UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JOHN ANTHONY YOCUM and	)	CASE NO. 05-33400 HCD
DORIE LYNN YOCUM,	)	CHAPTER 13
	)	
DEBTORS.	)	
	)	
	)	
DEBRA L. MILLER, TRUSTEE,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 06-3088
	)	
HOUSEHOLD FINANCE CORPORATION III and	)	
HSBC MORTGAGE SERVICES,	)	
DEFENDANTS.	)	

Appearances:

Rebecca Hoyt Fischer, Esq., counsel for plaintiff, 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601-1438;

Sarah Quinn Kuhny, Esq., counsel for defendant, Barnes & Thornburg LLP, 100 North Michigan Street, Suite 600, South Bend, Indiana 46601; and

Timothy J. Abeska, Esq., counsel for defendant, Barnes & Thornburg LLP, 600 1st Source Bank Center, 100 North Michigan Street, South Bend, Indiana 46601-1632.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 24, 2007.

Before the court is the Motion for Summary Judgment filed by the plaintiff Debra L. Miller, Chapter 13 Trustee in the bankruptcy case of John Anthony Yocum and Dorie Lynn Yocum ("debtors"). It requests summary judgment against the defendants Household Finance Corporation III ("Household") and HSBC Mortgage Services ("HSBC") (collectively, "defendants") with respect to the Trustee's Complaint To Avoid Lien, which seeks to avoid the defendants' mortgage lien on the debtors' residence. The defendants have opposed the Trustee's motion. After the parties briefed the issues underlying the summary judgment motion, the court took the matter under advisement.

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 in this adversary proceeding are not contested. On June 25, 2002, the debtors purchased real property on Canty Street in Logansport, Indiana. They executed and delivered to Household a mortgage to secure a promissory note in the original principal amount of $95,000. On the last page of the 11-page mortgage document was printed a standard form of acknowledgment,[1] also called the notary's jurat,[2] because it is a statement by the notary public ("notary") certifying that the mortgagors 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 individuals who appeared before the notary and executed the document. The debtors' mortgage contained this acknowledgment:

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[1] 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).

[2] 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).

STATE OF INDIANA, Cass COUNTY ss:
Before me, [notary's name was written here], a Notary Public, this 25th day of June, 2002 [left blank] acknowledged the execution of the annexed mortgage.

WITNESS my hand and official seal.

R.1, Ex. A, p. 11. Below the witness line, the notary wrote and printed her name, the name of the county, and the date that her commission was to expire. She also stamped her official seal. *See id.* The mortgage was recorded on June 28, 2002.

On June 21, 2005, the debtors filed their petition for relief under Chapter 13. Debra L. Miller was named the chapter 13 Trustee in their bankruptcy case. On July 11, 2005, HSBC filed a proof of claim in the amount of $92,518.15 and asserted that it was a secured creditor. The claim was allowed, and the debtors' chapter 13 plan was confirmed on January 4, 2006.

On September 7, 2006, the Trustee filed a Complaint to avoid the defendants' mortgage on the debtors' real estate. The Trustee alleged that the mortgage was not properly acknowledged under Indiana law. As a result, she contended, the mortgage was not entitled to recordation under Indiana Code Section 32-1-2-18[3] and did not serve as constructive notice to bona fide purchasers or mortgagees under Indiana law. The Trustee asked that the mortgage lien be avoided pursuant to 11 U.S.C. § 544.

In their Answer, the defendants admitted the factual allegations of the Complaint and stated that they lacked knowledge concerning the Trustee's claim that the improperly acknowledged mortgage should be avoided. *See* R. 7 at 1. They also raised, as affirmative defenses, the principles of collateral estoppel and ratification. At

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[3] 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.

the conclusion of a telephonic pre-trial conference, the court directed the parties to file dispositive motions on the issues. The Trustee's Motion for Summary Judgment and supporting memorandum of law asserted that the debtors' 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. 12, 13. The Defendants' Statement of Genuine Issues and Brief in Response to Plaintiff's Motion for Summary Judgment urged the court to deny the Trustee's motion on the grounds that the Complaint was untimely and was barred by the doctrine of res judicata.[4] *See* R. 26 at 1, 3. When the briefing schedule had passed, the court took the matter under advisement.

Discussion

The Trustee, in her summary judgment motion, asks 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. She moves the court for summary judgment on her Complaint to Avoid Lien.

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

[4] Although the defendants concluded their introduction to their Brief with the statement that "[t]his [argument] precludes summary judgment in the Trustee's favor and compels the entry of summary judgment in favor of the Defendants," R. 26 at 3, the defendants did not file a motion for summary judgment.

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).

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 a 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 Logansport, 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 of the transfer of the property).[5] 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 –
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> . . .
>
> (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). "While it is true that the bankruptcy trustee generally acquires no greater rights in property than those held by the debtor, § 544(a)(3) is an exception to this limitation." *In re Sagamore Park Properties*, 1995 WL 1049898 at *2 (Bankr. N.D. Ind. 1995), *aff'd*, *Sagamore Park Centre Assocs. Ltd. P'ship v. Sagamore Park Props.*, 200 B.R. 332 (N.D. Ind. 1996). Through this strong-arm section, then, "[t]he estate gets what the debtor could *convey* under local law rather than only what the debtor *owned* under local law." *Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir.), *cert. denied*, 493 U.S. 893 (1989). Therefore, "if a hypothetical bona fide transferee

[5] "Actual knowledge of an encumbrance on a property is irrelevant under § 544(a)(3), regardless of any state law or actual notice." *Camp v. Select Portfolio Servs., Inc.(In re Camp)*, __ B.R. __, 2007 WL 2257653 (N.D. Ind. 2007) (citing *In re Sandy Ridge Oil Co., Inc.*, 807 F.2d 1332, 1336 (7th Cir. 1986); *In re Baldin*, 135 B.R. at 594).

from the debtor would come ahead of the 'true' owner's rights, then the trustee takes ahead of the true owner." *Id.*

The Trustee argues that the defendants' mortgage lien is defective and therefore not valid. To have a valid mortgage lien 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 thus 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 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"), *aff'd*, 2006 WL 2361814, at *5 (N.D. Ind. 2006)).

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:
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> > "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. Gregory v. Ocwen Fed'l Bank (In re Biggs)*, 377 F.3d 515, 518 (6th Cir. 2004) (reviewing statutory forms that fulfill 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. It does not substantially comply with the statutory prerequisites. Even though the language of the pre-printed mortgage was quite similar to the acceptable acknowledgment set forth in the statute, the court finds that it 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).

It is clear, therefore, that under the laws of Indiana "the recording of a document not entitled to be recorded does not afford constructive notice." *In re Sandy Ridge Oil Co., Inc.*, 510 N.E.2d at 669. "Following this rule, courts have held, for example, that recording a mortgage with a defective acknowledgment does not provide constructive notice." *Camp v. Select Portfolio Servs, Inc. (In re Camp)*, _ B.R. _, 2007 WL 2257653 at *5 (N.D. Ind. Aug. 2, 2007) (c*iting In re Baldin*, 135 B.R. at 602; *In re Stubbs*, 330 B.R. at 731).[6]

> 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; *see also In re Stubbs*, 330 B.R. at 730 ("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 both *Baldin* and *Stubbs*, the Indiana bankruptcy 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.

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[6] *In re Camp* affirmed the bankruptcy court's determination that a technical error in the definition of the Note's "Borrower" in the mortgage was an exception to the general rule: That error was not fatal to giving constructive notice of the encumbrance to a bona fide purchaser. *See In re Camp*, 2007 WL 2257653 at *6.

This court therefore 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. Williams v. Wells Fargo Fin'l Mississippi 2, Inc. (In re Rick's Auto Outlet)*, 327 B.R. 650, 653 (8th Cir. B.A.P. 2005) (reversing on ground that trustee can avoid deed of trust with defective acknowledgment under Mississippi law); *Burden v. CitGroup/Consumer Finance, Inc. (In re Armstrong)*, 366 B.R. 716, 719 (Bankr. E.D. Ky. 2007) (finding that trustee may avoid mortgage with defective acknowledgment under Kentucky law); *Geygan v. World Savings Bank, FSB (In re Nolan)*, 365 B.R. 804, 807 (Bankr. S.D. Ohio 2007) (same, under Ohio law); *Lyon v. Franklin Mtg. Funding (In re Shannon)*, 343 B.R. 585, 589 (Bankr. E.D. Ky. 2006) (same, under Kentucky law).

The defendants challenge the Trustee's complaint to avoid the mortgage lien first by asserting that it is untimely. They note that the Trustee filed her adversary complaint over a year after the defendants filed their proof of claim and eight months after the Special Confirmation Order was entered. They point out that the Trustee had more than a year to review and dispute the validity of the defendants' lien against the debtors' property but "has only now raised the issue." R. 26 at 3.

The defendants are correct that a trustee is limited in bringing a § 544 avoidance action. However, the time limitation is set by the statute of limitations found in 11 U.S.C. § 546, not by the date of the court's order of confirmation of a chapter 13 plan or a creditor's filing date for its proof of claim.[7] *See Telesphere Liquidating Trust v. Galesi*, 246 B.R. 315, 324-25 (N.D. Ill. 2000) ("As long as a trustee exercises the undeniable right . . . to bring a claim under Code § 544, the express language of Code § 546(a) brings its limitations period into play."). Section 546 sets a two-year limit on the avoidance powers of a trustee. *See Hildebrand v. Hay Imports, Inc. (In re Johnson)*, 279 B.R. 218, 225 (Bankr. M.D. Tenn. 2002) (noting that chapter 13 trustees, with a duty to identify objectionable claims and avoidable liens after claims are filed, are limited by § 546, not by the date of confirmation). In this case, the debtors filed their petition for relief on June 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 debtors' chapter 13 plan.

The defendants next contend that the Trustee's Complaint is barred by the doctrine of res judicata. "Res judicata forecloses all that which might have been litigated previously." *Brown v. Felsen*, 442 U.S. 127, 139 n. 10, 99 S. Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767 (1979). "The requirements for res judicata under federal law are (1) identity of the parties or their privies, (2) identity of the causes of action, and (3) a final judgment on the merits." *Highway J. Citizens Group v. U. S. Dep't of Transportation.*, 456 F.3d 734, 741 (7th Cir. 2006). An

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[7] 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 –
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> (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).

order confirming a chapter 13 plan has long been recognized as a final judgment for the purposes of res judicata. *See Delta Employees Credit Union v. Gonzalez (In re Gonzalez)*, 73 B.R. 754, 756 (N.D. Ill. 1987).

The defendants insist that the Trustee, a party to the confirmed plan, "could or should have asserted the claim in the earlier proceeding." R. 26 at 4 (quoting *Celli v. First Nat'l Bank (In re Layo)*, 460 F.3d 289, 292 (2d Cir. 2006)). Since the debtors' amended plan had been in place for more than 1 1/2 years, the defendants claim that the Trustee is barred by the principle of res judicata from bringing her Complaint now. Relying on the Second Circuit's analysis in *Layo*, the defendants urge this court to admonish the Trustee in this case that "checking the county records is the most basic type of due diligence" and that she should have challenged the mortgage lien earlier, during the plan confirmation process. *Id.* at 6 (quoting *In re Layo*, 460 F.3d at 293).

This court finds *Layo* to be factually 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.[8] 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 Second Circuit first stated that it was making a de novo review of "the dismissal of a claim on *res judicata* grounds." *Id.* It explained that

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[8] 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.

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. It is clear, therefore, that *In re Layo* is distinguishable on factual and legal grounds. It does not mention § 544 or discuss the avoidance powers of a trustee. Moreover, 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. In contrast to *Layo*, the case herein is an adversary proceeding filed to challenge the validity of the mortgage lien and to avoid it under § 544. It falls squarely under Rule 7001(2) of the Federal Rules of Bankruptcy Procedure, which states that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" is an adversary proceeding. Fed. R. Bankr. P. 7001(2).

The court finds that the Trustee properly brought an adversary proceeding, based on § 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 herein properly resolved the amount of HSBC's claim and the monthly payment amounts to be paid. *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"). Only after the plan was confirmed did the Trustee question the validity of the mortgage lien securing HSBC's claim, an issue requiring an adversary proceeding. *See* Fed. R. Bankr. P. 7001(2). The Fourth Circuit Court of Appeals emphasized the importance of the procedural requirements in the adversary setting:

> Because confirmation of a Chapter 13 plan is *res judicata* only as to issues that can be raised in the less formal procedure for contested matters, confirmation generally cannot have preclusive effect as to the validity of a lien, which must be resolved in an adversary proceeding.

Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995) (citing *In re Beard*, 112 B.R. at 955-56); *see also Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir.) ("Although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor"), *cert denied*, 543 U.S. 1021 (2004). This court agrees with *Beard* and the Fourth and Ninth Circuits' assessment that the initiation of an adversary proceeding, not the confirmation of a debtor's plan, establishes whether a creditor's lien on property of the estate is valid. *See Cen-Pen Corp.*, 58 F.3d at 93. The court finds that the Trustee properly and timely brought the adversary complaint to avoid the defendants' mortgage lien.

The defendants also argue that it is well established that a "party with adequate notice of a bankruptcy cannot ordinarily attack a confirmed plan." R. 26 at 7 (citing *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000)). According to the defendants, the Trustee had adequate notice and time to examine the note and mortgage and then to dispute their validity before confirmation, and thus she now is barred. The court agrees with the defendants' premise that the parties to a confirmed plan should not be allowed "to revisit or recharacterize" arguments and claims previously made. *See In re Harvey*, 213 F.3d at 321. That rule is clearly applicable to the facts in *Harvey:* Long after the debtor's chapter 13 plan had been confirmed and was being carried out pursuant to its terms, the debtor sought to modify its terms; only then did the creditor object to the plan's terms. The appellate court in *Harvey* would not permit the creditor an opportunity "to launch a later attack on a confirmed plan." *Id.* In this case, in contrast, the Trustee is neither attacking a provision of the confirmed plan nor revisiting issues that were resolved in the plan. Rather, she is challenging the validity of the mortgage underlying the defendants' lien. Procedurally, such a challenge must be brought as an adversary proceeding.

The defendants' penultimate assertion is that the law of the case doctrine bars the Trustee's complaint. They argue that "a court will ordinarily not reconsider its own decision made at an earlier stage, absent clear and convincing reason to do so." R. 26 at 8 (citing *Gertz v. Welch*, 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983)). Noting that the court confirmed the debtors' amended plan by Special Order, based on the Trustee's recommendation, the defendants insist that the court should not revisit its earlier decision that the amended plan complied with the requirements of the Bankruptcy Code.

"The law of the case doctrine establishes a presumption that a ruling made at one point in a lawsuit will govern throughout." *Trustees of the Pension, Welfare, and Vacation Fringe Benefit Funds v. Pyramid Electric*, 223 F.3d 459, 468 n.4 (7th Cir. 2000). The doctrine "only applies where a court actually decided the issue in question." *Universal Guar. Life Ins. Co. v. Coughlin*, 481 F.3d 458, 462 (7th Cir. 2007). In this case, the doctrine does not apply because neither the chapter 13 plan nor the special confirmation order resolved whether the defendants' underlying mortgage was invalid and avoidable. Moreover, the court finds that the Trustee did not ask the court to revisit issues raised in the confirmed plan or confirmation order. Rather, she brought an adversary proceeding to focus precisely on an issue which had not been examined during the confirmation process, namely the validity of the defendants' mortgage.

As a final argument, the defendants briefly point out that the debtors' real estate was vested in the debtors upon confirmation of the amended plan. It may be reinstated as property of the estate only if the case is dismissed prior to the debtor's discharge. R. 26 at 9 (citing *McRoberts v. Transouth Fin'l (In re Bell)*, 194 B.R. 192, 198 (Bankr. S.D. Ill. 1996) (citing, in turn, § 349(b))). They assert, therefore, that the real estate is no longer property of the estate subject to the control of the Trustee.

A trustee's strong-arm powers are granted "as of the commencement of the case" under § 544(a). The trustee continues as a hypothetical bona fide purchaser throughout the pendency of a chapter 13 case, limited of course by the statutory time period established in § 546. Moreover, "the general consensus among bankruptcy courts is that a chapter 13 trustee has the power to prosecute avoidance actions while chapter 13 debtors do not." *Hope v. First Family Fin'l Services of Georgia, Inc. (In re Harrison)*, 259 B.R. 794, 796 (Bankr. M.D. Ga. 2000) (finding that the trustee had standing to prosecute a post-confirmation avoidance action based upon her interest in exercising the power of her office). The chapter 13 Trustee herein, like the trustee in *Bell*, "has both statutory and constitutional standing to avoid unperfected liens under § 544(a) when such avoidance would increase the amount of disposable income to be allocated among unsecured creditors and thus benefit the estate." *In re Bell*, 194 B.R. at 196 (citing *In re Bequette*, 184 B.R. 327, 333 (Bankr. S.D. Ill. 1995)). The court finds that the Trustee properly brought a § 544(a)(3) complaint to avoid the mortgage lien at issue.

In conclusion, the court determines that, under Indiana law, the incomplete acknowledgment in the mortgage instrument before the court was defective. The defective acknowledgment invalidated the mortgage and failed to create a valid lien. Moreover, the recording of a mortgage with a defective acknowledgment did not provide constructive notice to subsequent bona fide purchasers. The court also finds that the Trustee's filing of the Complaint was timely under § 546 and was not barred by the doctrines of res judicata or law of the case. Consequently, the court determines that the Trustee may avoid the defendant's defective mortgage lien on the debtors' residential real estate under 11 U.S.C. § 544(a)(3). It further finds that there are no genuine issues of material fact and that the Trustee is entitled to judgment as a matter of law.

Conclusion

For the reasons presented in this Memorandum of Decision, the court grants the Motion for Summary Judgment of the Trustee Debra L. Miller on her Complaint to Avoid Lien concerning the mortgage lien held by the defendants Household Finance Corporation III and HSBC Mortgage Services.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Chief Judge
United States Bankruptcy Court