

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
TIMOTHY ERIC GYSIN and	)	CASE NO. 07-32739 HCD
DONNA ELIZABETH GYSIN,	)	CHAPTER 13
	)	
DEBTORS.	)	
	)	
	)	
DEBRA L. MILLER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 08-3018
	)	
LaSALLE BANK NATIONAL ASSOCIATION as	)	
Trustee in Trust for the Holders of MERRILL	)	
LYNCH MORTGAGE INVESTORS TRUST	)	
SERIES 2002-AFCI,	)	
and	)	
ALLIANCE FUNDING, a Division of	)	
Superior Bank, FSB,	)	
	)	
DEFENDANT.	)	

Appearances:

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

Mark R. Galliher, Esq., attorney for defendant LaSalle Bank National Association, Doyle & Friedmeyer, P.C., 135 North Pennsylvania Street, Suite 2000, Indianapolis, Indiana 46204.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 24, 2009.

Before the court are cross-motions for summary judgment filed by the plaintiff Debra L. Miller, Chapter 13 Trustee (“Trustee”), and by the defendant LaSalle Bank National Association, in Trust for the Holders of Merrill Lynch Investors Trust Series 2002-AFCI (“LaSalle” or “defendant”). The Trustee initiated this adversary proceeding by asking the court, pursuant to her strong arm powers under 11 U.S.C. § 544(a), to avoid the mortgage the debtors executed and gave to LaSalle’s predecessor in interest,

Alliance Funding, a division of Superior Bank, FSB. The issue is whether the improper acknowledgment in the mortgage invalidates the lien and allows the Trustee to avoid the mortgage, in light of the Indiana legislature's recent amendments to the statute concerning recorded mortgages, Indiana Code 32-21-4-1.

### 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 are not in dispute. On April 25, 2001, the debtors executed and delivered to LaSalle's predecessor a mortgage on their home in Peru, Indiana, to secure payment of a promissory note. However, the mortgage document did not identify, in the acknowledgment (sometimes called the notary jurat), the individuals who appeared before the notary and executed the document. *See* R. 1, Ex. B. Instead, the appropriate line for the names of the mortgage signors was left blank. Nevertheless, the mortgage was filed in the office of the Recorder of Miami County, Indiana, on May 1, 2001. The debtors filed their voluntary petition for relief under chapter 13 on October 18, 2007, and Debra L. Miller was named the chapter 13 Trustee in the case.

The Trustee filed a complaint to avoid the defendant's mortgage on the ground that, under Indiana Code 32-21-2-3, an improperly acknowledged mortgage was defective and thus was not entitled to

be recorded. “Under this statute, a mortgage is eligible to be recorded if it is ‘(1) acknowledged by the grantor or (2) proved before a (A) judge . . . [or] (E) notary public . . . .’” *Fifth Third Bank, Indiana v. Edgar County Bank & Trust*, 482 F.3d 904, 906 (7th Cir. 2007). According to the Trustee, this unacknowledged mortgage did not serve as constructive notice of the lienholder’s interest to a bona fide purchaser and should be avoided pursuant to 11 U.S.C. § 544(a). LaSalle responded that the Trustee was precluded from asserting her claim because Indiana Code 32-21-4-1 was amended to provide that a mortgage which fails to comply with Indiana Code 32-21-2-3 will nevertheless be effective to provide constructive notice to later buyers as long as the mortgage has been recorded.

Each party filed a Motion for Summary Judgment. The parties agree and the record shows that “there is no genuine issue as to any material fact,” but each claims entitlement to 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). 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.” *The First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 567 (7th Cir. 2009) (citations, internal quotations omitted). The issue before the court, the effect of the 2007 amendment to Indiana Code 32-21-4-1 on the Trustee’s avoidance claim, is a question of law.

A trustee’s avoidance powers arise under § 544(a) of the Bankruptcy Code, which grants a trustee the power to avoid any transfer of the debtor’s property that is voidable. The trustee obtains the status of “a bona fide purchaser of real property” (“BFP”) on the date the debtor filed the petition commencing the bankruptcy case. The trustee’s BFP status allows her to use applicable state law to avoid certain transfers or encumbrances when they would be voidable by a BFP. *See Sandy Ridge Oil Co., Inc. v. Centerre Bank Nat’l Ass’n. (In re Sandy Ridge Oil Co., Inc.)*, 807 F.2d 1332, 1333 (7th Cir. 1986). The parties do not question this Trustee’s strong arm powers. She asserts those powers in this case to avoid the mortgage lien

held by LaSalle which, she claims, is invalid. LaSalle argues, however, that the Trustee is divested of those powers pursuant to the 2007 amendment to Indiana Code 32-21-4-1.

The court begins by considering the validity of the mortgage under Indiana law prior to the enactment of the 2007 amendment. The conveyance and recording requirements for real property in Indiana are found in Title 32, Article 21 of the Indiana Statutes. The parties focus on two of those statutes. Indiana Code 32-21-4-1 sets forth mortgage recording requirements and priority rules for properly recorded mortgages; and Indiana Code 32-21-2-3 requires that, in order for a mortgage to be eligible to be recorded, the mortgage must be acknowledged by the grantor or proved before a notary public or other authorized official. Therefore, to provide constructive notice to subsequent purchasers, a mortgage “must be properly acknowledged and recorded.” *Camp v. Select Portfolio Servs. Inc. (In re Camp)*, 2007 WL 2257653 at \*4 (N.D. Ind. 2007). *Camp* describes the state’s long-standing principle, as seen in its judicial interpretations:

“[T]he 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 667, 669 (Ind. 1987) (collecting cases). Following this rule, courts have held, for example, that recording a mortgage with a defective acknowledgment does not provide constructive notice. *See In re Baldin*, 135 B.R. [586] at 602 [Bankr. N.D. Ind. 1991]; *in re Stubbs*, 330 B.R. 717, 731 (Bankr. N.D. Ind. 2005), *aff’d*, No. 2:05-CV-439, 2006 WL 2361814, at \*5 (N.D. Ind. 2006).

*Id.* at \*5. Indiana bankruptcy cases consistently have followed *Sandy Ridge*, *Stubbs* and *Baldin*. *See, e.g., In re Canaday*, 376 B.R.260, 265-68 (Bankr. N.D. Ind. 2007). They have found that mortgages that do not identify who appeared before the attesting official (a) are deficient, (b) do not meet the requirements of the recording statute, (c) are not entitled to be recorded, (d) do not provide constructive notice to third parties, and (e) can be avoided by a trustee under § 544(a) for the benefit of creditors. *See, e.g., Groves v. Citifinancial Mtg. Co., Inc. (In re Groves)*, No. 07-40144, Adv. No. 07-4020, Decision at \*2 (Bankr. N.D. Ind. June 6, 2008). Therefore, a long line of state and federal decisions has established that the defective acknowledgment in the debtors’ mortgage held by LaSalle did not meet the requirement of the recording statute and therefore that the mortgage was not eligible to be recorded. Even though it was in fact recorded, it does not provide notice to third parties. *See In re Stubbs*, 2006 WL 2361814 at \*5 (“The well-acceptable

rule in Indiana is that a recorded instrument which is not duly acknowledged does not provide constructive notice.”). The mortgage therefore is invalid under those cases and is subject to avoidance by the Trustee under 11 U.S.C. § 544(a).

However, the statute governing the “priority of recorded transactions,” Ind. Code 32-21-4-1, was amended in 2007. Before July 2007, the statute provided:

(a) The following must be recorded in the recorder’s office of the county where the land is situated:

- (1) A conveyance or mortgage of land or of any interest in land.
- (2) A lease for more than three (3) years.

(b) A conveyance, mortgage, or lease takes priority according to the time of its filing. The conveyance, mortgage, or lease is fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration if the purchaser’s, lessee’s, or mortgagee’s deed, mortgage, or lease is first recorded.

Ind. Code 32-21-4-1. On July 1, 2007, the amended statute, with its added subsection (c), took effect:

(c) This subsection applies only to a mortgage. If:

- (1) an instrument referred to in subsection (a) is recorded; and
- (2) the instrument does not comply with the:
  - (A) requirements of:
    - (i) IC 32-21-2-3; or
    - (ii) IC 32-21-2-7; or
  - (B) technical requirements of IC 36-2-11-16(c);

the instrument is validly recorded and provides constructive notice of the contents of the instrument as of the date of filing.

Ind. Code 32-21-4-1(c) (effective July 1, 2007). LaSalle contended that subsection (c) clearly established that a recorded mortgage like the one now before the court provided constructive notice despite its failure to comply with Indiana Code 32-21-2-3. The Trustee countered that subsection (c) did not apply to mortgages executed prior to July 1, 2007.

The court agrees that the 2007 amendment to the statute applies in this case. The new subsection (c), which became law on July 1, 2007, was in effect on October 18, 2007, the date the debtors’ bankruptcy petition was filed and the Trustee’s avoidance powers accrued. *See In re Groves*, Adv. No. 07-4020,

Decision at \*2 (“The relevant date for determining the rights of the parties is . . . the date upon which the debtors filed bankruptcy.”). However, the court does not agree with LaSalle’s assertion that the amendment “merely changed the constructive notice effect to be given to a recorded mortgage containing technical defects.” R. 34 at 2. No “mere” change has occurred. The 2007 amendment, made apparently in response to *In re Stubbs*,<sup>1</sup> was intended to overturn “the well established case law of Indiana, that the recording of a document not entitled to be recorded does not afford constructive notice.” *In re Baldin*, 135 B.R. at 596-97; *see also, e.g., Reeves v. Hayes*, 95 Ind. 521 at \*1 (Ind. 1884) (“We suppose there can be no question that the fact that the mortgage was actually recorded, without being acknowledged or approved, as the statute required to entitle it to be recorded, is not notice.”) (quoting *Deming v. State, ex rel. Miller*, 23 Ind. 416 (1864)). One purpose of the revision, perhaps the sole purpose, appears to be to divest a BFP and a bankruptcy trustee of the right to avoid an improperly recorded mortgage.

The question is whether the Trustee can avoid LaSalle’s mortgage lien after subsection (c) was inserted into the statute. LaSalle contended that the Trustee had constructive notice of LaSalle’s recorded mortgage under Indiana Code 32-21-4-1(c), even though the mortgage did not comply with Indiana Code 32-21-2-3. *See* R. 31 at 4; R. 34 at 2. Because the mortgage was deemed to be validly recorded, LaSalle argued, the Trustee could not avoid its lien. The Trustee responded that, under this amendment, “a mortgage executed after July 1, 2007, the effective date of the amendment, would be considered validly recorded and provide constructive notice, which would defeat the Trustee’s action.” R. 33 at 2-3. However, the amendment does not affect this mortgage, which was executed and recorded in 2001, she insisted. The

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The Ohio legislature, like Indiana’s, responded to the bankruptcy trustees’ avoidance of mortgages that were avoidable “due to the failure of the lenders and their closing agents to ensure adherence to the long-standing requirement that mortgages be signed in the presence of two witnesses.” *In re Carte*, 303 B.R. 338, 340 (Bankr. S.D. Ohio 2003). The legislature passed legislation that “cure[d] defectively witnessed mortgages by irrefutably presuming their validity.” *Id.* Cases reviewing the effects of legislative changes on bankruptcy decisions include *Kovacs v. First Union Home Equity Bank (In re Huffman)*, 408 F.3d 290 (6th Cir. 2005), *In re Potts*, 353 B.R. 874 (Bankr. N.D. Ohio 2006); *In re DeLong*, 273 B.R. 141 (Bankr. S.D. Ohio 2001); *see also In re Androes*, 382 B.R. 805 (Bankr. D. Kan. 2008); *In re Hickman*, 367 B.R. 620 (Bankr. E.D. Tenn. 2007).

court is asked to determine whether the amended statute, as written, applies to all mortgages or only those executed after July 1, 2007, the effective date of the amendment. It is guided by the rules of statutory interpretation established by the Supreme Court of Indiana:

When faced with a question of statutory interpretation, we first examine whether the language of the statute is clear and unambiguous. If it is, we need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings. This Court has articulated that, “[t]he primary purpose in statutory interpretation is to ascertain and give effect to the legislature’s intent.” The statute itself is the best evidence of legislative intent, “and we strive to give the words in the statute their plain and ordinary meaning.” We construe statutes only where there is some ambiguity which requires construction. The plain meaning of the statute, if it has one, must be given effect.

*State of Indiana v. American Family Voices, Inc.*, 898 N.E.2d 293, 297 (Ind. 2008) (citations omitted).

The court finds that some parts of Indiana Code 32-21-4-1(c) are clear. The new subsection plainly states that it applies only to mortgages. Although the court suggests some syntactic changes to clarify the awkward wording of the amendment, in its view subsection (c) deems a mortgage to be validly recorded and to give constructive notice, even if the mortgage “does not comply with the requirements” of any of three listed state statutes, if (or, as long as) the “instrument referred to in subsection (a) is recorded.” The parties, however, have different interpretations of the phrase in paragraph (c)(1), “an instrument referred to in subsection (a) is recorded.” LaSalle asserts that any recorded mortgage qualifies; the Trustee claims that only mortgages recorded after July 1, 2007, qualify.

The court finds that paragraph (c)(1) of the 2007 amendment is ambiguous; it gives no clear indication whether it was to apply to mortgages executed or recorded prior to July 1, 2007. The phrase “an instrument referred to in subsection (a)” makes reference to the initial mandate in paragraph (a) requiring that a mortgage “must be recorded in the recorder’s office of the county where the land is situated.” Subsection (c)(1) thus starts with that present command – the mortgage must be recorded in the proper location – and then further requires that the mortgage is recorded. The legislature did not write descriptively that the mortgage “is a recorded instrument,” but rather wrote the present active verb “is recorded.” In the court’s view, the natural interpretation of this language is that the mortgage of paragraph (c)(1) must be

recorded in the right location and at the present time – that is, it is recorded on or after July 1, 2007. Subsection (c)(2) then adds that, even if that mortgage does not comply with other requirements listed in the three mentioned statutes, it will be treated as a validly recorded instrument which provides constructive notice. This construction gives the words in the statute their plain and ordinary meaning. It gives effect to the statute as written without unduly restricting or expanding the scope of the statute beyond the meanings of the words themselves.

However, the Indiana legislature apparently recognized the ambiguity of subsection (c) and realized that the 2007 amendment was susceptible to more than one interpretation. It amended the statute a year later, adding a sentence (in italics below) to subsection (c):

(c) This subsection applies only to a mortgage. *This subsection applies regardless of when a mortgage was recorded.* If:

- (1) an instrument referred to in subsection (a) is recorded; and
- (2) the instrument does not comply with the:

(A) requirements of:

- (i) IC 32-21-2-3; or
- (ii) IC 32-21-2-7; or

(B) technical requirements of IC 36-2-11-16(c);

the instrument is validly recorded and provides constructive notice of the contents of the instrument as of the date of filing.

Ind. Code 32-21-4-1(c) (effective July 1, 2008) (emphasis added). The 2008 amendment, therefore, requires the application of the statute to every mortgage, regardless of its recordation date. This addition to the statute is the first clear indication that the legislature intended the statute to apply to any mortgage that meets the criteria of (c)(1) and (2), regardless of its recording date.

LaSalle acknowledged that the 2008 amendment, which went into effect July 1, 2008, did not affect the Trustee’s avoidance power, which she obtained on October 18, 2007, the date of the petition. Nevertheless, LaSalle asserted that the Indiana Legislature passed the 2008 amendment “to make its intention even more clear.” R. 34 at 2. The amendment was “intended to cure a defect or mischief that

existed in a prior statute,” and that the mischief “was being interpreted to grant an unjustified windfall to later purchasers and mortgagees, who had no legitimate basis to expect that a recorded mortgage would not be enforceable against them.” R. 31 at 5. The court finds, to the contrary, that the legislature’s statutory changes inure to the benefit of mortgage lenders and their closing agents, who have failed to uphold the long-standing recording requirements demanding compliance with the formalities of execution before a document is eligible for recordation. See *Fifth Third Bank, Indiana v. Edgar County Bank & Trust*, 482 F.3d 904, 906 (7th Cir. 2007) (describing Ind. Code 32-21-3-2 as “simple as can be,” explaining that “a mortgage is *eligible* to be recorded” if it is acknowledged or proved (emphasis added)); see also *In re Carte*, 303 B.R. 338, 340 (Bankr. S.D. Ohio 2003) (discussed *infra* fn. 1).

In Indiana, “[t]he general rule is that unless there are strong and compelling reasons, statutes will not be applied retroactively.” *In re Estate of Powers*, 849 N.E.2d 1212, 1217 (Ind. App. 2006). Because the court finds that there are no strong and compelling reasons for giving the 2008 amended provision retroactive application, it applies the statute in a prospective manner. Nothing in the amendment suggests that the change was intended to apply retroactively, and LaSalle has not proven that the legislature unambiguously and unequivocally intended it. See *Miller Brewing Co. v. Indiana Dept. of State Revenue*, \_\_\_ N.E.2d \_\_\_, 2009 WL 690278, at \*5 (Ind. March 13, 2009) (citing *Isaak Walton League of America v. Lake Cty. Prop. Tax Assessment Bd. of Appeals*, 881 N.E.2d 737, 741 (Ind. Tax Ct. 2008)). Moreover, it finds that the 2007 amendment to Indiana Code 32-21-4-1, which applied to mortgages recorded in the right location and at the present time (on or after July 1, 2007), does not apply to the mortgage in this case, executed and recorded in 2001, and thus does not defeat the Trustee’s action in this case. The court determines that the amended statute does not divest the Trustee of her rights as a BFP under the law governing at the commencement of the case.

The court determines, therefore, that the general rule upholding the policies underlying the recording statute in Indiana still applies and holds:

The purpose of the Indiana recording statutes in issue is to put all the world on notice of prior liens and encumbrances thereby providing stability to commercial transactions involving the transfers and encumbrances of realty. Strict compliance with this statute permits innocent third

parties to rely on the authenticity and validity of documents in that they were properly executed, acknowledged, and recorded.

*In re Stubbs*, 330 B.R. at 731. This court finds that the debtors' mortgage herein, containing an acknowledgment that failed to name those who appeared before an attesting officer to acknowledge their execution of the mortgage, was not in compliance with Indiana Code 32-21-2-3 and was not eligible to be recorded under Indiana Code 32-21-4-1. The actual recording of that defective instrument in 2001 did not validate the mortgage and did not serve as constructive notice to a bona fide purchaser. The mortgage lien therefore is avoidable pursuant to 11 U.S.C. § 544(a). The Trustee, in the exercise of her strong-arm powers as a hypothetical bona fide purchaser, can avoid the defendants' mortgage for the benefit of the estate.

#### CONCLUSION

For the reasons presented above, the Motion for Summary Judgment of the Plaintiff Debra L. Miller, Chapter 13 Trustee, is granted. The relief requested in the Trustee's Complaint is granted. The Motion for Summary Judgment of the defendant LaSalle Bank National Association is denied.

SO ORDERED.

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