The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on May 06, 2008, which may be different from its entry on the record.

IT IS SO ORDERED.

Arthur I. Harris
United States Bankruptcy Judge

Dated: May 06, 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 06-13361
	)	
STEVEN L. CALA, and	)	Chapter 7
TERRI L. CALA,	)	
Debtors.	)	Adversary Proceeding No. 07-1272
	)	
LAUREN A. HELBLING,	)	Judge Arthur I. Harris
Plaintiff,	)	
	)	
v.	)	
	)	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., *et al.*,	)	
Defendants.	)	

MEMORANDUM OF OPINION[1]

This matter is currently before the Court on cross-motions for summary judgment by the Chapter 7 trustee and creditor Mortgage Electronic Registration Systems Inc. ("MERS"). (Dockets #39 & #41). At issue is whether the trustee is

[1] This memorandum of opinion is not intended for official publication.

entitled to avoid a mortgage due to alleged defects - specifically, the failure to name debtor Terri Cala in the notary's certificate of acknowledgment and as a "borrower" in the definitions section of the mortgage. For the reasons that follow, the Court holds that the execution of the mortgage is in fact defective as to Terri Cala. Accordingly, the trustee's motion for summary judgment is granted, and the creditor's motion is denied.

FACTS AND PROCEDURAL BACKGROUND

The following facts are undisputed. The debtors, Steven ("Steven") and Terri Cala ("Terri"), are the joint owners of real property located at 25200 Hazelmere Road, Beachwood, Ohio 44122. The debtors acquired the real property by a joint and survivorship deed dated April 30, 2002. On July 28, 2004, Steven executed a note for $204,000 in favor of Republic Bank. On the same date, both Steven and Terri signed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Republic Bank, as security for the note.

The MERS mortgage defines the borrower referenced in the mortgage as "Steven L. Cala, A Married Man." Each page of the mortgage and the attached certificate of acknowledgment, with the exception of the signature page, contains the initials "SLC/TLC." The signature page contains the signatures of both

debtors; however, the name Steven L. Cala is typed below his signature while the name Terri L. Cala is handwritten beneath her signature.

Page fifteen of the MERS mortgage contains the notary's certificate of acknowledgment, which reads as follows: "This instrument was acknowledged before me this 28th of July, 2004 by Steven L. Cala." The acknowledgment was signed by Ronald S. Perelka, notary public. Terri Cala's name does not appear typewritten or handwritten anywhere in the certificate of acknowledgment or anywhere else on the page, but the initials "SLC/TLC" do appear at the bottom of the page.

On August 5, 2004, the debtors executed a mortgage in favor of Republic Bank, which was subsequently assigned to United Guarantee Residential Insurance Company ("United"). On August 2, 2006, the debtors filed a petition under Chapter 13 of the Bankruptcy Code. On April 25, 2007, they filed a notice of voluntary conversion to Chapter 7, and Lauren A. Helbling was assigned as the trustee.

On July 9, 2007, the plaintiff-trustee initiated the above-captioned adversary proceeding against defendants Mortgage Electronic Registration Systems, Inc., United Guaranty Residential Insurance Company, Steven Cala, Terri Cala, and the Cuyahoga County Treasurer ("treasurer") seeking (1) to avoid the mortgage

interest of MERS as against Terri Cala's half-interest in the real property and (2) a determination of the validity, priority, and extent of liens on and claims against the real property. All parties, with the exception of the debtors, filed answers. The Court entered default judgment against the debtors on September 26, 2007. On February 19, 2008, both MERS and the plaintiff-trustee filed motions for summary judgment.

On February 20, 2008, the Court entered an agreed partial judgment entry determining that the treasurer has an undisputed first and best lien on the real property for real estate taxes and assessments in an amount to be determined at the time of sale. The MERS mortgage, to the extent it is valid, is junior in priority to the lien of the treasurer, but senior in priority to the United mortgage. United has an undisputed second mortgage on the real property junior in priority to the liens of the treasurer and the MERS mortgage. Therefore, the only disputed interest is MERS's interest against Terri's half-interest in the real property. Specifically, the trustee challenges MERS's interest due to the omission of Terri's name in the certificate of acknowledgment and the failure to include Terri as a "borrower" in the definitions section of the mortgage. Both the plaintiff-trustee and MERS filed responses and replies to each other's motions for summary judgment, and the Court is now ready to rule.

JURISDICTION

Determinations of the validity, extent, or priority of liens are core proceedings under 28 U.S.C. § 157(b)(2)(K). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that a court shall render summary judgment,

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The party moving the court for summary judgment bears the burden of showing that "there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining the existence or nonexistence of a material fact, a court will view the evidence in a light most favorable to the nonmoving party. *See Tenn.*

Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466, 1472 (6th Cir. 1996). "[S]ummary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56.

DISCUSSION

The "strong arm" clause of the Bankruptcy Code gives the bankruptcy trustee the power to avoid transfers that would be avoidable by certain hypothetical parties. *See* 11 U.S.C. § 544(a). 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 –
>
> . . . .
>
> (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.

Any transfer avoided under this section is preserved for the benefit of the estate. *See* 11 U.S.C. § 551. The MERS mortgage contains a choice of law provision stating that the instrument "shall be governed by federal law and the law of the jurisdiction in which the Property is located." MERS Mortgage at 11. Therefore, because the real property at issue is located in Ohio, the Court will apply Ohio law

to determine whether the trustee may avoid the mortgage as a bona fide purchaser under 11 U.S.C. § 544(a)(3).

Under Ohio law, a bona fide purchaser is a purchaser who " 'takes in good faith, for value, and without actual or constructive knowledge of any defect.' " *Stubbins v. Am. Gen. Fin. Serv., Inc*. (*In re Easter*), 367 B.R. 608, 612 (Bankr. S.D. Ohio 2007), *quoting Terlecky v. Beneficial Ohio, Inc*. (*In re Little Key*), 292 B.R. 879, 883 (Bankr. S.D. Ohio 2003); *see also Shaker Corlett Land Co. v. Cleveland*, 139 Ohio St. 536 (1942). The Bankruptcy Code expressly provides that a bankruptcy trustee is a bona fide purchaser regardless of actual knowledge. *See Simon v. Chase Manhattan Bank* (*In re Zaptocky*), 250 F.3d 1020, 1027 (6th Cir. 2001) ("actual knowledge does not undermine [trustee's] right to avoid a prior defectively executed mortgage."). Therefore, the Court need only determine whether the trustee had constructive knowledge of the prior interest.

Ohio law provides that "an improperly executed mortgage does not put a subsequent bona fide purchaser on constructive notice." *Zaptocky*, 250 F.3d at 1028. Similarly, a mortgage which is properly executed as to one of two joint mortgagors, but improperly executed as to the second does not put a subsequent purchaser on notice. *See Citizens National Bank in Zanesville v. Denison*, 165 Ohio St. 89, 89 (1956) (a mortgage by two persons is not properly executed

. . . and the recording thereof does not constitute constructive notice to subsequent mortgagees, where . . . the signing by one mortgagor is not in fact acknowledged before a notary public); *see also Field v. Wheeler* (*In re Wheeler*), No. 1:05CV805, 2006 WL 1645214 (S.D. Ohio June 12, 2006) (no constructive knowledge where certificate of acknowledgment omits name of one of two joint mortgagors).[2] Accordingly, if the MERS mortgage was improperly executed as to Terri L. Cala it does not impart constructive knowledge to the trustee, and the trustee may avoid the mortgage in her capacity as a bona fide purchaser.

The MERS Mortgage Is Not Properly Executed
in Accordance With Ohio Revised Code § 5301.01

Ohio Revised Code § 5301.01, requires four separate acts to properly execute a mortgage: (1) the mortgage shall be signed by the mortgagor; (2) the mortgagor shall acknowledge his signing in front of a notary public, or other

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[2] MERS requested the Court certify to the Supreme Court of Ohio the issue of whether a mortgage, which is validly executed as to one of two joint mortgagors, imparts constructive knowledge of the improperly executed interest. The Court declines to certify this question because this Court believes there is controlling precedent in the decisions of the Supreme Court of Ohio, notwithstanding contrary decisions by other state supreme courts. *Compare Citizens Nat'l Bank in Zanesville v. Denison*, 165 Ohio St. 89 (1956) (finding no constructive knowledge under Ohio law), *with Greater Providence Deposit Corp. v. Barnacle* (*In re Barnacle*), 623 A.2d 445 (R.I. 1993) (agreeing with minority viewpoint and finding constructive knowledge where mortgage at issue was properly executed as to only one of two joint mortgagors).

qualified official; (3) the official shall certify the acknowledgment; and (4) the official shall subscribe his name to the certificate of acknowledgment. Ohio Rev. Code § 5301.01(A) (2004); *see Drown v. GreenPoint Mortgage Funding, Inc*. (*In re Leahy*), 376 B.R. 826, 832 (Bankr. S.D. Ohio 2007) (listing four requirements provided by Ohio Rev. Code. § 5301.01).[3] At issue in this case is the third required step and whether the certificate of acknowledgment attached to the MERS mortgage is sufficient under Ohio law.

Section 147.53 of the Ohio Revised Code requires that the person taking an acknowledgment certify that: "(A) The person acknowledging appeared before him and acknowledged he executed the instrument;" and "(B) The person acknowledging was known to the person taking the acknowledgment, or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument." Ohio Rev. Code § 147.53. The Revised Code further provides that a certificate of

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[3] In *Zaptocky*, the Sixth Circuit identified "three major prerequisites for the proper execution of a mortgage: (1) the mortgagor must sign the mortgage deed; (2) the mortgagor's signature must be attested by two witnesses; and (3) the mortgagor's signature must be acknowledged or certified by a notary public." *Zaptocky*, 250 F.3d at 1024. The differences between *Zaptocky's* three requirements and *Leahy's* four requirements are (A) the deletion in *Leahy* of *Zaptocky's* second requirement – attestation by two witnesses – due to a change in the statute, and (B) the *Leahy* court's breaking down of *Zaptocky's* third requirement – certification of acknowledgment – into three separate parts.

acknowledgment is acceptable in Ohio if it is in a form prescribed by the laws or regulations of Ohio or contains the words "acknowledged before me," or their substantial equivalent. Ohio Rev. Code § 147.54. Ohio's statutory short form acknowledgment for an individual is as follows:

> State of _____
>
> County of _____
>
> The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged.)
>
> (Signature of person taking acknowledgment)
>
> (Title or rank)
>
> (Serial number, if any)

Ohio Rev. Code § 147.55(A).

There is over 150 years of case law reviewing certificate of acknowledgments for compliance with Ohio's statutory formalities. In one of the earliest of those cases the Supreme Court of Ohio was asked to determine the validity of a mortgage with a certificate of acknowledgment that did not include the name of the sole mortgagor. *See Smith's Lessee v. Hunt*, 13 Ohio 260 (1844). The court stated "[a] mortgage in which the magistrate's certificate does not show by whom the instrument was acknowledged, vests no legal interest in the

mortgage." *Smith's Lessee*, 13 Ohio at 260. While the deficiency in *Smith's Lessee* was apparent on the face of the certificate, the court has also held that latent defects can also render a mortgage ineffective as against subsequent interests. *See Denison*, 165 Ohio St. at 89. In *Denison*, the notary public who signed the certificate of acknowledgment to the mortgage at issue did not actually witness one of the joint mortgagors sign the mortgage or acknowledge her signature. *Denison*, 165 Ohio St. at 93. The court held that a "mortgage by two persons is not properly executed in accordance with the provisions of *Section 5301.01* . . . where . . . the signing by one mortgagor is not in fact acknowledged before a notary public." *Denison*, 165 Ohio St. at 89. Therefore, although the defect in execution was not apparent on the face of the instrument, the court nonetheless held that the defect rendered the mortgage "ineffective as against subsequent creditors." *Denison*, 165 Ohio St. at 95.

In 1967, the Supreme Court of Ohio issued an opinion which at first glance appears to conflict with prior Ohio law. *See Wayne Building & Loan Co. v. Hoover*, 12 Ohio St.2d 62 (1967). In *Hoover*, the court was asked to determine the validity of a certificate of acknowledgment which included the names of the mortgagors who had appeared before a notary and signed the document without saying a word to him. *Hoover*, 12 Ohio St.2d at 64-65. "*Hoover* appears to stand

for nothing more than the common sense proposition that a verbal acknowledgment need not precede a written acknowledgment in order to comply with 5301.01." *Wheeler*, 2006 WL 1645214 at *3. It merely provides that a mortgagor may acknowledge his signing in one of two ways: (1) by signing in the presence of a qualified official; or (2) taking a previously signed document to an official and telling the official that the signature on the document is his. *Cf.* Ohio Rev. Code § 2107.03 (witness to will may either see testator sign or hear him acknowledge his signature). *Hoover* says nothing regarding the notary's obligation to certify the mortgagor's acknowledgment.

The bankruptcy courts in Ohio, particularly those in the Southern District of Ohio, have recently had the opportunity to apply Ohio's longstanding law on certificates of acknowledgment. Interpreting the existing law, the Bankruptcy Court for the Southern District of Ohio found a certificate of acknowledgment valid when the certificate contained the typewritten name of only one of two joint mortgagors, but the notary handwrote the words "they" and "their" in the certificate of acknowledgment to indicate more than one party appeared before him. *See Menninger v. First Franklin Financial Corp. (In re Fryman*), 314 B.R. 137 (Bankr. S.D. Ohio 2004). In a similar case, the District Court for the Southern District of Ohio affirmed the decision of the bankruptcy court which found that a

mortgage did not comply with the Ohio Revised Code where the certificate of acknowledgment contained the typewritten name of only one of two joint mortgagors and did *not* have any pronoun to indicate how many people appeared before the notary. *Wheeler*, 2006 WL 1645214 at *4. Similarly, the Bankruptcy Court for the Southern District of Ohio found a mortgage defective when the certificate of acknowledgment omitted the name of the sole mortgagor, and further found that the presence of the notary at the signing was irrelevant to this issue. *See Leahy*, 376 B.R. at 835.

Most recently the Bankruptcy Appellate Panel for the Sixth Circuit addressed the requirements of certificate of acknowledgments under Ohio law. *See Geygan v. World Savings Bank, FSB* (*In re Nolan*), 383 B.R. 391 (6th Cir. B.A.P. 2008) (relying on interpretation of Kentucky statutes which are virtually identical to those at issue in Ohio to determine that an acknowledgment that does not identify the individuals who signed the document is defective). In *Nolan*, the court found two separate defects with the certificate of acknowledgment which rendered the mortgage at issue avoidable by the Chapter 7 trustee. First, the court concluded that the phrase "witness my hand" was not sufficient under Ohio law because the phrase did not indicate the presence of the mortgagors or that the notary had satisfactory evidence that the persons signing were who they said they

were. *In re Nolan*, 383 B.R. at 395-96. Next, the court held that the certificate of acknowledgment was defective because the names of the borrowers were not recited. *In re Nolan*, 383 B.R. at 396. The court determined that the Ohio Revised Code "clearly require[s] some identification of the person whose signature is being acknowledged. This requirement satisfies the primary purpose of the acknowledgment on a mortgage that the person signing the mortgage is indeed the person to whom the mortgage obligation runs." *In re Nolan*, 383 B.R. at 396.

This Court agrees with *Nolan* and finds that Ohio law requires some indication in the certificate of acknowledgment that the notary actually witnessed the mortgagor sign or heard him acknowledge his signature. The Court further finds that Ohio law requires this formality to be satisfied independently for each mortgagor to a joint obligation.

Ohio Revised Code § 5301.01 requires an official to certify the mortgagor's acknowledgment. Section 147.53, which places obligations on such an official, requires the official to certify that the party appeared and acknowledged his signature. Section 147.55 further provides an acceptable form of certificate of acknowledgment for individuals that includes a blank for the official to write in the "name of [the] person acknowledged." In order to properly certify an acknowledgment, the notary must provide some indication that the party actually

appeared. *See In re Nolan*, 383 B.R. at 396.

In this case, the acknowledgment merely states, "This instrument was acknowledged before me this 28th of July, 2004 by Steven L. Cala." Unlike the acknowledgment in *Wheeler*, this acknowledgment has no pronoun or any other words which would suggest the number and/or gender of parties appearing before the notary other than Steven Cala. The only possible indication of Terri's presence are the initials "SLC/TLC" which appear at the bottom of the page containing the certificate of acknowledgment. Viewing the initials in the light most favorable to MERS, the Court concludes they do not satisfy the requirements of Ohio Revised Code 5301.01 because the initials are separate from the acknowledgment which excludes Terri's name. Nor do the initials suggest that the notary actually certified Terri's acknowledgment. Although MERS argues that the notary's presence when Terri signed is enough to satisfy the requirements of Ohio Revised Code 5301.01, the statute and the Ohio Supreme Court case law interpreting it require two separate acts – (1) the mortgagor signing the document in the presence of a notary or telling the notary that the signature is indeed his; and (2) the notary certifying that acknowledgment – and fulfilling one act alone is not sufficient. *See Smith's Lessee*, 13 Ohio at 260 (official taking acknowledgment must indicate in certificate of acknowledgment that the party acknowledging appeared); *Denison*, 165 Ohio

St. at 89 (official taking acknowledgment must have witnessed the signing or heard the acknowledgment). As previously explained, *Hoover* does not stand for the proposition that the mere presence of the notary when Terri signed satisfies the requirements because there are two separate acts relating to the certificate of acknowledgment that must *both* be satisfied for a mortgage to be properly executed in accordance with Ohio Revised Code § 5301.01. Therefore, because the notary's certificate of acknowledgment completely omits Terri's name and nothing in the acknowledgment indicates the presence of more than one party, MERS's mortgage was not properly executed in accordance with Ohio Revised Code § 5301.01, and it may therefore be avoided by the trustee pursuant to 11 U.S.C. § 544(a)(3) in her capacity as a bona fide purchaser. Viewing the evidence before it in a light most favorable to MERS, the Court finds that there is no genuine issue of material fact and that the trustee is entitled to judgment as a matter of law. Accordingly, the trustee's motion for summary judgment is granted, and MERS's motion for summary judgment is denied. Having decided that the mortgage was defectively executed, the Court need not address any issues regarding possible ambiguities in the contract – in particular, the failure to include Terri as a "borrower" in the definitions section of the mortgage.

The MERS Mortgage May Not Be Reformed

Ohio Revised Code § 2719.01 provides in pertinent part:

> When there is an omission, defect, or error in an instrument in writing or in a proceeding by reason of the inadvertence of an officer, or of a party, person, or body corporate, so that it is not in strict conformity with the laws of this state, the courts of this state may give full effect to such instrument or proceeding, according to the true, manifest intention of the parties thereto.

MERS argues that pursuant to section 2719.01 it may reform the mortgage at issue to correct any defects in execution. However, the Ohio Supreme Court has stated that section 2719.01 "relates only to technical defects in instruments." *Delfino v. Paul Davies Chevrolet, Inc*., 2 Ohio St.2d 282, 285 (1965). To allow reformation to correct a defect in *execution* "would result in rendering completely nugatory the provisions of *Section 5301.01, Revised Code*." *Delfino*, 2 Ohio St.2d at 285. Even if the error in execution were a mistake capable of correction by section 2719.01, reformation cannot be made when it would "prejudice the rights of bona fide and innocent purchasers." *Guenther v. Downtown Mercury, Inc*., 151 N.E.2d 749, 753 (Ohio Ct. App. 1958); *see Easter*, 367 B.R. at 615 ("right of reformation cannot be invoked to abrogate the rights of an innocent intervening third party."). Accordingly, because the defect in execution is one which could not be reformed under Ohio Rev. Code § 2719.01, and alternatively because reformation cannot be made as against the trustee as a bona fide purchaser, the Court holds that MERS is

not entitled to reform the mortgage at issue.

CONCLUSION

For the reasons stated above, the Court holds that the certificate of acknowledgment in the mortgage at issue is defective and the trustee is entitled to avoid the mortgage as against Terri L. Cala's interest. Accordingly, the trustee's motion for summary judgment is granted, and MERS's motion is denied.

IT IS SO ORDERED.