

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
LESLIE HAROLD KROFT and)	CASE NO. 05-39794 HCD
GOLDIE MICHELLE KROFT,)	CHAPTER 7
)	
DEBTORS.)	
)	
DEBRA L. MILLER, TRUSTEE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 06-3091
)	
EVERHOME MORTGAGE COMPANY/)	
PB REIT INC., MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS, INC.,)	
DEFENDANT(S).)	

Appearances:

Rebecca Hoyt Fischer, Esq., attorney for Standing Chapter 13 Trustee, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601; and

Joanne B. Friedmeyer, Esq., attorney for defendant PB REIT Inc., Doyle & Friedmeyer, P.C., First Indiana Plaza, Suite 2000, 135 North Pennsylvania Street, Indianapolis, Indiana 46204.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 6, 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 defendant PB REIT, Inc.¹ Each party moves for summary judgment with respect to the Trustee's Complaint, which seeks to avoid the defendant's mortgage lien on the debtors' 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 PB REIT's motion.

¹ By its Order of November 1, 2006, the court allowed the substitution of PB REIT, Inc., as the defendant in this matter due to a transfer of interest. *See* R. 9. PB REIT, Inc., the assignee of the mortgage in question, is the current holder of the claim. *See* R. 6.

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 November 15, 1999, almost six years before Leslie Harold Kroft and Goldie Michelle Kroft (“the debtors”) filed bankruptcy, they executed a mortgage on their residence in Knox, Indiana, securing a loan for \$20,000 and naming First Indiana Bank, the defendant’s predecessor in interest, as the lender/mortgagee.² On the last page of the 7-page mortgage document was printed the standard form of acknowledgment,³ also called the notary’s jurat,⁴ because it was a statement by the notary public (“notary”) certifying that the mortgagors had appeared before him or her and duly had executed that

² According to the debtors’ Schedule D, USDA/Rural Housing holds a first mortgage, in the amount of \$47,765, and the defendant (now PB REIT) holds a second mortgage in the amount of \$20,000.

³ 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 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).

⁴ 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).

mortgage. In this case, the acknowledgment at issue was only partially completed: It did not name the individuals who appeared before the notary and executed the document. The debtors' 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.5, Ex. A, p. 7. The notary signed, dated, and sealed the acknowledgment. On February 8, 2000, the mortgage was recorded in the Office of the Recorder of Starke County, Indiana. It later was assigned to Mortgage Electronic Registration Systems, Inc., Everhome Mortgage Company, and now PB REIT, the defendant before the court today.

On October 15, 2005, the debtors filed their petition for relief under chapter 13. Debra L. Miller was named the chapter 13 Trustee in the bankruptcy case. On December 13, 2005, the defendant's predecessor filed a proof of claim in the amount of \$18,970.56 and asserted that it was a secured claim. *See* Claim # 13. The debtors' chapter 13 plan was confirmed by Special Order on May 10, 2006.

On September 7, 2006, the Trustee filed a complaint to avoid the defendant's mortgage on the debtors' residential real estate. *See* R. 5. 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 32-1-2-18⁵ and does not serve as constructive notice to bona fide purchasers or mortgagees under Indiana law." *Id.* The

⁵ 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, it must be:

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

Trustee asked that the mortgage lien be avoided pursuant to 11 U.S.C. § 544. The defendant, in its Answer to the complaint, denied the allegations contained in paragraph 6. *See* R. 6 at 2. It affirmatively asserted that the Trustee's claim was barred on the ground that "a Chapter 13 bankruptcy confirmation order is *res judicata* with respect to a Trustee's post-confirmation attempt to avoid a secured claim included within the confirmed plan." *Id.*

At the conclusion of a telephonic 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. 16, 17. According to the defendant, however, the mortgage's acknowledgment was sufficient and the document's presumed validity was substantiated by its recordation in Starke County. The defendant insisted that there was no basis for the Trustee's use of § 544's strong-arm power. In addition, it pointed out that, because the mortgage document, attached to the proof of claim, was available to the Trustee prior to confirmation, the Trustee's challenge to the validity of the mortgage lien should have been raised before the plan was confirmed. As an affirmative defense, the defendant also claimed that the debtors' confirmed chapter 13 plan was *res judicata* as to the Trustee's attempt to attack the mortgage. *See* R. 20, 21. When the briefing schedule had passed, 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 defendant responds that the acknowledgment is not defective and that, as a matter of law, the mortgage lien on the debtors' real estate is 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. 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. 2004)). 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 Knox, 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 notice⁶ of the transfer of the property). The statute provides:

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 defendant’s mortgage constitutes a valid prior interest under Indiana law.

The Trustee argues that the defendant’s mortgage lien, even though recorded, is defective and therefore invalid. The defendant insists that the mortgage was properly recorded and is a valid lien. 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.*

⁶ The distinction between constructive and actual notice was described precisely in this appellate court decision:

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).

(*In re Stubbs*), 330 B.R. 717, 725 (Bankr. N.D. Ind. 2005) (stating 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 v. Ross*, 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 debtors’ mortgage left blank the space where the names of those who appeared before the notary public were to be inserted. The defendant argued, however, that the form used in the debtors’ mortgage was substantially the same as the statutorily approved form found in Indiana Code § 32-21-2-7 and that it adequately described the signers. “[T]he notary did acknowledge the personal appearance of the Krofts by describing them as ‘known to be the individual described in and who executed’ the mortgage.” R. 21 at 5.

It is indeed correct 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 cannot agree with the defendant’s position that this acknowledgment substantially complied 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.

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 document signers 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 defendant insists that the recording of the mortgage provided constructive notice. Because the recorder of Starke County accepted and recorded the mortgage, even without the names written in the acknowledgment, it contends, the document is presumed to comply with the recording statutes. *See* R. 21 at 5. The defendant relies 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.” Consequently, claims the defendant, this recorded mortgage, which presumably complies with the statute, contains no deficiency, provides constructive notice, and is not avoidable by the Trustee. *See id.*

The court begins its consideration of this argument by reviewing the statute cited by the defendant, a provision in county government law (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, *see* § 36-2-11-16(d)) 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 this 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.⁷ It referred to subsection (f) as a “curative provision,” *id.* at 669-70, but determined that 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].” Its holding also draws a distinction between section 15, the preparer’s name requirement, and other recording requirements. The state supreme court limits its decision carefully:

⁷ As background, the court notes that the statute under scrutiny in the *Sandy Ridge* cases was Ind. Code § 36-2-11-15(b), a provision not affecting the case 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 the following question to the Indiana Supreme Court: “Does a recorded instrument conveying, creating, encumbering, assigning, 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 fide purchaser?” In *In re 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).” *In re Sandy Ridge*, 832 F.2d at 76.

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. Subsequent court decisions have respected the narrowness of that 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 596-99 (thoroughly discussing 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."). In *Sandy Ridge*, the Supreme Court of Indiana held only that, if the preparer's name is omitted, the mortgage when recorded nevertheless provides constructive notice. *Sandy Ridge*, 510 N.E.2d at 671. The Indiana Supreme Court eighteen years later underscored 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).

In the view of this court, therefore, § 36-2-11-16 imposes a duty on a county recorder to examine an instrument 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. Subsection (f) of § 36-2-11-16 presumes compliance only with the county recorder statute, however; 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 persons 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). 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 at 327. The county recorder’s recording of the invalid mortgage cannot validate an instrument with a fatally defective acknowledgment. The court finds that the defendant’s reliance on the county recorder statute’s conclusive presumption provision in § 36-2-11-16(f) has no merit.

The defendant presents a final contention in the form of an affirmative defense. It notes that the mortgage was attached to the defendant’s proof of claim when it was filed and that the Trustee could have challenged the alleged deficiency in the document before the debtors’ chapter 13 plan was confirmed. Because the Trustee did not file an adversary proceeding prior to the court’s acceptance of the plan, it insists that confirmation renders the debtors’ plan *res judicata* on the issue. “To allow a belated attack on the mortgage, after a plan has been confirmed, undermines the finality of confirmation of a plan,” it claims. R. 21 at 3.

The court finds that the Trustee’s complaint cannot be characterized as a belated attack on the mortgage. First, the court determines (and the defendant does not disagree) that the Trustee properly brought an adversary proceeding, based on 11 U.S.C. § 544(a)(3), to avoid the invalid mortgage lien on the debtors’ 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) (“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.”). During the confirmation process, the parties resolved the arrearage amount of the defendant’s claim. *See id.* at 954-55 (describing differences between contested matters and adversary proceedings, explaining that questions concerning amounts of claim are contested matters “which are properly before the court in the context of confirmation”). The Order Confirming the Chapter 13 Plan established the agreed arrearage amounts to be paid to the mortgage companies, including the defendant. *See* R. 43, Order of May 10, 2006. Only after the plan was confirmed did the Trustee question the validity of the mortgage lien securing the defendant’s claim, an issue requiring an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(2).

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.⁸ In this case, the debtors filed their petition for relief on October 15, 2005. The trustee filed this § 544 complaint on September 7, 2006, less than a year 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 debtors’ chapter 13 plan.

However, the defendant relies on a recent Second Circuit decision, *In re Layo*, 460 F.3d 289 (2d Cir. 2006) in its claim that the Trustee’s complaint, a “post-confirmation attempt to avoid the confirmed mortgage on the debtor’s property[,] is barred by the doctrine of *res judicata*.” R. 21 at 6. The court finds *Layo* to be factually

⁸ 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).

and legally distinguishable from the case before it. First, the underlying facts in that case (whittled down to the bare essentials) are not at all comparable to those herein.⁹ In *Layo*, the debtor had executed four mortgages; he stopped making payments on the fourth mortgage in the belief that he had paid it off. The bank disagreed; it moved to lift the automatic stay to foreclose on the property. The debtor and the trustee asserted that the debt had been discharged and that the debtor had satisfied the lien; they then filed a complaint to avoid the mortgage. The bank did not deny the factual allegations but responded that, since the confirmation order had accepted the bank as a secured creditor, the doctrine of *res judicata* precluded further litigation on the issue. See *In re Layo*, 460 F.3d at 291. It readily is seen that the background facts in *Layo* are altogether different from the straightforward ones in this case. The preliminary issue in *Layo* was whether the mortgage lien had been discharged; there is no claim that the mortgage at issue was invalid or that its recording was improper.

It is also clear that the legal issues presented in *Layo* are different. The appellate court first stated that it was making a de novo review of “the dismissal of a claim on *res judicata* grounds.” *Id.* It explained that the case “involves an after-the-fact attack on a lien by a debtor who did not dispute the lien despite having notice and opportunity to do so.” *Id.* at 295. It also described the debtor’s and trustee’s position as a “post-confirmation attempt to avoid a confirmed, recorded lien on the debtor’s property where the lien was claimed by [the bank] at the outset of the bankruptcy proceedings and included by the debtor in his plan.” *Id.* at 296. Indeed, the circuit court recognized that “a proceeding to determine the validity, priority, or extent of a lien or other interest in property” must be brought as an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001(2):

We acknowledge that challenges to the validity of a lien must be brought through an adversary proceeding. Where, at the outset, there is no dispute as to the basis of a lien, however, given the policy embodied in § 1327(a) that confirmation of a plan “bind the debtor and each creditor,” it does not follow that a non-objecting creditor has a right to bring an adversary proceeding whenever he gets around to doing so.

Id. at 294.

⁹ As a caveat, the court notes that the facts are distilled from the Second Circuit decision without the benefit of descriptions from the bankruptcy court’s or district court’s unpublished opinions.

This court finds that *In re Layo* is distinguishable on factual and legal grounds. The case herein is an adversary proceeding challenging the validity of the mortgage lien and seeking to avoid it under § 544. It falls squarely under Rule 7001(2) of the Federal Rules of Bankruptcy Procedure. *Layo* does not mention § 544 or discuss the avoidance powers of a trustee. It does not recognize that a trustee is limited in bringing a § 544 avoidance action by the § 546 statute of limitations rather than by the date of the order of confirmation of the chapter 13 plan. Finally, the precedential influence of this Second Circuit decision extends to the federal courts in New York, Vermont and Connecticut, but not to Indiana. This court respectfully declines to follow it in making its determination in this case.

In conclusion, the court determines that, under Indiana law, an acknowledgment in a mortgage instrument must be properly completed to be sufficient. The state law is clear that constructive notice is given only by properly acknowledged and recorded instruments. In this case, the acknowledgment omitted the names identifying the signers of the document as the persons who appeared before the notary and who freely executed the instrument. The defective acknowledgment 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 Starke County Recorder nor the curative provision of § 36-2-11-16(f) can resuscitate the invalid mortgage. The court also rejects the defendant's claim, based on *In re Layo*, that confirmation renders the debtors' chapter 13 plan *res judicata* and secures the defendant's confirmed, recorded mortgage lien. Consequently, the court determines that the Trustee may avoid the defendant's mortgage lien on the debtors' residential real estate under 11 U.S.C. § 544(a)(3).

Conclusion

For the reasons presented in the Memorandum of Decision, the court grants the Motion for Summary Judgment of the Trustee and denies the Cross-Motion for Summary Judgment of the defendant PB REIT, Inc. The Trustee's Amended Complaint to Avoid Lien is granted.

SO ORDERED.

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