

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 07-40144)	
)	
KENNETH E. GROVES)	
LORI E. GROVES)	
)	
Debtors)	
)	
)	
KENNETH E. GROVES)	
LORI E. GROVES)	
DAVID ROSENTHAL, TRUSTEE)	
)	
Plaintiffs)	
)	
vs.)	PROC. NO. 07-4020
)	
CITIFINANCIAL MORTGAGE)	
COMPANY, INC.)	
)	
Defendant)	

DECISION

At Fort Wayne, Indiana on June 6, 2008.

By this adversary proceeding, the plaintiffs have asked the court to avoid a mortgage the debtors gave to the defendant, CitiFinancial Mortgage Company, upon the property commonly known as 11597 Candlewick Court, DeMotte, Indiana. The complaint is based upon the strong arm powers of § 544(a) of the United States Bankruptcy Code. 11 U.S.C. § 544(a). Plaintiffs argue that, although recorded, the mortgage was not properly acknowledged and, therefore, does not provide notice of the lienholder's interest, making that interest subordinate to the interest of the trustee and the bankruptcy estate. There are no disputed facts and the matter has been submitted to the court on the briefs of counsel.

This case is a replay of In re Stubbs, 330 B.R. 717 (Bankr. N.D. Ind. 2006), aff'd, 2006 WL 2361814 (N.D. Ind. 2006). Although the defendant's mortgage was notarized, it does not identify who appeared before the attesting official. Because of that deficiency, it did not meet the requirements of the recording statute, was not entitled to be recorded and, under Indiana law, does not provide constructive notice to third parties. See, In re Sandy Ridge Oil Co., 510 N.E. 2d 667 (Ind. 1987) (an instrument which is not entitled to be recorded does not afford constructive notice). As such, § 544(a) allows it to be avoided for the benefit of creditors. In re Stubbs, 330 B.R. 717 (Bankr. N.D. Ind. 2006), aff'd, 2006 WL 2361814 (N.D. Ind. 2006). See also, In re Baldin, 135 B.R. 586 (Bankr. N.D. Ind. 1991).

The only meaningful argument advanced by the defendant is that, since Stubbs was decided, the applicable statute has been changed, and this change supposedly rectifies any defect from which the mortgage suffers. Apparently in response to Stubbs, the Indiana legislature revised IC 32-21-4-1. The essence of the revision is that, so long as it has been accepted for recording, a recorded mortgage provides constructive notice, notwithstanding a defective acknowledgment. The effective date of the change was July 1, 2007. Since this adversary proceeding was not filed until after that date the defendant argues that its interest in the property is the superior one.

The relevant date for determining the rights of the parties is not the date this adversary proceeding was filed but the date upon which the debtors filed bankruptcy. Section 544 is quite specific temporally. The rights and powers given by that portion of the Bankruptcy Code are given "as of the commencement of the case." 11 U.S.C. § 544(a). The bankruptcy case was commenced on March 30, 2007, before the effective date of the changes to IC 32-21-4-1. As a result, those changes have no bearing on the court's decision and this matter continues to be controlled by

decisions such as Stubbs, Sandy Ridge Oil, and Baldin. Under those authorities, the defendant's mortgage can be avoided for the benefit of the estate.

Judgment will be entered accordingly.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court