

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WELLS FARGO BANK, N.A.,	:	
	:	NO. 1:09-CV-00090
Appellant,	:	
	:	OPINION AND ORDER
	:	
v.	:	
	:	
	:	
RICHARD D. NELSON, TRUSTEE,	:	
	:	
Appellee.	:	

This matter is before the Court on Appellant Wells Fargo Bank, N.A.'s Appeal from United States Bankruptcy Court (doc. 5), the Brief of Appellee, Trustee Richard D. Nelson (doc. 6), and the Reply Brief of Appellant (doc. 7). For the reasons stated herein, the Court AFFIRMS the decision by the United States Bankruptcy Court for the Southern District of Ohio.

I. Background

The following facts, as drawn from the filings, are not in dispute. By Special Corporate Warranty Deed dated July 23, 2004 and recorded August 9, 2004, in the Recorder's Office of Butler County, Ohio, Key Bank USA NA conveyed real estate described as "Lot Number 1324 in the City of Fairfield, Butler County, Ohio" (the "Property") to Eric Gehm and Nicole Gehm, as husband and wife. Through this deed, Nicole Gehm ("Debtor") acquired an undivided one-half interest in the Property.

By a mortgage dated July 29, 2004 and recorded August 9,

2004, in the Recorder's Office, a security interest was conveyed in the Property to First Franklin Financial Corporation, and then subsequently to Appellant Wells Fargo. The mortgage was security for a loan evidenced by a note signed only by Eric Gehm ("the Note"). On page 1 of the mortgage, the "Borrower" is described as "ERIC GEHM MARRIED AND NICOLE GEHM SIGNING TO RELEASE DOWER." The signatures of both parties appear on page 14 of the mortgage with Eric Gehm signing as "Borrower" and Nicole Gehm signing as "Non-Borrower." Both Eric and Nicole Gehm initialed the bottom of each page of the mortgage. The mortgage is notarized and the name of both Eric Gehm and Nicole Gehm appear in the acknowledgment block with the handwritten notation "(husband and wife)".

A prepayment rider and an adjustable rider were executed and attached to the Mortgage. The prepayment rider was signed by Eric Gehm and Nicole Gehm with no notation. However, the adjustable rate rider was signed by Eric Gehm as "Borrower" and Nicole Gehm as "Non-Borrower."

On February 26, 2007, Appellant Wells Fargo filed a Complaint for Foreclosure against Eric Gehm and Nicole Gehm in the Court of Common Pleas in Butler County, Ohio (the "Foreclosure Complaint"). On March 9, 2007, Nicole Gehm filed a chapter 7 bankruptcy petition effectively staying prosecution of the Complaint for Foreclosure. On November 12, 2007, Appellee Trustee Richard D. Nelson filed an adversary Complaint for Determination of

Validity of Lien or Avoidance Thereof (the "Adversary Complaint") in Nicole Gehm's bankruptcy case. The Adversary Complaint asserted that the Mortgage did not convey Nicole Gehm's half interest in the Property to the mortgagee because Nicole Gehm executed the mortgage for the sole purpose of releasing her dower interest. The Trustee asserted that Nicole Gehm's half interest is reserved for the bankruptcy estate.

On August 1, 2008, the Bankruptcy Court denied both Appellant's Motion to Dismiss, and the Trustee's Cross Motion for Summary Judgment (doc. 1). U.S. Bankruptcy Judge J. Vincent Aug, Jr. held that because there was "no question that the status of the mortgage as to Nicole Gehm's half interest in [the Property] affects her bankruptcy estate," the Bankruptcy Court had subject matter jurisdiction over the matter (Id.). Further, the Bankruptcy Court held that although the Trustee had notice of the mortgage through the doctrine of lis pendens, the Trustee had clearly stated a claim in her Adversary Complaint (Id.).

In a December 17, 2008 Order, the Bankruptcy Court granted the Trustee's second motion for summary judgment, holding that because Nicole Gehm was not obligated on the Note there was no consideration to support the mortgage as to her one-half interest in the Property (Id.). Additionally, the Bankruptcy Court held that Nicole Gehm's release of her dower did not convey a mortgage interest in her one-half interest of the Property (Id.).

Appellant now seeks an order reversing the Bankruptcy Court's August 1, 2008 Order on the Motion to Dismiss, and December 17, 2008 Order on the Motion for Summary Judgment (doc. 5).

II. Discussion

The Court has jurisdiction over Appellant's timely filed appeal under 28 U.S.C. 158(a)(1). As the issues presented in this appeal arise solely from conclusions of law made by the Bankruptcy Court, the Court will review these issues de novo. In re Hurtado, 342 F.3d 528, 531 (6th Cir. 2003).

A. August 1, 2008 Order Denying Dismissal

Appellant first challenges the Bankruptcy Court's decision denying Appellant's motion to dismiss (doc. 5). Appellant argues dismissal is proper pursuant to the Bankruptcy Appellate Panel's holding in In re Periandri, 266 B.R. 651, which found that if there is a foreclosure action pending at the time the borrower files bankruptcy, and the filing of the foreclosure meets all of the requirements for lis pendens, the trustee cannot be a bona fide purchaser under 11 U.S.C. § 544. Id. at 656.

The doctrine of lis pendens is codified in R.C. § 2703.26 and read, at the time of this case:

When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of this action, as against plaintiff's title.

Lis pendens has been determined to attach at the time any defendant is served with the summons and complaint. Beneficial Ohio, Inc. v. Ellis, 2009-Ohio-311(Ohio Sp. Ct. February 3, 2009).

Appellant argues that because it met the elements of lis pendens, the Trustee had notice of the mortgage and therefore could not be a bona fide purchaser, which is necessary to avoid a lien under 11 U.S.C. § 544 (a)(3) (doc. 5). In response, the Trustee contends that he is not challenging notice of the mortgage, but instead seeking declaratory judgment that the mortgage does not encumber Nicole Gehm's half interest in the property (doc. 6). The Trustee argues that Periandri and the doctrine of lis pendens simply do not apply because he is not seeking to avoid the mortgage, because his contention is that Nicole Gehm is not a borrower of the mortgage (Id).

The Court agrees. As the Bankruptcy Court found, Appellant's reliance on Periandri is misplaced. The Trustee does not argue lack of notice of the mortgage due to any assertion that the mortgage was incorrectly executed under the Ohio statutes. Rather, the Trustee is arguing that Nicole Gehm did not convey her entire one-half interest in the mortgage to the mortgagee. Inherent in the nature of the lis pendens doctrine is the fact that the doctrine does not, in and of itself, create any substantive rights. See Katz v. Banning, 84 Ohio App. 3d 543, 617 N.E.2d 729 (1992). Instead, the lis pendens doctrine is simply a procedural

device designed to protect the status quo until a party's substantive rights in an item of property can be determined. Id. at 549. As the Bankruptcy Court stated, Appellant "may not rely on the lis pendens doctrine to cure an otherwise fatal defect that exists in a party's interest in an item of property" (doc. 1). Because the Trustee clearly asserted in the Complaint that the mortgage did not transfer Nicole Gehm's half interest in the Property to the mortgagee, dismissal on the basis of Periandri and the doctrine of lis pendens is not warranted. The Court therefore affirms the Bankruptcy Court's denial of Appellant's Motion to Dismiss.

B. December 17, 2008 Order Granting Summary Judgment

Appellant next seeks reversal of the Bankruptcy Court's Order granting summary judgment in favor of the Trustee (doc. 5). The issue on summary judgment was "whether Wells Fargo has a valid mortgage on the Debtor's one-half interest in certain real property where the signature line in the mortgage identifies the Debtor as a non-borrower and where the granting clause in the mortgage recites that the Debtor signed to release her dower interest" (doc. 1).

Appellant first argues that summary judgment is inappropriate because there is doubt as to what interest Nicole

Gehm intended to convey when she signed the mortgage (doc. 5).¹ Noting that all parts of a mortgage are to be construed together, Appellant argues that the inconsistencies in how Nicole Gehm signed each part of the mortgage create a genuine issue of material fact which should preclude a grant of summary judgment (Id., citing Dodd v. Bartholomew, 44 Ohio St. 171 (1886)). Appellant contends that those inconsistencies make the facts of this case distinguishable from In re Creter, 2007 WL 2615214 (Bankr. N.D. 2007), and In re Morgeson, 371 B.R. 798 (B.A.P. 6th Cir. 2007), where the courts held signing a mortgage with the notation "signing only to release her dower interest" evidenced a clear intent to only release a dower interest (doc. 5).

Appellant further notes that the mortgage is a purchase money mortgage and argues that it is "illogical to conclude that purchase money would be obtained for only a half interest in the property" (Id.). Citing Lipps v. Lipps, 87 N.E.2d 823 (Ohio App. 1949), Appellant argues that because this is a purchase money interest, there is a presumption that the mortgage is fully secured in the property (Id.).

Having reviewed these arguments, the Court does not find

¹ Appellant also again argues that because the Trustee had notice of the foreclosure action, the mortgage cannot be avoided under 11 U.S.C. § 544. As stated above, Appellant misses the mark with this argument. The Trustee's contention is that the mortgage does not encumber Nicole Gehm's interest in the Property, making the issue of notice irrelevant.

Appellant's positions well-taken. Despite Appellant's contention otherwise, the facts of this case are indistinguishable from those in In re Morgeson, 371 B.R. 798. There the debtor and her spouse obtained title to real estate as joint tenants with rights of survivorship and then entered into a mortgage which the wife signed with the notation below her signature stating "spouse, signing only to release her dower interest." Id. As is the case here, the husband and wife later filed for bankruptcy and the trustee filed an adversary action against the mortgagee to avoid the mortgage as to the wife's one-half interest and to determine the validity and extent of the mortgagee's lien. Finding that the mortgagee's interest in the real property extended only to the husband's one-half interest, the Bankruptcy Appellate Panel stated:

[T]he deed must be interpreted according to Ohio contract law. . . . In construing a written contract, the court's paramount objective is to ascertain and give effect to the parties' intention. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. When contract terms are unambiguous, the courts will not, in effect, create a new contract by finding an intent not expressed in the clear contractual language. Since both the signature page and the notary page of the mortgage document stated that [Wife] was signing only to release her dower interest, the clear language of the contract evidences [Wife's] intent only to release her dower interest.

In re Morgeson, 371 B.R. at 804 (citations and internal quotations omitted). See also In re Creter, 2007 WL 2615214.

Here, the language of the loan documents is equally unambiguous. As the Bankruptcy Court found, the loan documents are consistent because "[i]n addition to not signing the Note, Nicole signed the Mortgage as a 'Non-Borrower.' Further, in the granting clause of the Mortgage, Nicole's name is expressly followed by the qualifier 'signing to release dower.' Further still, Nicole signed the Adjustable Rate Rider as a 'Non-Borrower'" (doc. 1). The Appellant can point to nowhere in the loan documents that indicates Nicole Gehm is a "borrower" or signing for any reason other than to release dower. Therefore, consistent with the holdings in Creter and Morgeson, the Court finds that Nicole Gehm's release of dower did not convey a mortgage interest in her one-half interest of the property.

Even if the Court did find that Nicole Gehm conveyed her half-interest to Appellant, consideration is necessary to support a mortgage. Square Lumber Co. v. Goldman, 159 N.E. 130 (Ohio App. 1929). Construing all the parts of the loan documents together, it is clear that Nicole Gehm is not obligated on the Note and therefore, that there is no consideration to support the mortgage as to her one-half interest in the property.

Finally, Appellant's contention that under Lipps, because the mortgage is a purchase money mortgage the Court must find that the mortgage is fully secured in the property is not correct. As the Bankruptcy Court found, Lipps is distinguishable, as Lipps

involved a forgery and was, therefore, expressly decided on equitable principles. 87 N.E. 2d at 828. Thus, the Court AFFIRMS the Bankruptcy Court's grant of summary judgment in favor of the Trustee.

III. Conclusion

For the foregoing reasons, the decisions of the United States Bankruptcy Court for the Southern District of Ohio are AFFIRMED (doc. 1).

SO ORDERED.

Dated: June 10, 2009

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge