

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JAMES RALPH CHRISTIE and	)	CASE NO. 08-30946 HCD
DAWN MARIE CHRISTIE,	)	CHAPTER 13
	)	
DEBTORS.	)	
	)	
	)	
DEBRA L. MILLER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 08-3031
	)	
TEACHERS CREDIT UNION,	)	
	)	
DEFENDANT.	)	

Appearances:

Rebecca Hoyt Fischer, Esq., attorney for plaintiff, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601-1438; and

John W. VanLaere, Esq., attorney for defendant, Jones Obenchain, LLP, 600 KeyBank Building, P.O. Box 4577, South Bend, Indiana 46634-4577.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 31, 2009.

Before the court are the Complaint to Avoid Lien filed by the plaintiff Debra L. Miller, Chapter 13 Trustee (“Trustee” or “plaintiff”), and the Answer to Complaint filed by the defendant Teachers Credit Union (“TCU” or “defendant”). The Trustee initiated this adversary proceeding by asking the court, pursuant to her avoidance powers under 11 U.S.C. § 544(a), to avoid the mortgage the debtors executed and gave to TCU. The defendant answered and asserted the affirmative defense that the complaint failed to state a cause of action upon which relief could be granted. The parties filed stipulated facts and briefs, and the court took the Complaint 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 were stipulated by the parties. On April 9, 2002, the debtors executed and delivered to TCU a mortgage (“first mortgage”) on real estate in Walkerton, Indiana, to secure payment of a promissory note in the amount of \$76,900. The mortgage was recorded with the St. Joseph County Recorder on April 17, 2002. On October 18, 2002, the debtors executed and delivered to TCU another mortgage (“second mortgage”) with respect to that same real estate to secure a promissory note in the amount of \$35,400. However, the second mortgage document did not identify, in the acknowledgment (sometimes called the notary jurat), the debtors as the individuals who appeared before the notary and executed the document. Nevertheless, the second mortgage was recorded in the office of the St. Joseph County Recorder on November 4, 2002. The debtors filed their voluntary petition for relief under chapter 13 on March 31, 2008, and Debra L. Miller was named the chapter 13 Trustee in the case. The defendant filed two proofs of claim in the amounts of \$70,341.35 and \$34,076.23. The Trustee asserts that the second mortgage, with the defective acknowledgment, should be avoided. (The second mortgage, the mortgage at issue herein, will be referred to as “the mortgage” unless there is a need to distinguish between the two mortgages.)

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 improperly acknowledged 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). *See* R. 1 at 2. TCU responded that the Trustee could not avoid the mortgage because Indiana Code 32-21-4-1 was amended in 2007 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.<sup>1</sup> *See* R. 19 at 4-6.

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 TCU which, she claims, is defective. TCU 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

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<sup>1</sup> The parties agree, and the court confirms, that the mortgage is valid and binding between the debtors, James Ralph Christie and Dawn Marie Christie, and TCU. *See* R. 19 at 4, R. 20 at 4.

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, because the defective acknowledgment in the debtors’ mortgage held by TCU did not meet the requirement of the recording statute, 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). TCU states that the Indiana legislature revised the statute in 2007 to establish that a mortgage recorded with a defective acknowledgment nonetheless provides constructive notice. *See* R. 19 at 4-5. In the court's view, perhaps a purpose of the legislature's revision was to divest a BFP and a bankruptcy trustee of the right to avoid an improperly recorded mortgage.<sup>2</sup>

The court determines, nevertheless, that the 2007 amendment to the statute applies in this case.

The new subsection was in effect on March 31, 2008, the date the debtors filed their bankruptcy petition and

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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).

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.”). The question is whether the Trustee can avoid TCU's mortgage lien after subsection (c) was inserted into the statute. TCU contends that the Trustee cannot avoid the mortgage because the amended statute, Indiana Code 32-21-4-1(c), establishes that even a defective acknowledgment on a mortgage provides constructive notice of TCU's recorded mortgage. *See* R. 19 at 5. The Trustee responds 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, as of the date that it was recorded, which would defeat the Trustee's action.” R. 20 at 2. However, the amendment does not affect this mortgage, which was executed and recorded in 2002, she insists. The court is asked to determine whether the amended statute affects 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 v. American Family Voices, Inc.*, 898 N.E.2d 293, 297 (Ind. 2008) (citations omitted).

TCU asserts that the language in the 2007 version of Indiana Code 32-21-4-1 “is clear enough to not need interpretation from the courts to divine its meaning.” R. 19 at 4. 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, differ about which mortgages

come under the umbrella of paragraph (c)(1). The Trustee claims that only mortgages recorded on or after July 1, 2007, qualify, but TCU asserts that it does not matter when the mortgage was recorded.

The court finds that the paragraph (c)(1) phrase “an instrument referred to in subsection (a) is recorded” 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. For that reason, the court declines to follow TCU’s suggestions that “‘is recorded’ could easily be interpreted to mean the state of having been recorded” and that “[i]t does not matter when the mortgage was recorded.” R. 22 at 2, 5.

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 retroactively to any mortgage that meets the criteria of (c)(1) and (2). However, the new sentence applies only to bankruptcy cases filed on or after July 1, 2008, and therefore not to the one now before this court, which was filed three months earlier, on March 31, 2008. The parties agree, but TCU asks the court to give “respectful consideration to subsequent changes in the statute.” R. 19 at 3. In its view, the 2008 amendment, coming only a year after the 2007 version went into effect, “suggests that the legislature meant the 2007 version to apply ‘regardless of when a mortgage was recorded.’” R. 22 at 3. TCU thus argues that “an Indiana court would likely find that the 2007 version of the statute would apply to TCU’s mortgage even though the mortgage was filed before the 2008 amendment went into effect.” *Id.*

This court cannot agree with TCU’s position. In its view, an Indiana court would recognize that the legislature’s statutory change in 2008, in order to excuse the mistakes of mortgage lenders and closing agents, set aside 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. 2). However, an Indiana court also would recognize that the legislature did not reflect that intent in its 2007 amendment.

Under Indiana law, unless the legislature indicates to the contrary, statutes are treated as operating prospectively, not retrospectively. *See Indiana Dept. of Envir'l Mgmt. v. Medical Disposal Serv., Inc.*, 729 N.E.2d 577, 581 (Ind. 2000) (stating the general rule); *see also Izaak Walton League v. Lake County Prop. Tax Assessment Bd. of Appeals*, 881 N.E.2d 737, 741 (Ind. Tax 2008) (applying general rule of prospective intent to statutory amendments, as well); *In re Estate of Powers*, 849 N.E.2d 1212, 1217 (Ind. App. 2006) (“The general rule is that unless there are strong and compelling reasons, statutes will not be applied retroactively.”). Statutes traditionally are construed prospectively so that they do not impair vested rights acquired under existing laws. Because this 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. TCU has not met its burden of proving that the legislature intended, in its 2007 amendment, to treat all flawed recorded mortgages as providing constructive notice to BFPs and bankruptcy trustees. *See Miller Brewing Co. v. Indiana Dept. of State Revenue*, \_\_\_ N.E.2d \_\_\_, 2009 WL 690278, at \*5 (Ind. 2009) (citing *Isaak Walton League*, 881 N.E.2d at 741). Moreover, the court finds that the 2007 amendment to Indiana Code 32-21-4-1 does not apply retroactively 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 2007 amended statute does not divest the Trustee of her rights as a BFP under the law governing at the commencement of the case.

TCU cites to two cases to support its argument that the debtors’ mortgage to TCU, although defective, provided constructive notice to the Trustee because it was recorded. It relied upon *Indi Investments, LLC v. Credit Union 1*, 884 N.E.2d 896 (Ind. App. 2008), to bolster its assertion that the Trustee must be charged with actual notice of the mortgage because it could have conducted a title search and could have found the first mortgage on the property. This court finds, however, that *Indi Investments* focused on the statutes governing sheriff’s sales and notices of sheriff’s sales, and it is therefore not of precedential value in this case. TCU also relied upon *Bank of New York v. Nally*, 820 N.E.2d 644 (Ind. 2005), when

arguing that the Trustee had constructive notice of TCU's mortgage. However, both the Supreme Court of Indiana and the appellate court, in *Indi*, reiterated the clear bedrock law in Indiana that "[a] mortgage provides constructive notice to subsequent purchasers when it is *properly acknowledged and recorded*." *Id.* at 648 (italics added); *see also Indi Investments*, 884 N.E.2d at 900 ("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.") (citing *Keybank Nat. Ass'n v. NBD Bank*, 699 N.E.2d 322, 327 (Ind. App. 1998)).

The court, in summary, finds that the 2007 amendment to Indiana Code 32-21-4-1 applies in this case, which was filed on March 31, 2008. The Trustee's avoidance powers thus are governed by this amended statute. Nevertheless, because the newly added subsection (c) affects mortgages that were recorded in the right location and at the present time (on or after July 1, 2007), it does not apply to the mortgage in this case, executed and recorded in 2002. The 2007 amendment thus does not defeat the Trustee's action in this case. 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. Consequently, the debtors' mortgage herein, containing an acknowledgment that failed to name the debtors 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 does not validate an invalid mortgage and does 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 relief sought in the Complaint to Avoid Lien filed by the Trustee Debra L. Miller is granted. The mortgage lien held by Teachers Credit Union is avoided pursuant to 11 U.S.C. § 544(a).

SO ORDERED.

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