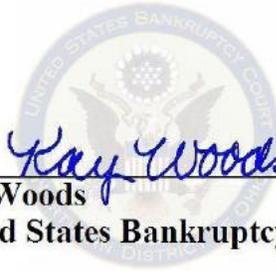


IT IS SO ORDERED.

Dated: August 14, 2012
01:40:24 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MATTHEW M. WHIDDON and
MELISSA M. WHIDDON,

Debtors.

* * * * *

MARK A. BEATRICE, TRUSTEE,

Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY AS TRUSTEE FOR FIRST
FRANKLIN MORTGAGE LOAN TRUST
2006-FF11, et al.,

Defendants.

CASE NUMBER 11-41334

ADVERSARY NUMBER 12-04027

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION TO DISMISS

This cause is before the Court on Motion of Defendants,
Deutsche Bank National Trust Company as Trustee for First Franklin

Mortgage Loan Trust 2006-FF11 and Wells Fargo Bank, N.A., to Dismiss Complaint ("Motion to Dismiss") (Doc. # 8) filed by Defendants Deutsche Bank National Trust Company as Trustee for First Franklin Mortgage Loan Trust 2006-FF11 ("Deutsche Bank") and Wells Fargo Bank, N.A. ("Wells Fargo") (collectively, "Defendants") on April 16, 2012. Mark A. Beatrice, Chapter 7 Trustee, ("Trustee") filed Trustee's Opposition to the Motion to Dismiss the Complaint ("Response") (Doc. # 12) on May 7, 2012. The Defendants filed Reply in Support of Motion of Defendants, Deutsche Bank National Trust Company as Trustee for First Franklin Mortgage Loan Trust 2006-FF11 and Wells Fargo, N.A., to Dismiss Complaint ("Reply") (Doc. # 13) on May 17, 2012. For the reasons set forth herein, the Court will grant the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Order Nos. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Bankruptcy Proceeding

Debtors Matthew M. Whiddon and Melissa M. Whiddon ("Debtors") filed a voluntary petition pursuant to chapter 7 of Title 11, United

States Code, on May 5, 2011 ("Main Case"). Mr. Beatrice was appointed the Chapter 7 Trustee.

On August 9, 2011, Deutsche Bank filed Motion of Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF11 for Relief from Stay and Abandonment ("Motion for Relief") (Main Case, Doc. # 22)¹ with respect to the Debtors' real property located at 1166 Orlo Drive Northwest, Warren, Ohio 44485 ("Property"). Attached to the Motion for Relief are (i) Note; (ii) Mortgage; and (iii) Assignment of Mortgage. On June 26, 2012, the parties moved to continue the hearing on the Motion for Relief in a document styled Joint Motion of Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF11 and the Chapter 7 Trustee to Continue Hearing on the Motion for Relief from Stay and Abandonment ("Joint Motion") (Main Case, Doc. # 55). This Court entered an order granting the Joint Motion on June 26, 2012. (See Main Case, Doc. # 56.)

B. The Adversary Proceeding

On February 23, 2012, the Trustee filed Adversary Complaint ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding against the Defendants. The following facts are derived from the Complaint and the documents referenced therein, which, for purposes of the Motion to Dismiss, the Court will view in the light most favorable to the Trustee.

¹All docket references refer to this adversary proceeding unless the Main Case is indicated.

On May 8, 2006, Debtor Matthew Whiddon obtained a loan from First Franklin, a division of National City Bank of Indiana ("First Franklin"), as evidenced by a Note ("Note"). (Compl. ¶ 8; Mot. for Relief, Ex. A.) Some time thereafter, First Franklin endorsed the Note to First Franklin Financial Corporation ("FFFC"). (Compl. ¶ 10.) FFFC then endorsed the Note in blank. (*Id.* ¶ 12.) Wells Fargo, as custodian for Deutsche Bank, currently claims to possess the Note. (*Id.* ¶ 7; Mot. for Relief ¶ 5.)

To secure payment of the Note, on May 8, 2006, the Debtors executed a Mortgage ("Mortgage"), which granted Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for First Franklin, a lien on the Debtors' Property. (Compl. ¶ 9; Mot. for Relief, Ex. B.) The Mortgage was recorded with the Trumbull County, Ohio, Recorder on May 9, 2006. (Compl. ¶ 9; Mot. for Relief, Ex. B at 1.) On February 10, 2009, MERS assigned the Mortgage ("Assignment of Mortgage") to Deutsche Bank. (Compl. ¶ 14; Mot. for Relief, Ex. C at 2.) The Assignment of Mortgage was recorded with the Trumbull County, Ohio, Recorder on February 17, 2009. (Compl. ¶ 27; Mot. for Relief, Ex. C at 2.)

In the Complaint, the Trustee alleges under a variety of theories that the transfers of the Note and/or Mortgage to the Defendants are invalid. Specifically, the Trustee alleges that (i) the transfers of the Note and Mortgage violate the terms of a Pooling and Servicing Agreement ("PSA") governing the First Franklin Mortgage Loan Trust 2006-FF11 ("First Franklin Trust"), of which

Deutsche Bank is trustee; (ii) MERS, as nominee for First Franklin, had no authority to assign the Mortgage to Deutsche Bank in 2009 because First Franklin closed in 2008; and (iii) First Franklin and FFFC endorsed the Note without valid corporate authority.

Based on the allegedly improper transfers of the Note and Mortgage, the Complaint asserts two causes of action entitled (i) Claim One: Determination of Secured Status; and (ii) Claim Two: Remove Cloud from Title, both of which seek to void the lien on the Debtors' Property. With respect to Claim One, the Trustee requests the Court to deem the Mortgage void and/or satisfied. (Compl. ¶ 45.) The Trustee also requests that "any claim of the Defendants should be deemed unsecured." (*Id.*) With respect to Claim Two, the Trustee requests the Court to strike the Mortgage from the Trumbull County, Ohio, land records as a cloud upon the title to the Debtors' Property. (*Id.* ¶ 48.)

C. The Defendants' Motion to Dismiss

The Defendants move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that the Trustee lacks standing to challenge the validity of the Mortgage. The Defendants allege that the Trustee may not avoid the Mortgage because (i) the Mortgage is not part of the Debtors' bankruptcy estate; and (ii) the Mortgage was properly recorded, giving any subsequent purchaser constructive notice of the lien on the Property. The Defendants also argue that the Trustee lacks standing to enforce the PSA because the underlying lien on the Property is

valid regardless of whether subsequent transfers of the Note and Mortgage violate the trust document. Finally, the Defendants contend that Claim One of the Complaint fails because the Defendants did not file a proof of claim, rendering any determination of the Defendants' secured status advisory.

D. The Trustee's Response

In the Response, the Trustee asserts that dismissal is not proper because (i) the Complaint alleges fraud in the assignment of the Mortgage and the transfer of the Note; (ii) the Debtors' obligations under the Note were satisfied upon transfer of the Note; and (iii) the First Franklin Trust does not own the Note and/or Mortgage. The Trustee further contends that no entity may enforce the Mortgage due to the Defendants' failure to comply with the PSA. Finally, the Trustee argues that Claim One of the Complaint survives dismissal because the Defendants' secured status is relevant to the Defendants' ability to obtain relief from the automatic stay provisions of 11 U.S.C. § 362.

E. The Defendants' Reply

In the Reply, the Defendants restate the arguments raised in the Motion to Dismiss and address the specific additional arguments set forth in the Response. First, the Defendants argue that the Complaint fails to allege any facts suggesting fraud in the origination of the Note and Mortgage. Second, the Defendants contend that the Debtors' obligations under the Note were not extinguished upon subsequent transfer of the Note because no payment

was made by or on behalf of the Debtors. Finally, the Defendants contend that the First Franklin Trust's ownership interest in the Note and Mortgage does not affect who may enforce the instruments. Thus, according to the Defendants, the purportedly invalid Assignment of Mortgage does not affect the underlying validity of the lien on the Property.

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 12(b)(6), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires that a pleading containing a claim for relief be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2012); FED. R. BANKR. P. 7012 (West 2012). A claim will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). A claim does not need to contain "'detailed factual allegations,'" but it must contain more than mere "'labels and conclusions'" or "'a formulaic recitation of the elements of a cause of action.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). As a consequence, a claim "'must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal

theory.'" *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (quoting *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)).

In determining whether a claim alleges enough facts to survive a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); see also *Twombly*, 550 U.S. at 555. Although the court "must accept all well-pleaded factual allegations in the complaint as true, [it] need not 'accept as true a legal conclusion couched as a factual allegation.'" *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

III. ANALYSIS

A. Claim One: Determination of Secured Status

In Claim One, the Trustee requests the Court to set aside the Mortgage and to declare the lien on the Property void. (See Compl. at 7.) Although the Trustee does not state the specific statutory basis for avoiding the Mortgage, the Court will assume that the Trustee seeks to exercise his strong-arm powers pursuant to 11 U.S.C. § 544(a)(3).² Section 544(a)(3) empowers a bankruptcy trustee to gather a debtor's property for the use and benefit of the

²Subparagraphs 1 and 2 of § 544(a) allow a bankruptcy trustee to avoid certain transfers voidable by a creditor with a judgment lien and an unsatisfied writ of execution, respectively. Because the Trustee does not allege any facts in the Complaint triggering his avoidance powers under either of these subparagraphs, the Court will limit its analysis to § 544(a)(3) only.

bankruptcy estate. *Kapila v. Atl. Mortg. & Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1337 (11th Cir. 1999). Section 544(a)(3) states:

(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.

11 U.S.C. § 544(a)(3) (West 2012). Section 544(a)(3) thus authorizes a bankruptcy trustee to avoid certain transfers (i) "of property of the debtor" (ii) that would be voidable by a hypothetical bona fide purchaser of real property. *Id.*; *Noland v. Wells Fargo Bank, N.A. (In re Williams)*, 395 B.R. 33, 39 (Bankr. S.D. Ohio 2008), *aff'd*, Adv. No. 08-3079, (S.D. Ohio Sept. 28, 2009).

1. The Mortgage is not Property of the Debtors

A trustee's avoidance powers under § 544(a)(3) "are necessarily limited to the actual or potential property of the [debtor's] bankruptcy estate." *In re Halabi*, 184 F.3d at 1337; *see also In re Williams*, 395 B.R. at 46. A trustee may only avoid transfers of the debtor's interest and may not seek to acquire rights beyond those of the debtor at the time of the bankruptcy filing. *See In re*

Halabi, 184 F.3d at 1337 (citing *Bank of Marin v. England*, 385 U.S. 99, 101 (1966)) ("The trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the petition.") Where the debtor has no interest in certain property, a bankruptcy trustee is powerless to avoid that property's transfer. See *In re Williams*, 395 B.R. at 46; cf. *Rogan v. Bank One, N.A. (In re Cook)*, 457 F.3d 561, 568 (6th Cir. 2006) (holding that the post-petition assignment of a perfected mortgage does not violate the automatic stay provisions of 11 U.S.C. § 362(a) because the mortgage is not part of the debtor's bankruptcy estate).

"[A] perfected mortgage is neither actually nor potentially the property of the debtor." *In re Cook*, 457 F.3d at 568 (quoting *In re Halabi*, 184 F.3d at 1337). A properly executed and perfected mortgage grants the mortgagee a right to foreclose on the debtor-mortgagor's real property to secure repayment of an underlying obligation. A subsequent assignment of the mortgage transfers only the mortgagee's security interest in the property, not the actual property to which the mortgage attaches. See *In re Williams*, 395 B.R. at 46; see also *In re Halabi*, 184 F.3d at 1337. As a consequence, a mortgagee's perfected security interest is not property of the debtor subject to a trustee's avoidance powers under § 544.

Moreover, any defect in the subsequent transfer of the note or mortgage has no effect on the debtor's underlying obligation. See,

e.g., *Price v. Wells Fargo Bank, N.A. (In re Price)*, Adv. No. 11-1177, 2012 Bankr. LEXIS 2531, *8 (Bankr. S.D. Ohio June 1, 2012) ("Whatever faults there may be in assignment transactions following execution of a valid mortgage, they do not affect the validity of the mortgage transaction."); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C.*, 717 F. Supp. 2d 724, 735 (E.D. Mich. 2010) ("[T]he validity of the assignment[] does not effect [sic] whether Borrower owes its obligations, but only to whom Borrower is obligated."), *aff'd*, 399 F. App'x 97 (6th Cir. 2012). Rather, an assignment of mortgage - valid or otherwise - does not alter the debtor's status and obligations under the perfected mortgage. See *Bridge v. Aames Capital Corp.*, Case No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 103154, *11-13 (N.D. Ohio Sept. 28, 2010).

Under facts similar to those presented here, several courts have held that a bankruptcy trustee lacks standing to avoid a properly perfected mortgage on the debtor's property based upon an allegedly invalid assignment of that mortgage. See, e.g., *In re Halabi*, 184 F.3d 1335; *In re Williams*, 395 B.R. 33.

In *In re Halabi*, the debtor mortgaged his real property to a bank, which properly recorded the mortgage. The mortgage was assigned to another entity, which recorded the mortgage and assigned it a second time. Before the second assignment of mortgage was recorded, the debtor filed bankruptcy. The bankruptcy trustee initiated an action to quiet title in the debtor's real property, arguing that the failure to record the second assignment prior to

the bankruptcy filing invalidated the lien on the debtor's property. The Eleventh Circuit Court of Appeals affirmed the bankruptcy court's determination that the assigned mortgage was not property of the debtor, stating:

In the present case, the assignment of the mortgage, once the original grant by the mortgagor to the mortgagee has been perfected, does not involve a "transfer of the property of the debtor" that would activate the Trustee's strong-arm powers under § 544. The Trustee is seeking to avoid the transfer of the perfected mortgage, in which the debtor has no interest. The transaction under scrutiny here does not involve the transfer of the debtor's real property, to which the mortgage attaches.

In re Halabi, 184 F.3d at 1337. The Eleventh Circuit thus held that a trustee's strong-arm powers under § 544(a)(3) did not reach an assignment of mortgage once the underlying mortgage was properly perfected.

Similarly, in *In re Williams*, the bankruptcy trustee sought to avoid an otherwise valid mortgage lien on the debtor's property based on a successor mortgagee's failure to record the assignment of mortgage. Relying on *In re Halabi*, Judge Guy Humphrey held that the assignment of mortgage was not property of the debtor and that the subsequent assignment of mortgage thus did not transfer any interest in the debtor's property. Judge Humphrey reasoned:

Through the effectuation of the assignment of the Mortgage, the Debtors transferred nothing themselves and no property interests of the Debtors were transferred. What the assignment of the Mortgage conveyed is the Mortgage itself and the rights and interests under that Mortgage from one creditor to another creditor - not property interests of the Debtors.

In re Williams, 395 B.R. at 46. Accordingly, the bankruptcy trustee

could not avoid the properly recorded mortgage under § 544(a)(3).

As in *Halabi* and *Williams*, the Trustee cannot avoid the lien on the Property under § 544(a)(3) because the Mortgage is not part of the Debtors' bankruptcy estate. The Debtors voluntarily executed a Mortgage in favor of MERS, thereby consenting to a lien on the Property to secure repayment of their obligations under the Note. The Complaint reflects that MERS recorded the Mortgage on May 9, 2006, in the Trumbull County, Ohio, Recorder's office. (Compl. ¶ 9; Mot. for Relief, Ex. B at 1.) The Trustee does not challenge the validity of the original Mortgage as recorded between MERS and the Debtors. Rather, the Trustee only attacks the subsequent transfer of the Mortgage to Deutsche Bank. Absent any indication that the original Mortgage was improperly or ineffectively recorded, the Assignment of Mortgage from MERS to Deutsche Bank does not involve a property interest of the Debtors. As a consequence, the Trustee may not avoid the properly executed and recorded Mortgage.

In the Complaint, the Trustee sets forth a variety of theories under which the transfers of the Note and Mortgage to the Defendants are invalid. Even if the transfers may be invalid under one or more of the Trustee's legal theories, the Trustee is powerless to avoid the underlying lien on the Property. Assuming, *arguendo*, that the Assignment of Mortgage fails to properly transfer MERS's security interest to Deutsche Bank, such failure does not negate the originally recorded Mortgage between MERS and the Debtors. Likewise, any failure of First Franklin and/or FFFC to properly

transfer the Note to Wells Fargo only implicates to whom the Debtors are obligated, not whether the Debtors are obligated under the Note in the first instance. Accordingly, even assuming that the subsequent transfers of the Note and Mortgage are invalid, the Debtors' obligations under the Note and Mortgage remain unchanged. The lien is not property of the Debtors' bankruptcy estate, and the Trustee may not avoid it pursuant to § 544(a)(3).

2. The Trustee is not a Bona Fide Purchaser

The Trustee may not avoid the lien on the Property for the additional reason that the Trustee is not a bona fide purchaser under § 544(a)(3). "[A] *bona fide* purchaser is one who takes property 1) for valuable consideration, 2) in good faith, and 3) absent notice of adverse claims." *In re Williams*, 395 B.R. at 44 (citing *Groza-Vance v. Vance*, 834 N.E.2d 15, 28 (Ohio Ct. App. 2005)). Bona fide purchasers are bound by encumbrances upon land for which they have constructive knowledge. *See Tiller v. Hinton*, 482 N.E.2d 946, 949 (Ohio 1985). A properly recorded mortgage provides constructive notice of an encumbrance on the property. *L&N P'ship v. Lakeside Forest Ass'n*, 916 N.E.2d 500, 512 (Ohio Ct. App. 2009) (citations omitted); *see also Argent Mortg. Co. v. Drown (In re Bunn)*, 578 F.3d 487, 489 (6th Cir. 2009).

A bankruptcy trustee with constructive notice of a properly recorded lien does not qualify as a bona fide purchaser under Ohio law for the purpose of mortgage avoidance under § 544(a)(3). *See*

In re Williams, 395 B.R. 33³; *cf. Rogan v. Bank One, N.A. (In re Cook)*, 457 F.3d 561 (6th Cir. 2006) (applying Kentucky law); *In re Halabi*, 184 F.3d 1335 (applying Florida law). A deficient assignment of mortgage “[does] not affect the perfection of the lien as against the mortgagors and those claiming through them.” *In re Cook*, 457 F.3d at 567 (citing *Obuchowski v. Assocs. Nat’l Mortg. Ass’n (In re Briggs)*, 186 B.R. 830, 833 (Bankr. D. Vt. 1995)) (holding that a bankruptcy trustee could not avoid a mortgage lien based on an unrecorded mortgage assignment because the recording of the original mortgage gave the trustee constructive notice); see also *In re Williams*, 395 B.R. at 47. As a result, a trustee with constructive knowledge of a properly recorded mortgage cannot avoid the mortgage or recover the property for the benefit of the bankruptcy estate.

In this instance, the Trustee is charged with constructive knowledge of the Mortgage on the Property. The Trustee states in the Complaint that the Mortgage was filed with the Trumbull County, Ohio, Recorder’s office on May 9, 2006. (Compl. ¶ 9; Mot. for Relief, Ex. B.) The Trustee does not raise any claims regarding chain of title defects, procedural or statutory violations, or other technical deficiencies in the recordation of the Mortgage. Once the Mortgage was properly recorded, all subsequent purchasers of the

³Having determined that a perfected mortgage interest is not property of the bankruptcy estate subject to the trustee’s avoidance powers, the Southern District of Ohio, in affirming Judge Humphrey’s decision, did not address whether the trustee qualified as a bona fide purchaser under Ohio law.

Property - including the Trustee - have constructive notice of the prior existing lien on the Property. Accepting the allegations in the Complaint as true, the Trustee cannot avoid the Mortgage as a bona fide purchaser under § 544(a)(3) because he has constructive knowledge of the lien on the Property.

The Trustee contends for the first time in the Response that he qualifies as a bona fide purchaser under § 544(a)(3) because the Complaint alleges fraud sufficient to invalidate the Mortgage. (See Resp. at 4.) Absent unusual circumstances, only fraud in the formation of the original mortgage may serve as a basis to invalidate the entire transaction. See *In re Williams*, 395 B.R. at 45 n.4 (collecting cases); see also *Gemini Servs., Inc. v. M.E.R.S. (In re Gemini Servs., Inc.)*, 350 B.R. 74, 84 (Bankr. S.D. Ohio 2006) (finding no precedent under Ohio law to eliminate an otherwise valid mortgage based solely on procedural defects in an assignment). The Complaint and the Response do not contain any facts suggesting that MERS or First Franklin defrauded the Debtors by securing the original Mortgage on the Property. At most, the Complaint alleges fraud in the transfers of the Note and Mortgage.⁴ (Resp. at 4

⁴The Court also notes that the Trustee fails to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7009. When a complaint alleges fraud, Rule 9(b) provides that the plaintiff "must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b) (West 2012). "This rule requires a plaintiff: (1) to specify the allegedly fraudulent statements; (2) to identify the speaker; (3) to plead when and where the statements were made; and (4) to explain what made the statements fraudulent." *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (citing *Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935, 942-43 (6th Cir. 2009)). The Complaint is devoid of any specific factual allegations concerning the time, place, content or maker of the allegedly fraudulent statements sufficient to satisfy Rule 9(b).

"[T]his adversary complaint alleges fraud in the assignment of the Whiddons' mortgage and in the purported transfer of the note.")
Thus, the Trustee fails to state a claim for avoiding the lien on the Property based on fraud.

Finally, the Trustee contends in the Response that the lien on the Property may be avoided under § 544(a)(3) because the Debtors' payment obligations were satisfied upon First Franklin's transfer of the Note to FFFC and/or Wells Fargo. The Trustee cites to no authority and alleges no facts in the Complaint to support his proposition. The Trustee does not specify the consideration purportedly paid for the Note or indicate how that amount compares to the face value or unpaid balance of the Note. The Trustee likewise does not contend that any payment was made to FFFC and/or Wells Fargo by the Debtors or by any other entity acting on the Debtors' behalf. Rather, it appears undisputed that the Debtors defaulted on the Mortgage and have not paid the outstanding balance due under the Note. Moreover, under the Trustee's rationale, any subsequent transfer of a debt instrument would relieve borrowers of their underlying contractual obligations pursuant to a note and mortgage. Such a result is untenable in both theory and practice.

Therefore, even accepting the Trustee's factual allegations as true, the Complaint fails to state a claim for avoiding the Mortgage under 11 U.S.C. § 544(a)(3). In so holding, the Court makes no determination regarding the validity of the subsequent transfers of the Note and Mortgage. Issues as to who ultimately may be entitled

to receive payments under the Note or to enforce the Mortgage may still arise. The Trustee's arguments as alleged in the Complaint, however, do not require an analysis of any possible error in the transfers of the instruments themselves or establish the Trustee's standing to raise them. Accordingly, Claim One will be dismissed.

B. Claim Two: Remove Cloud from Title

In Claim Two, the Trustee requests the Court to strike the Mortgage from the land records of Trumbull County, Ohio, as a cloud upon the title to the Debtors' Property. Although the Trustee again does not set forth a specific statutory basis for Claim Two in the Complaint, the Court will treat Claim Two as an action to quiet title under Ohio Revised Code § 5303.01.

An action to quiet title is a statutory cause of action, essentially equitable in nature, to resolve disputes over possession of and title to real estate. Section 5303.01 provides, in pertinent part, "An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest." O.R.C. § 5303.01 (West 2012). A cloud upon a title is a title or encumbrance that is facially valid but substantively invalid. *See Metz v. Hawn*, 2002 Ohio 2381, ¶ 33 (Ohio Ct. App. 2002); *Hays v. Nemenz*, Case No. 88-C-40, 1989 Ohio App. LEXIS 1853, *8 (Ohio Ct. App. May 22, 1989). A party may quiet title only absent a valid lien on the property. *See H&S Co. v. City of Aurora*, 2004 Ohio 3507, ¶ 10 (Ohio Ct. App. 2004).

A properly recorded and valid mortgage does not constitute a cloud upon the title of the encumbered property. See *Bank of N.Y. Mellon Trust Co. v. Unger*, 2012 Ohio 1950, ¶ 37 (Ohio Ct. App. 2012). In *Unger*, the court rejected the homeowners' attempt under § 5303.01 to remove a mortgage lien from their property based on allegedly fraudulent mortgage assignments. The court held that the properly recorded mortgage was "nothing more than a lien on the premises, the purpose of which is to put other lien holders on notice that there is a prior claim on the premises." *Id.* (citations omitted). Although the mortgage assignments purported to transfer the right to enforce the lien after default, the assignments could not alter the underlying validity of the lien. As such, the mortgage and mortgage assignments were not clouds on the homeowners' title.

The Trustee may not quiet title in the Debtors' Property for the same reasons set forth in *Unger*. The Trustee alleges no basis to avoid the originally recorded Mortgage, which the Court will thus accept as both facially and substantively valid. Even assuming that the Assignment of Mortgage fails to effectively transfer the right to enforce the lien to Deutsche Bank, such failure does not create a basis for avoiding the valid lien on the Debtors' Property. The fact remains that the Debtors defaulted on their legitimate loan obligations, exposing them to foreclosure on the Mortgage, regardless of which entity is ultimately entitled to pursue a remedy against them. Under these circumstances, the valid Mortgage lien

does not cloud the title to the Debtors' Property.

Moreover, it appears to the Court that the Trustee's purpose in seeking to quiet title in the Debtors' Property is to acquire the Property free and clear of all liens for the benefit of the bankruptcy estate. Accepting the validity of the original Mortgage as pled in the Complaint, however, the Trustee will take the Property subject to the original Mortgage lien. According to the Debtors' schedules, the Property is currently valued at \$64,500.00, while the amount of the Defendants' secured claim is \$80,000.00.⁵ (Main Case, Doc. # 1, Sch. A.) Based on these valuations, no equity remains in the Property. The Trustee has nothing to gain by acquiring the Property subject to the valid Mortgage lien and the Trustee's action to quiet title does not benefit the estate. Accordingly, Claim Two will be dismissed.

IV. CONCLUSION

For the reasons set forth above, the Court finds that the Trustee has not stated a claim against the Defendants. Even accepting the Trustee's allegations in the Complaint as true, the Trustee fails to set forth sufficient facts by which he may avoid the Mortgage on the Debtors' Property pursuant to 11 U.S.C. § 544(a)(3). The Mortgage is not part of the Debtors' bankruptcy estate and the Trustee has constructive notice of the lien on the Property. The Trustee likewise fails to state a claim to quiet

⁵Because the Complaint does not indicate the value of the Property or the debt against it, the Court will rely on the Debtors' Schedules.

title under Ohio Revised Code § 5303.01. The Mortgage is a valid lien on the Property and the Trustee has not demonstrated that any equity remains to benefit the estate. As a consequence, the Court will grant the Motion to Dismiss. An appropriate order will follow.

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IT IS SO ORDERED.

Dated: August 14, 2012
01:40:25 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MATTHEW M. WHIDDON and
MELISSA M. WHIDDON,

Debtors.

* * * * *

MARK A. BEATRICE, TRUSTEE,

Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY AS TRUSTEE FOR FIRST
FRANKLIN MORTGAGE LOAN TRUST
2006-FF11, et al.,

Defendants.

CASE NUMBER 11-41334

ADVERSARY NUMBER 12-04027

HONORABLE KAY WOODS

ORDER GRANTING MOTION TO DISMISS

This cause is before the Court on Motion of Defendants,
Deutsche Bank National Trust Company as Trustee for First Franklin

Mortgage Loan Trust 2006-FF11 and Wells Fargo Bank, N.A., to Dismiss Complaint ("Motion to Dismiss") (Doc. # 8) filed by Defendants Deutsche Bank National Trust Company as Trustee for First Franklin Mortgage Loan Trust 2006-FF11 and Wells Fargo Bank, N.A. (collectively, "Defendants") on April 16, 2012. Mark A. Beatrice, Chapter 7 Trustee, ("Trustee") filed Trustee's Opposition to the Motion to Dismiss the Complaint (Doc. # 12) on May 7, 2012. The Defendants filed Reply in Support of Motion of Defendants, Deutsche Bank National Trust Company as Trustee for First Franklin Mortgage Loan Trust 2006-FF11 and Wells Fargo, N.A., to Dismiss Complaint (Doc. # 13) on May 17, 2012.

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion to Dismiss entered on this date, the Court hereby:

1. Finds that the Mortgage is not property of the Debtors' bankruptcy estate;
2. Finds that the Trustee is not a bona fide purchaser;
3. Finds that the Trustee may not avoid the Mortgage pursuant to 11 U.S.C. § 544(a)(3);
4. Dismisses Claim One of the Complaint;
5. Finds that the Mortgage is a valid lien on the Debtors' Property;
6. Finds that the Trustee may not quiet title in the Debtors' Property pursuant to Ohio Revised Code § 5303.01;

7. Dismisses Claim Two of the Complaint; and
8. Grants the Motion to Dismiss.

#