

11 U.S.C. §544(a)(3)

O.R.S. 87.920  
O.R.S. 93.410  
O.R.S. 93.640  
O.R.S. 194.515(1)  
Acknowledgement (defective)  
Bona fide purchaser  
(hypothetical, trustee as)  
Constructive notice  
Forgery  
Strong arm powers (trustee's)  
Trust deed  
(defectively acknowledged)

Grassmueck v. Bane, Adv. No. 688-5183-R

In re George and Deloris Oerding, Case No. 685-08566-R7

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The trustee sought to avoid or otherwise invalidate the defendant's recorded interest, under a trust deed, in real property, and to recover rents, income or proceeds received by the defendant on the promissory note secured by the trust deed. The trustee contended that the signature of the debtor, George Oerding, on the trust deed was procured by fraud or was forged and therefore the recording of the trust deed failed to provide constructive notice to the trustee so as to cut off his ability to avoid the trust deed under 11 U.S.C. §544(a)(3).

The court found that the signature on the trust deed was not authored by George Oerding. Therefore the trustee failed to prove that George Oerding's signature was procured through fraud, because his signature was not procured. The court further held that the trustee failed to prove that George Oerding's signature was forged because he failed to prove that it was authored without George Oerding's authority. However, because the signature on the trust deed was not George Oerding's the notarial acknowledgement of his signature was false and defective.

The court held that because under Oregon law the recording of a defectively acknowledged trust deed does not impart constructive notice to subsequent bona fide purchasers of that instrument, such recording does not defeat the trustee's avoidance powers under 11 U.S.C. §544(a)(3). Actual knowledge of such recording is irrelevant.

E90-8(10)

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE )  
 )  
GEORGE E. OERDING and ) Case No. 685-08566-R7  
DE LORIS A. OERDING, )  
 )  
\_\_\_\_\_ Debtors. )  
 )  
MICHAEL A. GRASSMUECK, Trustee, ) Adversary Proceeding  
 ) No. 688-5183-R  
Plaintiff, )  
 )  
v. )  
 )  
BETTY BANE, ) MEMORANDUM OPINION  
 )  
\_\_\_\_\_ Defendant. )

**BACKGROUND**

This adversary proceeding has been brought by the trustee, as plaintiff, seeking to avoid and/or otherwise invalidate the defendant's recorded interest in certain real property, located in Coos County, Oregon, by virtue of a trust deed covering the subject real property wherein the grantors are the debtors and the defendant is named as beneficiary. Plaintiff further seeks to recover from the defendant all rents, income and/or proceeds received by the defendant on the promissory note secured by the trust deed or the subject property itself.

More specifically, plaintiff contends that the signature of the debtor, George E. Oerding, contained on the trust deed, was either procured by fraud or forged. Accordingly, plaintiff seeks the following:

1. An accounting and turnover of estate property pursuant to 11 U.S.C. § 542;

2. The avoidance of an unperfected transfer under the trustee's status as a hypothetical bona fide purchaser of real property pursuant to 11 U.S.C. § 544(a) (3);

3. To avoid a transfer procured through fraud and/or forgery under 11 U.S.C. § 544; and

4. To the extent that the transfer (the trust deed) is avoided under § 544, to recover any property transferred pursuant to 11 U.S.C. § 550.

After a pre-trial conference held herein on January 3, 1989, this court found that this court has jurisdiction herein and that this adversary proceeding is a core proceeding as defined in 28 U.S.C. § 157 (see scheduling order entered January 4, 1989).

On November 16, 1989, a pre-trial order was lodged in this proceeding containing certain agreed facts. These facts were incorporated as part of the court's findings of fact resulting from the subsequent trial held April 18, 1990. The pertinent agreed facts are as follows:

1. Plaintiff is the duly qualified and acting trustee in the above referenced bankruptcy case.

2. On July 1, 1958, the debtor, George E. Oerding, acquired a certain parcel of real property located at 1200 W. Central, Coquille, Coos County, Oregon. A copy of the warranty deed, which caused the subject property to be vested in the debtor, George E. Oerding and which more particularly describes the subject real property, is attached to plaintiff's complaint as "Exhibit A". Said deed was recorded, on or about September 12, 1958, in the Official Records of Coos County, Oregon. Said parcel of real property was property of the bankruptcy estate as of the commencement of the above bankruptcy case.

3. On April 20, 1984, a certain trust deed covering the subject real property was recorded in the Coos County Deed Records, which trust deed is dated April 18, 1984, and which shows the defendant, as beneficiary, the debtors

George E. Oerding and De Loris A. Oerding, as grantors and Willamette Valley Title Insurance Company, as trustee. The trust deed further indicates that it secures payment of a promissory note, dated April 18, 1984, in the face amount of \$18,000.00, made by the debtors, George E. Oerding and De Loris A. Oerding. A copy of the subject trust deed is attached to plaintiff's complaint as "Exhibit B".

4. Plaintiff has demanded that the defendant release and deliver to the plaintiff the promissory note secured by the subject trust deed, and release and extinguish all of the defendant's recorded title interests in the subject property, and account for all rents, income and/or proceeds received by the defendant from the promissory note, trust deed, or from the subject property. Defendant has refused to do so.

5. Defendant was the initial transferee of the transfers to the defendant of the subject promissory note and trust deed, or the entity for whose benefit such transfers were made.

6. Plaintiff contends that it has the superior right to possession and control, and now holds all ownership interests in the subject parcel of real property, as trustee of the debtors' estate. Plaintiff further contends that the defendant's lien or other ownership interests, if any, in the subject property, are void, of no effect, and are inferior to the lawful rights and interests of plaintiff. Plaintiff further contends, on information and belief, that the promissory note secured by the trust deed, is void and unenforceable, as against plaintiff and the estate. Plaintiff further contends he has a right to recover all the rents, profits, and/or proceeds, if any, acquired by the defendant from the promissory note, trust deed, or from the subject property.

7. Defendant contends she has a valid beneficial trust deed interest in the subject property, and that the ownership claims of the plaintiff are subject to those of the defendant. Defendant further contends that the promissory note is enforceable as against the plaintiff, and that it evidences a valid debt of the debtors due to the defendant. Defendant further contends that plaintiff has

no right to the rents, profits, and/or proceeds acquired by the defendant from the promissory note, trust deed or from the subject property.

8. An actual controversy exists between the parties.

9. Defendant has received some money on account of the promissory note and trust deed, since April 18, 1984, in an amount undetermined at this time. Plaintiff will establish the amount at trial.

There were other agreed facts not relevant to this opinion.

The parties disputed the issue of whether or not the signature of George E. Oerding on the subject trust deed was procured, either by fraud or by forgery. The parties agreed that only George Oerding appeared in the chain of title concerning the subject real property.

Trial was held in this matter on April 18, 1990, the plaintiff appearing by counsel, G. Jefferson Campbell, Jr., and the defendant appearing by counsel, William E. Hewes. At the conclusion of the trial, this court made the following additional findings and conclusions:

1. George Oerding did not authorize the signature that purports to be his which appears on the trust deed;
2. Plaintiff failed to prove that George Oerding's signature was procured through fraud, because his signature was not procured;
3. Plaintiff failed to prove that George Oerding's signature was forged because he failed to prove that it was authored without George Oerding's authority;
4. The trust deed contains a defective acknowledgment, in that the acknowledgment of Jimmie D. Davis, the notary thereon, is false;
5. The amount of money received by defendant on account of the promissory note secured by the trust deed is \$5,100; and
6. The plaintiff is not entitled to a turnover of the \$5,100 received by defendant.

Apparently, the subject real property has been sold and the sales proceeds impounded. After the trial, the court took under advisement the remaining legal

issue, the effect of the defectively acknowledged trust deed. A post-trial briefing schedule was set. The parties have now filed their post-trial briefs.

#### ISSUE

The sole remaining issue to be decided by this court is the legal effect of the defectively acknowledged trust deed, or, put another way, does the defendant's recorded trust deed impart constructive notice to the plaintiff such as to cut off his ability to avoid the trust deed using his strong-arm powers?

#### DISCUSSION

The plaintiff-trustee obtains his status as a hypothetical bona fide purchaser of real property pursuant to the Bankruptcy Code. 11 U.S.C. § 544 provides in part as follows:

(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.

By the terms of 11 U.S.C. § 544(a) (3), the trustee's actual knowledge is irrelevant. Placer Savings & Loan Assoc. v. Walsh, (In re Marino), 813 F.2d 1562 (9th Cir. 1987).

The nature and extent of the powers conferred upon the plaintiff by such status, however, are determined by state law. In re Cox, 68 Bankr. 788 (Bankr. D. Or. 1987).

Since the trustee's actual notice is irrelevant, only constructive notice of a creditor's lien defeats the trustee's subsequent avoidance powers under 11 U.S.C. § 544(a) (3). See In re Gurs, 27 Bankr. 163 (BAP 9th Cir. 1983).

The question thus becomes, under Oregon law, does the actual recording of a trust deed which contains a defective notarial acknowledgment provide

constructive notice of the beneficiary's interest in the real property to a subsequent bona fide purchaser?

O.R.S. 93.640 provides in pertinent part that:

(1) Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state which is not recorded as provided by law is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, . . . is first filed for record, and as against the heirs and assigns of such subsequent purchaser. As used in this section, "every conveyance, deed, land sale contract". . . includes . . . trust deeds, . . . (emphasis added)

O.R.S. 93.480 provides that:

Every conveyance acknowledged, proved or certified in the manner prescribed by law by any of the authorized officers may be read in evidence without further proof thereof and is entitled to be recorded in the county where the land is situated.

O.R.S. 93.410 provides that:

Deeds executed within this state, of lands or any interest in lands therein, shall be signed by the grantors and may be acknowledged before any judge of the Supreme Court, circuit court judge, county judge, justice of the peace or notary public within the state. No seal of the grantor, corporate or otherwise, shall be required on the deed.

O.R.S. 194.515(1) provides that:

In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument.

When the grantor never appears before the notary public who acknowledged the deed, the acknowledgment is false. Houck v. Darling, 395 P.2d 445 (Or., 1964). The court in Houck stressed that an acknowledgment is not essential to the validity of the deed as between the parties; its purpose is to entitle the deed to be recorded. A record, however, of a deed bearing a false acknowledgment should be stricken.

It has been the law in Oregon for over 100 years that the recordation of an instrument which contains a defective notarial acknowledgment does not provide

constructive notice, the instrument is not entitled to be recorded. Musgrove v. Bonser, 5 Or. 313 (1874); Fleschner v. Sumpter, 12 Or. 161 6 P. 506 (1885).

The defendant argues that the defect, in this case, is not apparent on the face of the trust deed and that, therefore, the better rule ought to be that the trust deed is entitled to be recorded and that such recordation provides constructive notice. The defendant has not, however, cited any Oregon authority for such a proposition. The defendant's argument is clearly contrary to the Oregon law as set forth above. O.R.S. 87.920 specifically provides that:

Except where filing of the document is specifically required or authorized by statute, no document filed for recording or otherwise with any public officer in this state before or after October 15, 1983, shall create a lien or encumbrance upon or affect the title to the real or personal property of any person or constitute actual or constructive notice to any person of the information contained therein.

See also In re Cox, supra.

Next, the defendant argues that the trustee should be estopped from denying the validity of the trust deed because George Oerding has imparted validity to an otherwise invalid instrument by later acknowledging that he let De Loris Oerding do whatever she wanted.

Estoppel as to George Oerding (if it does exist) is not estoppel as to the trustee who occupies the status of a hypothetical bona fide purchaser who takes for value without constructive notice of the defendant's interest.

#### **CONCLUSION**

The trust deed in which the defendant is named as beneficiary was not entitled, under Oregon law, to be recorded as the notarial acknowledgment was false. Accordingly, under Oregon law, it imparts no constructive notice to the plaintiff who may avoid the defendant's lien on the real property by virtue of his status as a hypothetical bona fide purchaser of real property pursuant to 11 U.S.C. § 544(a)(3). It follows that plaintiff is entitled to the impounded proceeds from the sale of the subject real property, a judgment consistent herewith shall be entered.

This opinion shall constitute the court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, they shall not be separately stated.

ALBERT E. RADCLIFFE  
Bankruptcy Judge