

IT IS ORDERED as set forth below:

Date: September 13, 2013



Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 09-72233-WLH
)	
NATONIA D. NESBITT,)	CHAPTER 7
)	
Debtor.)	JUDGE WENDY L. HAGENAU
_____)	
)	
NEIL C. GORDON, Chapter 7 Trustee)	
for the Estate of Natonia D. Nesbitt,)	
)	
Plaintiff,)	
)	
v.)	ADV. PROC. NO. 11-5251
)	
AMERITRUST MORTGAGE COMPANY, LLC,)	
and BANC MORTGAGE, a Division of)	
National Bank of Commerce,)	
)	
Defendants.)	
_____)	

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
IN PART AND DENYING IT IN PART
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Before the Court are cross-motions for summary judgment from the Plaintiff and the Defendant Ameritrust Mortgage Company, LLC ("Ameritrust"), both of which address the

adequacy of the attestation in a security deed. The particular question is whether the deed contains a signature of an unofficial witness. The Court holds it does not, the defect in the deed is patent and, under Georgia law, the deed does not provide constructive notice to a bona fide purchaser. Therefore, the Trustee's Motion for Summary Judgment as to the enforceability of the Ameritrust security deed is granted and Ameritrust's Motion for Summary Judgment is denied. As discussed more fully below, the Trustee's Motion for Summary Judgment as to Bancmortgage is denied. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and 157, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (K) and (O).

FACTS

The facts in this case are undisputed, although the inference from the facts is disputed. On August 25, 2006, the Debtor executed a security deed to Ameritrust and MERS as its nominee ("Security Deed"). This Security Deed was recorded in the Fulton County Superior Court on September 7, 2006. The Security Deed is signed by the Debtor, and it is notarized. The form of the signature block provides two lines. Under the first line are the words, "Unofficial Witness". Under the second line are the words, "Notary Public, County". Above the line for the "Unofficial Witness" are the following: "County ss:". The Security Deed was filled in with the word "Cobb" after "County ss:". The notary signed his name on the line for the "Unofficial Witness" and applied his notary stamp. On the line above the words "Notary Public, County" appears the word "Cobb" again. A copy of the signature block is below.



The Debtor filed a bankruptcy petition on May 11, 2009, and Neil Gordon was appointed as the Chapter 7 Trustee. On May 10, 2011, the Trustee filed this Complaint against Ameritrust and Bancmortgage, a Division of National Bank of Commerce (“Bancmortgage”). In the Complaint, the Trustee seeks to avoid the security interest held by Ameritrust under its Security Deed of August 25, 2006, and to avoid the security interest of Bancmortgage under a security deed dated October 29, 2004, both pursuant to 11 U.S.C. § 544. The Trustee seeks to recover the Security Deed itself or the value thereof under 11 U.S.C. § 550 and preserve the security deeds for the benefit of unsecured creditors under 11 U.S.C. § 551. Finally, the Trustee seeks a recovery against Ameritrust for certain pre- and post-petition payments made by the Debtor to Ameritrust on the debt allegedly secured by the Security Deed.

On July 30, 2013, Ameritrust filed its Motion for Summary Judgment [Docket No. 27], including its Memorandum of Law in Support of the Motion and its Statement of Material Facts. On July 31, 2013, the Trustee filed his Motion for Summary Judgment against both Ameritrust and Bancmortgage [Docket No. 29], seeking summary judgment as to the avoidability of both security deeds. With respect to Bancmortgage, though, the Court must deny the Trustee’s

Motion without prejudice. A review of the docket reveals no certificate of service of a summons on Bancmortgage, and the Court notes further that the Trustee's Motion for Summary Judgment was not served on Bancmortgage. Consequently, the Motion for Summary Judgment is not proper as to Bancmortgage.

Ameritrust's Motion for Summary Judgment seeks judgment on all counts, apparently including the counts for recovery of pre- and post-petition payments. The Motion, however, only addresses the avoidability of the Security Deed. The Trustee's Motion for Summary Judgment against Ameritrust also only addresses the avoidability of the Security Deed and not the recovery of any payments. Consequently, the Court will address only the issue of the avoidability of Ameritrust's Security Deed under Section 544, and the effect of such avoidance under Sections 550 and 551 of the United States Bankruptcy Code. The Court will leave for another time the Trustee's claims against Ameritrust for recovery of payments.

LEGAL CONCLUSION

Under 11 U.S.C. § 544(a)(3), a bankruptcy trustee may avoid "any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by a bona fide purchaser of real property ... that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists." A bona fide purchaser, under Georgia law, is not subject to a security deed, even if recorded, that is patently defective. A security deed must be attested or acknowledged as provided by law in the manner set forth for mortgages under Georgia law. See O.C.G.A. §§ 44-2-14, 44-14-61. In order for a security deed to be "duly recorded", it must be attested or acknowledged by an "official witness" such as a judge of a court of record, a notary public, or a clerk or deputy clerk of a superior court or a city court, and it must also be attested or acknowledged by an additional "unofficial" witness. See O.C.G.A. §§ 44-2-15, 44-14-33.

The Georgia Supreme Court has clarified recently in cases involving this Trustee that a security deed with a patent defect, even though it may be recorded, does not provide constructive notice to a bona fide purchaser. U.S. Bank Nat'l Ass'n v. Gordon, 289 Ga. 12 (2011). A patent defect is one that can be determined from the face of the document. See Id. at 13. A patent defect is one that is “obvious and easily detectable”, while a latent defect “is not apparent on the face of the deed”. Gordon v. Wells Fargo Bank, N.A. (In re Codrington), 430 B.R. 287, 292 (Bankr. N.D. Ga. 2009). The Georgia Supreme Court has relied on Lord Bacon’s definition in stating that a latent defect “is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.” Walker v. Wells, 25 Ga. 141, 142 (1858). If the document appears proper on its face, and only matters outside the document create the issue, the deficiency is latent, but if the issue is identifiable on the face of the document, it is patent.

The question here is whether the Security Deed is patently defective. The Trustee argues it is because there is only one signature, which appears to be that of the notary. Ameritrust argues that, because something is written on both signature lines, any defect is latent. Ameritrust argues that any mark or scrawl is sufficient to be a signature and the Court should not determine if the mark or scrawl is in fact a signature. Ameritrust effectively argues that the Court cannot use its own judgment and reason and common sense to determine if words written on a signature line are in fact a signature. The Court rejects that notion. It is clear from looking at the Security Deed that the notary, David Rachel, signed on the unofficial witness block and wrote the county “Cobb” both above and below his name. In fact, he wrote “Cobb” on the blank above the words “Notary Public, County”. The handwriting of the words “Cobb” are the same above and below the notary’s signature. Cobb County is indicated on Mr. Rachel’s notary stamp as his county of residence. While it is theoretically possible that “Cobb” is someone’s name, it is highly

implausible in the context of this document. The issue of whether “Cobb” is a signature is obvious from the face of the document. It is not matters outside the document that create the defect: rather, the defect is on the face of the document and Ameritrust would hope to use matters outside the document to remedy the defect. The defect in signature is patent.

None of the cases cited by Ameritrust support its argument. The Court does not argue with the proposition that an illegible signature may be sufficient as in Gilliam v. Burgess, 169 Ga. 705 (1930), or that a “mark” may be sufficient. But this is not a mark, and not an illegible signature. This writing is clear, and the word is “Cobb”, the county of the notary’s residence. This Security Deed does not “appear” to have two signatures, and therefore does not appear to comply with all statutory requirements. See Leeds Bldg. Prods. v. Sears Mortg. Corp., 267 Ga. 300 (1996). As such, the Security Deed was not duly recorded and a bona fide purchaser does not take subject to it. The Trustee is entitled to avoid the Security Deed pursuant to 11 U.S.C. § 544.

CONCLUSION

The Trustee’s Motion for Summary Judgment on avoidance of Ameritrust’s Security Deed under 11 U.S.C. § 544 is GRANTED, and the Trustee is authorized to recover the deed or the value thereof from Ameritrust for the benefit of the estate pursuant to 11 U.S.C. §§ 550 and 551. The parties are directed to file a status report within thirty (30) days of the date hereof as to the Trustee’s remaining claims versus Ameritrust and the Trustee’s claims versus Bancmortgage and their readiness for trial.

END OF ORDER

DISTRIBUTION LIST

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