

MAY 24 2011

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN RE:	:	CASE NO. 10-96570-JB
	:	
COURTNEY BAILEY and	:	
DOUGLAS BAILEY,	:	
	:	CHAPTER 13
Debtors.	:	
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COURTNEY BAILEY and	:	
DOUGLAS BAILEY,	:	
	:	CONTESTED MATTER
Movants,	:	
	:	
v.	:	
	:	
U.S. BANK NATIONAL ASSOCIATION, AS	:	
TRUSTEE, RELATING TO HOME EQUITY	:	
MORTGAGE TRUST SERIES 2007-2,	:	
HOME EQUITY MORTGAGE PASS-	:	
THROUGH CERTIFICATES, SERIES 2007-2,	:	
	:	
Respondent.	:	

ORDER

This *pro se* Chapter 13 case came before the Court on May 10, 2011 on debtors' objection to Proof of Claim #1-1 (the "Claim") filed by U.S. Bank National Association, as Trustee, relating to Home Equity Mortgage Trust Series 2007-2, Home Equity Mortgage Pass-Through Certificates, Series 2007-2 ("U.S. Bank") (Docket No. 52). The Claim is filed as a secured claim in the amount of \$201,791.93 secured by real property located at 5257 Chamblee Dunwoody Road, Dunwoody, GA 30338. Present at the hearing were debtors Courtney and Douglas Bailey and Sonya

Buckley on behalf of the Chapter 13 Trustee. Debtors served the objection and a notice of hearing on the president of U.S. Bank, the president of Specialized Loan Servicing, LLC at the mailing address at which the Claim indicates notices should be sent, and on Lawrence Buckley, the individual designated on the Claim as the creditor's authorized agent. U.S. Bank did not file any response, nor did anyone appear on behalf of U.S. Bank or its servicer, Specialized Loan Servicing, LLC ("SLS").

After hearing argument by Mr. Bailey and carefully reviewing the record in this case, the Court concludes that debtors' objection should be sustained insofar as U.S. Bank has not demonstrated that it is entitled to receive payment under any confirmed Chapter 13 plan in this case on account of the Claim. The documents filed as exhibits to the Claim do not establish a transfer or assignment of a note or security deed from the original lender, Opteum Financial Services, LLC, to U.S. Bank or its servicer, SLS. Attached to the Claim is a Note dated August 11, 2006 with Mrs. Bailey as the Borrower and Opteum Financial Services, LLC as the Lender in the amount of \$161,800.00. Also attached to the Claim is a Security Deed dated August 11, 2006 with Mrs. Bailey as the Borrower, Opteum Financial Services, LLC as the Lender, and Mortgage Electronic Registration Systems, Inc. as a grantee and a nominee. There is no endorsement on either the Note or the Security Deed, and no

documents are attached to the Claim that establish a transfer or assignment of the Note and Security Deed or any other connection between Opteum Financial Services, LLC and U.S. Bank or its servicer. Thus, the Court cannot find that U.S. Bank is entitled to be paid in this Chapter 13 case or that it is the proper party to file a proof of claim pursuant to Federal Rule of Bankruptcy Procedure 3001.

Although debtors' objection is sustained to the extent indicated above, several points must be noted. First, the fact that U.S. Bank has not established that it is the proper claimant with respect to the Claim as filed does not result in a finding that there is no entity that may be entitled to receive payments or enforce the Security Deed. Second, by sustaining debtors' objection, the Court is not voiding any lien created by the Security Deed. In fact, debtors do not appear to be seeking such relief. In paragraph two (2) of debtors' objection, they state that they "are not challenging the validity of the security interest at this time, only that US Bank is not a valid holder of that security interest".

Finally, debtors argue that the Security Deed is unenforceable under the holding of U.S. Bank National Association v. Gordon, –S.E.2d–, 2011 WL 1102995 (Ga. 2011). That argument seems to contradict debtors' statement that they are not challenging the validity of the security interest. In any event, Gordon does not support debtors' argument. In Gordon, the Supreme Court of Georgia answered a

question certified from the United States District Court for the Northern District of Georgia. The question certified was whether a 1995 amendment to O.C.G.A. § 44-14-33¹ means that, in the absence of fraud, a security deed that is filed, recorded, and accurately indexed on the appropriate county land records provides constructive notice to subsequent bona fide purchasers, where the grantor's signature lacks both an official and unofficial attestation. The Chapter 7 trustee, Neil Gordon, had filed an action to avoid a security deed pursuant to the "strong-arm" power of 11 U.S.C. § 544(a)(3), which gives the trustee the rights of a hypothetical bona fide purchaser of real property. The recorded security deed in that case was patently defective, meaning it was defective on its face, because it lacked both an official attestation by a notary public and an unofficial attestation by an unofficial witness. The Chapter 7 trustee argued that the 1995 amendment served only to acknowledge that a security deed with a latently defective attestation, meaning one that is not defective on its face, will provide constructive notice to a subsequent bona fide purchaser, while a patently defective security deed could not provide constructive notice even if it has been recorded. The Supreme Court of Georgia agreed with the Bankruptcy Court and the Chapter 7 Trustee that, under the 1995 Amendment, an unwitnessed security deed that was nonetheless recorded in the appropriate county land records is not "duly

¹ O.C.G.A. § 44-14-33 governs the law for attestation of mortgages and, pursuant to O.C.G.A. § 44-14-61, the law for attestation of deeds to secure debt.

recorded” and, therefore, will not provide constructive notice under O.C.G.A. § 44-14-13. As such, the Chapter 7 trustee in Gordon could avoid the unwitnessed security deed pursuant to the trustee’s avoidance power in § 544(a)(3).

Gordon is easily distinguishable from the case at bar. Unlike Gordon, the Security Deed does not have a patently defective attestation. It is signed by Mrs. Bailey as the Borrower, it contains a notary seal, and it is signed by both an unofficial witness and an official witness in accordance with the recordation requirements of O.C.G.A. § 44-14-33. As such, any defect in the recorded Security Deed, if one exists, would be a latent defect and, consequently, the Security Deed would have been duly recorded to provide constructive notice to a subsequent bona fide purchaser. In addition, the legal issue in Gordon was whether an unwitnessed defective security deed was valid as against the Chapter 7 trustee with the rights of a hypothetical bona fide purchaser, not whether the security deed was valid against the borrower. The debtors are not treated as hypothetical bona fide purchasers, and a security deed may be valid as against a borrower despite a lack of attestation. *See* DANIEL F. HINKEL, 2 PINDAR’S GEORGIA REAL ESTATE LAW & PROCEDURE § 19-53 (6th ed. 2004) (“Despite a statutory requirement that the signature of the maker of a deed must be attested by two witnesses, the requirement relates only to the recordability of the instrument, and a deed may be valid between the parties without attestation”).

In accordance with the above reasoning, debtors’ objection to the Claim

is sustained only to the extent that U.S. Bank and/or its servicer, SLS, are not entitled to receive payments under any confirmed plan in this Chapter 13 case.

IT IS SO ORDERED, this 24th day of May, 2011.



JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order was mailed to the following:

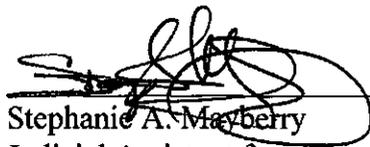
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Mailed: 05/24/2011