

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

HILARIO STANISLOUS VALDEZ and
ROSE MARIE VALDEZ,
Debtors.

No. 7-00-11279 SF

RICHARD J. PARMLEY, JR. ,
Plaintiff,
v.

Adv. No. 00-1141 S

HILARIO STANISLOUS VALDEZ,
ROSE MARIE VALDEZ, and
SUN COUNTRY CREDIT UNION,
Defendants.

**MEMORANDUM OPINION ON CROSS MOTIONS
FOR SUMMARY JUDGMENT**

This matter is before the Court on cross motions for summary judgment. Plaintiff is the Debtors' Chapter 7 Trustee and is self represented. Defendant Sun Country Credit Union ("SCCU") is represented by its attorney Don Fenstermacher. Debtors are represented by their attorney Robert Finch. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (B), (K) and/or (O).

UNDISPUTED FACTS

1. Debtors owned certain real estate (the "5 acres") described as:

5.00 acres, more or less, situate in the SW
1/4 NW 1/4 of Section 2, T 30 N, R 121 W,
N.M.P.M., SAN JUAN COUNTY, NEW MEXICO;
and more particularly described as follows,
to wit:

Beginning at a point ... [metes and bounds].

2. On or about February 14, 1991, Debtors executed a Credit Agreement and Truth-in-lending disclosure and mortgage in favor of SCCU. The mortgage was properly recorded on October 18, 1991.
3. The mortgage describes the property in which SCCU had a security interest as "½ acre home site and 1982 Nashua with addition located at #40 Road 2945 in rural Aztec, New Mexico, San Juan County. Total square feet of home is approx. 1,950." This one-half acre site is within the 5 acres.
4. Debtors filed a Chapter 7 bankruptcy case on March 9, 2000 and Plaintiff is the trustee.
5. On October 3, 2000, Miller Engineering, Inc. conducted a field survey of the 5 acres and one-half acre homesite.
6. The survey was completed on October 17, 2000, and was filed with the county on October 18, 2000.
7. Miller Engineering, Inc. surveyed a one-half acre tract as part of the survey.
8. The one-half acre tract is but one of a number of possible tracts which would fit the description in the mortgage.

9. The one-half acre tract would require an ingress-egress easement over the remainder of the property.

DISCUSSION

First, the Court will comment on other "facts" alleged by the parties. For the purpose of these motions for summary judgment the Court finds it not relevant that defendant Rose Valdez was an employee of SCCU or that she may have violated SCCU policies and procedures in connection with the mortgage loan. This adversary proceeding is a complaint by the bankruptcy trustee to avoid and preserve SCCU's claimed lien. The issue is whether the lien is good against the estate, not whether the loan should have been granted or whether proper procedures were followed in connection with the loan. Therefore, the affidavit of Penny Hamilton and the Rose Marie Valdez deposition excerpts are not relevant.

Affidavits offered on a motion for summary judgment must be based on personal knowledge, set forth facts which would be admissible in evidence and affirmatively show that the affiant is competent to testify to the matters described in the affidavit. United States v. Valore, 152 F.R.D. 1 (D. Me. 1993). See also Fed.R.Civ.P. 56(e). Personal knowledge includes inferences and opinions. Equal Employment Opportunity Commission v. Admiral Maintenance Service, L.P.,

174 F.R.D. 643, 647 (N.D. Il. 1997)(citing Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655, 659 (7th Cir. 1991)).

"But the inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience." Id.

Paragraph 6 of Robert Stannard's affidavit states that the survey he did for the one-half acre tract "appears to be consistent with the property described in the Mortgage and was intended by Defendants to have been conveyed to Plaintiff in the Mortgage." (Emphasis added.) Stannard's affidavit swears "under oath" that the contents are "true and correct to the best of my knowledge and belief." The affidavit does not state that he actually has personal knowledge or is competent to testify to the facts stated in paragraph 6. Nor do the statements in the affidavit provide any foundation for his statement about what Mr. and Mrs. Valdez intended. Therefore, the Court will disregard ¶ 6.

The Bankruptcy Code defines what interests of the debtor become property of the bankruptcy estate, but nonbankruptcy law defines the scope and existence of those interests. Taylor v. Rupp (In re Taylor), 133 F.3d 1336, 1341 (10th Cir.

1998); Paul v. Monts, 906 F.2d 1468, 1475 (10th Cir. 1990).

"The underlying creditors' rights asserted in bankruptcy proceedings are creatures of state law." Id. (citing In re Elcona Homes Corp., 863 F.2d 483, 486 (7th Cir. 1988)).

Therefore, the Court must look to New Mexico law to determine the relative rights of the parties.

Under New Mexico law to make a valid conveyance of land the subject land must be capable of identification; if the conveyance does not describe the land with such particularity as to render this possible, the conveyance is "absolutely nugatory." Komadina v. Edmondson, 81 N.M. 467, 469, 468 P.2d 632, 634 (1970)(quoting 4 Tiffany, Real Property § 990 (3rd ed. Jones 1939)). There is a presumption that a grantor intended to convey something, so a deed will be upheld unless the description is so vague that it cannot be ascertained what land is meant to be conveyed. Id., 468 P.2d at 634.

The grantor's intent must be ascertained from the description contained in the deed, which must itself be certain or capable of being reduced to certainty by something extrinsic to which the deed refers. Consequently, if extrinsic evidence is to be relied upon to identify the land intended to be conveyed, the deed itself must point to the source from which such evidence is to be sought.

Id., 468 P.2d at 634 (citations omitted.) However, if the deed refers to some other instrument or document, that "other instrument must so referred to that third parties could be

reasonably required to discover it and learn its contents...." Bintliff v. Setliff, 75 N.M. 448, 450, 405 P.2d 931, 932 (1965). If the purported conveying document does not identify the location of the other instrument, or if that instrument does not contain an adequate description, or if the other instrument does not exist, then the conveyance fails. Id., 405 P.2d at 932.

Similarly, an inaccurate description in a deed or a mortgage does not automatically invalidate the instrument. Selby v. Roggow, 126 N.M. 766, 771, 975 P.2d 379, 384 (Ct. App. 1999). See also Hughes v. Meem, 70 N.M. 122, 125, 371 P.2d 235, 238 (1962)("[A] deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed.") If a surveyor can locate the boundaries with the deed and extrinsic evidence, the description is sufficient. Id. at 125-26, 371 P.2d at 238.

The mortgage in this case does not describe the one-half acre tract whatsoever. The only survey in evidence was done after the filing of the bankruptcy and may not represent the land intended to be described, if indeed there ever was an agreement on what specific property would be subject to the

mortgage. The one-half acre tract surveyed is but one of a number of possible tracts which would fit the description in the mortgage. See Deposition of Robert B. Stannard, Jr., pp. 10-11. The mortgage does not refer to any other instrument that would identify the property. The mortgage does not refer to any monuments or borders. The mortgage does not contain a metes and bounds description. The mortgage fails for lack of description. The facts in this case are very close to those in Rhodes v. Wilkins, 83 N.M. 782, 784, 498 P.2d 311, 313 (1972), where the Court stated:

[T]he description was that of approximately 1.862 acres within a ten acre tract. There was no description in the contract of any particular 1.862 acres; there was no reference in the contract to any data in which these 1.862 acres are described; and there was no reference in the contract to any means or data by which these 1.862 acres could be identified.

That court held that an option contract to purchase an unidentified smaller parcel located within a larger parcel was invalid. Id. at 785. See also In re Poteat, 176 B.R. 734, 740 (Bankr. D. De. 1995)(Grossly inadequate description makes mortgage unenforceable under Delaware law.); In re Atkinson, 126 B.R. 713, 716 (Bankr. N.D. Tx. 1991)("New Mexico requires that a mortgage describe the land to be conveyed with such particularity as to render the land capable of identification. Otherwise the mortgage is absolutely ineffectual.")(citing

Komadina); Komadina, 81 N.M. at 470, 468 P.2d at 635 (“[T]he surveyor testified, in substance, that he could not locate the land from the information contained in the deeds themselves and the deeds referred to no extrinsic information from which the land could be located.”); Bintliff, 75 N.M. at 449-50, 405 P.2d at 932 (“2000 acres of land located in Taos County” described in second instrument was insufficient when second instrument was not produced.) Compare Hughes, 70 N.M. at 126, 371 P.2d at 238 (Deed upheld when surveyor testified that it was possible to locate boundaries based on a 1904 survey.)

Furthermore, under federal law, the bankruptcy trustee has the status of a bona fide purchaser of real property who purchased the property in a hypothetical transaction as of the filing of the bankruptcy case. 11 U.S.C. § 544(a)(3)¹. Ryan

¹Bankruptcy Code Section 544(a)(3) provides:

(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 fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, 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.

v. Continental Assurance Company, 851 F.2d 502, 505 (1st Cir. 1988); Simon v. Chase Manhattan Bank (In re Zapotcky), 232 B.R. 76, 84 (6th Cir. B.A.P. 1999) ("§ 544(a)(3) cloaks the Trustee with the status of a bona fide purchaser without notice who has recorded his interest as of the commencement of the case."); Billings v. Cinnamon Ridge, Ltd. (In re Granada, Inc.), 92 B.R. 501, 503 (Bankr. D. Ut. 1988)("[T]he critical inquiry under § 544(a)(3) concerns the rights of the parties under Utah law had the debtor transferred the ... real property to a bona fide purchaser on the petition date, and had the transfer been perfected on that date.").

Alternatively, under New Mexico law, a mortgage with an insufficient legal description is the functional equivalent of an unrecorded mortgage. Fulghum v. Madrid, 33 N.M. 303, 265 P. 454, 456 (1928). The trustee, as a bona fide purchaser² of

²SCCU argues that the Trustee cannot be a bona fide purchaser in this case because the recording of the defective mortgage would give a reasonably prudent person constructive notice of its claim, citing Security State Bank v. Clovis Mill & Elevator Co., 41 N.M. 341, 344, 68 P.2d 918, 921 (1937). See Section 14-9-2 NMSA 1978 (1995 Repl.):

Such records shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording.

Even if the Trustee were deemed to have this information however, further search would only result in finding that the mortgage contained a completely inadequate legal description declared unenforceable by Komadina. See also Thacker v. United Companies Lending Corporation, 256 B.R. 724, 729 (W.D. Ky. 2000)(Mortgage which lacks proper property description

the real property, would take priority over the holder of an unrecorded mortgage. See Section 14-9-3 NMSA 1978 (1995

Repl.):

No deed, mortgage or other instrument in writing not recorded in accordance with Section 14-9-1³ NMSA 1978 shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments.

SCCU raises, as an affirmative defense, that it is entitled to judicial and equitable reformation of the mortgage and deed under the circumstances of this case. Essentially, SCCU wants the Court to uphold a secret lien on the property at the expense of other unsecured creditors. Under New Mexico law, deeds can be reformed in two situations: if (1) there has been a mutual mistake, or (2) a mistake by one party accompanied by fraud or other inequitable conduct by the other party. Ruybalid v. Segura, 107 N.M. 660, 664, 763 P.2d 369, 373 (Ct. App. 1988)(citing Wright v. Brem, 81 N.M. 410, 411, 467 P.2d 736, 737 (Ct. App. 1970)). Even assuming that SCCU

does not provide constructive notice and trustee may avoid.)

³Section 14-9-1 NMSA 1978 (1995 Repl.) provides:
All deeds, mortgages, ... and other writings affecting the title to real estate shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated.

had established mistake, SCCU still could not obtain priority over the trustee. Reformation is not allowed as against a subsequent bona fide purchaser or encumbrancer of the land. Id. at 665, 763 P.2d at 374; Kimberly v. Hays, 88 N.M. 140, 144, 537 P.2d 1402, 1406 (1975). See also Restatement(Second) of Contracts § 155 (1979):

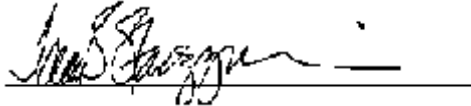
Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.

Because a bankruptcy trustee has the powers of the bona fide purchaser, reformation cannot defeat the Trustee in this case. Peebles v. Commercial Credit Corp. (In re Peebles), 197 B.R. 799, 802 (Bankr. W.D. Pa. 1996)(Reformation is equitable remedy; trustee is bona fide purchaser that defeats equitable claims.); In re Granada, Inc. 92 B.R. at 503 (Trustee is a bona fide purchaser. Under Utah law, "a bona fide purchaser would obtain title to the property free and clear of any unrecorded equitable interest...."); First National Bank of Poplar Bluff v. R & J Construction Company, Inc. (In re R & J Construction Company, Inc.), 43 B.R. 29, 31 (Bankr. E.D. Mo. 1984)(Under Missouri law a defective instrument conveying an interest in real estate cannot be reformed if it would

prejudice the rights of the Trustee who is a bona fide purchaser.)

CONCLUSION

The Court finds that the Trustee's Motion for Summary Judgment should be granted, and that SCCU's Motion for Summary Judgment should be denied. The Court will enter a Judgment in conformity with this Memorandum Opinion.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on June 20, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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