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IT IS SO ORDERED.

Dated: March 04, 2008

  
Donald E. Calhoun, Jr.  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re : Case No. 07-53966  
:   
Harold J. McEowen : Chapter 7  
Patricia L. McEowen :   
Debtor. : Judge Preston

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Larry McClatchey, Trustee :   
:   
Plaintiff : Judge Calhoun  
:   
v. : Adv. Pro. No. 07-02366  
:   
Union Savings Bank, et al., :   
:   
Defendants. :

**ORDER GRANTING MOTION FOR SUMMARY  
JUDGMENT BY PLAINTIFF**

This matter came before the Court upon the Motion for Summary Judgment of the Plaintiff,  
Larry McClatchey, Trustee (Doc. 24), Response to Motion for Summary Judgment by Defendant,

Union Savings Bank (hereinafter "Union Savings")(Doc. 33); and Reply of Plaintiff to Response of Union Savings in Further Support of Motion for Summary Judgment filed by Plaintiff (Doc. 34).

### **I. Jurisdiction**

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district. The main complaint is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

### **II. Motion for Summary Judgment Standard**

The Plaintiff has moved for summary judgment pursuant to Federal Civil Rule 56, for the reason that there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law.

The Court should grant summary judgment to the movant "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), made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7056.

The purpose of a motion for summary judgment is to determine if genuine issues of material fact exist to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). The party seeking summary judgment bears the initial burden of asserting that the pleadings, depositions, answers to interrogatories, admissions and affidavits establish the absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The burden on the moving party is discharged

by a "showing" that there is an absence of evidence to support a nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. Summary judgment will be appropriate if the nonmoving party fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. *Id.*, at 322. Thus, the ultimate burden of demonstrating the existence of a genuine issue of material fact lies with a nonmoving party. *Id.*, at 324. The evidence must, however, be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

The nonmoving party must do more than rest upon the allegations found in the pleadings. They must demonstrate that a genuine issue exists for trial through their own affidavits, or depositions, answers to interrogatories, and admissions on file. *Id.* If the nonmoving party, after adequate time for discovery, fails to establish an essential element of the case or defense, all other facts are rendered immaterial, entitling the moving party to a judgment as a matter of law. *Id.* at 322-323.

### **III. Legal Analysis**

On August 2, 2007, the Plaintiff filed the instant adversary proceeding<sup>1</sup> seeking authorization to sell property of the estate and avoidance of mortgage pursuant to 11 U.S.C. § 544(a)(3), having the Court determine that the mortgage does not constitute a valid and subsisting lien on the property, that the property is an asset of the estate that the Trustee may sell pursuant to 11 U.S.C. § 363, and preserving the avoided lien for the benefit of the estate.

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<sup>1</sup>On October 24, 2007, default judgment was entered in favor of the plaintiff against Defendant, Robertson Heating Supply of Columbus (Doc. 17). Additionally, the Plaintiff and the Defendant, Key Bank filed an Agreed Judgment Entry that was Granted by this Court on December 21, 2007 (Doc. 25). The only remaining Defendant in this Adversary Proceeding is Union Savings Bank.

The evidence shows that the Plaintiff is entitled to judgment because the legal description contained in the mortgage to Union Savings is incorrect, referencing a different lot number than the lot that the Debtors own and intended to encumber.

Based upon the pleadings, admissions, stipulation of the parties, and affidavits, the Court makes the following findings of fact: Debtors acquired a parcel of property commonly known as 1302 Clement Drive, Worthington, Ohio 43085 ("Property"). The Deed granting the Property to the Debtors contains the proper legal description and provides:

Situated in the County of Franklin, in the State of Ohio, and in the City of Columbus and bounded and described as follows:

Being lot(s) number 166 of WORTHINGTON WOODS Section Three, as the same is numbered and delineated upon recorded plat thereof, of record and Plat Book 60, Page(s) 14 and 15, Recorder's Office, Franklin County, Ohio. Subject to conditions, restrictions, and easements, if any, of record.

(Doc. 24, Exhibit 1).

Union Savings Mortgage ("Mortgage") contains a legal description that does not describe the Property. The legal description contained in the Mortgage is:

Situated in the State of OH, County of Franklin and in the City of Columbus.

Being Lot Number One Hundred Eighty-seven (187) of WORTHINGTON WOODS SECTION 3, as the same is numbered and delineated upon recorded plat thereof, of record in Plat Book 60, Page 14, Recorder's Office, Franklin County, Ohio.

(Doc. 24, Exhibit 2). The Mortgage from the Debtors to the Defendant does not by its stated legal description, encumber the Property intended to be encumbered. Defendant or its agent was solely and exclusively responsible for the preparation of and recording of its Mortgage, including a proper legal description of the property they intend to encumber.

The Debtors filed a Petition for Relief under Chapter 7 of the Bankruptcy Code on May 24,

2007. Plaintiff is the duly appointed case Trustee of their bankruptcy estate. Upon discovery of the defect in the Defendant's Mortgage, the Trustee commenced the instant adversary proceeding, utilizing the "strong arm" powers granted bankruptcy trustees under § 544 of the Bankruptcy Code. Section 544 of the Bankruptcy Code provides in pertinent part:

(a) 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—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(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.

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544. "The purpose of the 'strong arm clause' is to cut off unperfected security interests, secret liens and undisclosed pre-petition claims against a debtor's property as of the commencement of the case." *Canney v. Merchants Bank (In re Canney)*, 284 F.3d 362, 374 (2d Cir. 2002) (quoting *Collier on Bankruptcy* ¶ 544.03 (15th ed. Rev. 2001)). Union Savings failed to include in its mortgage a correct legal description of the property its Mortgage was to encumber, specifically Union Savings legal description listed Lot 187 to be encumbered by its mortgage, rather than the

Property's correct Lot 166. Section 544 grants a trustee in bankruptcy the ability to avoid interests in real property that are unperfected on the date of filing, under either a bona fide purchaser of real property or a judgment lien creditor, whether such a purchaser or creditor actually exists. In Ohio, a bona fide purchaser is one who "takes in good faith, for value and without actual or constructive knowledge of any defect." *Terlecky v. Beneficial Ohio, Inc. d/b/a Beneficial Mortgage Co. of Ohio (In re Little Key)*, 292 B.R. 879, 883 (Bankr. S.D. Ohio 2003). (citing *Shaker Corlett Land Co. v. City of Cleveland*, 139 Ohio St. 3d 66, 68 (1942)). The purpose is to allow the goal of equal distribution of the Debtors' assets among its general unsecured creditors. Courts have held that Section 544(a) permits the Trustee to enjoy the "status of a hypothetical bona fide purchaser, without regard to any actual knowledge of the Trustee." *Stubbins v. American General Financial Services, Inc. (In re Easter)*, 367 B.R. 608 (Bankr. S.D. Ohio 2007) (citations omitted).

The issue before the Court is whether the Property was sufficiently described, regardless of the incorrect lot number being used so as to impart constructive notice to the Plaintiff. Upon review of the Plat Map (Doc. 24, Exhibit 3) there is a Lot 187 located on Clement Drive just a few lots from the Property. Even if one reviewed the Mortgage containing the incorrect lot number it would not serve as notice constructive or otherwise, as there would be no reason to look or investigate the matter further. Union Savings cites to *Roebuck*, however, even the Court in that case found the following:

"Every conveyance of real property must contain such a convenient and definite description that by its terms the land can be located and distinguished from other lands of the same kind. If the description is not such as to locate the land, or is so uncertain that it cannot be known what land was intended to be conveyed, the deed is void."

*Roebuck v. Columbia Gas Transmission Corp.*, 57 Ohio App.2d 217, 220, 386 N.E.2d 1363 (Ohio

App. 1977). Courts have uniformly held that a street address and parcel number is insufficient as a legal description of property. The case of *Bunn*, relying on the *Easter* ruling, noted the following:

In explaining the insufficiency of a street address and parcel number as a property description, the court reasoned that a real estate legal description is generally a detailed, exact, specific description. In Ohio, the street address and parcel number are not part of the [p]roperty's legal description; inclusion of that information is not statutorily mandated, but is often included for the convenience of the parties. These identifiers can be changed by the governmental authorities.

*In re Bunn*, 376 B.R. 835, 845 (Bankr. S.D. Ohio, 2007) (citing *Stubbins v. American General Financial Services, Inc. (In re Easter)*, 367 B.R. 608 (Bankr. S.D. Ohio, 2007).

Union Saving Mortgage contained an insufficient legal description and is therefore found to be unperfected at the time the Debtors filed for relief under the Bankruptcy Code. Due to Union Savings incorrect legal description of the Property on the date that the Debtors filed their bankruptcy petition the Plaintiff is entitled to judgment against Defendant, Union Savings.

#### IV. Conclusion

In light of the foregoing, the Court finds that there are no genuine issues of material fact and the Plaintiff is entitled to judgment as a matter of law. Accordingly it is:

**ORDERED AND ADJUDGED** that the Plaintiff's Motion for Summary Judgment Against Defendant hereby is **GRANTED**. A separate Final Judgment will be entered in accordance with the foregoing.

**IT IS SO ORDERED.**

**Copies to:**

**Larry J. McClatchey, 65 East State Street, Suite 1800, Columbus, Ohio 43031**

**Union Saving Bank, c/o Charles Thornton, Statutory Agent, 8534 East Kemper Road, Cincinnati, Ohio 45249**

**Stephanie P. Union, 65 East State Street, Suite 1800, Columbus, Ohio 43031**

**Nathan L. Swehla, PO Box 5480, Cincinnati, Ohio 45201-5480**

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