Recording Requirements: When "Duly Acknowledged" Is Not Enough

DeGiacomo v. First Call Mortgage Company (In re Reznikov), 548 B.R. 606 (Bankr. D. Mass. 2016) –

A chapter 7 trustee sought to avoid a recorded mortgage based on a defective acknowledgment and then to preserve the lien of the mortgage for the benefit of the bankruptcy estate. The mortgagee objected – arguing that the acknowledgment was sufficient, and the debtor objected – claiming a homestead exemption in the property.

The chapter 7 trustee proposed to use the "strong-arm" powers in section 544 of the Bankruptcy Code to avoid the mortgage. Specifically he relied on section 544(a)(3), which allows the trustee to avoid any transfer that would be voidable by a hypothetical *bona fide* purchaser of real property.

As is typically the case, under applicable state law a properly recorded mortgage provided constructive notice of the mortgage to a subsequent purchaser for value, while an unrecorded mortgage was unenforceable against the purchaser. Thus the case turned on whether the mortgage was properly recorded, and if not, the effect of the mortgage on a *bona fide* purchaser. The question of proper recording turned on whether the mortgage acknowledgment met statutory recording requirements.

In particular: "No deed shall be recorded unless a certificate of its acknowledgment or of the proof of its due execution, made as hereinafter provided, is endorsed upon or annexed to it, and such certificate shall be recorded at length with the deed to which it relates." Although no specific language is mandated, the courts have interpreted the law to require an affirmative statement that execution is voluntary.

The acknowledgment in the mortgage was as follows:

Notary Acknowledgment

> State of Massachusetts
> County of Middlesex
>
> On the 16 day of July, 2008 before me personally appeared [name] to me known and known to me to be the individual(s) described in and who executed the foregoing instrument, and duly acknowledged to me that he/she/they executed the same.

The trustee argued that this was not sufficient and the mortgage was defective since the acknowledgment did not express the concept that the debtor executed the mortgage voluntarily as her free act and deed. The mortgagee responded that “duly acknowledged” adequately expressed this concept, and thus the mortgage was not defective.

In considering the mortgagee’s argument, the court first turned to Black’s Law Dictionary, noting that “the word ‘duly’ means, ‘[i]n a proper manner; in accordance with legal requirements.’ And the word ‘acknowledge’ means ‘[t]o confirm as genuine before an authorized officer.'” Thus the court read the notary acknowledgment to mean that the debtor confirmed her signature was genuine, but not that she signed voluntarily.

The objective of the recording requirement was to put the world on notice that the document was signed voluntarily. According to the court, the language in the mortgage acknowledgment did not provide the required notice.

The mortgagee also argued that the court should give effect to the parties’ intent. In support of this argument the mortgagee attached declarations by the debtor and the notary public. The debtor confirmed that she executed the mortgage voluntarily and as her free act and deed, and the notary stated that it was his usual practice to ask the party executing the document whether he or she was signing voluntarily and as his or her free act and deed. The notary further stated that he would not notarize a document without obtaining the affirmation.

The court rejected the declarations as irrelevant. Putting aside the question of whose intent should be considered, intent was irrelevant. This was not a question of contract interpretation. Rather the court was tasked with determining whether on its face the acknowledgment provided the required notice to the world.

Accordingly the court concluded:

- The acknowledgment was defective since it did not indicate that the debtor executed the document voluntarily and as her free act and deed.
- This meant that the mortgage was not properly recorded, and therefore did not provide constructive notice to a subsequent bona fide purchaser.
- This in turn meant that the trustee could avoid the mortgage.

Under section 551 of the Bankruptcy Code when a transfer is avoided, it is preserved for the benefit of the bankruptcy estate. The debtor argued that it was entitled to claim a homestead exemption with respect to the recovered property.

However, the court agreed with the view that "'[p]reservation is just that. It simply puts the estate in the shoes of the creditor whose lien is avoided. It does nothing to enhance (or detract from) the rights of that creditor vis-à-vis other creditors."' Under state law the debtor's homestead exemption claim was not enforceable against the mortgagee since the mortgage was executed before the debtor recorded her homestead exemption. Since the homestead exemption was originally subordinate to the mortgage, it remained so with respect to the mortgage as preserved for the benefit of the bankruptcy estate.

Consequently the court granted the trustee's motion for summary judgment on the counts seeking to (1) avoid the mortgage and (2) preserve the avoided mortgage for the benefit of the estate as a first lien senior to the debtor's homestead exemption.

Although there are a large number of cases avoiding mortgages due to technical defects in execution, in a typical case a mistake is made (such as failing to fill in blanks in the notary block) that would be evident to someone who sees the mistake. This case is more subtle. It highlights the wisdom of consulting with local counsel on recording requirements to make sure that all of the magic language is included and any quirky local requirements are met.