

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

IN RE:)	
)	
)	CHAPTER 7
SHAUN DUPRE RINGS and)	
BRENDA SUE RINGS,)	CASE NO. 01-62667
)	
Debtors.)	JUDGE RUSS KENDIG
)	
ANNE PIERO SILAGY, TRUSTEE,)	ADV. PRO. NO. 01-6221
)	
Plaintiff,)	
)	
vs.)	
)	MEMORANDUM OF DECISION
SHAUN DUPRE RINGS, et al.,)	
)	
Defendants.)	

This matter is before the court upon the motion for summary judgment and memorandum in support filed by Bank One, N.A., (hereafter “Bank One”), against Anne Piero Silagy, Trustee, (hereafter “Trustee”), on September 16, 2002. Trustee filed a memorandum in opposition on September 24, 2002. The Attorney General of the State of Ohio, (hereafter “Attorney General”), filed an amicus brief on October 24, 2002 to which Trustee filed a responsive brief on November 4, 2002.

This matter was originally scheduled to proceed to trial on December 2, 2002 but was continued to February 3, 2003 on the oral request of the parties. Additionally, a motion for an order to hold the matter in abeyance pending the determination of the constitutionality of O.R.C. § 5301.234 by the United States District Court for the Northern District of Ohio, Western Division, was filed on November 15, 2002 by Bank One.¹

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) 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). The following constitutes the court’s findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

¹This motion was never ruled upon by the court. In the meantime, Judge Carr of the United States District Court for the Northern District of Ohio, Western Division, rendered a decision in Kovacs v. First Union Home Equity Bank, No. 01-7219 (N.D. Ohio December 3, 2002), the case to which Bank One had referred in its request for a stay.

FACTS AND ARGUMENTS

Debtors Shaun Dupre Rings and Brenda Sue Rings, (hereafter “Debtors”), commenced a proceeding under Chapter 7 of the United States Bankruptcy Code on June 26, 2001. On December 26, 2001, Trustee filed a complaint for lien avoidance, turnover, and declaratory judgment relief regarding an allegedly defective mortgage on Debtors’ residential real property. Debtors executed a mortgage to Bank One on September 5, 2000, which Trustee alleged was defectively executed² under O.R.C. § 5301.01 and which Trustee claimed was thus avoidable pursuant to 11 U.S.C. § 544.

In its motion for summary judgment, Bank One argues that the parties are in agreement that Debtors’ mortgage was properly notarized and recorded and that the only issue that remains in dispute is whether a second witness was present at Debtors’ execution of the mortgage. Bank One argues that this fact is immaterial as § 5301.01, as amended effective February 1, 2002, no longer requires that two witnesses be present during a mortgage’s execution. Bank One argues that the amended statute states that even if a mortgage was defectively executed and filed prior to the statute’s effective date, the recording of the mortgage is constructive notice to any subsequent purchaser regardless of when the mortgage was recorded. Bank One further argues that the amended version of § 5301.01 is retroactively applicable to the present case. Finally, Bank One argues that the question of the constitutionality of § 5301.234, effective June 30, 1999, is moot because it has been repealed.

In her response, Trustee argues that it is inappropriate to retroactively apply § 5301.01, effective February 1, 2002, as application of the statute would infringe upon Trustee’s substantive rights of avoidance that had accrued prior to the statute’s effective date. Therefore, Trustee argues that § 5301.234, the statute in effect at the time of the mortgage signing, governs the rights of the parties. Trustee argues that § 5301.234 is unconstitutional because it violates Ohio Rule of Evidence 1008, enacted via Article IV, § 5(B) of the Ohio Constitution, and the single subject rule of Article II, § 15(D) of the Ohio Constitution.

Attorney General argues that it is unnecessary for the court to analyze the constitutionality of § 5301.234 because the statute was repealed when Substitute House Bill 279, which amended § 5301.01, was signed into law. Attorney General argues that § 5301.01 is retroactive in nature, and therefore, a determination of the constitutionality of § 5301.234 would be inappropriate.

²Trustee also named Beneficial Ohio, Inc., (hereafter “Beneficial”), as a party-defendant. Debtors had also executed a mortgage to Beneficial. Trustee did not allege that this mortgage was defectively executed, but presumably named Beneficial to preserve its rights with respect to an avoidance of Bank One’s lien and a sale of Debtors’ property. Beneficial filed an answer and counterclaim to Trustee’s complaint and a crossclaim against Bank One on June 12, 2002.

ANALYSIS

I. Standard of Review

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part that

[j]udgment 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.

Federal Rule of Civil Procedure 56(c).

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 a material dispute exists over the facts, “that is, if 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 Court of Appeals 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) (citations omitted) (quoting Street, 886 F.2d at 1478).

II. Mortgage Avoidance Historically

Historically, the former version of O.R.C. § 5301.01 governed the execution of mortgages and stated, 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 the acknowledgment.

O.R.C. § 5301.01. It was well settled law that an improperly executed or otherwise invalid mortgage was not entitled to be recorded, did not serve as constructive notice either of its existence or its contents to subsequent mortgagees, and did not bind a trustee standing in the capacity of a hypothetical judicial lien creditor. Bash v. Check (In re Check), 129 B.R. 492 (N.D. Ohio 1991); Logan v. Kingston National Bank (In re Floater Vehicle, Inc.), 105 B.R. 420 (S.D. Ohio 1989); Wayne Building & Loan Co. v. Hoover, 12 Ohio St.2d 62 (Ohio 1967); Citizens National Bank in Zanesville v. Denison, 165 Ohio St. 89 (Ohio 1956).

Upon the filing of a bankruptcy case, a trustee utilized the avoidance powers granted under 11 U.S.C. § 544(a)(3) to avoid these defectively executed or otherwise invalid mortgages and recover property for the estate.

The Ohio legislature attempted to prevent these avoidances by enacting Amended Substitute House Bill 163, which adopted § 5301.234, effective June 30, 1999. Section 5301.234 created an irrebuttable presumption that a mortgage was properly executed without regard to any defects in the witnessing or acknowledgment of the mortgage. After constitutional

challenges, the legislature enacted Substitute House Bill 279, which adopted an amended § 5301.01 and repealed § 5301.234, effective February 1, 2002.

III. Constitutionality of O.R.C. § 5301.234

As § 5301.234 became effective June 30, 1999, it was in effect at the time of the execution of Debtors' mortgage. Although the statute was subsequently repealed, it is still applicable to the case at hand by virtue of O.R.C. § 1.58: "[t]he reenactment, amendment, or repeal of a statute does not . . . [a]ffect the prior operation of the statute or any prior action taken thereunder; [a]ffect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder." O.R.C. § 1.58; *see also* Cesa v. Cesa, 2001 WL 1528911, at *5 (Ohio App. 5th Dist. 2001). Therefore, the constitutional challenge to the statute must be addressed.

Trustee challenges the constitutionality of § 5301.234 on the basis that its passage as part of a transportation bill by the legislature violated Article II, § 15(D) of the Ohio Constitution, which is commonly referred to as the "one subject rule."³ Article II, § 15(D) provides: "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed." Ohio Const. Art. II, § 15(D). If a bill violates this article, then it is void and has no effect. *See* Simmons-Harris v. Goff, 86 Ohio St. 3d 1 (1999). To find a violation of the one subject rule, "a court must determine that various topics contained therein lack a common purpose or relationship so that there is no discernible practical, rational or legitimate reason for combining the provisions in one Act." Beagle v. Walden, 78 Ohio St. 3d 59, 62 (1997) (quoting State ex re. Dix v. Celeste, 11 Ohio St. 3d 141, 145 (1984)).

Applying the standard set forth by the Ohio Supreme Court, Judge Baxter conducted a thorough analysis of the constitutionality of § 5301.234 in Wasserman v. Household Realty Corp. (In re Barkley), 263 B.R. 533 (Bankr. N.D. Ohio 2001). Judge Baxter determined that § 5301.234 was part of a "voluminous bill" that

amends, enacts, or repeals approximately 53 provisions of the Ohio Revised Code, although it does nothing to modify or repeal § 5301.01 which § 5301.234 materially affects. Consequently, this enactment is violative of Article II, Section 15(D) of the Ohio Constitution. . . .

This Court's examination of Bill Number 163 and the

³*See, e.g.,* Farrell v. Equity One Credit Corp. (In re Farrell), 269 B.R. 181, 185, fn. 2 (Bankr. S.D. Ohio 2001).

resulting § 5301.234 reveals no commonality of subject matters. The bill contains provisions in the following titles of the Ohio Revised Code: State Government (4 provisions); Counties (3); Municipal Corporations (1); Criminal Procedure (3); Liquor (5); Motor Vehicles (13); Public Utilities (1); Road and Highways (15); and Taxation (3). Section 5301.234 was the only provision that related to Real Property. The provisions in the Counties title address the regional transit board, the regional transit authority, and suits against county officials- -statutes that clearly do not bear relation to a mortgage recording law. Likewise, the sections of the Bill that concerned Motor Vehicles had no relation to the recording of mortgages. They addressed disposition of monies from vehicle registration, highway safety, privacy of personal information, renewal of vehicle registration, driver's license examinations, and the issuance of certificates of registration. A search of all other provisions of the Bill for commonality to § 5301.234 is similarly unfruitful.

Id. at 558-59. He also relied upon the bill's lack of a title in finding that its enactment violated Article II, § 15(D). Id. at 560. Therefore, Judge Baxter concluded that § 5301.234 was unconstitutional under Article II, § 15(D) of the Ohio Constitution. Id.; *see also Kovacs v. First Union Home Equity Bank*, No. 01-7219 (N.D. Ohio December 3, 2002).

There is no rebuttal to Judge Baxter's conclusion. The court finds the statute to be unconstitutional under Article II, § 15(D) of the Ohio Constitution.

The court's finding of § 5301.234 as being unconstitutional means that Bank One's motion for summary judgment must be denied on this ground. However, the court must examine the retroactivity of § 5301.01, as amended effective February 1, 2002, in order to determine whether Bank One prevails on its other ground for summary judgment.

IV. Retroactivity of Amended O.R.C. § 5301.01

Section 5301.01, amended effective February 1, 2002, provides in relevant part:

- (1) If a . . . mortgage . . . was executed prior to the effective date of this amendment and was not acknowledged in the presence of, or was not attested by, two witnesses as required by this section prior to that effective date, both of the following apply:
 - (a) The instrument is deemed properly executed and is presumed to be valid unless the signature of the . . . mortgagor . . . was obtained by fraud.
 - (b) The recording of the instrument in the office of

the county recorder of the county in which the subject property is situated is constructive notice of the instrument to all persons, including without limitation, a subsequent purchaser in good faith or any other subsequent holder of an interest in the property, regardless of whether the instrument was recorded prior to, on, or after the effective date of this amendment.

(2) Division (B)(1) of this section does not affect any accrued substantive rights or vested rights that came into existence prior to the effective date of this amendment.

O.R.C. § 5301.01.

At issue in the present case is the retroactivity of the statute given Trustee's filing of her complaint prior to the statute's February 1, 2002 effective date. The only case which the court is aware of that addresses the issue of retroactivity is Kovacs v. First Union Home Equity Bank, No. 01-7219 (N.D. Ohio December 3, 2002) issued by Judge Carr of the District Court of the Northern District of Ohio, Western Division. The court finds application of this case instructive and appropriate.⁴ First, Judge Carr examined the specific remedial language in Substitute House Bill 279, Section 3, which states in pertinent part:

the amendment made by this act to section 5301.01 of the Revised Code is retrospective in its operation and is remedial in its application to instruments described in that section that were executed or recorded prior to the effective date of this act, except that the amendment does not affect any substantive rights or vested rights that came into existence prior to the effective date of this act.

Id. at 5 (quoting Sub. H.B. 279). Judge Carr determined that this statute complied with Article II, § 28 of the Ohio Constitution and found that the statute was a remedial provision that "cur[ed] . . . defects . . . in instruments . . . arising out of their want of conformity with the laws of this state," Ohio Const. Art. II, § 28, and was therefore permissible under the constitution. Kovacs, No. 01-7219, at 6 citing Bielat v. Bielat, 87 Ohio St. 3d 350, 355-56 (2000) and Goshen v. Purchell, 11 Ohio St. 641, 646 (1860).

⁴Although a single court's decision in a multi-court district is not binding authority on a lower court, the decision can provide persuasive authority. See In re Simetco, Inc. v. Amsouth Bank, N.A. (In re Simetco, Inc.), 1994 WL 470490, at *2 (Bankr. N.D. Ohio 1994). Further, the application of this decision to a pending case is appropriate. See Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) (a new rule of federal law must be applied to all open cases).

However, because the debtors had filed their bankruptcy case prior to the effective date of the amended § 5301.01 and given the language in § 5301.01(B)(2) that the statute “does not affect any accrued substantive rights or vested rights that came into existence prior to the effective date of this amendment,” Judge Carr found that the statute infringed upon the trustee’s substantive rights of avoidance under 11 U.S.C. § 544. Kovacs, No. 01-7219, at 6 (quoting O.R.C. § 5301.01). Judge Carr determined that § 5301.234 had no bearing on the issue because it had been found to be unconstitutional. Id.

Judge Carr’s analysis applies in the case at bar. Debtors filed bankruptcy on June 26, 2001. Trustee filed her complaint to avoid Bank One’s lien on December 26, 2001. Section 5301.01, as amended, did not go into effect until February 1, 2002. Although the statute is retroactively effective to remedy those mortgages that were defectively executed, giving them the presumption of validity in the future, the statute specifically states it will not trump those substantive rights that were vested as of the date of the statute’s effectiveness. Trustee’s avoidance rights were in effect as of the date of the filing of her complaint. Because the statute states it will not trample upon those rights, the court finds § 5301.01 not retroactive in the case at bar.

Given the inapplicability of § 5301.01, as amended effective February 1, 2002, the next inquiry is whether Bank One can meet its burden on its motion for summary judgment under the former version of § 5301.01.

IV. Applicability of O.R.C. § 5301.01

The parties have failed to agree whether a second witness was present at the execution of Debtors’ mortgage to Bank One. Bank One argues that this failure is not fatal to its motion for summary judgment as whether a second witness was present is not a material fact given the applicable statutes. Section 5301.01, effective August 10, 1994, requires the signing of a mortgage to take place in the presence of two witnesses who can attest the signing and subscribe their names to the attestation. O.R.C. § 5301.01. Bank One has failed to put forth a scintilla of evidence to prove the presence of two witnesses. Likewise, Trustee has failed to put forth a scintilla of evidence to prove the absence of two witnesses. Whether or not a second witness was present is a material fact under this statute. The court finds that a material fact remains in dispute, and therefore, Bank One is not entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, Section 5301.01, effective August 10, 1994, is applicable to the within case, and Bank One has failed to meet its burden on its motion for summary judgment.

An appropriate order shall enter forthwith.

RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
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SHAUN DUPRE RINGS and)	CASE NO. 01-62667
BRENDA SUE RINGS,)	
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Debtors.)	JUDGE RUSS KENDIG
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ANNE PIERO SILAGY, TRUSTEE,)	ADV. PRO. NO. 01-6221
)	
Plaintiff)	
)	ORDER
vs.)	
)	
SHAUN DUPRE RINGS, et al.,)	
)	
Defendants.)	
)	

For the reasons set forth in the accompanying Memorandum of Decision, the court finds Defendant Bank One's motion for summary judgment not well taken. Accordingly, Bank One's motion is **DENIED**.

IT IS THEREFORE ORDERED that this matter shall proceed to trial on **February 3, 2003**, as originally scheduled, to determine the presence or absence of witnesses at Debtors' execution of their mortgage to Bank One.

RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

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