

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
AMPARO MARTINEZ,	)	CASE NO. 05-32107 HCD
	)	CHAPTER 13
	)	
DEBTOR.	)	
	)	
	)	
DEBRA L. MILLER, TRUSTEE,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 06-3089
	)	
MORTGAGE ELECTRONIC	)	
REGISTRATION SYSTEM, INC. and	)	
HSBC MORTGAGE SERVICES,	)	
	)	
DEFENDANTS.	)	

Appearances:

Rebecca Hoyt Fischer, Esq., counsel for plaintiff, Laderer & Fischer, P.C., 112 West Jefferson Boulevard,, Suite 310, South Bend, Indiana 46601-2354;

Carl A. Greci, Esq., counsel for defendants, Baker & Daniels LLP, 205 West Jefferson Boulevard, South Bend, Indiana 46601;

Fredric Lawrence, Esq., counsel for defendants, Nelson & Frankenberger, 3105 East 98th Street, Suite 170, Indianapolis, Indiana 46280; and

Scott J. Fandre, Esq., counsel for defendants, Baker & Daniels LLP, 205 West Jefferson Boulevard, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 15, 2007.

Before the court are the cross-motions for summary judgment filed by the Trustee, Debra L. Miller, plaintiff in this adversary proceeding, and by the defendants Mortgage Electronic Registration System, Inc. and HSBC Mortgage Services. Each party moves for summary judgment with respect to the Trustee's Complaint,

which seeks to avoid the defendants' mortgage lien on the debtor's residence. Each party agrees that there are no material facts in dispute, and each one claims that it is entitled to judgment as a matter of law. After briefs were filed, the court took the motions under advisement. For the reasons that follow, the court grants the Trustee's motion and denies the defendants' motion.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(K) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The facts underlying this case are not contested. On May 11, 1999, almost six years before Amparo Martinez ("debtor") filed bankruptcy, he purchased real property on Fisher Street in South Bend, Indiana, by executing a warranty deed. The deed was recorded in the Office of the Recorder of St. Joseph County on May 14, 1999. *See* R. 23, Ex. A. On November 27, 2000, Martinez executed and delivered to defendants' predecessor in interest a first mortgage on the real estate. On the last page of the 7-page mortgage document was printed the standard form of acknowledgment,<sup>1</sup> also called the notary's jurat,<sup>2</sup> because it was a statement by the notary public

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<sup>1</sup> Black's Law Dictionary defines "acknowledgment" as "[a] formal declaration made in the presence of an authorized officer, such as a notary public, by someone who signs a document and confirms that the signature is authentic. In most states, the officer certifies that (1) he or she personally knows the document signer or has established the signer's identity through satisfactory evidence, (2) the signer appeared before the officer on the (continued...)

(“notary”) certifying that the mortgagor had appeared before him or her and duly had executed that mortgage. In this case, the acknowledgment at issue was only partially completed: It did not name the individual who appeared before the notary and executed the document. The debtor’s mortgage contained this acknowledgment:

On this day personally appeared before me  [space left blank]  to me known to be the individual described in and who executed the within and foregoing instrument and acknowledged that signed the same as free and voluntary act and deed, for the uses and purposes therein mentioned.

R. 1, Ex. A, p. 7. The notary signed, dated, and sealed the acknowledgment. On December 18, 2000, the mortgage was recorded in the Office of the Recorder of St. Joseph County, Indiana. It later was assigned to Mortgage Electronic Registration Systems, Inc., as nominee of HSBC Mortgage Services, which holds the beneficial interests. Both are defendants in this adversary proceeding.

On April 21, 2005, the debtor filed his petition for relief under chapter 13. Debra L. Miller was named the chapter 13 Trustee in the bankruptcy case. On May 17, 2005, the defendant HSBC Mortgage Services filed a proof of claim in the amount of \$48,613.09 and asserted that it was a secured claim. *See* Claim # 3. The debtor’s chapter 13 plan was confirmed on May 3, 2006.

On September 7, 2006, the Trustee filed a complaint to avoid the defendants’ mortgage on the debtor’s residential real estate. *See* R. 1. The Trustee argued that the acknowledgment was defective under Indiana law because it did not identify the persons who executed the mortgage. *See id.* at 2, ¶ 6. As a result, the Trustee contended, “the Mortgage was not entitled to recordation pursuant to Indiana Code Section 32-1-2-18<sup>3</sup>

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<sup>1</sup>(...continued)  
date and in the place (usu. the county) indicated, and (3) the signer acknowledged signing the document freely.”

Black’s Law Dictionary 24 (8th ed. 2004).

<sup>2</sup> The Latin term “jurat” means “he (or she) swears.” Its definition in Black’s Law Dictionary is quite similar to the definition of “acknowledgment.” *See* Black’s Law Dictionary 866 (8th ed. 2004).

<sup>3</sup> This section was repealed in 2002 and was replaced by Indiana Code § 32-21-2-3, which provides:

Requirements for recording. — For a conveyance, a mortgage, or an instrument of writing to be recorded,  
(continued...)

and does not serve as constructive notice to bona fide purchasers or mortgagees under Indiana law.” *Id.* The Trustee asked that the mortgage lien be avoided pursuant to 11 U.S.C. § 544. The defendants, in their Answer to the complaint, denied the allegations contained in paragraph 6. *See* R. 12, 19.

At the conclusion of the pre-trial conference, the court directed the parties to file dispositive motions on the issues. The parties filed motions for summary judgment and memoranda of law supporting the motions. The Trustee’s position was that the mortgage, with an incomplete acknowledgment, was not entitled to be recorded under Indiana law and therefore could be avoided by the Trustee pursuant to § 544(a)(3). *See* R. 20. According to the defendants, however, the mortgage was duly recorded in St. Joseph County, Indiana, and as a matter of law was presumed to be a valid lien on the real estate under Indiana Code § 36-2-11-16. *See* R. 22. After the parties filed response and reply briefs, the court took the matter under advisement.

#### Discussion

The parties, through their summary judgment motions, ask the court to consider the legal sufficiency of the incomplete acknowledgment (or notary’s jurat) in this mortgage. It is undisputed that a portion of the acknowledgment was left blank; it does not identify the person or persons who executed the mortgage. The Trustee asserts that, as a matter of law, the mortgage lien can be avoided based on the improper acknowledgment. The defendants respond that the mortgage was accepted for recording and thus that, as a matter of law, the acknowledgment is presumed to be valid. Each party claims that it is entitled to summary judgment.

This court renders summary judgment only if the record shows that “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Fed.

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<sup>3</sup>(...continued)  
it must be:

- (1) acknowledged by the grantor; or
- (2) proved before a:
  - ...
  - (E) notary public.

R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

When, as in this case, the parties have filed cross motions for summary judgment, the court must examine the evidence and “construe all facts and inferences therefrom ‘in favor of the party against whom the motion under consideration is made.’” *In re United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir. 2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir. 2005)). Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

The Trustee brought the complaint under § 544 of the Bankruptcy Code, often called the “strong-arm statute,” a provision which considers the Trustee to be a bona fide purchaser of the debtor’s real property. Section 544(a)(3) “permits a Trustee to avoid any transfer of the debtor’s property if the transfer would be voidable by a bona fide purchaser of that property.” *Sandy Ridge Oil Co., Inc. v. Centerre Bank Nat’l Ass’n (In re Sandy Ridge Oil Co., Inc.)*, 832 F.2d 75, 75 (7th Cir. 1987). In this case, the real property transferred by mortgage contract was located in South Bend, Indiana; therefore, the law of Indiana governs the court’s decision. *See Baldin v. Calumet Nat’l Bank (In re Baldin)*, 135 B.R. 586, 594 (Bankr. N.D. Ind. 1991) (explaining that § 544(a)(3) requires an examination of “applicable law,” in this case Indiana law, to determine whether the Trustee had constructive notice<sup>4</sup> of the transfer of the property). The statute provides:

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<sup>4</sup> The distinction between constructive and actual notice was described precisely in this appellate court decision:

(continued...)

544(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 at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3). “More simply, the trustee hypothetically purchases the debtor’s property at the commencement of the bankruptcy case, then determines whether it is subject to any valid prior interests.”

*Gregory v. Ocwen Fed’l Bank (In re Biggs)*, 377 F.3d 515, 517 (6th Cir. 2004). The parties’ fundamental disagreement concerns whether the defendants’ mortgage constitutes a valid prior interest under Indiana law.

The Trustee argues that the defendants’ mortgage lien, even though recorded, is defective and therefore invalid. The defendants insist that the lack of a name in the acknowledgment section is a minor defect that should not invalidate the mortgage. The court therefore begins by considering what constitutes a valid mortgage lien in Indiana.

Under Indiana law, a mortgage “must be recorded in the recorder’s office of the county where the land is situated.” Ind. Code § 32-21-4-1. “The purpose of recording a mortgage is to give notice to persons subsequently dealing with the property of the existence of the mortgage and to charge them with notice of what the records disclose.” *Bank of New York v. Nally*, 820 N.E.2d 644, 649 (Ind. 2005). A mortgage therefore requires recordation in order to take priority against a subsequent bona fide purchaser such as the Trustee. *See Stubbs v. Chase Manhattan Mortgage Corp. (In re Stubbs)*, 330 B.R. 717, 725 (Bankr. N.D. Ind. 2005) (stating

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<sup>4</sup>(...continued)

The law [of Indiana] recognizes two kinds of notice, constructive and actual. Constructive notice is provided when a deed or mortgage is properly acknowledged and placed on the record as required by statute. However, an otherwise valid instrument which is not entitled to be recorded, improperly recorded, or recorded out of the chain of title does not operate as constructive notice, although binding upon persons having actual notice. Notice is actual when notice has been directly and personally given to the person to be notified.

*Keybank Nat’l Ass’n v. NBD Bank*, 699 N.E.2d 322, 327 (Ind. App. 1998) (citation omitted).

that the state statute “provides that constructive notice sufficient to defeat the interests of a bona fide purchaser is given only if certain instruments are recorded”).

It is well settled in this state that, to entitle a mortgage to be recorded, it must be properly acknowledged or proved before a notary public, judge, or other authorized official. *See* Ind. Code § 32-21-2-3; *Bledsoe v. Ross*, 109 N.E. 53, 54 (Ind. App. 1915); *see also Moehlenkamp v. Shatz*, 396 N.E.2d 433, 438 (Ind. App. 1979) (stating that the jurat was “substantial and probative evidence of due execution of the mortgage”). The Supreme Court of Indiana has summarized succinctly that a “mortgage provides constructive notice to subsequent purchasers when it is properly acknowledged and recorded.” *Nally*, 820 N.E.2d at 648. On the other hand, an otherwise valid mortgage which was not entitled to be recorded or which was improperly recorded does not provide constructive notice. *See In re Stubbs*, 330 B.R. at 726 (citing *Keybank Nat’l Ass’n v. NBD Bank*, 699 N.E.2d 322, 327 (Ind. App. 1998)); *Bledsoe*, 109 N.E. at 54 (citing *Watkins v. Brunt*, 53 Ind. 208 (Ind. 1876)); *cf. Haverell Distributors v. Haverell Mfg. Corp.*, 58 N.E.2d 372, 375 (Ind. App. 1944) (concluding that the acknowledgment in a chattel mortgage, which did not identify the signors, was defective and thus that the mortgage was invalid and not entitled to be recorded).

In evaluating whether a mortgage is properly acknowledged, the court begins with the underlying principle that Indiana law “requires compliance with the formalities of execution as required by the acknowledgment and recording statutes.” *In re Baldin*, 135 B.R. at 599.

Pursuant to Indiana Law, a proper acknowledgment must provide the identity of the acknowledgers, and state that they are the same parties that executed the underlying instrument as well. If this is not done, and if such a defectively acknowledged instrument is recorded, it is nevertheless considered as never having been filed as such.

*Id.* at 596 (citing I.L.E. *Acknowledgments*, § 1); *see also Sandy Ridge Oil Co., Inc., v. Centerre Bank Nat’l Assoc.* (*In re Sandy Ridge Oil Co., Inc.*), 510 N.E.2d 667, 671 (Ind. 1987) (emphasizing that the recording requirements, “if absent from a recorded instrument, will not be excused so as to permit the improper document to be afforded constructive notice”). However, Indiana requires substantial, not strict, compliance with those formalities. The

state statute has provided an acceptable form of an acknowledgment, one which will meet the statutory criteria if inserted in a mortgage but which allows other forms that are “substantially the same”:

The following or any other form substantially the same is a good or sufficient form of acknowledgment of a deed or mortgage:

“Before me, E.F. (judge or justice, as the case may be), this \_\_\_\_\_ day of \_\_\_\_\_, A.B. acknowledged the execution of the annexed deed (or mortgage, as the case may be).”

Ind. Code § 32-21-2-7; *cf. In re Biggs*, 377 F.3d at 518 (reviewing several statutory forms that fulfill the acknowledgment requirement under Tennessee law, finding that “all of the forms require the notary to include the names of the individuals acknowledging their signatures”).

In this case, the acknowledgment in the debtor’s mortgage left blank the space where the name or names of those who appeared before the notary public were to be inserted. The defendants argue, however, that the absence of the debtor’s name in the acknowledgment was merely a minor defect. They point out that the debtor’s name was printed as the mortgagor on the face of the document and was printed beneath the signature line; that the debtor signed the document; and that the notary public notarized it. It is obvious, they state, that the debtor had the intention to mortgage the property. The defendants insist that the lack of name in the acknowledgment therefore should not invalidate the mortgage.

The state statute made clear that a document need not use the specific form of acknowledgment found in Indiana Code § 32-21-2-7; a form “substantially the same” as the statutory form will be treated as valid. However, the court finds that this acknowledgment does not substantially comply with the statutory prerequisites. It finds that the pre-printed form of this mortgage, which used language only somewhat similar to the acceptable acknowledgment set forth in the statute, left an empty space in which the notary was expected to insert, in writing, the identity of the persons who personally appeared before that notary and who were in fact the ones who executed the mortgage. *See Moehlenkamp*, 396 N.E.2d at 438 (stating that the jurat was “substantial and probative evidence of due execution of the mortgage”). By leaving that space blank, the notary did not recognize the signers of the document in any way. The identity of the individuals who signed the mortgage was left

uncertain. The signature and seal of the notary, at the end of the acknowledgment, thus did not perform the role of confirming the signatures of the mortgagors and of authenticating the proper execution of the document. *Cf. Fifth Third Bank v. Edgar County Bank & Trust*, 482 F.3d 904, 906 (7th Cir. 2007) (stating that “the notary tells us that the signatures are genuine”). In addition, without the names of the acknowledging individuals properly inserted, a subsequent purchaser could not be certain that the mortgage was signed by the actual owners of the real property and that the document was signed freely, without fraud or forgery. *Cf. In re Biggs*, 377 F.3d at 520 (discussing the role of an acknowledgment under Tennessee law).

Two bankruptcy judges, esteemed colleagues in the Northern District of Indiana, have addressed the issue now before this court. Judge Kent Lindquist, in *In re Baldin*, determined that an Indiana mortgage was defective when it contained an acknowledgment which failed to specify who appeared before the notary:

The Indiana legislature has recognized and adopted the general rule requiring identification of the acknowledger in the body of the acknowledgment before an instrument can be recorded. To hold that this requirement may be waived by leaving that space blank is to ignore the long standing case law in Indiana, the plain language of the statutes, and the apparent intent of the legislature.

*In re Baldin*, 135 B.R. at 601-02. Fourteen years later, Judge J. Philip Klingeberger confronted the same type of incomplete acknowledgment. Following the clear reasoning of Judge Lindquist’s comprehensive *Baldin* decision, Judge Klingeberger found that “the most critical part of an acknowledgment is missing, i.e., the identity of the person who appeared before the attesting officer to certify that he/she had signed the instrument.” *In re Stubbs*, 330 B.R. at 730. Both courts concluded that the acknowledgment was defective and thus that the mortgage was invalid, the recording of that mortgage was improper, and the Trustee could avoid the mortgage lien.<sup>5</sup>

This court has reviewed those thorough, well-reasoned determinations, which resolved the same issue as the one herein, and has considered the statutes and case law in light of the record in this case. It now determines that, as a matter of law under Indiana law, this acknowledgment that omitted the identity of the

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<sup>5</sup> The defendants attempt to distinguish those cases on the ground that more than one signer was involved in them whereas “in this case [the debtor] Martinez is the only person whose signature could have been acknowledged.” R. 25 at 5. The court finds, however, that the factual differences are irrelevant; each case clearly focused on the defective omission of any name in the acknowledgment and the resulting invalidation of the mortgage.

document signer is defective. See *In re Stubbs*, 330 B.R. at 731 (concluding that “an acknowledgment that fails to specifically state *who* appeared before an attesting officer to acknowledge his/her execution of a mortgage is not a valid acknowledgment”); *In re Baldin*, 135 B.R. at 600 (“This is a case of no compliance whatsoever as to the completion of the formal part of the acknowledgment”). It further finds that this mortgage containing the defective acknowledgment fails to comply with Indiana law. See *Nally*, 820 N.E.2d at 648 (“A mortgage provides constructive notice to subsequent purchasers when it is properly acknowledged and recorded.”). Moreover, the improperly acknowledged mortgage was not entitled to recordation and cannot provide constructive notice to subsequent purchasers. See *In re Baldin*, 135 B.R. at 602 (concluding that a “recording of this mortgage, with its defective acknowledgment, is in effect no recording at all, and thus does not provide constructive notice, even though in fact received for recording by the County Recorder”). As a result, the court determines, the mortgage lien may be avoided under 11 U.S.C. § 544(a)(3). See *In re Stubbs*, 330 B.R. at 731; *In re Baldin*, 135 B.R. at 603; cf. *In re Rick’s Auto Outlet*, 327 B.R. 650 (8th Cir. B.A.P. 2005) (finding that the trustee may avoid a deed of trust with defective acknowledgment under Mississippi law); *In re Armstrong*, \_\_\_ B.R. \_\_\_, 2007 WL 1113662 (Bankr. E.D. Ky. 2007) (finding that trustee may avoid a mortgage with defective acknowledgment under Kentucky law); *In re Shannon*, 343 B.R. 585 (Bankr. E.D. Ky. 2006) (same).

As an alternative argument, the defendants insist that, once the mortgage was reviewed and recorded by the St. Joseph County Recorder, it was presumed to comply with the recordation statute and to be valid – even without the name of the debtor written in the acknowledgment. See R. 22 at 2; R. 23 at 3. The defendants rely on Indiana Code § 36-2-11-16(f), which states that “[a]n instrument, document, or copy received and recorded by a county recorder is conclusively presumed to comply with this section.” According to the defendants, paragraph (f) of Section 16 “controls the issue as to whether the mortgage is valid.” R. 23 at 7. They compare the factual and legal circumstances herein with those in the Indiana Supreme Court decision of *Sandy Ridge Oil Co.*, 510 N.E.2d 667 (Ind. 1987), and in the state appellate ruling of *Whitfield v. Greater South Bend Housing*

*Corp.*, 276 N.E.2d 188 (Ind. App. 1971). Based on those cases and § 36-2-11-16(f), they claim that this recorded mortgage is a valid mortgage and that summary judgment should be granted in their favor. *See id.*

The statute cited by the defendants is a provision found in the county government statutes (Title 36, Article 2), specifically in the chapter pertaining to county recorders (Chapter 11). Section 36-2-11-16 of the Indiana Code is entitled “Identification of Signatories by printing, typewriting or stamping – Exceptions.” Relevant to this discussion are two pertinent subsections:

(c) The recorder may receive for record an instrument only if:

(1) the name of each person who executed the instrument is legibly printed, typewritten, or stamped immediately beneath his signature or the signature itself is printed, typewritten, or stamped;

. . . ; and

(4) the name of each person who executed the instrument appears identically in the body of the instrument, in the acknowledgment or jurat, in his signature, and beneath his signature [.]

Ind. Code § 36-2-11-16(c)(1), (4). Under Subsection (c), therefore, a recorder is required to examine an instrument such as a mortgage to determine that the names appearing on the instrument – those identifying the person or persons who executed, acknowledged, and signed the instrument – are identical. Only when the elements listed in Subsection (c) are checked and verified (or are explained by affidavit, as § 36-2-11-16(d) allows) may the recorder receive the instrument to be recorded. *See In re Sandy Ridge Oil Co.*, 510 N.E.2d at 669 (“Section 16 allows recording of instruments only if signatures are followed by printed, typewritten or stamped names . . .”). Subsection (f), found at the end of the statute, states that any recorded instrument is “conclusively presumed to comply with this section.” The Indiana Supreme Court, in dictum in *Sandy Ridge*, provided guidance in analyzing this statute.<sup>6</sup> It referred to Subsection (f) as a “curative provision,” *id.* at 669-70, but determined that

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<sup>6</sup> The court notes that the statute under scrutiny in the *Sandy Ridge* cases was Ind. Code § 36-2-11-15(b), a provision not before this court. In *Sandy Ridge Oil Co., Inc., v. Centerre Bank Nat’l Ass’n*, 807 F.2d 1332, 1338 (7th Cir. 1986), the Seventh Circuit certified this question to the Indiana Supreme Court: “Does a recorded instrument conveying . . . or otherwise disposing of an interest in or lien on property that does not disclose the name of the preparer as required by Ind. Code § 36-2-11-15(b) nevertheless impart constructive notice to a bona (continued...) ”

it was “not appropriate” to extend that provision’s utilization to encompass the later enacted Section 15, since “the preparer’s name requirement [found in § 36-2-11-15] applies only to the recording of documents pertaining to interests in property, rather than to all documents eligible for recording [as § 36-2-11-16 does].” *Id.* at 670. Its holding also drew a distinction between Section 15, the preparer’s name requirement, and other recording requirements. The state supreme court limited its decision carefully:

We emphasize that the recording requirements which affect the nature of the interest and the formalities of execution, if absent from a recorded instrument, will not be excused so as to permit the improper document to be afforded constructive notice. By our decision today, we hold only that the omission of the preparer’s name, contrary to the requirements of Section 15, does not operate to deprive a recorded document of the constructive notice to which it would otherwise be entitled.

*Sandy Ridge*, 510 N.E.2d at 671.

The defendants, however, give an expansive construction to the *Sandy Ridge* decision. They assert that the state supreme court held that “a mortgage omitting a preparer’s name is deemed valid,” and then they attempt to broaden that ruling by arguing that “it should logically follow that a mortgage without a proper acknowledgment should be valid as well.” R. 23 at 5. This court declines to consider such a misinterpretation of *Sandy Ridge*. The Indiana Supreme Court’s language unambiguously states that “we hold only that the omission of the preparer’s name . . . does not operate to deprive a recorded document of . . . constructive notice.” *Id.* (emphasis added). That conclusion follows the court’s emphatic affirmation of strict compliance with the recording requirements and its refusal to excuse them “so as to permit the improper document to be afforded constructive notice.” *Id.* Subsequent court decisions have respected the narrowness of the Indiana Supreme Court’s *Sandy Ridge* ruling. See *In re Stubbs*, 330 B.R. at 727 (following the Indiana Supreme Court’s clear, unequivocal statement that it “has long recognized the general principle that the recording of a document not entitled to be recorded does not afford constructive notice”); *In re Baldin*, 135 B.R. at 597 (thoroughly discussing

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<sup>6</sup>(...continued)

fide purchaser?” In *Sandy Ridge*, 510 N.E.2d at 671, the Indiana Supreme Court answered in the affirmative: “[A] recorded instrument, notwithstanding the omission of the name of its preparer, nevertheless does impart constructive notice to a bona fide purchaser.” Based on that answer, the Seventh Circuit held that the chapter 11 debtor “Sandy Ridge may not avoid the mortgage under § 544(a)(3).” *Sandy Ridge*, 832 F.2d at 76.

the case, finding that “[n]o where in that decision can this Court find any language, either express or implied, changing the well-established case law of Indiana that the recording of a document not entitled to be recorded does not afford constructive notice.”). Eighteen years after *Sandy Ridge*, the Indiana Supreme Court again underscored the importance of formal recording requirements by confirming that “[a] mortgage provides constructive notice to subsequent purchasers when it is properly acknowledged and recorded.” *Nally*, 820 N.E.2d at 648 (emphasis added). The defendants have cited no cases that have expanded the narrow ruling in *Sandy Ridge* or that have held that a mortgage without a proper acknowledgment is valid. In the view of this court, the *Sandy Ridge* decision does not provide support to the defendants’ argument.

This court also finds that *Whitfield v. Greater South Bend Housing Corp.*, 276 N.E.2d 188 (Ind. App. 1971), cited by the defendants, is unhelpful to them. At first glance, it appears analogous to this case, because in both cases the affiant’s name was omitted from the jurat. In *Whitfield*, however, the underlying document was a notice of intention to file a mechanic’s lien, and the state statute being interpreted was Indiana’s mechanic’s lien statute, Indiana Code § 32-8-3-3 (now Ind. Code § 32-28-3-3). That provision requires a person wanting a lien to record a sworn statement and notice of the person’s intention to hold the lien. The appellate court determined that a notice of intention to hold mechanic’s lien qualified as a sworn statement even though the affiant’s name was omitted from the jurat. *See id.* at 191. This court agrees with its sister court, however, that a “sworn statement is simply not the same as an acknowledgment” and that the “mechanics of accomplishing an acknowledgment and an affidavit are also entirely distinct and different.” *In re Baldin*, 135 B.R. at 600. Judge Lindquist, in *Baldin*, presented a thoughtful, thorough analysis of *Whitfield*. *See* 135 B.R. at 600-01. He presented numerous reasons for choosing not to follow the *Whitfield* holding; this court agrees with all of them. It also concurs with *Baldin*’s conclusion “that the Supreme Court’s reiteration[,] in *Sandy Ridge*, that the recording of a document not entitled to be recorded does not afford constructive notice is the present state of the law in Indiana.” *Baldin*, 135 B.R. at 601. That conclusion is as valid today as it was in 1991.

In the view of this court, therefore, § 36-2-11-16 imposes a duty on a county recorder to examine a document and to establish that the § 16 criteria are met before the recorder receives and records that instrument. Subsection (f) provides the presumption that any instrument that in fact was recorded by a county recorder was examined by that recorder pursuant to § 36-2-11-16. Whether the criteria actually were fulfilled – that is, whether the names in the body of the instrument, in the acknowledgment, and on the signature lines are identical, and whether the other factors were verified – is a question of fact. Nevertheless, the statute conclusively presumes that the recorder acted in compliance with the requirements of the county recorder statute and that the instrument, if received and recorded, qualified for recordation. It is important to recognize, however, that Subsection (f) of § 36-2-11-16 presumes compliance only with the county recorder statute. It does not presume compliance with the real property conveyance laws found in Article 21 of Title 32 or more specifically with the recording requirements for mortgages and acknowledgments in mortgages, found in § 32-21-2-3 and § 32-21-2-7. As the Indiana Supreme Court emphasized, “the recording requirements . . . , if absent from a recorded instrument, will not be excused so as to permit the improper document to be afforded constructive notice.” *Sandy Ridge*, 510 N.E.2d at 671.

In this case, the court first finds that the notary failed to perform the essential function of naming the person who appeared before her and who signed the instrument in her presence. It next finds that the county recorder failed to perform her duty properly: She recorded the mortgage even though identical names were not written in the body of the document, in the acknowledgment, and on the signature lines, as required by Indiana Code § 36-2-11-16(c)(4). The mortgage remains recorded under the curative provision of § 36-2-11-16(f), but it presumes compliance only with § 16 of the county recorder statute. Nevertheless, Indiana case law has made clear that the omission of names from an acknowledgment renders a mortgage defective and that a defective mortgage, even though recorded, cannot provide constructive notice of the mortgage. *See Keybank Nat’l Ass’n v. NBD Bank*, 699 N.E.2d 322, 327 (Ind. App. 1998). The county recorder’s recording of the invalid mortgage cannot validate an instrument with a defective acknowledgment. There is no curative provision in the recording

statutes at issue herein. The court therefore finds that the defendants' reliance on § 36-2-11-16(f) is of no benefit to the defendants' position.

The defendants present a final contention to the court. They argue that, because the Trustee failed to object (or to reserve the right to object) to the defendants' claim prior to confirmation of the debtor's chapter 13 plan, she lost the right to object when the plan was confirmed. They assert that confirmation binds the parties and that the principles of *res judicata* bar relitigation of any issues that could have been raised in the confirmation proceedings. *See* R. 25 at 2.

This argument was raised for the first time in the defendants' response brief. In the view of this court, the allowance of a new argument in a response brief effectively allows a party to add a new count or to plead a different case. *See Conner v. Illinois Dept. of Natural Resources*, 413 F.3d 675, 679 (7th Cir.) (concluding that an issue raised for the first time in response to a motion for summary judgment was outside the scope of original charges), *cert. denied*, 126 S. Ct. 804 (2005); *Samuels v. Wilder*, 871 F.2d 1346, 1349 (7th Cir. 1989) (stating that, once the motion for summary judgment and the statement in opposition are on file, parties cannot add new issues). Nevertheless, the Trustee responded to the defendants' contentions without challenging the procedural impropriety of their argument. For that reason, the court will address the defendants' position.

The court finds first that the Trustee properly brought an adversary proceeding, based on § 544(a)(3), to avoid the invalid mortgage lien on the debtor's real estate. Disputes concerning the validity or existence of a lien require an adversary proceeding and "are not resolved by the confirmation process." *In re Beard*, 112 B.R. 951, 956 (Bankr. N.D. Ind. 1990). During the confirmation process, questions concerning the proper amount of a claim may be raised as contested matters and "are properly before the court in the context of confirmation." *Id.* at 955. However, when a trustee questions the validity or existence of a mortgage lien securing a claim, that issue requires an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(2). *See id.* In *Beard*, Judge Robert E. Grant, another valued colleague of this court, elucidates the distinction between adversary proceedings and contested matters and clarifies the *res judicata* effect of only contested matters:

[T]he only questions which are properly before the court in the context of confirmation are those which can be raised as contested matters. Only as to issues of this kind will confirmation operate as *res judicata*. If an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have a preclusive effect.

*Id.* at 955-56. The court determines, therefore, that the confirmation of the debtor's chapter 13 plan did not have a preclusive or *res judicata* effect and did not bar the Trustee in this case from bringing an adversary proceeding under § 544(a)(3) to avoid the mortgage lien on the ground that the lien was invalid.

Section 544 actions to avoid a lien are subjected to the time limitations found in § 546, which sets a two-year limit on the avoidance powers of a trustee.<sup>7</sup> In this case, the debtor filed his petition for relief on April 21, 2005. The trustee filed this § 544 complaint on September 7, 2006, less than two years after the entry of the petition and order for relief. The court finds, therefore, that the adversary proceeding was timely and was not barred by the order confirming the debtor's chapter 13 plan.

The defendants, in buckshot fashion, cited many cases to justify their *res judicata* argument, but most concerned the *res judicata* effect of chapter 11 (not 13) plan confirmation. The general premise is true in both chapter 11 and 13 cases: “[C]onfirmation of a plan is *res judicata* as to all issues that were or could have been resolved during the confirmation process.” *In re Beard*, 112 B.R. at 954. However, issues raised in adversary proceedings are not part of the confirmation process, and confirmation does not have a *res judicata* effect on them. *Id.* at 956. In addition, none of the cases cited by the defendants has a fact pattern similar to the one herein.

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<sup>7</sup> Section 546, “Limitations on avoiding powers,” presents the following statute of limitations:

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –

(1) the later of –

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee . . .; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

One of the few chapter 13 cases on which the defendants rely, *In re Hearn*, 337 B.R. 603 (Bankr. E.D. Mich. 2006), held that the debtor was entitled to a judgment that avoids the defendant's unrecorded mortgage lien under § 544(a)(3). *See id.* at 615. Other cases referenced by the defendants are inapposite and the court need not discuss them further. *See, e.g., In re Met-L-Wood*, 861 F.2d 1012 (7th Cir. 1988) (discussing *res judicata* in context of trustee's belatedly filed fraud suit); *In re Marlow*, 216 B.R. 975, 980 (Bankr. N.D. Ala. 1998) (discussing *res judicata* effect of confirmation order on issue of whether state court judgment was a voidable preference under § 547). The court finds that the issues raised in the cited cases were quite peripheral to the issues before it in this case; it therefore focuses on the straightforward issues herein.

This case was brought as an adversary proceeding challenging the validity of the mortgage lien and seeking to avoid it under § 544(a)(3). It falls squarely under Rule 7001(2) of the Federal Rules of Bankruptcy Procedure. The Trustee brought this § 544 avoidance action within the time allowed under § 546. The court determines that the action is not barred by the Order of confirmation of the debtor's chapter 13 plan.

In summary, the court determines that the acknowledgment in the debtor's mortgage was not properly completed and therefore was not valid under Indiana law. The state law is clear that constructive notice is given only by properly acknowledged and recorded instruments. In this case, the acknowledgment, which omitted the name identifying the signer of the document as the person who appeared before the notary and who freely executed the instrument, invalidated the mortgage and failed to create a valid lien. It therefore was not entitled to be recorded. In addition, it could not and did not provide constructive notice to subsequent bona fide purchasers. Neither the recording of the mortgage by the St. Joseph County Recorder nor the curative provision of § 36-2-11-16(f) can resuscitate the defective mortgage. The court also rejects the defendants' claim that confirmation of the debtor's chapter 13 plan had the *res judicata* effect of barring the Trustee's complaint. Consequently, the court determines that the Trustee may avoid the defendants' mortgage lien on the debtor's real estate under § 544(a)(3).

Conclusion

For the reasons presented above in this Memorandum of Decision, the court grants the Motion for Summary Judgment of the Trustee and denies the Motion for Summary Judgment of the defendants HSBC Mortgage Services and Mortgage Electronic Registration System, Inc. The Trustee's Complaint to Avoid Lien pursuant to 11 U.S.C. § 544(a)(3) is granted.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT