MORTGAGE ACKNOWLEDGEMENTS: CAN OMMISSION BE FIXED?

Bank of America, N.A. v. Casey, 517 B.R. 1 (D. Mass. 2015)

A Chapter 7 trustee sought to avoid a mortgage using "strong-arm" powers based on a defect in the acknowledgement. The mortgagee contended that the defect was cured by a subsequently recorded affidavit. The bankruptcy court found in favor of the trustee, and the mortgagee appealed.

Although the debtors (1) were identified as "Borrowers," (2) initialed the bottom of each page and (3) executed the mortgage, as witnessed by an attorney, the jurat at the end of the document omitted their names. To correct the mistake, the attorney that witnessed the mortgage recorded an affidavit certifying that (a) he witnessed the signatures, (b) the debtors provided satisfactory evidence of their identity, and (c) they acknowledged that they signed voluntarily.

It was clear under state law that omission of the names in the acknowledgement was a material defect, with the result that the mortgage did not provide constructive notice to subsequent purchasers. Under state law, a bona fide purchaser of real estate typically acquires title subject to interests of record, since it is deemed to have constructive notice of those interests. However, if it does not have notice, it can usually acquire title free of those interests. Since a trustee is entitled to exercise the rights of a bona fide purchaser of real estate under Section 544 of the Bankruptcy Code, the defect in the acknowledgement meant that the trustee was not deemed to have constructive notice, and consequently the mortgage could be avoided.

While the mortgagee conceded the original defect, it argued that the subsequently recorded affidavit cured the defect so that the mortgage *did* provide constructive notice. It found support in a state statute that authorized filing affidavits regarding knowledge of facts that an attorney certifies is relevant to title and that "will be of benefit and assistance in clarifying the chain of title." The mortgagee contended that the affidavit clarified that the mortgage was in fact executed and acknowledged by the debtors, so that omission of their names was an oversight (as opposed to a failure to execute).

The trustee countered that a defective mortgage cannot be legally recorded, and the sole method for curing a defective acknowledgement is found in a

statutory section that provides that if a document is actually recorded and indexed, then after 10 years the document will become effective notwithstanding a long list of defects. (Covered defects included a failure to comply with requirements "relating to seals, corporate or individual, to the validity of acknowledgement, to certificate of acknowledgement, witnesses, attestation, proof of execution, or time of execution, to recitals of consideration, residence, address, or date, to the authority of a person signing for a corporation who purports to be the president or treasurer or a principal officer of the corporation.") In addition, a proceeding may be commenced before the end of the 10 year period requesting relief. According to the trustee, these are the only cure options

In finding for the mortgagee, the district court noted that state law did not impose strict requirements on the actual form of the acknowledgement, nor did it require any particular words as long as there was a formal statement that the instrument was executed voluntarily. Further, drawing on an 1857 state court case, the court concluded that state law was also not strict about timing:

> "It is of little importance that the deed was not acknowledged on the same day on which it purports to have been executed, but on the 17th of January 1806. It is well known that in this commonwealth the title to land, followed by a corresponding seisin and possession, often passes by instruments of conveyance which are not duly acknowledged; and accordingly the law will not allow a title to fail on account of such omission, but has made suitable provision for supplying the defect of an acknowledgment, where it is found to exist."

In this case the district court found that the affidavit was sufficient to serve the function of a proper acknowledgement. It made the closing comment: "In an area of law flush with technicalities, the trustee's position here is hyper-technical."

There are a number of cases in which seemingly miniscule mistakes have provided the basis for avoiding a mortgage in bankruptcy. This case suggests that it may be worth attempting to cure a mistake once it is discovered. However, you should not take for granted that this will work. Not only did the bankruptcy court decide against allowing the cure, when the district court decision was appealed to the First Circuit, it was sufficiently troubled by the issue that it certified several questions to the Massachusetts Supreme

Judicial Court regarding the curative affidavit and its effect as a prelude to considering the case.