UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re:

CASE NO.: 05-02683-JAF
CHAPTER 13

HAROLD VAUGHN and
JUDITH ANN VAUGHN,

Debtors.
_____/

COASTAL EXCHANGE,

Plaintiff,

v.

ADV. NO.: 05-00261-JAF

HAROLD VAUGHN and
JUDITH ANN VAUGHN,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This Proceeding came before the Court upon Plaintiff's Motion for Summary Judgment, Defendants' Motion for Summary Judgment, Plaintiff's Response, Defendants' Response, and Plaintiff's Reply to Defendants' Response. Based upon the evidence presented and the arguments of the parties, the Court finds it appropriate to grant Plaintiff's Motion for Summary Judgment in part and deny it in part, and deny Defendants' Motion for Summary Judgment.

Plaintiff filed Motion for Summary Judgment contending that the release of mortgage recorded in error should be vacated by the Court. In addition, Plaintiff argues that Defendants' counterclaim to strip Defendants' lien pursuant to §506(a) of the Bankruptcy Code is so unreasonable that no genuine issue of fact exists. Defendants contend in their Response that Defendants' Bankruptcy filing and subsequent appointment of a Trustee bestowed upon the Trustee the status of a bona fide purchaser, thereby defeating Plaintiff's right to vacate the erroneously entered release. Furthermore, Defendants submit that summary judgment is inappropriate for determining property valuation, due to its highly speculative nature. Plaintiff counters in its Reply that Defendants admitted that they owed money on the mortgage and that their only contention was a legal, not factual, one. Moreover, Plaintiff avers that Defendants did not assert any new facts to support their valuation, and that the Court need only find $1.00 of equity over Defendants' claimed value to find no genuine issue of material fact.

Defendants filed Motion for Summary Judgment as to Plaintiff's Complaint to Determine Validity, Priority, Extent of Mortgage. Defendants contend that Plaintiff cannot show any lien on Defendants' property because of the strong arm powers of the Trustee. As such, Plaintiff's claim against Defendants is completely unsecured. In Reply, Plaintiff counters that Defendants never pled the affirmative defense of the Trustee's strong arm powers, that Defendants do not have standing to utilize the Trustee's powers, and that pursuant to state law the Trustee is not a bona fide purchaser.

Summary judgment under Rule 56 is appropriate "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 judgment as a matter of law." Fed. R. Civ. P. 56(c) (2005)(incorporated by Fed. R. Bankr. P. 7056). A moving party bears the initial burden of showing a court that there are no genuine issues of material fact that should be decided at trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); accord Clark v. Coats & Clark, Inc., 929 F.2d 604, 607 (11th Cir. 1991). A moving party discharges its burden on a motion for summary judgment by "'showing' – that is, pointing out . . . that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. In determining whether the movant has met this initial burden, "the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997)(citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) and Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1985)). In other words, the court must decide "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 (1986).

If a moving party satisfies this burden, then a nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. See id. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Id. Therefore, the burden is on Plaintiff to show there is no genuine dispute over whether the release of mortgage recorded in error should be vacated by the Court, and that the evidence supporting Plaintiff's valuation of Defendants' lien is so one-sided that Plaintiff must prevail as a matter of law. The burden is on Defendants to show there is no genuine dispute over whether Plaintiff has a valid lien on Defendants' property. Defendants, as the non-moving party, submit that the record could lead the Court to find for Defendants on the issue of valuation, and as such there exists a genuine issue for trial.

The Court finds that Plaintiff met its burden of showing there is no genuine dispute over whether the Court should vacate the erroneously entered release of mortgage. The Court also finds that Plaintiff did not meet its burden of showing that there is no genuine dispute over the valuation of the lien. The Court further finds that Defendants did not meet their burden of showing that there is no genuine dispute over whether Plaintiff possessed a valid lien on Defendants' property.

According to Plaintiff, and as Defendants concede, the facts are as follows. Defendants purchased a home and executed a mortgage on or about October 29, 1999. On or about August 14, 2001, Defendants executed a mortgage with Wilmington National Finance ("Wilmington"). Popular Financial, LLC ("Popular") executed a Release of Mortgage on or about October 6, 2003, followed by an Assignment of Mortgage by Wilmington to Popular on the same day. On or about November 30, 2004, Wilmington assigned the mortgage to Plaintiff. Defendants, on or about March 18, 2005, filed a Chapter 13 Bankruptcy with the Court.

In their Motion for Summary Judgment and Response, Defendants list numerous case law supporting the contention that upon filing of the bankruptcy, the Trustee becomes an innocent intervening third party and therefore obtains the status of a bona fide purchaser pursuant to §544(a)(3) of the Bankruptcy Code. See Peebles v. Commercial Credit Corp. (In re Peebles), 197 B.R. 799 (Bankr. W.D.Pa. 1996); First Am. Nat'l Bank v. Miller (In re Miller), 286 B.R. 334 (Bankr. E.D.Tenn. 1999); Cent. Bank v. McGregor (In re Whitlow), 116 B.R. 158 (Bankr. W.D.Mo. 1990); Washington Mut. Bank, F.A. v. Sommerville (In re Sommerville), 2005 Bankr. LEXIS 2334, *1 (Bankr. E.D.Mo. October 13, 2005). Yet in each of these cases, the Trustee did not have notice. In fact, the court in Whitlow goes to great lengths to explain that notice is the important distinction in cases involving a Trustee utilizing her powers under §544(a)(3). Whitlow, 116 B.R. at 160-61. The Whitlow court makes this distinction while differentiating its facts from those present in Maine Nat'l Bank v. Morse (In re Morse), 30 B.R. 52 (B.A.P. 1st Cir. 1983).

In Morse, the Bankruptcy Appellate Panel of the First Circuit reversed the decision by the bankruptcy court below on the following facts. A bank employee mistakenly recorded a discharge of mortgage, yet following such discharge the bank proceeded with foreclosure proceedings against the property in default. Morse, 30 B.R. at 53. The bankruptcy court allowed the Trustee, as an intervening third party, to step in as a hypothetical lien holder, and disallowed reformation of the deed to reflect the inconsistency. Id. at 53-54. The Morse court stated,

> In construing the rights of the trustee as a hypothetical bona fide purchaser and creditor under state law as against other parties, the phrase 'without regard to the knowledge of the trustee' found in 11 U.S.C. § 544(a) does not give the trustee any greater rights than he, or any other person would have as a bona fide purchaser or creditor under applicable state law.

Id. at 54 (citations omitted). As a result, the Morse court reversed the decision because the bankruptcy court "should have gone one step further" by considering the notice provision in the state recording statute. Id.

In this case, Defendants agree that Plaintiff recorded its assignment from Wilmington on or about November 30, 2004. This act occurred approximately four months prior to Defendants' bankruptcy filing. Even while viewing these facts in a light most favorable to Defendants, state law requires that to be protected as a bona fide purchaser, the innocent third party must not have notice of an unrecorded interest. See §701.02(5). Thus, when

Plaintiff recorded its assignment in 2004, it put all future parties on notice of an interest in the property. See Smith v. FDIC, 61 F.3d 1552, 1557 (11th Cir. 1995)(describing three types of notice recognized by Florida under its recording statutes: express actual, implied actual, and constructive notice). At the date of filing, the Trustee was already attributed with notice of Plaintiff's interest in the property. See id.; see also Blunt v. Brigety (In re Blunt), 80 B.R. 234 (Bankr. M.D. Fla. 1987)(granting summary judgment for deed holder because creditor, United States, was put on inquiry notice and failure to inquire defeated United States' claim for a superior interest).

Both Plaintiff and Defendants agree that Florida law permits reformation of an erroneously released mortgage, provided that innocent third parties have not intervened. See United Serv. Corp. v. Vi-An Constr. Corp., 77 So. 2d 800, 803 (Fla. 1995); Cherry v. Chase Manhattan Mortgage Corp., 190 F. Supp. 2d 1330 (M.D. Fla. 2002). Because the facts before the Court show that at the time of filing there were not any innocent third parties, the Court, using its equitable powers, may vacate the erroneously entered mortgage and find that Plaintiff holds a valid mortgage on Defendants' property. Therefore, with respect to the validity, priority and extent of Plaintiff's mortgage lien, the Court finds no genuine issue of material fact.[1]

As to Plaintiff's request for summary judgment on the issue of valuation of the mortgage, the Court finds that Plaintiff has failed to prove to the Court that there is an absence of evidence supporting Defendant's case. The Court finds the issue of valuation too tenuous to determine on a motion for summary judgement. As such, the Court will determine this remaining count at trial.

Based upon the foregoing, it is

ORDERED:

1. Plaintiff's Motion for Summary Judgment as to vacating the erroneously entered release is granted and the Court finds that Plaintiff holds a valid mortgage on Defendants' property.

2. Plaintiffs' Motion for Summary Judgment as to the valuation of the lien is denied.

3. Defendants' Motion for Summary Judgment is denied.

DATED this 10 day of April, 2006 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:
Christine L. Herendeen, Attorney for Plaintiff
Albert H. Mickler, Attorney for Defendant
Mamie L. Davis, Trustee

[1] Because the Court finds in favor of Plaintiff with respect to the validity of the mortgage, the Court finds it unnecessary to discuss Plaintiff's arguments that Defendants lacked standing to raise the Trustee's strong arm powers, and that Defendants failed to plead an affirmative defense. If the Court were to decide the issue of Defendants' ability to utilize the Trustee's avoidance powers, this Court has already ruled once before that Chapter 13 debtors cannot use the Trustee's avoidance powers. See Hacker v. David Hodges as Assignee of Citizens Banks of Macclenny (In re Hacker), 252 B.R. 221, 223 (Bankr. M.D. Fla. 2000)("Aside from a debtor's avoidance powers set forth in § 363, Chapter 13 debtors have no standing to exercise the avoidance powers of a Trustee.")