

ARKANSAS BANKRUPTCY COURT VOIDS MORTGAGE LIEN ON BASIS OF FAULTY ACKNOWLEDGMENT

By
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Recently, an Arkansas Bankruptcy Court allowed the trustee to avoid a mortgage lien due to a defective acknowledgment. In Re Stewart, Case No. 1:08-bk-71338, (Chapter 7), AP NO. 1:08-ap-07153 (Bankr. W.D. Ark. 2009). The Court stated that although the debtor's name was omitted from the acknowledgment, this alone did not create the defective notice because referencing the document as a whole could have provided the missing information. However, the acknowledgment incorrectly referenced the debtor as a "he", and that this, coupled with the missing debtor's name, was enough to create ambiguity thus requiring extrinsic evidence. *Id* at 4088.

The debtor, Mary Stewart, granted a mortgage lien to the lender, JP Morgan Chase, to secure a \$105,000.00 note. The debtor filed for Chapter 7 bankruptcy protection under the United States Bankruptcy Code, and the trustee filed an adversary proceeding against the lender to avoid the lien. At issue was the defective acknowledgment. It was missing the debtors name entirely and was instead left blank. In addition, the pronoun "he" was used in the acknowledgment, when the debtor was a single woman. The trustee argued that constructive notice was not provided and therefore the lien should be avoided altogether. The Bankruptcy Court agreed.

Citing Hawkins v. First Nat'l, Bank (In re Bearhouse), 99 B.R. 926, 927 (Bank.W.D. Ark. 1989), the Court noted that an acknowledgment can be deemed sufficient if it *substantially* complies with Arkansas state law. In Bearhouse, the mortgage was deemed to have provided constructive notice to third parties when it was improperly acknowledge because the document as a whole was regular on it's face. *Id* at 927. In addition, the Arkansas Supreme Court held in Magness v. Arnold, 31 Ark. 103 (1876), an acknowledgment on a deed which was missing the grantors name did not make the deed defective. In Magness, the justice was able to identify the grantor as the person who appeared before him and this was enough for the court to hold the acknowledgment as being sufficient. Moreover, in Farm Bureau Finance Co., Inc. v. Carney, 100 Idaho 745, 750, 605 P.2d 509, 514 (1980), the court held that the omission of a pronoun or use of the wrong gender is not generally considered a fatal error to an acknowledgment.

However, in the instant case, the Court finds that although an acknowledgment missing a debtor's name or an acknowledgment whose pronoun use was of the wrong gender would not alone be held to provide defective notice to third parties, the combination of the two flaws did. In Re Stewart, Case No. 1:08-bk-71338, (Chapter 7), AP NO. 1:08-ap-07153 (Bankr. W.D. Ark. 2009). By referencing the mortgage document as a whole, one could easily fill in the missing debtor's name on the blank acknowledgment. But by using "he" instead of "she" when the debtor is clearly marked as a single women, this caused enough ambiguity so as to require extrinsic evidence. *Id*. Therefore, the mortgage instrument is deemed defective in that it fails to provide constructive notice to third parties. Lastly, the lender sought an equitable remedy of reformation of the mortgage due to mutual mistake. Because the trustee is considered a bona fide purchaser under 11 U.S.C. § 544(a)(3), and would be prejudiced by any equitable reformation of the mortgage, this relief was denied.

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