

NOT FOR COMMERCIAL PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 08-17001
PATRICK M. ZVER, SR. and)	
LISA J. ZVER,)	Chapter 7
)	
Debtors.)	Judge Pat E. Morgenstern-Clarren
_____)	
LAUREN A. HELBLING, TRUSTEE,)	Adversary Proceeding No. 08-1322
)	
Plaintiff,)	
)	
v.)	
ABN AMRO MORTGAGE GROUP,)	<u>MEMORANDUM OF OPINION</u> ¹
INC., et al.,)	
)	
Defendants.)	

Lauren Helbling, the chapter 7 trustee, brought this action against the debtors Lisa and Patrick Zver and ABN AMRO Mortgage Group, Inc. seeking authority to sell the debtors' real property and to determine the validity, priority, and extent of the defendants' interests in the property. The trustee and the debtors entered into an agreed order,² leaving only the dispute between the trustee and ABN AMRO. That dispute focuses on whether ABN AMRO's mortgage lien extends to Patrick Zver's interest in the real property. The trustee has moved for summary judgment against ABN AMRO on that issue, and ABN AMRO opposes the motion. (Docket 34, 38, 39). For the reasons stated below, the trustee's motion for summary judgment is denied.

¹ In the court's view, the value of this opinion is to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. Consequently, the opinion is not intended for commercial publication.

² The parties stipulated in the agreed order that the debtors are joint owners of the real property with rights of survivorship, and that the trustee may sell the property, with the debtors retaining the right to object to any proposed sale. (Docket 23).

JURISDICTION

Jurisdiction over this adversary proceeding exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §157(b)(2)(A), (K), and (N).

FACTS

These are the relevant undisputed facts:

In 1997, the debtors acquired title as joint owners with right of survivorship to property located at 8768 Fairlane Drive, Olmsted Township, Ohio (the property). On February 3, 2005, both debtors signed a mortgage related to the property in favor of ABN AMRO. The mortgage states that it secures the repayment of a loan evidenced by a “promissory note signed by Borrower and dated February 3, 2005 . . . [which] states that Borrower owes Lender . . . \$166,250.00, plus interest.” The mortgage defines the “borrower” and “mortgagor” as “Lisa Zver, a married woman.”

Although Lisa Zver is defined as the sole borrower and mortgagor, the last page of the mortgage includes this preprinted language:

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider executed by Borrower and recorded with it.

_____(Seal)
PATRICK M ZVER SR

_____(Seal)
LISA ZVER

Each of the debtors signed the mortgage on the appropriate line and initialed each page of the mortgage. The mortgage’s preprinted acknowledgment clause states that “[t]he foregoing instrument was acknowledged before me this February 3, 2005 . . . by Patrick M. Zver Sr. and Lisa Zver”

DISCUSSION

The Positions of the Parties³

The trustee acknowledges that ABN AMRO's mortgage encumbers Lisa Zver's interest in the property, but moves for summary judgment that the mortgage does not extend to Patrick Zver's one-half interest in the property. The trustee's argument is that Mr. Zver's name does not appear in the body of the mortgage, and his signature at the end is legally insufficient to encumber his interest. Alternatively, the trustee argues that the parties did not intend for the mortgage to extend to Mr. Zver's interest. To the extent that there is any ambiguity in the mortgage regarding the parties' intent, the trustee contends that the ambiguity must be interpreted against ABN AMRO as the drafter of the document. If the trustee is successful, Patrick Zver's interest will be sold for the benefit of the bankruptcy estate.

ABN AMRO argues that the intention of the parties, rather than a technical reading of the mortgage, determines whether its mortgage extends to Patrick Zver's interest. ABN AMRO posits that intent is an issue of fact which cannot be determined on summary judgment. ABN AMRO also states that there is no evidence that it drafted the contract, and thus there is no basis to apply to its detriment the principle that a contract is generally construed against the drafter.⁴

The Mortgage

In Ohio,⁵ mortgages are interpreted using the same rules that apply to contracts generally. *Ogan v. Ogan*, 702 N.E.2d 472, 474 (Ohio Ct. App. 1997); *see also Menninger v. Accredited*

³ A word of clarification about the trustee's position. Although her motion refers to bankruptcy code § 544, *see* docket 34 at 3, the complaint does not request avoidance and the trustee is not relying on the rights and powers given to a trustee under that section, *see* docket 39 at 2. Instead, she asks for judgment that ABN AMRO did not obtain a lien with respect to Patrick Zver's interest in the property through the mortgage. Consequently, the court will not address ABN AMRO's arguments regarding avoidance.

⁴ Docket 38 at 5. The court need not at this point address ABN AMRO's suggestion that the debtors drafted these documents, as opposed to the lender. Before pursuing that position further, counsel for ABN AMRO is referred to federal rule of bankruptcy procedure 9011(b)(3).

⁵ The parties agree that Ohio law applies.

Home Lenders (In re Morgeson), 371 B.R. 798, 804 (B.A.P. 6th Cir. 2007) (interpreting mortgage according to Ohio contract law). Under those rules:

‘In construing a written contract, the court's paramount objective is to ascertain and give effect to the parties’ intention.’ *Rosepark Prop., Ltd. v. Buess*, 167 Ohio App.3d 366, 375, 855 N.E.2d 140 (2006) (citing *Aultman Hosp. Assn. v. Cmty. Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989)). The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Kelly v. Med. Life. Ins. Co.*, 31 Ohio t.3d 130, 509 N.E.2d 411, syllabus ¶ 1 (1987). When contract terms are unambiguous, the courts will not, in effect, create a new contract by finding an intent not expressed in the clear contractual language. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978).

In re Morgeson, 371 B.R. at 804. A mortgage is construed by reading the document in its entirety; therefore, it does not matter which part of the mortgage indicates the parties’ intent. *Dodd v. Bartholomew*, 5 N.E. 866, 867 (Ohio 1886); *see also In re Morgeson*, 371 B.R. at 804 (determining the spouse’s intent in signing the mortgage by reviewing the entire mortgage, including the signature line and acknowledgment).

The interpretation of an unambiguous contract is a matter of law. *Pavlovich v. Nat’l City Bank*, 435 F.3d 560, 565 (6th Cir. 2006) (citing *Long Beach Ass’n, Inc. v. Jones*, 697 N.E.2d 208, 209-20 (Ohio 1998)). “When the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.” *Shifrin v. Forest City Enters., Inc.*, 597 N.E.2d 499, 501 (Ohio 1992). In such a case, the court may not consider extrinsic or parol evidence. *Beverly v. Parilla*, 848 N.E. 2d 881, 886 (Ohio Ct. App. 2006).

If, on the other hand, a written contract is ambiguous, a factual issue arises as to what the parties intended when they entered into the contract. Faced with ambiguity, the trier of fact may consider extrinsic evidence to determine intent. *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1261 (Ohio 2003). Extrinsic evidence may include: (1) the circumstances that surrounded the transaction; (2) the parties’ intended objectives in entering into the contract; and (3) any acts by the parties that demonstrate what they intended in the contract. *Crane Hollow, Inc. v. Marathon*

Ashland Pipe Line, LLC, 740 N.E.2d 328, 339 (Ohio Ct. App. 2000) (citations omitted). As a general rule, ambiguous contracts are construed against the drafter. This “rule of construction [however] is merely a guiding principle the court uses in determining the parties’ intent after viewing the extrinsic evidence presented by the parties.” *Beverly*, 848 N.E.2d at 887.

Summary Judgment

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (applicable pursuant to FED. R. BANKR. P. 7056). The Sixth Circuit has stated the summary judgment standard as follows:

Summary judgment for [the movant] is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). However, [the movant] bears the burden of proving that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539, 546-47 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 1319 (U.S. Feb. 23, 2009). Further:

In evaluating the evidence presented, a court must draw all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A genuine issue of material fact exists when there are “disputes over facts that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Savedoff v. Access Group, Inc., 524 F.3d 754, 762 (6th Cir. 2008). “[D]isputed questions of contractual intent are considered factual issues which are precluded from summary resolution.”

Manley v. Plasti-Line, Inc., 808 F.2d 468, 471 (6th Cir. 1987).

If the movant meets its burden of proof, the non-moving party has an affirmative duty to point to those portions of the record that create a genuine issue of material fact:

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.’” The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. It is also not sufficient for the nonmoving party merely to “show that there is some metaphysical doubt as to the material facts.” 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.”

Youngstown Osteopathic Hosp. Ass’n v. Pathways Ctr. for Geriatric Psychiatry, Inc. (In re *Youngstown Osteopathic Hosp. Ass’n*), 280 B.R. 400, 407 (Bankr. N.D. Ohio 2002) (citing *Liberty Lobby, Matsushita, and Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989)).

The Trustee’s Motion

The trustee contends that the mortgage is legally insufficient under Ohio law to encumber Patrick Zver’s interest in the property because his name does not appear in the body of the mortgage. She cites *Kindt v. ABN AMRO Mortgage Group, Inc.* (In re *Wallace*), No. 06-1322, 2007 Bankr. LEXIS 4651 (Bankr. S.D. Ohio Nov. 16, 2007) and *Schlarman v. Chase Home Fin. LLC* (In re *Padgitt*), No. 07-2063, 2008 WL 4191517 (Bankr. E.D. Ky. Sept. 11, 2008) to support this argument. Those decisions are not persuasive here, however.

In the *Wallace* decision, the bankruptcy court determined that if the Ohio Supreme Court had to decide the issue, it would follow the lead of other states, and would conclude that a mortgage which did not otherwise refer to a spouse who had signed it did not encumber that spouse’s one-half interest in the mortgaged property. The decision is not instructive here because it addresses very different facts: (1) the mortgage did not contain any indicia of the wife’s status as a grantor; (2) there was only one preprinted line for the husband’s signature on the mortgage, with the wife’s hand written signature-line below; and (3) the acknowledgment clause only contained the preprinted name of the husband, with the wife’s name added in handwriting below. Also, the evidence presented showed that only the husband had executed the note secured by the mortgage. Moreover, as discussed above, Ohio case law calls for a mortgage

to be interpreted according to contract law. As the *Wallace* decision did not analyze the mortgage at issue according to the principles of contract interpretation, the decision is not persuasive as a matter of law. The *Padgitt* case is not persuasive because it is based on Kentucky, rather than Ohio, mortgage law, and also addressed different facts.

The trustee next argues that ABN AMRO's mortgage does not extend to Patrick Zver's interest in the property based on the unambiguous terms of the mortgage. However, a review of the mortgage leads the court to conclude that the mortgage is ambiguous on that point. Although Lisa Zver is defined as the borrower and mortgagor, both Lisa and Patrick Zver signed the mortgage as borrowers and initialed each page. Moreover, there is no indication that Patrick Zver was signing the mortgage for a limited purpose, such as to release any dower rights. The note is not in evidence, so no information can be gleaned from that part of the transaction. When a mortgage is ambiguous, the court turns to extrinsic evidence to determine the parties' intent. Neither party has addressed intent, by affidavit or otherwise. That dispute must, therefore, be resolved at trial, rather than at the summary judgment stage.

CONCLUSION

The trustee's motion for summary judgment is denied. A separate order will be entered to memorialize this ruling.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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Defendants.

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) Chapter 7

) Judge Pat E. Morgenstern-Clarren

) Adversary Proceeding No. 08-1322

) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the motion of the plaintiff-trustee for summary judgment is denied. (Docket 34).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge