

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

IN RE: CASE NO. 06-40121)
)
DOUGLAS CRAIG HARL)
MELANIE HARL)
)
Debtor)
)
)
DOUGLAS CRAIG HARL)
MELANIE ANN HARL)
DAVID A. ROSENTHAL, TRUSTEE)
)
Plaintiffs)
)
vs.) PROC. NO. 08-4005
)
LANDMARK FINANCIAL, INC.)
U.S. BANK, N.A.)
)
Defendants)

DECISION

At Fort Wayne, Indiana, on October 21, 2008.

By this adversary proceeding, the plaintiffs have asked the court to avoid a mortgage the debtors gave to the defendants upon the property commonly known as 9756 N. US. 421, Monticello, 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. The matter is before the court on the plaintiff's motion for summary judgment and defendant's response.¹

¹No brief was filed in response to the defendant's brief. That may have been because the defendant has titled his brief as a cross-motion for judgment. Given its content, however, the court

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Bankr.P.Rule 7056(c); Fed.R.Civ.P.Rule 56(c). Thus, summary judgment is essentially an inquiry as to “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

Rule 56 requires the moving party to inform the court of the basis of the motion and to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). In ruling on a summary judgment motion, the court accepts as true the non-moving party’s evidence, draws all inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

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

has characterized it as a brief filed in opposition to the plaintiff’s motion.

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 defendant argues that, since Stubbs was decided, the applicable statute has been changed, and this change supposedly rectifies any defect from which the mortgage suffers. That change occurred when the Indiana legislature recently 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 regardless of when the mortgage was recorded. The effective date of the change was July 1, 2008. According to the defendant, the addition of the language that “this subsection applies regardless of when [the] mortgage was recorded” is retroactive, such that it applies here.

In Indiana, statutes are generally not applied retroactively unless the legislature unequivocally states that they are retroactive. Western Smelting & Metals, Inc. v. Slater Steel, Inc., 621 F. Supp. 578, 585 (N.D. Ind. 1985). The present statute and any legislative history accompanying it do not provide that it is to be given retroactive effect. Neither is it, as the defendant contends, a remedial statute. A remedial statute is one that does not create new rights or take existing ones away. Western Smelting & Metals, Inc. v. Slater Steel, Inc., 621 F. Supp. 578, 585 (N.D. Ind. 1985). To some extent, the changes made to 32-21-4-1 do take away existing rights – those of a bona fide purchaser who would not otherwise be given constructive notice of a mortgage due to a defective acknowledgment. Thus, the statute does not fall within some sort of remedial exception which

would permit the statute to be given retroactive effect.

While the statute was obviously designed to cure (or eliminate) defects in recorded mortgages, nothing about it suggest that it was designed to apply to (and therefore eliminate) rights that had already vested, before the statute was enacted, much less to actions that had been brought prior to its enactment. Consequently, although it applies to mortgages regardless of the date the mortgage was recorded, vis-a-vis rights such as those of the trustee under § 544, the revised I.C. 32-21-4-1 operates only prospectively.

The trustee's rights are determined as of the date of the petition. The debtors' bankruptcy case was filed on May 24, 2006, prior to the effective date of the most recent changes to I.C. 32-21-4-1. 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