This opinion is not intended for publication

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 01-17917
	)	
PHILIP J. TROPKOFF and	)	Chapter 7
TRACI A. TROPKOFF,	)	
Debtors.	)	Adversary Proceeding No. 01-1460
	)	
WALDEMAR J. WOJCIK,	)	Judge Arthur I. Harris
CHAPTER 7 TRUSTEE,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
HOMEQ SERVICING CORP., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND DECISION

The Chapter 7 Trustee filed this Adversary Proceeding in order to determine the validity, priority, or extent of liens and interests in the Tropkoffs' real property and to set aside one or more of the mortgages that were attached to the property. The Trustee seeks, pursuant to the trustee's "strong arm" powers, to have the Court set aside the mortgages of several secured creditors because those mortgages are allegedly invalid under Ohio law which previously required two witnesses to attest to the execution of a mortgage. A bench trial was held on February 6, 2003, to determine the validity of the only lien priority not yet resolved in this adversary proceeding–the Tropkoffs' 1999 first mortgage to Defendant First Union Home Equity Bank (First Union). For the reasons that follow, the Court finds that First

Union has a valid first lien on the proceeds of the Tropkoffs' real property.

PROCEDURAL BACKGROUND

On August 14, 2001, Debtors filed their petition under Chapter 7 of the Bankruptcy Code. On November 28, 2001, the Trustee filed this adversary proceeding in order to determine the validity, priority, or extent of liens and interests in the Tropkoffs' real property and to set aside one or more of the mortgages that were attached to the property.

By virtue of prior orders of the Court, the validity and priority of liens and interests in the Tropkoffs' real property have now been determined, with the exception of the Tropkoffs' 1999 first mortgage to First Union. Defendant First Merit Bank has been determined to have a valid second mortgage. (Docket #10) Debtor Defendants Philip and Traci Tropkoff have been determined to have a valid third interest in the amount of $10,000 by virtue of their homestead exemption. (Docket #10) Defendant Homeq Services Corp. has been determined to have no interest (Docket #21), and Defendant James A. Rokakis, County Treasurer, has been dismissed, by virtue of his having been paid from the proceeds of the sale of the Tropkoffs' real property in April 2002. (Docket #30)

The Court previously approved the Trustee's sale of the Tropkoffs' real

property to third parties for $206,100. (Bankruptcy Case Docket #38) After payment of the real estate commission, real estate taxes, and other closing costs, the sale netted proceeds of approximately $178,000. (Bankruptcy Case Docket #42) Thus, the only issue at trial was the validity of the Tropkoffs' 1999 first mortgage to First Union.

A bench trial was held on February 6, 2003. This Memorandum constitutes the Court's findings of fact and conclusions of law as required by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

DEFENDANT FIRST UNION'S MOTION *IN LIMINE*

The day before trial, Defendant First Union filed a motion *in limine* (Docket #41) seeking to prevent the Trustee from presenting evidence that would contradict First Union's unanswered interrogatories. On the day of trial, the Court heard argument on the motion from counsel and allowed the Trustee to submit a written response, which was filed the following day. (Docket #46) The Court indicated that it would take the motion under advisement. For the reasons that follow, the motion is denied.

Under the scheduling order issued in this case, discovery was to be completed on or before April 15, 2002. (Docket #12) First Union did not serve its

interrogatories until April 22, 2002, and in a letter dated April 25, 2002, counsel for the Trustee advised First Union that the interrogatories were untimely and that no responses would be forthcoming. Under the Court's scheduling orders and the local rules governing discovery disputes, it was incumbent upon First Union to attempt to resolve this discovery dispute with opposing counsel and, if unresolved, to raise the issue with the Court in April 2002, not on February 5, 2003, the day before trial. First Union's motion *in limine* is denied.

FACTS

Prior to the mortgage closing at issue in this case, the Tropkoffs took out several construction loans and home equity lines of credit while building their house on Boston Road in Strongsville, Ohio. For example, in August of 1998, the Tropkoffs obtained a construction loan for $17,000 from Park View Federal Bank and granted that bank a mortgage on their Boston Road residence. Later in December of 1998 and January of 1999, the Tropkoffs obtained loans from Star Bank, Provident Bank, and Park View Federal and granted those institutions mortgages on their property. In April of 1999, the Tropkoffs also contracted for an $88,000 line of credit from First Merit Bank, using their residence as collateral.

Around the time of the mortgage closing at issue in this case, the Tropkoffs

sought to refinance the several mortgages that had encumbered their property. The Tropkoffs, through mutual friends, knew an acquaintance named Richard Silvers who was and remains a mortgage consultant with Crown Equity Group, Inc. Philip Tropkoff and Silvers had known each other for a few years, occasionally meeting socially amid other friends. The Tropkoffs had even celebrated New Year's Eve at Silvers's residence on one occasion, although Silvers had never visited the Tropkoffs' residence prior to the Tropkoffs' decision to hire him for the refinancing.

Silvers attempted to arrange two different refinancings for the Tropkoffs, but those fell through. On his third attempt, Silvers obtained a workable loan, but the Tropkoffs found the interest rate higher than they had anticipated. Despite what they regarded as an unfavorable interest rate, the Tropkoffs agreed to the refinancing, in part because Silvers had advised them that they could refinance in the future at a better rate of interest if they wanted.

Closing on the loan was scheduled to take place at the Tropkoffs' residence on Wednesday, August 11, 1999, at 7:00 p.m. Silvers and Ronald Tuckerman, a mortgage "closer" from Tower City Title Agency, were to serve as witnesses to the Tropkoffs' signing of the documents. Witness testimony and documentary

evidence painted markedly different pictures of the closing of that particular mortgage.

According to the Trustee, Silvers telephoned Philip Tropkoff and informed him that he was running late and would probably not be able to attend the closing. Philip Tropkoff testified that Tuckerman, who had already arrived at the Tropkoffs' residence at that point, waited with the Tropkoffs for approximately one half hour to see if Silvers would make it on time. After that, Tuckerman advised them that the closing could proceed without Silvers being present, and the three of them executed the documents in a room adjacent to the Tropkoffs' kitchen.

Both Philip and Traci Tropkoff testified that they specifically recalled Silvers not being present for the closing and then appearing at their home later that night between 9:00 and 10:00 p.m. The late hour and the unexpected nature of the visit stuck out in the minds of both Philip and Traci Tropkoff. According to them, Silvers came to their home and asked if everything went alright with the closing. Philip Tropkoff and Silvers conversed for a few more minutes, and then Silvers left.

By contrast, according to First Union and the written documentation accompanying the transaction, Tuckerman and Silvers were both present as

witnesses when the Tropkoffs signed the mortgage papers. Although neither Silvers nor Tuckerman had a specific recollection of the closing, both testified that the only way that Silvers's name would appear on the mortgage as a witness would be if he had actually been present for the closing. Tuckerman further stated that, as a result of the spate of one-witness litigation that had arisen prior to the Tropkoffs' closing, his company mandated a strict policy of requiring and documenting the presence of two witnesses at every closing.

Marilyn Mannarino, President of Tower City Title Agency, testified that she vigorously enforces the policy of requiring two witnesses at a closing. In her experience, her employees have exhibited an unfailing adherence to such policy. Mannarino testified consistently with Tuckerman that, prior to the Tropkoffs' closing, her company had changed its closing documents specifically because of adverse court decisions involving one witness mortgages. *See* Exhibit S.

Finally, after the closing on August 11, 1999, the mortgage was recorded in the Cuyahoga County Recorder's Office on August 16, 1999. The recorded mortgage bears the signatures of two witnesses, Tuckerman and Silvers.

JURISDICTION

The Court has jurisdiction in this proceeding pursuant to 28 U.S.C.

§ 1334(b) and Local 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 pursuant to 28 U.S.C. § 157(b)(2)(K) and (O)

THE STRONG ARM CLAUSE AND APPLICABLE OHIO LAW

The Bankruptcy Code provides the trustee with an array of "strong arm" powers to avoid certain transfers and to bring property back into the bankruptcy estate. Section 544 provides in pertinent part:

> (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–
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> * * * *
>
> (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.

In this case, the Trustee seeks to avoid the Tropkoffs' 1999 mortgage to First Union through the use of Section 544(a)(3), which by conferring upon the trustee the status of a bona fide purchaser of property under applicable state law permits the trustee to avoid any security interest against which, as of the commencement of

the case, a bona fide purchaser would have taken a superior interest. Since this mortgage concerns real property located in Ohio, this inquiry is governed by Ohio law. *See In re Zaptocky*, 250 F.3d 1020, 1024 (6th Cir. 2001).

As a result of actions such as this to set aside mortgages under Section 544 of the Bankruptcy Code, the Ohio legislature has instituted several significant changes to the laws governing the proper execution of mortgages in Ohio and the effect of defectively executed but recorded mortgages on bona fide purchasers. The history of these changes is described briefly below. Nevertheless, this Court need not determine which provision is applicable to this adversary proceeding, because the Court finds that the Trustee has not met his burden of proving that the mortgage is defective even under the version of the law most favorable to the Trustee – *i.e.*, proving the instrument is defective by clear and convincing evidence. *See In re Zaptocky*, 250 F.3d at 1024-25.

Prior to June 30, 1999, there were three major prerequisites for the proper execution of a mortgage in Ohio: (1) the mortgagor must sign the mortgage deed; (2) the mortgager's signature must be attested by two witnesses; and (3) the mortgagor's signature must be acknowledged or certified by a notary public. *See* OHIO REV. CODE ANN. § 5301.01 (Anderson 1999); *In re Zaptocky*, 250 F.3d at

1024. If any one of the these prerequisites is not met, the mortgage is not validly executed and may be avoided by a subsequent bona fide purchaser, even if the mortgage is subsequently recorded. *See id.*, 250 F.3d at 1024-28. Under case law interpreting this version of Section 5301.01, a facially valid mortgage bears a presumption of validity, and those who contest such a mortgage must prove the instrument is defective by clear and convincing evidence. *See id.* at 1024-25.

In 1999, the Ohio legislature enacted legislation which provided that, absent evidence of fraud on the mortgagor, a mortgage is presumed effective notwithstanding any alleged or actual defect in the execution of the mortgage. Ohio Revised Code Section 5301.234 provided, in pertinent part:

> (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 purposes of constructive notice.

(Emphasis added). O.R.C. § 5301.234 was enacted by the Ohio legislature in Ohio House Bill Number 163 of the 1999 regular session, with an effective date of June 30, 1999, and was later repealed as of February 1, 2002.

In 2001, the Ohio legislature further amended the law regarding the execution of mortgages. *See* 2001 Ohio Laws 279 (repealing § 5301.234 and amending § 5301.01 to require only one witness to attest a mortgage execution and to extend retroactively the irrebuttable presumption of validity).

While bankruptcy courts and their reviewing courts have struggled to resolve difficult issues such as the applicability, retroactivity, and constitutionality of these amendments to Chapter 5301 of the Ohio Revised Code,[1] this Court need

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[1]*See, e.g.*, *Zaptocky*, 250 F.3d at 1028 n.5 (noting that O.R.C. § 5301.234 did not apply to that case because the bankruptcy petition was filed over one year prior to the effective date of that statute); *In re Kovacs*, No. 3:01CV7219, 2002 U.S. Dist. LEXIS 23260, at *4-5 (N.D. Ohio Dec. 3, 2002) (finding O.R.C. § 5301.234 unconstitutional because it violates the one-subject rule contained in Article II, §15(D) of the Ohio Constitution); *In re Haviaras*, 266 B.R. 792, 797-98 (N.D. Ohio 2001) (finding that O.R.C. § 5301.234, in a bankruptcy action filed after the effective date of that statute, prevents a bankruptcy trustee from using avoidance powers to set aside a previously recorded mortgage, regardless of when the recording occurred); *In re Barkley*, 263 B.R. 553 (Bankr. N.D. Ohio 2001) (finding O.R.C. § 5301.234 violative of Ohio one-subject rule and evidentiary rule regarding the admissibility of writings); *In re Stewart, et. al.*, 96 Ohio St. 3d 67 (2002) (affirming that O.R.C. § 5301.234 can be applied to

not address any of these issues or break any new legal ground to resolve the current case. This is because the Court finds that the Trustee has not met his burden of proving that the mortgage is defective even under the version of the law most favorable to the Trustee – *i.e.*, proving the instrument is defective by clear and convincing evidence.

CLEAR AND CONVINCING EVIDENCE

Under case law interpreting Ohio Revised Code Section 5301.01, prior to its being amended by the Ohio legislature, a facially valid mortgage bears a presumption of validity, and those who contest such a mortgage must prove the instrument is defective by clear and convincing evidence. *See In re Zaptocky*, 250 F.3d at 1024-25. The Ohio Supreme Court has defined "clear and convincing evidence" as that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cleveland Bar Association v. Cleary*, 93 Ohio St. 3d 191, 198 (2001) (applying clear and convincing standard to disciplinary proceedings involving judicial misconduct), *citing Cross v. Ledford*, 161 Ohio St. 469, 477 (1954) (applying clear and

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presume the validity of a mortgage in a bankruptcy case filed after the effective date of O.R.C. § 5301.234 when the mortgage at issue in the bankruptcy case was recorded before the statute's effective date).

convincing standard for actions to rescind a contract procured by fraudulent representations). *Accord Brooks v. American Broadcasting Co.*, 999 F.2d 167, 171 (6th Cir. 1993) (applying Ohio's clear and convincing standard to defamation claim).

DETERMINING CREDIBILITY AND WEIGHING EVIDENCE

The findings of fact contained in this Memorandum reflect the Court's weighing of the evidence and determining credibility. In doing so, the Court considered the witnesses' demeanor, the substance of their 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.

In concluding that the Trustee has not shown by clear and convincing evidence that the mortgage is defective, the Court has considered the parties' pleadings, exhibits, and the testimony of witnesses at trial. Those factors weighing most heavily in the Court's evaluation include:

(1) In an affidavit prepared and signed on the evening of the closing, the Tropkoffs swore under penalty of perjury that both Ronald Tuckerman and Rich Silvers were present at the execution of the mortgage. At trial, Philip and Traci Tropkoff admitted signing this

document and identified their signatures thereon. Nothing on the face of this affidavit suggests any irregularity in its execution. *See* Exhibit S.

(2) There is no feasible explanation as to how Silvers's signature would have been written into the documents, absent some sort of collusion at the time of the closing on the part of Silvers and Tuckerman, who have no business or social connection with each other. Tuckerman's uncontradicted testimony showed that, in accordance with established company policy, he took the executed mortgage documents with him after he left the Tropkoffs' residence that night and returned to his home in Richmond Heights, Ohio. Silvers, who lives in Ravenna and works in the Akron area, would have had to make a long drive to Richmond Heights on the night of the closing or early the next morning in order for Tuckerman to submit the closing documents at work the next morning by 8:00 a.m. That Tuckerman and Silvers would concoct and execute such a burdensome scheme–especially given that their jobs would be at stake for doing so–seems improbable. In fact, the uncontradicted testimony was that

Tuckerman and Silvers did not know each other, making it unlikely that Tuckerman would place his trust in the illicit cooperation of a stranger. The more likely explanation is that Silvers was in fact present during the closing, and the documentation accurately reflects that.

(3) While the Trustee does not have the burden of demonstrating how Silvers's signature actually ended up on the mortgage if he was not present for the closing, the absence of any testimony about how Silvers's signature might have ended up on the recorded mortgage is relevant. For the Trustee to leave such an important matter for the Court's speculation is troublesome, particularly given the "clear and convincing" evidentiary standard applicable to this case.

(4) The Tropkoffs' testimony may have been affected by their belief, however misguided, that they might have benefitted financially if the mortgage were invalidated, for example, by incurring a windfall in the amount of $10,000 as a result of the homestead exemption they declared in their bankruptcy petition.

(5) The testimony of Ronald Tuckerman was persuasive. In an assured

and professional manner, he described his unwavering adherence to the policy of Tower City Titling requiring two witnesses at a mortgage closing. He answered questions in a straightforward, non-evasive manner. Moreover, he had no motive to fabricate his testimony to protect his job because, for reasons unrelated to his work performance, he is no longer employed at Tower City Titling.

(6) By contrast, the testimony of Philip Tropkoff was weak and unconvincing. He had difficulty remembering the several occasions when his wife and he refinanced their home. Given such difficulty, it is unlikely that he would remember the intricate details of this mortgage closing or any of the mortgage closings, for that matter. Finally, when asked if he knew he was signing a false affidavit when he signed the "Conditions of Settlement Affidavit" stating that Silvers was present for the closing, Tropkoff replied, "Right." Tropkoff later elaborated on why he signed the allegedly false affidavit by saying, "I mean, I didn't care. I'm getting a loan, you know." The Court finds that Tropkoff's willingness to flout a sworn oath in order to benefit himself seriously diminishes his credibility as a witness. *Cf.* DEVITT

& BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS §§ 15.10 and 105.03 (5th ed.) (testimony of perjurer "should always be considered with caution and weighed with great care").

(7) Both Traci and Philip Tropkoff testified incorrectly that this mortgage was executed sometime around the Christmas holidays in 1999. In fact, the closing did not take place any time close to the winter holiday season, but rather it occurred on August 11, 1999. For both of them to share the same grossly mistaken recollection suggests that their testimony may have been coached or, perhaps, that both of them may have been recalling a closing from one of the other mortgages they executed during the construction and refinancing of this property.

(8) Even though Silvers's testimony did not appear as steadfast and convincing as that of Tuckerman, he stated that he would not sign mortgage documents as a witness unless he was actually present. Any reticence he exhibited on the witness stand may have been a result of an inner desire to maintain friendly ties with the Tropkoffs by not directly contradicting their testimony. Also, given his connections to

the mortgage industry, he too may have believed that the Tropkoffs could have benefitted financially by having the mortgage invalidated. Therefore, while Silvers's testimony came across as vague and at times evasive, it is unclear whether his lack of credibility was (1) because he knew full well he was not there for his friends' closing, or (2) because he knew full well that he was there for the closing. The Court believes it unlikely that Silvers would have such a poor recollection of attending a friend's closing.

(9) Silvers testified consistently with Tuckerman and the Tropkoffs that the mortgage closing took place on a small table in a room that adjoined the Tropkoffs' kitchen. While Silvers may have been well coached or just lucky, the most likely explanation is that Silvers simply remembered that fact correctly.

(10) Had there been a problem obtaining a second witness, the parties likely could have found one. Tuckerman and Silvers were keenly aware of the legal necessity of having a second witness present, and for the two of them to recklessly disregard that necessity without even trying to obtain a different witness does not stand to reason.

(11) Shortly before the closing in question, Tuckerman's company had changed its procedures specifically because of adverse court decisions involving one-witness mortgages. Because Tuckerman was aware of the heightened concern of his management and the importance of obtaining and documenting the presence of two witnesses at each closing, there was even less of an incentive for him to deviate from that policy and opt instead for some cumbersome, collusive arrangement with an apparent stranger, the details of which are left for the Court to speculate.

In short, after weighing the evidence received at trial, the Court simply is not left with a "firm belief or conviction" as to the Trustee's claim that only one witness was present during the mortgage closing. *Cleveland Bar Association v. Cleary*, 93 Ohio St. 3d 191, 198 (2001) (defining clear and convincing standard), *citing Cross v. Ledford*, 161 Ohio St. 469, 477 (1954). Indeed, even if the standard were a mere preponderance of the evidence, the Court would have had difficulty finding that the Trustee had established the absence of two witnesses in this case. Thus, the Trustee has not succeeded in his burden to show the invalidity of the mortgage.

CONCLUSION

For the foregoing reasons, the Court finds that the Trustee has not met his burden of proving that the Tropkoffs' 1999 mortgage to First Union is defective even under the version of the law most favorable to the Trustee – *i.e.*, proving the instrument is defective by clear and convincing evidence. Accordingly, the Court finds that First Union has a valid first lien on the proceeds of the Tropkoffs' real property and enters judgment in favor of First Union on the Trustee's claim to set aside First Union's 1999 mortgage to the Tropkoffs under 11 U.S.C. § 544. In addition, Defendant First Union's Motion *in Limine* (Docket #41) is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 03/14/2003
Arthur I. Harris
United States Bankruptcy Judge