

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

DANIEL VRABLE and  
BARBARA VRABLE,

Debtors.

CASE NUMBER 02-41253

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MICHAEL D. BUZULENCIA, TRUSTEE,

Plaintiff,

vs.

DANIEL VRABLE, et al.,

Defendants.

ADVERSARY NUMBER 02-4128

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M E M O R A N D U M O P I N I O N

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This cause is before the Court on a motion for summary judgment filed by Advanta National Bank ("Advanta"). Trustee Michael D. Buzulencia ("Trustee") filed a brief in opposition/cross motion for summary judgment. This Court has jurisdiction over this matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANK. P. 7052.

I. S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found

in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that

[t]he judgment 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.

FED. R. BANKR. P. 7056. Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *Structurlite Plastics Corp. v. Griffith (In re Griffith)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998).

The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). 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). However, 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 v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 257). 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. *Street*, 886 F.2d at 1479.

## II. F A C T S

The material facts in this case are not in dispute. On August 4, 1999, Daniel and Barbara Vrable ("Debtors") borrowed One Hundred Seventy-Seven Thousand Dollars (\$177,000.00) from Advanta and executed a promissory note in favor of Advanta. As security for the note, Debtors granted Advanta a mortgage interest in real property located at 15010 Strader Road, East Liverpool, Ohio 43920 (the "Mortgage"). The Mortgage bears Debtors' signatures, the signatures of David Andrasik and William Smith as witnesses, and

is notarized by David Andrasik.<sup>1</sup> The Mortgage was duly recorded on August 9, 1999 in the Columbiana County Recorder's Office.

On March 26, 2002, Debtors filed for relief under Chapter 7 of Title 11, United States Code. On August 14, 2002, Trustee filed the present adversary proceeding to determine Advanta's interest in the above-referenced property, asserting that Trustee has an interest in the property superior to the interests of Advanta and that Advanta should be declared an unsecured creditor of the estate pursuant to 11 U.S.C. § 547.

In support of Trustee's motion for summary judgment, Trustee submitted an affidavit in which Debtors assert the Mortgage was not properly executed under Ohio law. Debtors' sworn affidavit provides as follows:

We, Daniel & Barbara Vrable, being first duly sworn, state upon our oath as follows:

1. We are the Debtors in a Chapter 7 bankruptcy proceeding filed in the Northern District of Ohio, Case No. 02-41253.
2. On or about 8/4/1999, We [sic] executed a mortgage in favor of Advanta National Bank or a mortgage on residence located at 15010 Strader Rd., East Liverpool, OH 43920.
3. Only one representative from Advanta National Bank witnessed the mortgage.
4. The only individuals present at the time that We [sic] executed the mortgage with Advanta National Bank were ourselves, and a

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<sup>1</sup>Under the law of Ohio a notary can both notarize the Mortgage's acknowledgment and sign the attestation as one of the two witnesses to the signature. *Wayne Bldg. & Loan Co. v. Hoover*, 231 N.E.2d 873, 875 (1967) (citing *Read v. Toledo Loan Co.*, 67 N.E. 729 (1903)).

representative from Advanta National Bank. There were not any other individuals present to witness the execution of the mortgage documents in favor of Advanta National Bank nor did individual [sic] from Advanta National Bank claim to be a notary public.

5. To the best of my [sic] knowledge and belief, said mortgage was recorded amongst the records of the Columbiana County Recorder.

(Aff. of Debtors in Supp. of Trustee's Br. in Opp'n to Advanta's Mot. for Summ. J.) Since the only individuals present at the time the Mortgage was executed were Debtors and a representative from Advanta, Trustee argues the Mortgage does not comply with the formalities required by the version of Ohio Revised Code § 5301.01 in effect at the time the Mortgage was executed. Accordingly, Trustee asserts that the defectively executed Mortgage could have been avoided by a bankruptcy trustee, pursuant to 11 U.S.C. § 544(a)(3), had Debtors filed their petition for relief before February 1, 2002, the effective date of Ohio Revised Code § 5301.01, as amended.<sup>2</sup>

Trustee contends that, because the Mortgage was avoidable had a bankruptcy petition been filed before February 1, 2002, a transfer occurred, for the purposes of preferential transfer analysis, on February 1, 2002, pursuant to 11 U.S.C. § 547(e). For the purposes of § 547, the Bankruptcy Code provides that a transfer of real property is perfected when a bona fide purchaser for value

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<sup>2</sup>This amended statute eliminates the two witness requirement to be a valid mortgage.

cannot attack the mortgage. 11 U.S.C. § 547(e)(1)(A). Thus, Trustee contends that the Mortgage, which had previously been deemed defective under Ohio Revised Code § 5301.01 and therefore could have been avoided by Trustee, was perfected on February 1, 2002. The Bankruptcy Code further provides, for the purposes of § 547, a transfer occurs "at the time such transfer is perfected, if such transfer is perfected" more than 10 days following the execution of the Mortgage. See 11 U.S.C. § 547(e)(2)(B). Accordingly, Trustee concludes the transfer of the Mortgage occurred on February 1, 2002, 54 days prior to the petition date, March 26, 2002. Trustee asserts the transfer of the Mortgage was made for the benefit of Advanta, on account of an antecedent debt, made while Debtors were insolvent, within 90 days of the petition date and enabled Advanta to receive more than it otherwise would receive. Accordingly, Trustee maintains that the Mortgage can be avoided as a preferential transfer pursuant to 11 U.S.C. § 547(e) and summary judgment should be granted in its favor.

Advanta argues the Mortgage cannot be avoided by a bankruptcy trustee under 11 U.S.C. § 544(a) because, pursuant to Ohio Revised Code § 5301.01, as amended, the Mortgage was not defective when the petition was filed. Advanta argues that whether two witnesses attested to the Mortgage is immaterial because the applicable statute, Ohio Revised Code § 5301.01(B), as amended,

does not require the attestation of two witnesses.<sup>3</sup> Under the amended statute, even if the Mortgage was not signed in the presence of two witnesses, it is deemed properly executed unless it was obtained by fraud, for which no evidence has been presented. The amended statute also provides that the original recording of the Mortgage is deemed constructive notice. Accordingly, Advanta concludes Trustee cannot avoid the Mortgage under 11 U.S.C. § 544.

In addition, Advanta argues the Mortgage cannot be avoided under 11 U.S.C. § 547(b) because the transfer of the Mortgage did not occur within the 90 days prior to the petition date. Advanta maintains that Debtors transferred a mortgage interest to Advanta in August 1999 and not on February 1, 2002, pursuant to Ohio Revised Code § 5301.01(B), as amended. Accordingly, the Mortgage cannot be avoided as a preferential transfer. Advanta asserts summary judgment should be granted in its favor.

### III. D I S C U S S I O N

The Bankruptcy Code provides the trustee with the power to avoid certain preferential transfers, pursuant to 11 U.S.C. § 547, which states:

(b) Except as provided in subsection (c) of this section, the trustee may avoid **any transfer** of an interest of the debtor in

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<sup>3</sup>Advanta has not submitted an affidavit to rebut Debtors' assertion that two witnesses did not attest to the execution of the Mortgage.

property --

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made --

(A) **on or within 90 days** before the date of the filing of the petition;  
or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;  
and

- (5) that enables such creditor to receive more than such creditor would receive if --

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made;  
and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (emphasis added).

Trustee and Advanta both seek summary judgment and do not dispute the material facts at issue, but have divergent views over whether a transfer occurred within the 90 days prior to petition date, as required by 11 U.S.C. § 547(b). This dispute raises two questions. First, was the Mortgage transferred to Advanta within

90 days before Debtors filed their bankruptcy petition? Second, does retroactive application of Ohio Revised Code § 5301.01, as amended, violate the Ohio Constitution?

**A. Was the Mortgage transferred to Advanta within 90 days before Debtors filed their bankruptcy petition?**

The Bankruptcy Code defines the term transfer in very broad terms. It defines transfer as, "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[.]" 11 U.S.C. § 101(54). The Bank-ruptcy Code supplements this definition for preferential transfer analysis. The Bankruptcy Code provides that, for the purposes of § 547, a transfer of real property is perfected when a bona fide purchaser for value cannot attack the mortgage.<sup>4</sup> 11 U.S.C. § 547(e). It further provides that, for the purposes of § 547, a transfer is made, "at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B)[.]" 11 U.S.C. § 547(e)(2)(A). Alternatively, the transfer occurs, "at the time such transfer is

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<sup>4</sup>"For the purposes of this section, a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee[.]" 11 U.S.C. § 547(e)(1)(A).

perfected, if such transfer is perfected after such 10 days[.]"  
11 U.S.C. § 547(e)(2)(B).

The Court must also consider relevant state law when analyzing the Mortgage transfer date. The Supreme Court explained,

"[w]hat constitutes a transfer and when it is complete" is a matter of federal law. This is unsurprising since, as noted above, the statute itself provides a definition of "transfer." But that definition in turn includes references to parting with "property" and "interest[s] in prop-erty." In the absence of any controlling federal law, "property" and "interests in property" are creatures of state law. ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law").

*Barnhill v. Johnson*, 503 U.S. 393, 397-98 (1992) (citations omitted). Issues concerning real property located in Ohio are governed by Ohio law. *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1024 (6th Cir. 2001) (citing *Watson v. Kenlick Coal Co., Inc.*, 498 F.2d 1183, 1190 (6th Cir. 1974)). Accordingly, the Court must examine Ohio law to determine whether, under Ohio law, a transfer of the Mortgage was made within 90 days prior to the petition date.

The pertinent state law has been amended several times in recent years. Historically, under Ohio law, the proper execution of a mortgage required the mortgagor to sign the mortgage deed and that the mortgagor's signature be attested by two witnesses and acknowledged or certified by a notary public (or other designated official). *In re Zaptocky*, 250 F.3d at 1024; see OHIO REVISED CODE

ANN. § 5301.01 (West 1998). A mortgage that failed to meet these three prerequisites was defectively executed. A defectively executed mortgage was not entitled to be recorded and thus failed to place a bona fide purchaser on constructive notice of the encumbrance. *Citizens Nat'l Bank v. Denison*, 133 N.E.2d 329, 333 (Ohio 1956); *Amick v. Woodworth*, 50 N.E. 437 (Ohio 1898); *Thames v. Asia's Janitorial Serv., Inc.*, 611 N.E.2d 948 (Ohio App. Dist. 1992). Accordingly, since a defectively executed mortgage did not place a bona fide purchaser on constructive notice of the encumbrance, bankruptcy trustees were permitted to avoid improperly executed mortgages under 11 U.S.C. § 544(a)(3). See *Zaptocky*, 250 F.3d 1020; *Davis v. Ocwen Fed. Savs. Bank (In re Haviaras)*, 266 B.R. 792 (N.D. Ohio 2001).

The Ohio General Assembly sought to nullify the historic doctrine that a defective mortgage, even though recorded, failed to put a bona fide purchaser on constructive notice of the encumbrance by enacting Amended Substitute House Bill 163, which was effective June 30, 1999, and adopted Ohio Revised Code § 5301.234. *Kovacs v. First Union Home Equity Bank*, 2002 U.S. Dist. LEXIS 23260, at \*3 (N.D. Ohio Dec. 3, 2002). The statute provided, "[a]ny recorded mortgage is irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage[.]" OHIO REVISED CODE ANN. § 5301.234(A) (West 2000) (repealed 2002). Section 5301.234

of the Ohio Revised Code was in effect when the Mortgage at issue was executed and recorded, in August 1999. However, the Sixth Circuit has held that Ohio Revised Code § 5301.234 is unconstitutional because it violates the Ohio Constitution's one-subject rule. *Huffman v. First Union Home Equity Bank*, 369 F.3d 972, 975 (6th Cir. 2004). Generally, "when a statute is held to have been unconstitutional as of its enactment, that statute is void *ad initio*." *Rosborough Mfg. Co. v. Trimble*, 301 F.3d 482, 491 (6th Cir. 2002). Accordingly, Ohio Revised Code § 5301.234 is void *ad initio* and the law in effect when the Mortgage was executed and recorded was the former Ohio Revised Code § 5301.01. Thus, when the Mortgage was initially executed, two witnesses were required to attest and acknowledge the mortgagor's signature to create a properly executed mortgage.

While the Mortgage at issue bears the signature of more than three parties, this Court must conclude that only three parties were present when the Mortgage was executed. Advanta, by relying solely on the Mortgage itself, has produced evidence from which this Court could concluded that two persons, other than Debtors, signed the Mortgage. However, evidence that the Mortgage was signed by two persons, other than Debtors, is not the same as evidence that two persons witnessed or were present when Debtors signed the Mortgage. See *Buzulencia v. TMS Mortgage, Inc. (In re Baker)*, 300 B.R. 298, 303 (Bankr. N.D. Ohio 2003) (citing *Suhar v.*

*Land (In re Land)*, 289 B.R. 71, 77 (Bankr. N.D. Ohio 2003)). By failing to submit any affidavits stating that more than three persons were present, Advanta has not rebutted the assertion that only three parties - the two Debtors and one witness - were indeed present when the Mortgage was executed. Accordingly, for purposes of weighing Trustee's motion for summary judgment against Advanta, this Court must conclude that two witnesses did not attest to the Mortgage.

Generally, a contract is governed by the law in effect at the time the contract is signed. *In re Baker*, 300 B.R. at 305. Pursuant to the terms of Ohio Revised Code § 5301.01 - the law in effect when the Mortgage was signed - the Mortgage was defectively executed. However, the Ohio General Assembly has the power to pass a retroactive law so long as the law does not violate Article II, § 28 of the Ohio Constitution. *Id.* The General Assembly amended Ohio Revised Code § 5301.01, effective February 1, 2002, and intended it to apply retroactively, with limited exception.

Ohio Revised Code § 5301.01, as amended, eliminated the historic two witness requirement. It provides that, for a mortgage to be valid, the mortgagor must sign the mortgage deed and the mortgagor's signature must be acknowledged or certified by a notary public (or other designated official). OHIO REVISED CODE ANN. § 5301.01, (West 2004). The attestation of two witnesses is no longer required. In addition, Ohio Revised Code § 5301.01, as

amended, provides that a mortgage executed prior to the amendment's effective date is pre-sumed valid even if it was not attested by two witnesses, unless the mortgagor's signature was obtained by fraud or unless vested rights came into existence prior to February 1, 2002. OHIO REVISED CODE ANN. § 5301.01(B). The statute provides, if a mortgage,

was executed prior to February 1, 2002, and was not acknowledged in the presence of, or was not attested by, two witnesses as required by this section prior to that date, both of the following apply:

(a) The instrument is deemed properly executed and is presumed to be valid unless the signature of the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or of the settlor and trustee in the case of a memorandum of trust was obtained by fraud.

(b) The recording of the instrument in the office of the country 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 February 1, 2002.

(2) Division (B)(1) of this section does not affect any accrued substantive rights or vested rights that came into existence prior to February 1, 2002.

OHIO REVISED CODE ANN. § 5301.01. Accordingly, if § 5301.01, as amended, retroactively governs the mortgage, the mortgage would be

deemed properly executed and the recording would provide constructive notice regardless of whether two witnesses attested to the mortgagor's signature.

In the case at bar, Trustee acknowledges that pursuant to the terms of Ohio Revised Code § 5301.01, as amended, and 11 U.S.C. § 544, he is unable to avoid the Mortgage in the present circumstances. However, Trustee asserts that the Mortgage did not become perfected until February 1, 2002 because, until that point, Trustee would have been able to avoid the defective mortgage under § 544 and, therefore, a purchaser in good faith could have attacked the Mortgage. For the purposes of preferential analysis, a transfer occurs at the time such transfer is perfected if it has not been perfected within 10 days following the day such transfer takes effect; a transfer of real property is perfected when a bona fide purchaser for value cannot attack the mortgage. 11 U.S.C. § 547(e). Trustee argues that, accordingly, under the definition of transfer set forth in § 547(e), the Mortgage was transferred to Advanta on February 1, 2002, well within the 90 day period required to be an avoidable preferential transfer. This analysis fails because Trustee inappropriately applies the retroactive application of Ohio Revised Code § 5301.01, as amended.

Ohio Revised Code § 5301.01(B), as amended, explicitly provides that a defectively witnessed mortgage executed prior to February 1, 2002, "is deemed properly executed and is presumed to

be valid[,]" unless such mortgage was obtained by fraud. OHIO REVISED CODE ANN. § 5301.01(B). Thus, § 5301.01, as amended, causes mortgages that were once labeled defective to be deemed valid retroactively upon inception/the record date. In addition, the statute provides that the recording of a mortgage with the county recorder provides constructive notice, regardless of whether the instrument was recorded prior to February 1, 2002, unless the mortgage was obtained by fraud.

Ohio Revised Code § 5301.01, as amended, does not apply retroactively if doing so would "affect any accrued substantive rights or vested rights that came into existence prior to February 1, 2002." A trustee's right to avoid a preferential transfer vests when the petition is filed. In the case at bar, Trustee's rights vested on March 26, 2002, 54 days after § 5301.01, as amended, became effective on February 1, 2002. Because Trustee's rights were not vested as of February 1, 2002, retroactive application of the amended § 5301.01 does not affect "any accrued substantive rights or vested rights[.]" Accordingly, retroactive application of Ohio Revised Code § 5301.01, as amended, is appropriate in the case at bar.

The Mortgage was executed on August 4, 1999 and duly recorded on August 9, 1999. For the purposes of preferential transfer analysis, the Bankruptcy Code provides that a transfer is made "at the time such transfer takes effect between the transferor

and the trans-feree, if such transfer is perfected at, or within 10 days after, such time[.]" 11 U.S.C. § 547(e)(1)(A). Perfection occurs when a bona fide purchaser for value cannot attack the mortgage. 11 U.S.C. § 547(e). Pursuant to the retroactive application of § 5301.01, as amended, the Mortgage was deemed perfected within the 10 day period because the transfer of a mortgage "is deemed properly executed and is presumed to be valid[.]" The retroactive language within Ohio Revised Code § 5301.01, as amended, indicates the Ohio General Assembly intended to eliminate the two witness requirement and validate previously defective mortgages. To interpret § 5301.01, as amended, as transferring interest in the Mortgage on February 1, 2002 ignores the purpose and impact of retroactive statutory application. Pursuant to § 5301.01, as amended, the Mortgage was transferred to Advanta in August 1999, well before 90 days prior to the petition date.

Under Ohio law as it existed at the time the Mortgage was recorded, Advanta's Mortgage could have been avoided by a bona fide purchaser of real property. However, retroactive application of Ohio Revised Code § 5301.01, as amended, makes the Mortgage valid upon its execution. Therefore, if retroactive application of § 5301.01, as amended, is constitutional, the transfer occurred more than 90 days prior to filing for bankruptcy and Trustee may not avoid the Mortgage as a preferential transfer. Accordingly, this

Court must determine whether Ohio Revised Code § 5301.01, as amended, can be applied retro-actively without violating Article II, § 28 of the Ohio Constitution.

**B. Does retroactive application of Ohio Revised Code § 5301.01, as amended, violate the Ohio Constitution?**

Article II, § 28 of the Ohio Constitution provides the Ohio General Assembly with the power to pass retroactive laws to cure "omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state[,]" but specifically denies the power to pass retroactive laws impairing the obligation of contracts. OHIO CONST., art. II, § 28. When determining whether an amended statute can be applied retroactively under Article II, § 28 of the Ohio Constitution, the Ohio Supreme Court established a two part test: (1) whether the Ohio General Assembly expressly intended the statute to apply retroactively and (2) whether the retroactive statute is remedial or substantive. *State v. Cook*, 700 N.E.2d 570, 576 (1998) (citing *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489 (1988)). In the case at bar, both prongs of the test are met and Ohio Revised Code § 5301.01, as amended, can constitutionally be applied retroactively.

First, the Court must consider whether the Ohio General Assembly expressly intended Ohio Revised Code § 5301.01, as amended, to apply retroactively. It explicitly stated as follows:

The General Assembly declares its intent that 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.

H.R. 279, 124th Gen. Assem., Reg. Sess. (Ohio 2001-02). Thus, the Ohio General Assembly clearly demonstrated an intent that Ohio Revised Code § 5301.01, as amended, should apply retroactively.

Second, the Court must consider whether the retroactive application of Ohio Revised Code § 5301.01, as amended, is remedial or substantive. "A law changes substantive rights when it 'creates or imposes an obligation where none existed before,' whereas remedial provisions 'have to do with the methods and procedure by which rights are recognized, protected and enforced, not with the rights them-selves.'" *Huffman*, 369 F.3d at 977 n.5 (citing *Weil v. Taxicabs of Cincinnati, Inc.*, 39 N.E. 2d 148, 151 (Ohio 1942)). Ohio Revised Code § 5301.01, as amended, explicitly limits its retroactive application to instances in which it "does not affect any accrued substantive rights or vested rights that came into existence prior to February 1, 2002." OHIO REVISED CODE ANN. § 5301.01(B)(2). Ohio Revised Code § 5301.01, as amended, does not grant any new rights. Rather it simply changes the proof required

to enforce mortgages entered into prior to February 1, 2002. When Debtors signed the Mortgage, they intended to enter into a lawful mortgage. "Section 5301.01, as amended, accomplishes that intent." *Kovacs*, 2002 U.S. Dist. LEXIS 23260, at \*10. Ohio Revised Code § 5301.01(B), as amended, cures the defect of failing to obtain two witness attestations to the execution of a mortgage that is subsequently recorded. Accordingly, Ohio Revised Code § 5301.01, as amended, is remedial in nature. Thus, because the Ohio General Assembly expressly intended retroactive application and the statute is remedial in nature, Ohio Revised Code § 5301.01, as amended, does not violate Article II, § 28 of the Ohio Constitution.

#### IV. C O N C L U S I O N

Trustee cannot avoid the Mortgage as a preferential transfer pursuant to 11 U.S.C. § 547(b). Accordingly, Advanta's motion for summary judgment is hereby granted and Trustee's brief in opposition/ cross motion for summary judgment is hereby denied pursuant to 11 U.S.C. § 547(b).

An appropriate order shall enter.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

DANIEL VRABLE and  
BARBARA VRABLE,

Debtors.

CASE NUMBER 02-41253

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MICHAEL D. BUZULENCIA, TRUSTEE,

Plaintiff,

vs.

DANIEL VRABLE, et al.,

Defendants.

ADVERSARY NUMBER 02-4128

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O R D E R

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For the reasons set forth in this Court's memorandum opinion entered this date, Advanta National Bank's motion for summary judgment against Trustee Michael D. Buzulencia pursuant to 11 U.S.C. § 547(b) is granted. Trustee Michael D. Buzulencia's brief in opposition/cross motion for summary judgment against Advanta National Bank pursuant to 11 U.S.C. § 547(b) is denied.

IT IS SO ORDERED.

\_\_\_\_\_  
HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this \_\_\_\_\_ day of December, 2004, addressed to:

MICHAEL D. BUZULENCIA, ESQ., 150 East Market Street, Suite 300, Warren, OH 44481.

FREDERIC P. SCHWIEG, ESQ., 2705 Gibson Drive, Rocky River, OH 44116.

DANIEL and BARBARA VRABLE, 15010 Strader Road, East Liverpool, OH 43920.

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KERIN LYN KAMINSKI, ESQ., 1717 East Ninth Street, Suite 1400, Cleveland, OH 44114.

SAUL EISEN, United States Trustee, BP America Building, 200 Public Square, 20th Floor, Suite 3300, Cleveland, OH 44114.

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JOANNA M. ARMSTRONG