avoid the Mortgage**

Implicit in the complaint and motion for summary judgment is the assumption that Plaintiff possesses standing to avoid the mortgage. In defending the motion for summary judgment, Defendant argues Plaintiff does not have standing to pursue avoidance.

Debtors are in a chapter 13 bankruptcy case. According to 11 U.S.C. § 103(a), chapter 5 of the bankruptcy code applies to chapter 13 cases. Section 522(h) of chapter 5 permits a debtor to

avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if –

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title, or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

The trustee has not undertaken an avoidance action to avoid the transfer, so Plaintiff is qualified to act under subsection two. To meet the requirement under subsection one, the court must examine the powers a trustee would have to avoid the transfer. Section 544 provides that the trustee could avoid a transfer

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). Under the bankruptcy code and Ohio law, a trustee would have the ability to avoid a mortgage which was invalidly executed. Thus, the first requirement of section 522(h) is also met.

Next, the court must determine if Plaintiff was eligible to exempt the property under section 522(g). That provision provides that, within certain confines, a debtor may exempt recovered property if

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(2) of this section.

The mortgage must be considered an involuntary transfer in order to qualify for avoidance by the Plaintiff.

Transfer is broadly defined at section 101(54) to include “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption . . . .” “Voluntary transfer” is not defined, but this court has previously determined the granting of a mortgage is a voluntary transfer. *See Silagy v. Briggs (In re Briggs)*, Case No. 00-60293, Adv. No. 01-6002 (Bankr. N.D. Ohio June 4, 2001) (unpublished). In reviewing section 522(g), the court announced:

“There is no statutory definition of voluntariness, so the courts must provide some guidance on that issue.” 4 Collier on Bankruptcy ¶ 522.12[2][b], pp. 522-99 (15th ed. rev. 1998). Courts have consistently held that the grant of a consensual lien or other security interest in debtor’s homestead represents a voluntary transfer. See *In re Young*, 238 B.R. 112 (6<sup>th</sup> Cir. B.A.P. 1999) (voluntary nature of debtor’s transfer of homestead property precluded debtor’s raising his homestead exemption in order to reduce trustee’s recovery after avoidance of transfer by trustee); *In re Kildow*, 232 B.R. 686 (Bankr. S.D. Ohio 1999) (debtor could not refute voluntary nature of transfer as he intended to grant security interests and there was no issue that the liens were consensual); *In re Sutton*, 1994 WL 127597 (Bankr. N.D. Ohio March 25, 1994) (debtor’s voluntary transfer of mortgage to lender would not permit debtor’s recovery or avoidance under 11 USC §522(g)(1) or (h)).

*Id.* at 2. Since the mortgage is a voluntary transfer, Plaintiff would not be able to exempt the recovery under section 522(g). Plaintiff cannot meet the standard set forth in section 522(h) for avoiding the mortgage and therefore has no standing to maintain such an action. *See also Trentman v. Meritech Mortgage Serv. (In re Trentman)*, 278 B.R. 133 (Bankr. N.D. Ohio 2002); *DeAngelis v. Alliance Mortgage Co. (In re DeAngelis)*, Case No. 01-52999, Adv. No. 01-5346 (Bankr. N.D. Ohio March 5, 2002); *Walker v. Investors Title Ins. Co. (In re Walker)*, Case. No. 01-16459, Adv. No. 01-1462 (Bankr. N.D. Ohio March 29, 2002).

Defendant’s response to Plaintiff’s motion for summary judgment is well-taken. Plaintiff has failed to demonstrate he is entitled to judgment as a matter of law under Federal Rule of Bankruptcy Procedure 7056, and the motion is denied.

## **2. Motion to Strike Defendant’s Cross-motion**

Plaintiff moved to strike Defendant’s cross-motion on the grounds it was untimely filed. According to the trial and scheduling order issued by the court, dispositive motions were due on June 3, 2002. Defendant incorporated a cross-motion for summary judgment in the response brief filed June 10, 2002. Defendant did not obtain an extension nor seek leave

to file a late motion.

The court recognizes the cross-motion is untimely but denies the motion to strike. Under Federal Rules of Bankruptcy Procedure 7016(f) and 7037(b), the court has discretion to enter appropriate remedies for failure to comply with a court order. In this case, the same arguments presented in response to Plaintiff's motion for summary judgment serve as the basis for the cross-motion. Essentially Plaintiff requests the court tie its own hands: if the motion is stricken, the court would be unable to grant Defendant's motion and dispose of the matter even though Defendant's arguments are well-taken. The court would be left in the position of denying Plaintiff's motion and leaving the matter set for trial. The court will not elevate form over substance by treating Defendant's brief merely as a response and ignoring Plaintiff's lack of standing on a technicality.

### **CONCLUSION**

Plaintiff seeks to avoid an allegedly defective mortgage presumably pursuant to 11 U.S.C. § 544. However, this avoidance power is generally reserved for the trustee. Section 522 sets forth limited situations in which a debtor can exercise the trustee's avoidance powers. Under the subsections of 522(h), the transfer must be subject to avoidance, and the trustee must have failed to take action to avoid the transfer. Plaintiff meets both subsections. However, 522(h) also requires debtor meet the requirements of section 522(g)(1). Under this section, the avoidable transfer must have been an involuntary transfer. The transfer by a mortgage signed by Debtors is a voluntary transfer. Plaintiff does not have standing to avoid the transfer of the mortgage. Plaintiff's motion for summary judgment is denied, and Defendant's motion is granted.

An appropriate order shall issue immediately.

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**RUSS KENDIG**  
**U.S. BANKRUPTCY JUDGE**

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this Memorandum of Decision and Order was mailed, via regular United States Mail, on the \_\_\_\_\_ day of June 2002 to the following persons:

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Deputy Clerk

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DAVID LAWRENCE McMANUS,	)	ADV. NO. 01-6217
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER DENYING PLAINTIFF'S</b>
	)	<b>MOTION FOR SUMMARY</b>
EQUICREDIT CORPORATION	)	<b>JUDGMENT AND GRANTING</b>
OF AMERICA,	)	<b>DEFENDANT'S MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
Defendant.	)	

For the reasons set forth in the accompanying Memorandum of Decision, the court finds Plaintiff lacks standing to avoid the transfer of the mortgage, and accordingly, Plaintiff's motion for summary judgment is **DENIED**, and Defendant's motion for summary judgment is **GRANTED**.

The court finds Plaintiff's motion to strike Defendant's motion for summary judgment as untimely not well-taken, and accordingly, Plaintiff's motion to strike is **DENIED**.

**IT IS SO ORDERED.**

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RUSS KENDIG  
U.S. BANKRUPTCY JUDGE