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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE: PETER MEEKS AND
GLORIA MEEKS

CASE NO. 9204698JC

PETER AND GLORIA MEEKS

PLAINTIFFS

VS.

ADVERSARY NO. 9300039JC

GREEN TREE FINANCIAL CORP.-
MISSISSIPPI

DEFENDANT

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Chapter 13 Trustee

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the Debtors' Complaint to Determine Extent or Validity of Lien. In their complaint the Debtors seek an adjudication that the acknowledgment contained in the deed of trust held by Green Tree Financial Corp.- Mississippi on the Debtors' principal residence is defective, and therefore the deed of trust is invalid. The Debtors further seek an adjudication that as a result of the defective acknowledgment Green Tree is an unsecured creditor and should be

paid in the same manner as other unsecured creditors, and that upon completion of the Debtors' plan any remaining debt to Green Tree should be discharged and Green Tree's lien avoided.

Also pending in the Debtors' chapter 13 case relating to the treatment of Green Tree are Green Tree's objection to confirmation of the Debtors' chapter 13 plan, the Trustee's motion to modify the Debtors' plan, and the Trustee's objection to Green Tree's proof of claim. Pursuant to an agreed order these proceedings are being held in abeyance pending a decision in the present adversary proceeding.

Also pursuant to the agreed order the parties have stipulated as to the facts in this adversary proceeding, submitted memorandum briefs in support of their respective positions, and requested a ruling based on their briefs. After considering the evidence before the Court along with the arguments of counsel, the Court holds that the Debtors are not entitled to the relief sought, and therefore, their complaint should be dismissed with prejudice. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The relevant facts in this case are not in dispute. On March 15, 1991, The Debtors, Peter and Gloria Meeks, executed a retail installment contract and security agreement with Leadco Construction whereby the Debtors agreed to pay Leadco \$ 6,600 for the construction of an additional room on their home.

Also on March 15, 1991, in connection with the contract, the Debtors executed a deed of trust on their home, naming Leadco as the beneficiary thereunder. The signatures of William Dickson and Roy Hodges appear on the deed of trust as subscribing witnesses. William Dickson served as the attesting witness upon whose signature the "Subscribing Witness Acknowledgment" is based. The acknowledgment is dated March 22, 1991. In fact, Mr. Dickson was not present at the execution of the deed of trust, and therefore did not witness the Debtors' signatures.

The deed of trust was conveyed to Green Tree by virtue of a "Deed of Trust Assignment" dated March 22, 1991, executed by William Dickson as "Owner" of Leadco Construction. The assignment identifies Leadco Construction as a sole proprietorship. Leadco Construction is not a sole proprietorship, but a corporation, and has been a corporation at all times relevant to this case. Mr. Dickson is a shareholder of Leadco Construction.

Both the deed of trust and the deed of trust assignment were filed for recordation in the Office of the Chancery Clerk of Hinds County, Mississippi on March 25, 1991.

On December 22, 1992, the Debtors filed their petition for relief under Chapter 13 of the Bankruptcy Code¹. The Debtors subsequently commenced this adversary proceeding seeking an adjudication that the acknowledgment to the deed of trust is defective, and therefore the deed of trust is invalid. The Debtors

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code.

further claim that Green Tree is an unsecured creditor, and as an unsecured creditor, it is entitled to receive under the Debtors' chapter 13 plan no more than the other unsecured creditors. Finally, the Debtors claim that upon completion of their plan any remaining debt to Green Tree should be discharged and Green Tree's lien should be avoided.

In support of their position that the acknowledgment is defective, the Trustee and Debtors argue that as a shareholder, William Dickson could not serve as a subscribing witness, and even if he could, the fact that he was not present at the execution of the deed of trust renders the subscribing witness acknowledgment defective. A deed containing an defective acknowledgment is not eligible for recordation, and is ineffective to give notice to third parties. Therefore, pursuant to § 544² of the Bankruptcy

² § 544 provides in pertinent part as follows:

11 USC § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(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.

Code, the Trustee, as a bona fide purchaser, holds an interest superior to that of Green Tree.

In the joint memorandum brief of the Trustee and the Debtors, although not appearing in the complaint, the Trustee and the Debtors argue also that the assignment is invalid since it incorrectly identifies Leadco as a sole proprietor.

CONCLUSIONS OF LAW

The general rule in Mississippi is that a defectively acknowledged deed is not eligible for recordation, and where a defectively acknowledged deed is recorded, the recording is ineffective to provide constructive notice to subsequent bona fide purchasers. Metropolitan National Bank v. United States of America, 901 F.2d 1297, 1302 (5th Cir. 1990); Mills v. Damson Oil Corp., 686 F.2d 1096, 1103 (5th Cir. 1982) (citing Ligon v. Barton, 88 Miss., 40 So. 555 (1906); Elmslie v. Thurman, 87 Miss. 537, 40 So. 67 (1906); Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936)).

The exception to the general rule is where the defect in the acknowledgment is entirely latent. In Mills v. Damson Oil Corp., the Fifth Circuit Court of Appeals certified to the Supreme Court of Mississippi the following question: "Whether a defectively acknowledged and recorded deed imparts constructive notice if the defect in the acknowledgement is entirely latent?" Mills, 686 F.2d at 1114. In response to the question, the Mississippi Supreme Court stated, "This Court's answer to this

question is 'yes.' We recognize there is a division of authority, but we are convinced better reasoning supports the affirmative." Mills v. Damson Oil Corp., 437 So.2d 1005, 1005-6 (Miss. 1983)(citations omitted).

Following the Mississippi Supreme Court's response to its question, the Fifth Circuit held that the defectively acknowledged and recorded deed provided constructive notice because the defect in the acknowledgment was entirely latent. Mills v. Damson Oil Corp., 720 F.2d 874, 875 (5th Cir. 1983).

It is undisputed that William Dickson was not present at the time the deed of trust was executed, but, nevertheless, he signed his name as a subscribing witness and served as the attesting witness upon whose signature the "Subscribing Witness Acknowledgment" is based. Assuming *arguendo* that the acknowledgment to the deed of trust is defective as a result of its undisputed falsity, the recordation of the deed of trust would nevertheless provide constructive notice. The defect in the acknowledgment is entirely latent since it cannot be ascertained by reference to the document alone. Therefore, under Mills v. Damson Oil Corp., 720 F.2d 874 (5th Cir. 1983), the defective acknowledgment still provides constructive notice to bona fide purchasers.

The Trustee and Debtors also argue that the acknowledgment is defective because as a shareholder of the beneficiary under the deed of trust, William Dickson was disqualified from acting as a subscribing witness. The Court need

not rule on whether William Dickson could properly act as a subscribing witness. Even assuming his signature as subscribing witness is sufficient to render the acknowledgment defective, the defect again would be entirely latent since no relationship between Dickson and Leadco Construction can be determined by reference to the deed of trust.

In addition to arguing that the acknowledgment to the deed of trust is defective, the Trustee and Debtors argue that the assignment of the deed of trust to Green Tree is invalid. However, the Court will not rule on the validity of the assignment. The Debtors and the Trustee have not offered any authority to show that the validity of the assignment affects the priority of the Trustee's interest in the property. If the Court were to hold that the assignment is invalid, the result would merely be that Leadco Construction instead of Green Tree would hold an interest in the property superior to the Trustee's interest.

CONCLUSION

Under Mississippi law, where a defect in an acknowledgment to a deed of trust is entirely latent, recordation of that deed of trust is effective to provide constructive notice to a subsequent bona fide purchaser. This Court holds that assuming the acknowledgment to the deed of trust is defective as a result of its falsity, the defect is one that is latent. It is not apparent from the document that William Dickson did not actually

witness the execution of the deed of trust, and likewise it is not apparent that his subscribing witness acknowledgment is false.

While this Court has not ruled on whether William Dickson, as a shareholder of Leadco Construction, could properly serve as a subscribing witness, this Court holds that any defect arising from Mr. Dickson's status as a shareholder of Leadco would also constitute a latent defect, and therefore would not affect the constructive notice afforded by the recordation of the deed of trust.

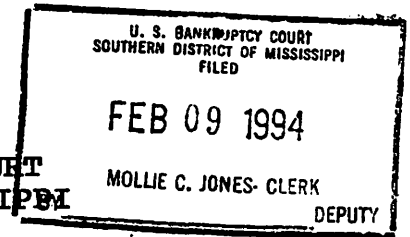
For the foregoing reasons, it is the opinion of this Court that the Debtors are not entitled to the relief sought in their complaint. Therefore, the complaint will be dismissed with prejudice. A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

DATED THIS the 9th day of February, 1994.



UNITED STATES BANKRUPTCY JUDGE

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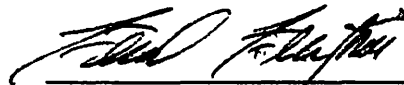
DEFENDANT

FINAL JUDGMENT

Consistent with this Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the Debtors' Complaint to Determine Extent or Validity of Lien shall be and hereby is dismissed with prejudice.

This is a final judgment for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED this the 9th day of February, 1994.



UNITED STATES BANKRUPTCY JUDGE