IT IS ORDERED as set forth below:

Date: September 18, 2013

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	CASE NUMBER
GARY E. RAINWATER and JATINA J. RAINWATER,	:	**08-71489-MGD**
Debtors.	:	CHAPTER 7
NEIL C. GORDON, as Chapter 7 Trustee for the Estate of Gary E. Rainwater and Jatina J. Rainwater,	:	**ADVERSARY PROCEEDING NO. 09-6711**
Plaintiff,	:	
v.	:	
CHASE HOME FINANCE, LLC, and JPMORGAN CHASE BANK, N.A.,	:	
Defendants.	:	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's[1] Motion for Summary Judgment. (Docket No.

[1] Defendant JPMorgan Chase Bank, N.A. identifies itself as asuccessor by merger to named co-defendant Chase Home Finance, LLC.

84). This is a core proceeding under 28 U.S.C § 157(b)(2), and jurisdiction and venue are proper. The Chapter 7 Trustee, Neil C. Gordon, ("Trustee"), commenced this adversary proceeding by filing a complaint seeking to avoid Defendant's security deed ("Security Deed") pursuant to his "strong arm" powers under 11 U.S.C. § 544(a)(3). Trustee contends that the Security Deed is not attested by an official witness and therefore does not provide constructive notice to a bona fide purchaser under Georgia law. Trustee filed a response to Defendant's Motion and Defendant filed a reply to Trustee's response. (Docket Nos. 91 & 94). There are material disputes of fact and Defendant's Motion for Summary Judgment is **DENIED**.

According to Rule 7056 of the Federal Rules of Bankruptcy Procedure, which incorporates Federal Rule of Civil Procedure 56, the Court will only grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. The moving party has the burden of establishing the right of summary judgment. *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). The moving party also has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 11th Cir. 1985).

At the summary judgment stage, the Court may not make credibility determinations or weigh evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.E.2d 105 (2000). The Court's only task is to assess whether "a genuine issue of material fact" remains for resolution at trial. *Celotex*, 477 U.S. at 322-23.

Here, Trustee seeks to avoid the Security Deed pursuant to 11 U.S.C. § 544(a)(3) on the basis that under applicable Georgia law, the mortgage is unperfected against a *bona fide* purchaser.[2] For a mortgage to be properly admitted to record, Georgia law requires that it shall be attested or acknowledged by two witnesses: an official witness, such as a notary public, and an additional, unofficial witness. *See* O.C.G.A. § 44-14-33. Where a notary serves as the official witness, the notary "must provide a seal of office." O.C.G.A. § 45-17-6(a)(1). [3]

The Supreme Court of Georgia has held that where a security deed lacks both an official and unofficial attestation, that deed does not provide constructive notice to subsequent bona fide purchasers, even if the deed is admitted to record. *U.S. Bank Nat'l Ass'n v. Gordon*, 709 S.E.2d 258, 259-60 (Ga. 2011). Accordingly, under 11 U.S.C. § 544(a)(3), a trustee in bankruptcy may avoid

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[2] (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –
(3) a bona fide purchaser of real property, other than fixture, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
11 U.S.C. § 544.

[3] (a)(1) For the authentication of his notarial acts each notary public must provide a seal of office, which seal shall have for its impression his name, the words "Notary Public," the name of the state, and the county of his residence; or it shall have for its impression his name and the words "Notary Public, Georgia, State at Large."

O.C.G.A. § 45-17-6.

a security deed that is not properly attested by both an official and unofficial as required by O.C.G.A. § 44-14-33. The basic facts in this action are fairly simple. The parties agree that in March of 2006, Debtors Gary E. Rainwater and Jatina J. Rainwater executed the Security Deed conveying certain real property to Defendant as security for a loan. The Security Deed is recorded in the real estate records of the Superior Court of Cherokee County at Deed Book 8649, page 485. On June 18, 2008, the Debtors filed their petition for relief under Chapter 7 of the Bankruptcy Code.

The parties dispute whether a notary seal was affixed on the Security Deed by an official witness at the time the Security Deed was submitted to the Cherokee County Clerk for recording. The parties have engaged in extensive discovery and material issues of fact remain. Defendant asserts that they hold a copy of the original Security Deed and that there is no defect with the original, and, therefore, Trustee is unable to establish his avoidance claim as a matter of law.

In support their claim, Defendant argues that the purported original Security Deed contains a blue notary seal. *C. Harshbarger Deposition*, Defendant's Exhibit 1.[1] Carolyn Harshbarger, who served as the deed supervisor in the Clerk's office at the time the Security Deed was recorded, was asked to run a test scan of the Security Deed. *Id.*, p. 8, 84. Ms. Harshbarger testified that she scanned the Security Deed at the same standard density which documents would have been scanned in 2006. *Id.*, p. 85-89. This scan failed to reproduce the blue stamp. Defendant's legal theory is that the Certified Copy of the Security Deed does not reflect the presence of this stamp because the stamp was too faint to be reproduced by the scanning system in Cherokee County.[2]

Trustee has responded with sufficient facts supported by admissible evidence that puts the

[1] A color copy of the purported original Security Deed was not submitted into evidence, only used for questioning. *Id.*, pp. 82-91. Trustee objected to admissibility based on failure to lay the foundation for chain of custody to authenticate the document *Id.* at 90.

[2] However, Ms. Harshbarger also testified that she was unsure whether the scanner used for this test was the same scanner that would have been used in 2006. *Id.*, pp. 116-117.

material fact of the form of the Security Deed at the time of recordation in dispute. FED. R. CIV. P. 56(c). Specifically, the Trustee submits a certified copy of the copy of the Security Deed on file with the Superior Court of Cherokee County, which does not include a notary stamp or seal. Docket No. 90; Plaintiff's Exhibit A: "Certified Copy of the Security Deed." Federal Rule of Evidence 1005 is incorporated into this proceeding by Rule 9017 of the Federal Rules of Bankruptcy procedure and specifically provides that "[t]he proponent may use a copy to prove the content . . . of a document that was recorded or filed in a public office as authorized by law – if . . . the document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4)." FED. R. EVID. 1005. Rule 902(4) provides that a certified copy of a public record is self-authenticated if it is "a document authorized by law to be recorded or filed and actually recorded or filed in a public office" and is "certified as correct by the custodian or other person authorized to make the certification." FED. R. EVID. 902(4). Accordingly, the Certified Copy submitted by Trustee constitutes a self-authenticating record because the Security Deed is authorized by law to be recorded, was actually recorded in Cherokee County, and was certified as correct by Ms. Harshbarger, the custodian of records in Cherokee County at the time of recordation.

The Certified Copy of the Security Deed submitted by the Trustee bears the signatures of the Debtors, Brittany Brady as unofficial witness, and David Anton's signature as an official witness, but there is no notary seal. Exhibit A: Certified Copy of the Security Deed. In addition, there is testimony by Debtors that they did not see Mr. Anton notarize any documents at their closing and that there was no second witness present. *J. Rainwater Deposition*, pp. 9-11; G; *Rainwater Deposition*, pp. 8-10, 12-14. Trustee has created a genuine issue of material fact with admissible evidence regarding the form of the Security Deed at the time of recordation. Defendant has not

authenticated any original Security Deed that would invalidate the self-authenticating certified copy presented in the record by Trustee. Accordingly, Defendant has failed to satisfy its burden of proof that Trustee could not make his claim as a matter of law. There remains a genuine issues of fact that impacts a determination of whether Trustee had constructive notice and whether he has the ability to invoke his avoidance powers.

Summary judgment is also not appropriate for this action because the record also includes Mr. Anton's testimony that he does not specifically remember the details surrounding Debtors' closing but does recall several occasions where a closing document was sent back to him because he had forgotten to notarize it. *D. Anton Deposition*, pp. 64-69, 111-12. Mr. Anton has no specific recollection as to this specific closing but testifies that on at least on occasion, these returned documents could have included a security deed. *Id.*, pp. 69, 112. Although Mr. Anton does not recall being asked to place his notary stamp on a document that had already been recorded, he recognizes that when a document is sent back, typically he only receives the signature page, not the entire document. *Id.*, p. 66. He also recognizes that the purported original Security Deed's signature page contains his blue notary stamp but does not contain any indication of whether or not the document has been recorded. *Id*.

To make the determination as to whether the Security Deed contained the notary seal at the time of filing, the Court would have to weigh these conflicting pieces of evidence and infer facts. Assessing credibility of the evidence is improper for motions of summary judgment. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012).

Because there are material facts in dispute, Defendant has not met its burden for summary judgment. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment is **DENIED**.

It is **FURTHER ORDERED** that the parties are to submit a proposed consolidated pre-trial order on or before October 18, 2013.

The Clerk is directed to mail a copy of this Order to Plaintiff, Defendant, and their respective counsel.

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