

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
TRENT R. JONES and	)	CASE NO. 09-32472 HCD
SHAWN MARY JONES,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
J. RICHARD RANSEL,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 10-3023
	)	
BRIAN K. MISER,	)	
	)	
DEFENDANT.	)	

Appearances:

J. Richard Ransel, Esq., Trustee, counsel for plaintiff, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516; and

Wendy K. Walker-Dyes, Esq., counsel for defendant, Baker & Daniels LLP, 202 South Michigan Street, Suite 1400, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 22, 2011.

Before the court is the Motion for Summary Judgment filed by the plaintiff J. Richard Ransel, chapter 7 Trustee (“plaintiff” or “Trustee”) of the bankruptcy case of Trent R. Jones and Shawn Mary Jones, chapter 7 debtors (“debtors”). He seeks to avoid the debtors’ pre-petition transfer of real property to the defendant, pursuant to 11 U.S.C. § 544(a)(3), and to avoid the transfer, which was recorded post-petition, pursuant to 11 U.S.C. § 549(a)(1). The defendant Brian K. Miser (“defendant”) has responded. After the briefing schedule had passed, the court took the matter under advisement.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F).

## BACKGROUND

The debtors filed for relief under chapter 7 of the Bankruptcy Code on May 26, 2009, and the chapter 7 Trustee brought this adversary proceeding on February 26, 2010. The underlying facts are not in dispute. Prior to the bankruptcy, the debtors owned an undivided one-half interest in the real property commonly known as 30 W. Second Street in Peru, Indiana. Ted and Susan Jones owned the other undivided one-half interest. The defendant purchased the real property, both the debtors' half and the Ted/Susan Jones half, on November 3, 2006, by warranty deed. The deed was recorded more than two and one-half years later, on June 19, 2009, in the office of the Miami County Recorder. The recording occurred after the debtors had filed bankruptcy. However, the defendant had leased the storefront to an antique furniture store soon after he purchased the real estate. That business operated in the storefront portion of the property and remained in operation from December 2006 until September 2010.

The Trustee alleged in the Complaint that, as of the date of the debtors' filing in bankruptcy, the debtors owned half the real estate as a matter of record. He then claimed that he, as Trustee, had the status of bona fide purchaser of real property on the date of the commencement of the case, pursuant to 11 U.S.C. § 544(a)(3), and that he could avoid any transfer of property of the estate that occurred after the commencement of the case pursuant to 11 U.S.C. § 549(a)(1).

The defendant, by counsel, filed an Answer to the Complaint.<sup>2</sup> He admitted that the debtors were the previous owners of an undivided one-half interest in the property, but denied that, as of the date of filing the bankruptcy petition, the debtors owned half of the real estate as a matter of record. As affirmative defenses, the defendant asserted that the plaintiff had "actual, constructive, implied, or inquiry notice of Miser's ownership and possession of the property" and that the defendant "did not receive any post-petition transfer from the Debtors." R. 13 at 3.

The Trustee then filed a Motion for Summary Judgment and memorandum in support. Based upon the undisputed facts, the Trustee contended that his interest in the real estate was superior to that of an

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<sup>2</sup> The defendant, pro se, had responded earlier by letter to the court.

owner who had not perfected his interest in the property by recording the deed in a timely fashion. He claimed that, as a bona fide purchaser, he held a superior interest in this property under § 544(a)(3). He further asserted that as Trustee he could avoid a transfer of property made after the commencement of the case under § 549(a)(1).

In his Response, the defendant denied that the Debtors owned any interest in the real estate on the petition date. He argued that his leasing of the storefront reflected his possession of the property and use of it from December 2006 until September 2010. The defendant claimed that the Trustee could not use the strong-arm power of § 544(a)(3) to avoid the debtors' portion of the defendant's pre-petition purchase of the property, although the deed was unrecorded, because the subsequent possession of the property provided notice. In addition, he contended, the Trustee could not avoid the defendant's purchase of the debtors' interest in the property as a post-petition transfer because the transfer was deemed complete upon the pre-petition execution and delivery of the deed. He further asserted that the Trustee's claim was barred by the statute of limitations.

### DISCUSSION

The plaintiff moves for summary judgment on his Complaint. Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. "To avoid summary judgment . . . the nonmoving party [is] required to set forth 'specific facts showing that there is a genuine issue for trial,' Fed. R. Civ. P.

56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that a real factual dispute exists, the nonmovant must produce evidence of the dispute rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

The parties dispute two strictly legal issues: whether the Trustee has the authority under his strong-arm powers in § 544(a)(3) to avoid a lien on property purchased pre-petition and recorded post-petition; and whether the Trustee has the authority under § 549(a)(1) to avoid a transfer of property made after the commencement of the case.

Section 544(a)(3), often called the strong-arm statute, allows a bankruptcy trustee to stand in the shoes of a bona fide purchaser and authorizes a trustee to avoid an encumbrance when a bona fide purchaser could do so.<sup>3</sup> See *In re Hershman*, 417 B.R. 97, 99 (N.D. Ind. 2009). “A bona fide purchaser who buys real estate in good faith but without actual or constructive notice that a third party has rights in the property takes title to the property free and clear of the third party’s claim,” and a trustee has the same power. *Id.* (citing *In re Sandy Ridge Oil Co., Inc.*, 807 F.2d 1332, 1333 (7th Cir.1986)). State law governs who is a “bona fide

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<sup>3</sup> Section 544(a)(3) of the Bankruptcy Code states:

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 –

...

(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 and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3).

purchaser” and what is required for perfection against such an entity. *See In re Sandy Ridge Oil Co., Inc.*, 807 F.2d at 1336.

“In Indiana, a bona fide purchaser takes free of any transfer of real estate which is unrecorded and of which he has no constructive or actual notice.” *In re Sagamore Park Properties*, No. 94-40175, 1995 WL1049898 at \*2 (Bankr. N.D. Ind. Dec. 4, 1995), *aff’d*, 200 B.R. 332 (N.D. Ind. 1996) (emphasis added). The Honorable Judge Robert E. Grant, Bankruptcy Judge for the Northern District of Indiana, made clear that

[t]he only change because of bankruptcy is that actual notice is irrelevant. 11 U.S.C. § 544(a). Thus, under § 544(a)(3) the debtor’s actual notice regarding the status of the title record is irrelevant. Instead, only the constructive notice gained by a review of the title record, under Indiana law, matters.

*Id.* (citing *U.S. v. Arnol & Mildred Shafer Farms, Inc.*, 107 B.R. 605, 608 (N.D. Ind. 1989)); *see also In re Hershman*, 417 B.R. at 99; *In re Camp*, 2007 WL 2257653 at \*4 (N.D. Ind. Aug. 2, 2007). The defendant argued that the Trustee had notice because of the clear and open possession of the property and use of it as a store. This notice, he insisted, put a bona fide purchaser on inquiry to examine whether the possessor had a claim of ownership and right to possession. However actual notice of possession or ownership is irrelevant under § 544(a)(3), “regardless of any state law of actual notice.” *In re Camp*, 2007 WL 2257653 at \*4 (citing cases). “An encumbrance can be avoided only if a bona fide purchaser would not have *constructive notice* of it.” *Id.* (emphasis added).

Both the state statutes and cases require a mortgage to be properly recorded to provide constructive notice to subsequent purchasers. *See, e.g.*, Ind. Code § 32-21-4-1 (which provides that constructive notice is given by a properly recorded instrument); *Bank of New York v. Nally*, 820 N.E.2d 644, 648 (Ind. 2005) (holding that a properly acknowledged and recorded mortgage provides constructive notice).

As the court emphasized in *Camp*, these requirements must be followed because:

[t]he purpose of the Indiana recording statutes . . . 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 [these] statutes permits innocent third parties

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

*In re Camp*, 2007WL 2257653 at \*5 (quoting *In re Baldin*, 135 B.R. 586, 601 (Bankr. N.D. Ind. 1991)).

In this case, on the date of the debtors' petition, the defendant's warranty deed was not properly recorded. The Trustee, a subsequent bona fide purchaser, therefore did not have constructive notice of a recorded lien held by the defendant, as Indiana requires. See *In re Kraft, LLC*, 429 B.R. 637, 647-48 (Bankr. N.D. Ind. 2010) (citing *C. Callahan Co. v. Lafayette Consumers Co.*, 2 N.E.2d 994, 1000 (Ind. App. 1936); *In re Canaday*, 376 B.R. 260, 272 (Bankr. N.D. Ind. 2007)). Consequently, the Trustee has the authority, under the strong-arm powers in § 544(a)(3), to avoid the lien on the debtors' unrecorded property that was conveyed pre-petition.

The second legal issue is whether the Trustee has the authority under § 549(a)(1) to avoid a transfer of property made after the commencement of the case. The Trustee asserted that the recording of the warranty deed after the debtors had filed bankruptcy was a post-petition transfer which could be avoided. The defendant argued that the transfer of the deed was complete upon execution and delivery of the deed on November 3, 2006, despite its being unrecorded.

The court finds that there was no challenge to the original conveyance of the real property at issue. The execution of the warranty deed and the transfer of title of the property to the defendant are not before the court. See *In re Kraft, LLC*, 429 B.R. 637, 646 ("It has always been the law of Indiana that even if a mortgage is improperly recorded, or has not been recorded, it is valid between the parties.") (citing *In re Dunn*, 109 B.R. 865, 873 (Bankr. N.D. Ind. 1988)). However, any transfer of real property that was not properly perfected on the petition date is of no effect against the trustee because the express language of § 544(a)(3) grants the trustee the rights of a bona fide purchaser of real property. See *id.* at 646-47.

In this case, the Trustee used his avoidance power under § 544(a)(3) and chose to avoid the recorded lien as a post-petition transfer under § 549(a)(1). The statute provides that "the trustee may avoid a transfer of property of the estate – (1) that occurs after the commencement of the case." The post-petition

action which the Trustee treats as a “transfer” is the recording of the deed. The Bankruptcy Code defines “transfer” in 11 U.S.C. § 101(54).

The term “transfer” means –

- (A) the creation of a lien;
- (B) the retention of title as a security interest;
- (C) the foreclosure of a debtor’s equity of redemption; or
- (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –
  - (i) property; or
  - (ii) an interest in property.

Courts generally hold that the recording of a mortgage does not fall within this definition and is not considered a transfer. *See In re Berg*, 387 B.R. 524, 563 (Bankr. N.D. Ill. 2008) (citing *Gold v. Nat’l City Home Loan Servs. (In re Hamama)*, 319 B.R. 851, 853 (Bankr. E.D. Mich.2005)). “The purpose of recording is to provide notice of the mortgage; it is not required for the mortgage to be valid.” *In re Hamama*, 319 B.R. at 853 (concluding that “the post-petition recording of a mortgage granted pre-petition is not a post-petition transfer under § 549(a)”) (citing cases). This court agrees. It determines, therefore, that the Trustee has not satisfied the requirements of § 549(a)(1) and cannot avoid the defendant’s recorded warranty deed as a post-petition transfer under § 549(a).<sup>4</sup>

Even though the post-petition recordation of the deed may not be avoided as a “transfer” of an interest in property under § 549, the actual transfer of the debtors’ interest in the real property is subject to avoidance under § 544(a)(3) because the pre-petition-executed deed was not perfected before the debtors filed bankruptcy. *See In re Brooks-Hamilton*, 348 B.R. 512, 522-23 (Bankr. N.D. Cal. 2006). Moreover, the court notes that the post-petition act of recording the deed was not authorized by the court or by the

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<sup>4</sup> Having determined that the requirements of § 549 were not met, the court does not address the statute of limitations argument raised by the defendant under § 549(d). *See R. 24 at 9.*

Bankruptcy Code.<sup>5</sup> It finds that the Trustee properly avoided the unrecorded warranty deed under § 544(a)(3) and that the debtors' interest in the property became preserved for the benefit of the debtors' estate under § 541(a)(4). *See In re Berg*, 387 B.R. at 570 (“the avoided interest automatically becomes property of the Estate by virtue of § 541(a)(4)”).

The court concludes that there is no genuine issue of material fact before it and that the Trustee is entitled to judgment as a matter of law. The Trustee, as a hypothetical or putative bona fide purchaser, has a superior interest in the real property that was unrecorded as of the commencement of the bankruptcy. The Trustee thus has the authority to avoid the defendant's claimed interest in the warranty deed pursuant to § 544(a)(3) of the Bankruptcy Code. However, the Trustee may not claim the authority under § 549(a)(1) to avoid the defendant's recordation of the warranty deed as a post-petition transfer.

#### CONCLUSION

For the reasons discussed in this Memorandum of Decision, the court grants in part and denies in part the Motion for Summary Judgment filed by the plaintiff J. Richard Ransel, chapter 7 Trustee of the bankruptcy case of Trent R. Jones and Shawn Mary Jones, chapter 7 debtors. The Motion is granted pursuant to 11 U.S.C. § 544(a)(3), and the debtors' pre-petition transfer of real property to the defendant Brian K. Miser is avoided by the Trustee. The Motion is denied pursuant to 11 U.S.C. § 549(a)(1). The relief sought in the plaintiff's Complaint is granted pursuant to 11 U.S.C. § 544(a)(3).

SO ORDERED.

/s/ HARRY C. DEES, JR.  
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HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT

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<sup>5</sup> The recording could be considered a violation of the automatic stay under § 362(a)(4) (“any act to create, perfect, or enforce any lien against property of the estate” is a violation). However, no § 362 allegation was made in the Complaint, and the court will not rule based on a potential violation of the stay.