

LENDER'S LIEN SURVIVES DESPITE FAULTY ACKNOWLEDGMENT

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Recently, the 8th Circuit Bankruptcy Appellate Court overturned the Bankruptcy Court District of Nebraska decision that held that a recorded deed of trust was void due to a faulty acknowledgement under Nebraska state law. *BowlNebraska v. Omaha State Bank* (MLW No. **60814**/Case No. 10-6016 - 8 pages) (U.S. Bankruptcy Appellate Panel, 8th Circuit, Federman, J.) The Appellate Court held that although the acknowledgment may not have met all of the state's filing requirements, the recorded notices of default contained enough information to provide notice to a bona fide purchaser of the bank's claimed interest. *Id.* Whether the acknowledgement was faulty was not at issue. The recorded notices of default were deemed to provide constructive notice and therefore defeated the strong arm power of Bankruptcy Code 544(a)(3), which allows the debtor in possession/trustee to avoid any lien as if he were a bona fide purchaser at the time the case is filed. *Id.* at 8.

BowlNebraska, L.L.C., a Nebraska limited liability company, filed for Chapter 11 Bankruptcy in June 2009. In an adversary proceeding, BowlNebraska sought to either have liens held by Omaha State Bank declared void or to avoid them pursuant to strong arm power provided by Section 544 of the Bankruptcy Code. In September 2006, Steve Sempeck and Theodore Baer executed a deed of trust to Omaha State Bank on behalf of BowlNebraska. Both signatures were notarized by Christopher Maher, the president of the bank and the brother-in-law of Theodore Baer. BowlNebraska defaulted on its loan and the bank began recording its notices of default. The Bankruptcy District Court determined that the liens were void under Nebraska law which provides "[a] notary public is disqualified from performing a notarial act . . . if the notary is a spouse, ancestor, descendent, or sibling of the principal, including in-law, step, or half relatives." Neb. Rev. Stat. § 64-105.01. The relationship between Maher and Baer was found to taint the entire document and thus extended to Sempeck as well. *BowlNebraska v. Omaha State Bank* (MLW No. **60814**/Case No. 10-6016 - 8 pages) (U.S. Bankruptcy Appellate Panel, 8th Circuit, Federman, J.) at 5.

On appeal, the Appellate Court noted that the Debtor conceded to the validity of the liens outside of the bankruptcy. Therefore the Court only considered whether or not the liens were voidable under §544. *Id.* at 3. "Section 544(a)(3) of the Code provides that [the trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or

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of any creditor, the rights and powers of, or may avoid the transfer of any property of the debtor or any obligation incurred by the debtor that is voidable by . . . a bona fide purchaser of real property . . . whether or not such purchaser exists.]” *Id.* In order to determine whether BowlNebraska was a bona fide purchaser, the Appellate Court looked to Nebraska state law. Section 76-238 of the Nebraska Statutes provides that a faulty recording of mortgage or deed of trust is ineffective only as to those *without notice*. *Id.* at 6, *citing Caruso v. Parkos*, 637 N.W.2d 351, 359 (Neb. 2002) (“A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. The burden of proof is upon a litigant who alleges that he or she purchased the property for value and without notice. This burden includes proving that the litigant was without notice, actual or constructive, of another’s rights or interest in the land.”)

The valid recording of the default notices by Omaha Bank after the recording of the deed in trust and before the Chapter 11 filing by the Debtor was not in dispute. The Debtor conceded to the validity of the liens outside of bankruptcy. Thus, the Appellate Court reversed the Bankruptcy Court’s decision in favor of BowlNebraska, L.L.C and concluded that they did not meet their burden in showing they were without actual or constructive notice of Omaha Bank’s interest in the property. *Id.* at 8. Even though one notice may have been faulty, the other notice prevailed.