

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

IN RE:	)	CHAPTER 7
	)	
MARK STEPHEN VAN VOORHIS & BETH A. VAN VOORHIS	)	CASE NO. 01-63445
	)	
Debtors.	)	JUDGE RUSS KENDIG
	)	
<hr/>	)	ADV. NO. 02-6141
ANNE PIERO SILAGY, TRUSTEE,	)	
	)	
Plaintiff,	)	<b>MEMORANDUM OF DECISION</b>
	)	
v.	)	
	)	
MARK S. VAN VOORHIS, <i>et al.</i> ,	)	
	)	
Defendants.	)	

This matter is before the court upon three motions for summary judgment. The first was filed by Plaintiff Anne Piero Silagy, Trustee, (hereafter "Trustee"), on October 24, 2002. Next, Defendant Wachovia Bank of Delaware, N.A., (hereafter "Wachovia") filed a memorandum in opposition to Trustee's motion for summary judgment and cross-motion for summary judgment with memorandum in support on November 1, 2002, to which the Trustee filed a memorandum in opposition on November 21, 2002. Finally, a motion for summary judgment was filed by Defendant Ocwen Federal Bank, (hereafter "Ocwen"), on July 11, 2003, to which the Trustee filed a reply on July 30, 2003.

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.

**FACTS AND ARGUMENTS**

Debtors Mark Stephen Van Voorhis and Beth A. Van Voorhis, (hereafter "Debtors"),

commenced a proceeding under Chapter 7 of the United States Bankruptcy Code on August 15, 2001. On September 5, 2002, Trustee filed a complaint for lien avoidance, turnover, and declaratory judgment relief regarding two allegedly defective mortgages on Debtors' residential real property. The first of these mortgages was executed on December 23, 1997 to First Union Home Equity Bank and is currently held by Wachovia. The second of these mortgages was executed on December 31, 1998 and is currently held by Ocwen. Trustee claims that these mortgages were improperly executed and are not entitled to record under O.R.C. § 5301.25. Trustee claims that these mortgages can be avoided pursuant to 11 U.S.C. § 544.

In her motion for summary judgment, Trustee argues that O.R.C. § 5301.234 is unconstitutional and, therefore, does not operate to give a presumption of validity to the mortgages at issue. Trustee posits that § 5301.234 is not constitutional because it intrudes on the rule making power of the Ohio Supreme Court and because it was unconstitutionally enacted in violation of Article II, § 15(D) of the Ohio Constitution (“the one subject rule”).

In its response to Trustee's motion for summary judgment and its cross-motion for summary judgement, Wachovia contends that O.R.C. § 5301.234 effectively bars Trustee's attempt to avoid its mortgage and advances several arguments as to why this section is constitutional. Wachovia argues that § 5301.234 is constitutional because it does not violate the one subject rule or intrude on the rule making power of the Ohio Supreme Court. Wachovia's argument is that although O.R.C. § 5301.234 amends many different sections of the Revised Code, the amendments to these sections have a common purpose or relationship between their topics. Wachovia also contends that the Ohio Supreme Court decision of In re Stewart, 96 Ohio St. 3d 67 (2002), implicitly finds O.R.C. § 5301.234 constitutional since the court in that case answered a certified question regarding that section, but made no finding as to its constitutionality. Wachovia further argues that § 5301.234 has no relationship to Ohio Evidence Rule 1008 and, therefore, does not intrude upon the rule making power of the Ohio Supreme Court. Finally, Wachovia also that if the court finds § 5301.234 to be unconstitutional, it must find all statutes passed in House Bill 163 to be invalid.

In her opposition to Wachovia's cross motion for summary judgment, Trustee responds that the Ohio Supreme Court did not decide the constitutionality of O.R.C. § 5301.234 in In re Stewart due, in part, to the doctrine of judicial restraint. The Trustee also re-asserts her argument that O.R.C. § 5301.234 violates the one subject rule.

Next, Ocwen filed its motion for summary judgment against the Trustee arguing that O.R.C. § 5301.234 is constitutional, supporting its argument with the In re Stewart decision. Ocwen further asserts that even if O.R.C. §5301.234 does not apply, O.R.C. § 5301.01 as amended by House Bill 279 allows Ocwen to prevail. Ocwen argues that this section can be applied to pending claims such the current matter before this court, and that this section can be properly applied retroactively.

In her response to Ocwen's summary judgment motion, Trustee argues that this court has already addressed these arguments in its decision handed down in the adversary proceeding of Trustee v. Rings (In re Rings), Ch. 7 Case No. 01-62667, Adv. No. 01-6221 (N.D. Ohio Jan. 17, 2003).

## ANALYSIS

### I. Constitutionality of O.R.C. § 5301.234

This court previously addressed the constitutionality of O.R.C. § 5301.234 in the case of Trustee v. Rings (In re Rings), Ch. 7 Case No. 01-62667, Adv. No. 01-6221 (N.D. Ohio Jan. 17, 2003). The court finds no reason to revisit its earlier ruling and hereby finds that O.R.C. § 5301.234 is unconstitutional for the reasons stated in the Rings decision. Accordingly, Trustee's motion for partial summary judgment is granted.

### II. Retroactivity of Amended O.R.C. § 5301.01 and Issues of Fact

This issue was also decided by this court in the Rings decision. With one small exception, this court follows the reasoning stated in the Rings decision and will not apply amended O.R.C. § 5301.01 retroactively.

In Rings, this court noted that Trustee in that case had filed the complaint to before House Bill 279 was passed, thus the Trustee's substantive right of avoidance accrued before the effective date of amended O.R.C. § 5301.01. The relevant time in determining when a trustee has acquired the substantive right of avoidance is at the time of the filing of the bankruptcy petition, not at the time at which the trustee files a complaint to start an adversary proceeding. *See General Electric Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184, 192 (3<sup>rd</sup> Cir. 1988). This clarification would not have affected the outcome of Rings, or this case.

The parties do not agree on whether a second witness was present at the execution of Debtors' mortgages to Ocwen and Wachovia. 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. Both Ocwen and Wachovia have 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 two witnesses were present is a material fact under this statute. The court finds that a material fact remains in dispute, and therefore, summary judgment is not appropriate.

## CONCLUSION

For the foregoing reasons, Section 5301.01, effective August 10, 1994, is applicable to the within case, and Section 5301.234 is declared to be unconstitutional.

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RUSS KENDIG  
UNITED STATES BANKRUPTCY JUDGE

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Plaintiff,	)	
	)	<b>ORDER</b>
v.	)	
	)	
MARK S. VAN VOORHIS, <i>et al.</i> ,	)	
	)	
Defendants.	)	

For the reasons set forth in the accompanying Memorandum of Decision, the court finds the motions for summary judgement submitted by Wachovia and Ocwen are not well taken. Accordingly these motions are **DENIED**.

Trustee's motion for partial summary judgment is **GRANTED** and O.R.C. § 5301.234 is unconstitutional.

This matter shall proceed to trial on **October 20, 2003**, as originally scheduled.

**SO ORDERED**

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RUSS KENDIG  
UNITED STATES BANKRUPTCY JUDGE

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