UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
AMY LEE INGRAM,	)	CASE NO. **08-61696** - MHM
	)	
Debtor.	)	
	)	
NEIL C. GORDON, Trustee,	)	
	)	
Plaintiff,	)	
v.	)	**ADVERSARY PROCEEDING NO. 08-6440**
	)	
WELLS FARGO BANK, N.A.,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Defendant's *Motion for Summary Judgment* ("Motion"). Plaintiff, the Chapter 7 Trustee ("Trustee"), filed a complaint seeking to avoid a security deed pursuant to his "strong arm" powers under 11 U.S.C. § 544. Trustee argues that the security deed is not attested by an unofficial witness; therefore, the security deed is patently defective and does not provide a bona fide purchaser constructive or actual notice of any security interest. Defendant contends that, because of various defects appearing in the real estate records, the doctrine of inquiry

notice protects the security deed.[1] For the reasons set forth below, Defendant's Motion will be denied.

I. STATEMENT OF FACTS

On March 13, 2002, a security deed (the "American Equity Security Deed") encumbering Debtor's real property at 1990 Cheatham Woods Drive, Marietta, Cobb County, Georgia 30008 in favor of American Equity Mortgage, Inc. ("American Equity") was recorded in the public records of Cobb County, Georgia. On June 30, 2003, Debtor took out a loan with Defendant's predecessor, Primrose Mortgage Company, Inc. d/b/a Southern States Funding Group ("Primrose"), and used the proceeds to pay off the loan secured by the American Equity Security Deed. In connection with the Primrose loan, Debtor executed a security deed in favor of Primrose (the "Primrose Security Deed"); the Primrose Security Deed was also recorded in the public records of Cobb County and subsequently assigned to Defendant. The Primrose Security Deed is signed by Debtor and notarized by a notary public, but it does not contain the signature of an unofficial witness.

The American Equity Security Deed, as it appears in the real estate records, bears the inscription "FOR CANC SEE JJ DE Book 13834, Page 2801." Deed Book 13834,

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[1] Defendant also argued that the recorded security deed, regardless of technical defects, constitutes constructive notice. However, in its recent decision in *U.S. Bank Nat'l Ass'n v. Gordon*, 289 Ga. 12 (2011), the Supreme Court of Georgia answered a certified question from the United States District Court for the Northern District of Georgia, that a recorded security deed lacking official and unofficial attestation cannot provide constructive notice to bona fide purchasers.

Page 2801 is a cancellation, executed by Defendant, of the American Equity Security Deed. A document titled "Assignment of Security Deed," filed with the Clerk of Cobb County June 23, 2003, purports to transfer from American Equity to Defendant a security deed dated December 14, 2001 and executed by Debtor in favor of American Equity; the document states that it constitutes an assignment of the deed recorded at "Book 13707, Page 3820" but does not otherwise describe the subject property. The American Equity Security Deed appears on page 3820 of Book 13507, not Book 13707; the document at Book 13707, Page 3820 has nothing to do with this case, and was apparently referenced in error. Another assignment, recorded in the public records of Cobb County, Georgia, May 26, 2004, repeats the language of the first assignment and includes the same erroneous reference.

II. DISCUSSION

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Only disputes of fact which might affect the outcome of the proceeding will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Trustee's complaint seeks a ruling that the Primrose Security Deed is patently defective because it is not attested by an unofficial witness and, therefore, Trustee may avoid the Primrose Security Deed pursuant to his "strong arm" powers under 11 U.S.C.

§ 544. Section 544 vests the Trustee with the power to avoid any obligation of a debtor or transfer of property by a debtor that is voidable by a lien creditor or a bona fide purchaser who has perfected a transfer at the time of the bankruptcy petition. A duly-filed, recorded, and indexed security deed provides constructive notice to subsequent bona fide purchasers; however, the recordation of a security deed which has not been properly attested does not provide constructive notice. *U.S. Bank Nat'l Ass'n v. Gordon*, 289 Ga. 12 (2011).

In its motion for summary judgment, Defendant argues that a bona fide purchaser would be charged with inquiry notice of the Primrose Security Deed because of defects in the property records, and thus Trustee cannot avoid the deed. Inquiry notice "imputes knowledge of an earlier interest to a later purchaser, if there is 'any circumstance which would place a man of ordinary prudence fully upon his guard and induce serious inquiry.'" *Watts v. Argent Mortg. Co., LLC*, 306 Fed. App'x 455, 457 (11th Cir. 2008)(quoting *In re Hedrick*, 524 F.3d 1175, 1181 (11th Cir. 2008)). Defendant asserts two defects with respect to the cancellation of the American Equity Security Deed: (1) it takes a form that is authorized only by O.C.G.A. § 44-14-67(c) when accompanied by a sworn statement testifying that the security deed has been lost or stolen, and, (2) because it is signed by Defendant and not American Equity, the cancellation could not be valid unless the American Equity Security Deed was transferred to Defendant prior to the cancellation. However, Defendant asserts that the assignments recorded in the public

records of Cobb County are defective because they do not appear to be signed by the president or vice president of American Equity and countersigned by the secretary, an assistant secretary, a cashier, or an assistant cashier in satisfaction of O.C.G.A. § 14-5-7(a), and because they do not identify the American Equity Security Deed as the instrument being assigned. Thus, Defendant argues, a prudent purchaser would have inquired with American Equity and Wells Fargo about the assignment and cancellation, and such inquiry would have revealed that Debtor refinanced the property, using the proceeds to satisfy the American Equity Security Deed and securing the new loan with the Primrose Security Deed.

With respect to the form of the cancellation, O.C.G.A. § 44-14-67(c) provides:

> Cancellation of a security deed, the original of which has been lost, stolen, or otherwise mislaid, may be made based upon a document executed by the owner of the security interest and who so swears in such document, which document shall be recorded and shall be in substantially the [form provided].

Defendant argues that the cancellation does not contain a statement swearing to the ownership of the security interest and that the original has been lost, stolen, or otherwise mislaid. The failure to provide a separate statement swearing to the fate of the original document does not, by itself, put a hypothetical bona fide purchaser on inquiry notice, because "[g]iven the plain language of the statute, the presentation of an instrument of cancellation conforming to this form with an attested, witnessed signature in and of itself evidences a sworn statement that the original security deed to be cancelled is

unavailable[.]" *In re Morgan*, 449 B.R. 821 (Bankr.N.D.Ga. 2010)(Brizendine, J.). Though the *Morgan* court did not address ownership, the reasoning plainly extends to it; the statute provides a form, so that form clearly complies with the requirements of the statute. However, Defendant notes that the notary public did not attest, but merely acknowledged, the cancellation and, therefore, the instrument does not evidence a sworn statement. In arguing that the acknowledgment does not satisfy the statute as the attestation did in *Morgan*, Defendant relies on *Lee v. SCX Transportation, Inc.*, 233 Ga. App. 30 (1998), which held that a notary public's acknowledgment of an affiant's signature does not constitute a jurat. In an action in which an employee was seeking compensation from his railroad employer, the *Lee* court held that "acknowledged" affidavits are invalid because they are not "sworn to and subscribed before" the witnessing official and fail to state that any witness took an oath. *Id.* at 31.

Lee can be distinguished from the instant case on its facts. The undersigned is persuaded that a Georgia court would not rely on *Lee* to reach a result that rewarded incompetency. Defendant is arguing that it should be rewarded for its cavalier attitude towards the execution and recordation of documents affecting title to real estate in Georgia. Defendant asserts that the latest in a long line of errors should be overlooked because any reasonable person looking at the record would know that the documents were incorrect and should therefore pursue further inquiry, i.e. the more mistakes a lender makes, the *more* likely it is that the lender will be saved from the consequences of its

mistakes. Public policy, however, would seem to call for an opposite result. Georgia's rules affecting title to real estate are not difficult or overly technical. Most people find no difficulty in complying. "Two wrongs make a right" is not a precedent the undersigned wants to set. Accordingly, it is hereby

ORDERED that Defendant's Motion is ***denied.***

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 5th day of April, 2013.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE