

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

**In re: Howard L. McDaniel and
Christa M. McDaniel, Debtors**

**No. 5:09-bk-75005
Ch. 7**

ORDER

Before the Court is an Amended Motion for Relief from Stay or for Adequate Protection filed by National Loan Investors, L.P. [NLI] on November 4, 2009. NLI, as an alleged secured lienholder, requested relief from the automatic stay as to two pieces of real property. On November 6, 2009, the chapter 7 trustee filed a response in which he alleged that the lien on one piece of property was unperfected and asked the Court to dismiss the motion. The parties later entered into an agreed order granting relief from the stay as to the uncontested property. On May 12, 2010, the Court held a hearing on the amended motion and response regarding the remaining property; at the conclusion of the hearing, the Court took the matter under advisement. For the reasons stated below, the Court grants NLI's amended motion for relief from the automatic stay as to the remaining piece of property.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157 and it is a core proceeding under 28 U.S.C. § 157(b)(2)(G). The following order constitutes finding of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Background

On December 4, 2007, the debtors executed a promissory note with ANB Financial, N.A. [ANB Financial] in the principal amount of \$251,918.75 for the purchase of real property located at 14363 Rt. E in Pineville, Missouri 64856, also known as the Linderhof Farm.

The debtors signed the promissory note as trustees on behalf of the Howard L. McDaniel Trust and Christa M. McDaniel Trust and executed a corresponding deed of trust securing a mortgage on the property in favor of ANB Financial. The legal description, which was included within the body of the deed of trust on the first page, reads as follows:

The Southwest Quarter of the Southeast Quarter and the South One Half of the Southeast Quarter of the Southeast Quarter of Section 28, Township 21, Range 30. Except that Part of the South One Half of the Southeast Quarter of the Southeast Quarter of Section 28, Township 21, Range 30 Lying East of Highway "E". Also Except All that Part of the Southwest Quarter of the Southeast Quarter of Section 28, Township 21, Range 30 Lying South and West of [sic]¹

The deed of trust was recorded on December 12, 2007, in the Office of the Recorder of Deeds in McDonald County, Missouri.

On December 13, 2007, the debtors executed another promissory note with ANB Financial in the principal amount of \$206,379.00 for the purchase of a separate, non-contiguous piece of real property located at 120732 Rt. E in Pineville, Missouri 64856. The debtors signed the promissory note as trustees on behalf of the Howard L. McDaniel Trust and Christa M. McDaniel Trust and executed a corresponding deed of trust securing a mortgage on the property in favor of ANB Financial. However, the legal description included within this deed of trust was erroneous because it was identical to the legal description included in the deed of trust executed on December 4, 2007, for the Linderhof Farm. On the same day, ANB Financial and Arvest Bank, N.A., [Arvest] also entered into a subordination agreement that granted ANB Financial a priority lien over Arvest's pre-existing lien on the property. The subordination agreement included the following correct legal description of the property:

All that past [sic] of the E 1/2 of the NW 1/4 of the NE 1/4 Section 21, Township 21, Range 30, that lies South and West of "E" Hwy. Also all of the SW 1/4 of the NE 1/4 of Section 21, Township 21, Range 30, McDonald County, Missouri, except the South 10 acres thereof. Also, all

¹ The legal description provided in the deed of trust ended with the word "of."

that part of the NE 1/4 of the NE 1/4 of Section 21, Township 21, Range 30, McDonald County, Missouri, that lies South and West of “E” Hwy.

Both the deed of trust and the subordination agreement were recorded on December 26, 2007, in the Office of the Recorder of Deeds in McDonald County, Missouri. The recording stamp on the deed of trust shows that it was filed at 7:55 a.m. in Book 160, at page 2606.² The recording stamp on the subordination agreement shows that it was filed at 7:56 a.m. in Book 160, at page 2610.

On October 13, 2008, the Federal Deposit Insurance Corporation, receiver for ANB Financial, executed a Transfer of Lien document in favor of NLI for each of the two loans. Both documents were recorded on October 17, 2008, in the same office as the deeds of trust. Each Transfer of Lien document included a legal description as “Exhibit A,” which was the same legal description that appears in both deeds of trust.

Issues

NLI argues that relief is proper because the debtors have no equity in the subject property and because NLI is not adequately protected as the result of the expiration of the debtors’ property insurance. The debtors do not contest either of these allegations. However, the trustee objects to NLI’s amended motion for relief from the stay for two reasons, both of which are based on the incorrect legal description that appears in the deed of trust for the subject property. First, he argues that the subject property is not encumbered by a lien; rather, because the deed of trust includes the legal description for the Linderhof Farm, any resulting lien attached to the Linderhof Farm rather than the subject property. The Court disagrees with this argument. Despite the incorrect legal description shown in the deed of trust, NLI has a secured lien on the subject property.

² The time of recording was handwritten on the deed of trust, and because of the way the numbers are written, the time may be interpreted as either 7:55 a.m. or 7:35 a.m. However, the Court finds that the time reads as 7:55 a.m. based on two things: (1) a comparison of handwritten numbers by the same individual, and (2) Joe Hendricks’s statement in his deposition that the deed of trust was filed at 7:55 a.m.

Missouri courts disfavor voiding property transfers on the basis of an insufficient property description, and where there is a deficiency or error in the property description, courts may “rely on the four corners of the instrument as well as the surrounding circumstances and conditions to ascertain the parties’ intentions.” *Gresham v. America’s Serv. Co.*, 373 B.R. 914, 919 (Bankr. W.D. Mo. 2007). As the *Gresham* court noted, “[t]he intention of the parties is the linchpin” *Id.* at 919. Here, the parties who entered into the promissory note and deed of trust agree that it was the debtors’ intention to mortgage the subject property to ANB Financial despite the incorrect legal description shown in the deed of trust. In addition, the debtors’ Statement of Intention shows that the property will be surrendered to NLI, successor in interest to ANB Financial. The correct street address included in the deed of trust and the extrinsic evidence of the correct legal description provided by the subordination agreement also support a finding that the subject property was intended to be encumbered by ANB Financial’s lien. Accordingly, the Court finds that the contracting parties intended for the subject property to be encumbered by a mortgage in favor of ANB Financial. A finding that the lien instead attached to the Linderhof Farm would effectuate a void of the transfer that occurred between the debtors and ANB Financial. *See Baird v. Harris*, 290 S.W. 80, 81 (Mo.App. 1927) (ruling that the deed was not void despite seller’s mistake in including a property description for a different piece of property that he also owned, where the intention of the parties could be ascertained). As the Missouri Supreme Court has stated, “[a] court will declare a deed void for uncertainty of description *only* where, after resorting to oral proof or after relying upon other extrinsic or external proof or evidence, that which was intended by the instrument *remains mere matter of conjecture.*” *Hamburg Realty Co. v. Woods*, 327 S.W.2d 138, 150 (Mo. 1959) (emphasis added) (quoting 26 C.J.S. *Deeds* § 30).³

³ This language is now found in 26A C.J.S. *Deeds* § 54 (West 2010).

Alternatively, the trustee argues that he can assume the status of a bona fide purchaser of the property, and as such, may avoid NLI's lien pursuant to 11 U.S.C. § 544(a)(3) in order to pursue sale of the property on behalf of the bankruptcy estate. Whether the trustee has the status of a bona fide purchaser in relation to the subject property is the remaining issue before the Court. If the trustee does not have this status, the Court will address the merits of NLI's amended motion for relief from the automatic stay.

Analysis

The bankruptcy code grants the trustee the rights of a bona fide purchaser under 11 U.S.C. § 544(a)(3). Section 544(a)(3) states that,

[t]he trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee . . . , 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 . . . from the debtor . . . that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists

11 U.S.C. § 544(a)(3). The trustee may assume these rights and powers “without regard to any knowledge,” meaning that any actual knowledge he may have regarding the title of the property will not preclude him from having the status of a bona fide purchaser.

Gresham, 373 B.R. at 921.

The definition of a bona fide purchaser is controlled by the laws of the state where the property is situated. *Williams v. Marlar*, 252 B.R. 743, 752 (B.A.P. 8th Cir. 2000) (“While the Bankruptcy Code creates the status of a hypothetical bona fide purchaser, state law defines that status.” (quoting *Realty Portfolio, Inc. v. Hamilton*, 125 F.3d 292, 298 (5th Cir. 1997))). The subject property is located in Missouri; therefore, Missouri law controls the definition of a bona fide purchaser. The Missouri Supreme Court defines a bona fide purchaser as someone who “pays a valuable consideration, has no notice of outstanding rights of others, and who acts in good faith.” *Johnson v. Stull*, 303 S.W.2d 110, 118 (Mo. 1957). A bankruptcy trustee is presumed to have paid valuable

consideration and to have acted in good faith when using powers and rights pursuant to § 544(a)(3). *Clement v. Ameriquest Mortgage, Co.*, 2007 WL 1289892, at *3 (Bankr. W.D. Mo. 2007). The analysis is therefore shifted to the requirement that the trustee must have no notice of any outstanding rights of others. Under Missouri law, notice may be actual or constructive. However, § 544(a)(3) renders actual notice, or knowledge, irrelevant to this analysis. *Gresham*, 373 B.R. at 921. Missouri law recognizes two types of constructive notice that are pertinent to this analysis: (1) notice provided by the content of recorded real estate instruments in the chain of title, and (2) notice provided by facts that would “place a reasonably prudent person on inquiry as to the title he is about to purchase.” *Id.* at 921–22. A purchaser of real property is considered to have constructive notice of the content of all instruments in the realty’s chain of title. Mo. Ann. Stat. § 442.390 (West 2000).⁴ In addition, a purchaser who might have notice of a fact through due diligence is put on inquiry of that fact, regardless of whether he actually performs the due diligence. *Gresham*, 373 B.R. at 922 (citing *St. Louis 221 Club v. Melbourne Hotel*, 227 S.W.2d 764, 769 (Mo. App. 1950)); *see also Woodbury v. Connecticut Mut. Life Ins. Co.*, 166 S.W.2d 552, 555 (Mo. 1942) (“[I]f a purchaser has knowledge from any source which should reasonably put him on inquiry, he should be charged with such knowledge as he would naturally gain by making such inquiry.”).

In the present case, the deeds of trust for both the Linderhof Farm and the subject property were recorded in McDonald County, Missouri, and indexed according to the Grantor/Grantee index required by Missouri statute. The subordination agreement between Arvest and ANB Financial was also recorded and indexed in McDonald County. Joe Hendricks, a title examiner who owned Elk River Abstract & Title in McDonald County for 28 years and continues to work there as a manager, stated in a deposition entered into evidence that a search for “McDaniel” in the Grantor/Grantee index would

⁴ Section 442.390 states that “[e]very such instrument in writing, certified and recorded in the manner herein prescribed, shall, from time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice.”

produce both deeds of trust because the debtors were the grantors of each mortgage. In addition, Hendricks stated that a search for “McDaniel” would also produce the subordination agreement, even though the grantor in that document was Arvest and the grantee was ANB Financial. As he explained, “they [the recorder’s office] list it under the banks that were doing the subordinating, but they also put the owner of the land or whoever is on the Deeds of Trust there.” In other words, while the subordination agreement was indexed under the names of Arvest and NLI as grantor and grantee, respectively, it was also indexed under “McDaniel” because the debtors were the owners of the property upon which the subordinated lien was attached. Hendricks also stated that he personally searched and verified that the subordination agreement was listed under “McDaniel” in the Grantor/Grantee Index.

Hendricks further stated that as a title examiner, the subordination agreement would alert him of abnormalities between the documents. Language in the subordination agreement states that Arvest was subordinating its first lien on the listed property in favor of a new lien to be executed simultaneously with the agreement. Hendricks said that based on this language, he would check the records for a deed of trust recorded immediately before or after the subordination agreement was recorded that would show the new and dominant lien in favor of ANB Financial. However, while he would find a deed of trust in favor of ANB Financial recorded within one minute of the subordination agreement, the legal description between the subordination agreement and the deed of trust would not match. Hendricks explained his potential reaction, saying,

I find the Deed of Trust there from the McDaniels, but it’s not covering the right land so all of a sudden it’s like, uh-oh, maybe I need to call somebody. What’s going on here? Because there’s a conflict. This document says something, but what was filed there is a conflict. So as a title examiner I’m not going to let you buy that without saying, listen, you may want to go do some more research because there’s supposed to be a lien here, so the potential buyer, I’m going to protect you and I’m going to say we’re not going to assume any liability. Now if you go ahead and buy it that’s up to you.

The trustee argues that he has no constructive notice of NLI's lien on the subject property because the content of both recorded deeds of trust, which he states are in the chain of title, relate only to the Linderhof farm according to the identical legal descriptions included in each document. In his Post-Trial Brief of Trustee, the trustee further argues that while the subordination agreement might provide information to place a reasonably prudent person on inquiry, it would "most likely not appear in the property's chain of title." However, the Court does not have sufficient evidence before it to support a finding that the subordination agreement was or was not in the chain of title.

Regardless, Missouri courts recognize inquiry notice as a form of constructive notice separate from the notice provided by the contents of documents within a property's chain of title. As stated in *Gresham*, a purchaser who might have notice of a fact through due diligence is put on inquiry of that fact, whether or not the purchaser actually performs the due diligence. Hendricks's deposition indicates that the subordination agreement was recorded and filed in the Grantor/Grantee index, and that a search of "McDaniel" would have revealed both deeds of trust and the subordination agreement. In addition, Hendricks made it clear in his deposition that the subordination agreement would raise serious questions regarding the conflict in the legal descriptions between the subordination agreement and the deed of trust for the subject property. The subordination agreement, recorded on December 26, 2007, at 7:56 a.m., stated that it was being executed simultaneously with a deed of trust in favor of ANB for the subject property. The deed of trust in favor of ANB, recorded on the same day at 7:55 a.m., clearly was the document that the subordination agreement was referencing, and yet the documents listed two entirely different legal descriptions. As a title examiner performing a routine title search, Hendricks stated in the deposition that this discovery would cause him to "alert both parties, the seller, the buyer, that something isn't right."

Based on Hendricks' deposition, the Court finds that the trustee, as a hypothetical purchaser of the subject property, would discover facts through due diligence that would have placed a reasonably prudent person on inquiry as to the title that person was about

to purchase. Therefore, the trustee does not qualify as a bona fide purchaser according to Missouri law and cannot avoid NLI's lien pursuant to § 544(a)(3) and pursue sale of the subject property. The trustee did not present any other defense to NLI's amended motion for relief from the automatic stay, and the debtors' Statement of Intentions indicates that they wish to surrender the subject property. The debtors are not maintaining insurance on the property. In addition, based on the debtors' schedules, the Court finds that there is no equity in the subject property. Therefore, relief from the automatic stay is proper under § 362(d).

Conclusion

For the reasons stated above, the Court finds that the trustee cannot avoid NLI's lien on the subject property under § 544(a)(3), and that relief from the automatic stay is proper under § 362(d). Accordingly, the Court grants NLI's amended motion for relief as to the subject property.

IT IS SO ORDERED.

August 10, 2010
DATE



BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

EOD 8/10/2010
by A. Penrod

cc: John T. Lee, trustee
Stanley V. Bond, attorney for trustee
Constance Clark, attorney for NLI
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