UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: HONG JU KIM, Debtor.	CASE NO. 06-66024-CRM CHAPTER 7
NEIL C. GORDON, Chapter 7 Trustee for the Estate of Hong Ju Kim, Plaintiff, v. TERRACE MORTGAGE COMPANY, Defendant.	ADVERSARY PROCEEDING NO. 06-06593-CRM JUDGE MULLINS

ORDER ON CROSS MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before court on the Cross Motion for Summary Judgment in the Adversary Proceeding (the "Cross Motion") filed by the Chapter 7 Trustee for the Estate of Hong Ju Kim (the "Trustee"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(J). The Trustee alleges that the lien of Terrace Mortgage Company (the "Defendant") on certain real property is avoidable because the subject security deed is patently defective. The Trustee alleges that, because of a missing attestation, the deed does not constitute constructive notice to third parties. As a result, the Trustee contends that pursuant to section 544(a) of the Bankruptcy Code, he can use his strong arm power to avoid the subject deed.

In the Defendant's Motion for Summary Judgment (the "Motion") the Defendant argues that, among other things, an attestation can be incorporated by reference into a deed to meet the requirements for constructive notice under the Georgia recording statutes. Consequently, the Defendant argues that it has a properly perfected, unavoidable lien on the subject real property. This matter is ripe for summary judgment as there is no issue of material fact remaining. For the reasons set forth below, the Court grants the Cross Motion.

Legal Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings in bankruptcy by Rule 7056 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), provides that summary judgment is appropriate if the Court determines that 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 also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); In re Henry, 110 B.R. 608, 609-610 (Bankr. N.D. Ga. 1990) (Bihary, J.). "[T]he court may consider any of the materials set forth in subdivision (c), to wit, pleadings, depositions, answers to interrogatories, admissions on file and affidavits, as well as any other evidentiary materials submitted by the parties which would be admissible at trial." 10 Collier on Bankruptcy ¶ 7056.05 (15th Ed. Rev. 2003).

An issue of fact is "material" if, under the applicable substantive law, it is a legal element of the claim that could affect the outcome of the case. Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d 1256, 1259 (11th Cir. 2004); Poole v. Country Club of Columbus, Inc., 129 F.3d 551, 553 (11th Cir. 1997); Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997); Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992), cert. denied, 507 U.S. 911 (1993); Wilcox v. Hritz (In re Hritz), 197 B.R. 702, 705 (Bankr. N.D. Ga. 1996) (Cotton, C.J.) (citing Anderson, 477 U.S. at 248). An issue of fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Wilcox, 197 B.R. at 705; see also Hickson, 357 F.3d at 1259; Poole, 129 F.3d at 553; Tipton, 965 F.2d at 998. A 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, 477 U.S. at 251-52.

The moving party has the burden of demonstrating that no genuine issue as to any material fact exists. Celotex, 477 U.S. at 322-23; Anderson, 477 U.S. at 248; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Allen, 121 F.3d at 646; Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993); Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir. 1982). Where the non-moving party bears the burden of proof at trial, the burden can be satisfied if the moving party demonstrates the absence of evidence supporting the non-moving party's case. Hickson, 357 F.3d at 1259; see Celotex, 477 U.S. at 325.

In determining whether there is a genuine issue of material fact, the court must view the evidence, including underlying facts and reasonable inferences from those facts, in the light most favorable to the non-moving party. Henry, 110 B.R. at 609-610 (citing Hershey v. City of Clearwater, 834 F.2d 937, 941 (11th Cir. 1987); Meir v. United States (In re Healthcare Services, Inc.), 85 Bankr. 913, 915 (Bankr. N.D. Ga. 1986)); see also Matsushita, 475 U.S. at 587.

"The moving party must identify those evidentiary materials listed in Federal Rule 56(c) that establish the absence of a genuine issue of material fact." Wilcox, 197 B.R. at 705 (citing Celotex, 477 U.S. at 323-24); Ellenberg v. Plaid Enters. (In re Home Sewing Enters.), 173 B.R. 790, 793-94 (Bankr. N.D. Ga. 1993) (Cotton, C.J.); Goger v. Merchants Bank (In re Feifer Indus.), 155 B.R. 256, 259 (Bankr. N.D. Ga. 1993) (Cotton, C.J.). When a motion for summary judgment is supported by a *prima facie* showing that there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law, the burden of proof shifts to the non-moving party. Rule 56(e) of the Federal Rules of Civil Procedure requires the non-moving party to go beyond the pleadings and set forth specific facts demonstrating that genuine issues

of material fact do exist.[1] Id.; Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 587; Coats & Clark, 929 F.2d at 608. See also Hickson, 357 F.3d at 1259 (the non-moving party bearing the burden of proof at trial must come forward with evidence sufficient to withstand a directed verdict motion). "If the evidence is merely colorable or not significantly probative, summary judgment may be granted." In re Atlanta Packaging Products, Inc., 99 B.R. 124, 128 (Bankr. N.D. Ga. 1988) (Bihary, J.). Nonetheless, reasonable doubt as to the existence of genuine issues of material fact should be resolved against the moving party and in favor of the non-moving party. 10 Collier on Bankruptcy ¶ 7056.05 (15th Ed. Rev. 2003); Anderson, 477 U.S. at 255 ("the evidence of the non-movant is to be believed"); Hickson, 357 F.3d at 1259.

Factual Background

On April 24, 2005, Hong Ju Kim, executed a security deed (the "Security Deed") granting the Defendant a security interest in residential real property commonly known as 508 Woodridge Way, Tucker, Dekalb County, Georgia 30084. The Security Deed was recorded in Dekalb County on May 10, 2005. The Security Deed includes a waiver of borrower's rights rider and a closing attorney's affidavit. The affidavit bears the signature of the closing attorney and the borrower as well as the signature and seal of a notary public. Defendant's principal position is that the attestation on the affidavit is incorporated by reference into the Security Deed such that the deed is properly recorded and serves as constructive notice to subsequent purchasers for value. The Trustee argues that this position is legally incorrect.

Legal Analysis

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[1] In Celotex Corp. v. Catrett, the Supreme Court observed that where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to the interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324.

Georgia law requires that in order to record a deed to secure debt, the deed must be attested in the manner prescribed by law for mortgages. O.C.G.A. § 44-14-61. Recorded mortgages for real property must be attested by or acknowledged by an official witness and at least one additional witness. O.C.G.A. § 44-14-33. The official witness can be a judge of record, magistrate, notary public, or clerk or deputy clerk of a superior court. O.C.G.A. §44-2-15. Georgia case law holds that an improperly attested deed, while binding between the parties to the deed, does not provide constructive notice to subsequent bona fide purchasers. Hopkins v. Va. Highlands and Assoc., LP, 247 Ga. App. 243, 247, 541 S.E.2d 386, 390 (2000).

In this case, the Security Deed lacks a notary's seal on its face. The Defendant argues that the attestations required under O.C.G.A. §44-14-33 are incorporated into the Security Deed by reference to the closing attorney's affidavit. Citing Bowman v. Walnut Mountain Prop. Owners Ass'n, Inc., 251 Ga. 91, 553 S.E.2d 389 (2001), Defendant contends that, under Georgia law, a written document may incorporate by specific reference, documents that are "treated as if part of the document making the reference." Id at 95. As further support, Defendant relies on Crooke v. Prop. Mgmt. Serv., Inc., 251 Ga. 410, 412, 110 S.E.2d 677, 678 (1959), in which the Supreme Court of Georgia held that a separate description of land could be incorporated into a deed and have the same effect as if it were written in the deed. Defendant argues that the attestations on the affidavit, including a notary's signature and seal, are incorporated into the Security Deed along with the terms of the document.[2]

The Trustee counters that the case law is unambiguous on this issue, arguing that while the terms of a specifically referenced document can be incorporated by reference into a deed, the attestations of that document may not. The court in Stone v. Decatur Fed. Sav. & Loan Ass'n (In re Fleeman), 81 B.R. 160 (Bankr. M.D. Ga. 1987), held that a security deed was improperly

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[2] The Defendant also cites a decision by Judge Laney in the U.S. Bankruptcy Court for the Middle District of Georgia. In Kelley v. Washington Mutual Bank (In re Lillie M. Yearwood), Adv. No. 046029 (Case No. 04-60872), Defendant contends that Judge Laney ruled in line with Defendant's position on the present matter on substantially similar facts. Defendant can provide no record of Judge Laney's reasoning in the case other than Defendant's attorney's oral representation.

attested when the signature of an unofficial witness did not appear directly on the deed but did appear on an adjustable rate rider. The terms of the rider were incorporated into the deed, but not the attestations. The court clarified its understanding of the meaning of attestation, noting that "by attesting to a document, an individual signifies that he has witnessed the execution of a particular document." Id. at 163. The Defendant's use of the Bowman and Crooke cases in support of its position is misplaced. The holdings in these cases do not address the issue of incorporation of attestations by reference, but instead deal with incorporation of the terms of attached documents into contracts. Bowman and Crooke deal with contract interpretation, not compliance with statutorily mandated forms of attestation.

The Defendant raises another argument in support of a finding that the Security Deed was properly attested. According to Defendant, even if the Security Deed was not properly attested under O.C.G.A. § 44-16-33, that it was properly attested under O.C.G.A. § 44-2-18 which states:

> If a deed is neither attested by nor acknowledged before one of the officers name in Code Section 44-2-15, it may be recorded upon the affidavit of a subscribing witness, which affidavit shall be made before any one of the officers named in the Code Section 44-2-15 and shall testify to the execution of the deed and its attestation according to law. A substantial compliance with the requirements of this Code Section shall be held sufficient in the absence of all suspicion of fraud.

This code provision provides a "safety valve" allowing a subscribing witnesses to overcome an error in attestation by testifying by affidavit that a security deed was executed and attested according to law. The subscribing witness must testify by affidavit to the execution and to the attestation of the deed according to the law. The Defendant suggests that language in the closing attorney's affidavit amounted to testimony that the Debtor executed the Security Deed. In the affidavit, the closing attorney testified under oath that "... in closing the above loan, but prior to the execution of the Security Deed and Waiver of Borrower's Rights by the Borrower(s), I reviewed with and explained to the Borrower(s) the terms and provisions thereof... After said review with an explanation to Borrower(s), Borrower(s) executed the Security Deed and 'Waiver of Borrower's Rights.'" The Defendant is correct in asserting that the closing attorney's affidavit fulfills one part of the test by acknowledging the execution of the deed, but fails to address the

question of attestation. The Trustee contends that while the closing attorney's affidavit indicates that the deed was executed, it does not make reference to attestation.

Finally, Defendant argues that Georgia law, as amended in 1995, recognizes that recorded security agreements constitute constructive notice, even if not in recordable form. The Defendant relies upon rules of statutory construction to support the argument. The pre-1995 version of O.C.G.A. § 44-14-33 read:

> In order to admit a mortgage to record, it must be attested by or acknowledged before an officer as prescribed for the attestation or acknowledgment of deeds of bargain and sale; and, in the case of real property, a mortgage must also be attested or acknowledged by one additional witness.

The amended statute added the following sentence:

> In the absence of fraud, if a mortgage is duly filed, recorded, and indexed on the appropriate county land records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers.

According to the Defendant, the additional language converts the statute from one that merely lists recordation requirements to one that now declares the effect of a security deed appearing of record. The Defendant attempts to support this argument with case law on statutory construction and interpretation. Citing Pruitt Corp. v. Strahley, 270 Ga. 430, 510 S.E.2d. 821, 822 (1999) (applying a principle of statutory construction that suggests that the express mention of one thing implies the exclusion of another), Defendant argues that since fraud was specifically excepted, then there is a presumption that there is no other exception. The Defendant also relies on Board of Assessors of Jefferson County v. McCoy Grain Exchange, 234 Ga. 98, 505 S.E.2d. 832 (1998), where the court applied the principle that the addition of words raises a presumption that the legislature intended some change in the existing law, Id. at 834. Thus, Defendant contends that since case law prior to the 1995 amendment interpreted the statute to excuse latent defects, the additional language changes the law to allow facially defective deeds that are accepted by the clerk to serve as constructive notice to bona fide purchasers. See also Higdon v. Gates, 238 Ga. 105, 107, 231 S.E.2d 345, 346 (1976) (finding that an improperly attested

deed, even if recorded, does not provide constructive notice).

The Trustee asserts that the addition to O.C.G.A. § 44-14-33 does in fact comply with the principle of statutory construction cited in Pruitt. By including the word "duly," the Trustee contends that the amendment excludes improperly recorded deeds. Thus, according to the Trustee, the amendment does not eliminate the requirements set forth in the other recording provisions, but merely codifies the case law confirmed in Leeds Bldg. Prod., Inc. v. Sears Mortgage Corp., 267 Ga. 300, 302, 477 S.E.2d 565, 567-68 (1996) (holding that "a security deed which has no facial defects as to attestation is entitled to be recorded once filed, provides constructive notice to subsequent bona fide purchasers"). A "duly filed" deed must still meet the technical requirements set forth in §§ 44-14-61 and 44-14-33. [3] The principle in McCoy can similarly be read in favor of the Trustee since the case law following the amendment suggests that the legislature meant to codify the case law. McCoy suggests that a change in language raises a presumption that there has been a change in law, but does not suggest that the presumption cannot be disproved.

In Leeds the court acknowledged the long-standing conventional wisdom that a latent defect in attestation does not preclude recordability or constructive notice. The Trustee cites a number of cases decided after the 1995 amendment to the statute that follow the principle that a deed which contains no facial defects provides constructive notice to third parties. See Hopkins, supra, 247 Ga. App. at 247, 541 S.E. 2d 386 (holding that a deed that is not attested by at least two witnesses in precisely the manner prescribed in O.C.G.A. § 44-5-30 does not give constructive notice to third parties); Washington Mut. Home Loans v. Yearwood (In re Yearwood), 318 B.R. 227, 229 (Bankr. M.D. Ga. 2004) (holding that where there is a patent

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[3] Plaintiff's Brief in Opposition to Defendant's Motion For Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment p10 (citing Black's Law Dictionary 501 (6th ed. 1990) definition of "duly" meaning: "In due or proper form and manner; according to legal requirements...properly...upon a proper foundation as distinguished from mere form; according to law in both form and substance").

defect in the security deed, there is no constructive notice like that of a latent defect); Farinash v. First Union Nat'l Bank (In re Blackmon), 283 B.R. 910, 912 (Bankr. E.D. Tenn. 2002) (interpreting Georgia law to mean that a recorded instrument that is facially invalid does not constitute constructive notice to subsequent purchasers). The Trustee also relies on Saxon Mortgage v. Howery, Case No. 06-69629 (Doc #39), a recent opinion by Bankruptcy Judge Murphy from the Northern District of Georgia. In Saxon, a creditor sought relief from an automatic stay to foreclose on real property. The Trustee objected on the grounds that the deed was not properly attested because the notary's signature was not accompanied by a visible notary seal.[4] Judge Murphy held that under Georgia law, the security deed was improperly attested as it appeared and did not provide constructive notice third parties.

The Defendant suggests that it is only logical to extend the principle asserted in Leeds to include patent defects like those present in the Security Deed. Defendant suggests that if a defective deed has been accepted for filing, then notice has been provided to any subsequent purchaser and that further investigation is necessary. Thus, according to Defendant, the purpose of the recording statute - to notify subsequent purchasers that there may be claims to the deed - is not lost by extending the historical rule of Leeds to include patent defects.

The Defendant urges the court to focus on substance over form and look to the general purpose of recording statutes while the Trustee relies on case law and strict statutory interpretation to support his position. Both parties presented excellent briefs and made compelling oral arguments, but the law favors the Trustee. Georgia case law prior to the 1995 amendments, after the amendments, and most recently in this district, supports the Trustee's position. Prior to1995, the Georgia case law indicated that an attestation appearing on a document whose terms were incorporated into a deed did not represent an attestation to the deed itself. See Stone, supra, 81 B.R. at 163. The 1995 amendments codified the historical rule stated in Leeds that a facially defective deed, even if properly recorded, does not serve as constructive

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[4] Saxon Mortgage maintained that the original deed bore a seal but provided no witnesses or other evidence to support this assertion.

notice to third parties. Most recently, Judge Murphy's decision in Saxon underscores the state of Georgia law on this issue. Accordingly, this court holds that a security deed that incorporates the terms of another document by reference does not also incorporate the attestations to that document and does not meet the requirements for constructive notice under § 44-14-33. The Security Deed is therefore avoidable by the Trustee pursuant to section 544(a) of the Bankruptcy Code.

IT IS ORDERED that the Trustee's Cross Motion for Summary Judgment be and is hereby **GRANTED**.

The Clerk's Office is directed to serve a copy of this Order on the Trustee and Counsel for the Defendant.

IT IS SO ORDERED, this 28 day of November, 2007.

C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE