

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

JAMES BRADFORD HARMON
STACEY ANN HARMON

No. 03-14260
Chapter 7

Debtors

MEMORANDUM & ORDER

Appearances: Kenneth C. Rannick, Chattanooga, Tennessee, Attorney for Debtors
Jerrold D. Farinash, Kennedy, Koontz & Farinash, Chattanooga,
Tennessee, Attorney for C. Kenneth Still, Bankruptcy Trustee

HONORABLE R. THOMAS STINNETT,
UNITED STATES BANKRUPTCY JUDGE

The debtors in this chapter 7 case have claimed a homestead exemption in land located in Georgia. The debtors contend the land is not subject to any liens, and they can exempt its full value. The debtors have listed the value of the land as \$18,000. They claim an exemption under Ga. Code Ann. § 44-13-100(a)(1). The bankruptcy trustee objects to the exemption. The trustee contends: (1) the debtors can not exempt the full value of the land because it is subject to a mortgage in favor of Catoosa Teachers Federal Credit Union; (2) he can avoid the credit union's mortgage; (3) he will succeed to the credit union's rights under the mortgage; (4) as a result, he will be entitled to the value of the property up to the amount of the mortgage debt.

The credit union apparently concedes that if it has a mortgage, the mortgage has never been registered as required by Georgia law to give it effect against the trustee's rights as a subsequent bona fide purchaser without notice. Ga. Code Ann. § 44-2-1; 11 U.S.C. § 544(a)(3); *Macleod v. Suntrust Bank (In re Henderson)*, 284 B.R. 515 (Bankr. N. D. Ga. 2002); *Flatau v. Madonian (In re Sheetex, Inc.)*, 1999 WL 739628 (Bankr. M. D. Ga. 1999). Nevertheless, the question of whether the trustee can avoid the mortgage, if it exists, is not to be decided in this proceeding.

With regard to whether the credit union has a mortgage on the property, the main questions are:

- (1) When the debtors and the credit union entered into a form security agreement of the kind used for personal property, did they intend to create a mortgage on the land?
- (2) If they intended to create a mortgage on the land, did they fail to do so because the description of the property is insufficient?

Georgia law applies. *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020 (6th Cir. 2001).

Georgia law requires no particular form to create a mortgage, but the agreement must clearly reveal the creation of a lien and must specify the debt to be secured and the property to be mortgaged. Ga. Code Ann. §§ 44-14-31; see also Ga. Code Ann. § 44-5-33; *Citizens' & Southern Bank v. Farr*, 164 Ga. 880, 139 S.E. 658 (1927) (essentially the same rule as to deeds to secure debts).

The court has examined the form security agreement. It is the kind used for security interests in personal property, but Paragraph 1 is sufficient to create a contractual lien on any real property listed elsewhere in the agreement as collateral. The security agreement does not contain any language that expressly restricts it to personal property. It also does not contain any language that eliminates it from being used for real property. Some of the language may be appropriate only for personal property but that language can be considered to apply only to personal property. That does not prevent the remainder of the security agreement from applying to real property. Indeed, the debtors do not seriously deny their intent to create a mortgage on at least a part of the real property.

The debtors contend the credit union must not have intended to create a mortgage because the loan documents did not include the disclosures required by the Truth in Lending law. 15 U.S.C. § 1635; 12 C.F.R. §§ 226.23 & 226.31. The court assumes for the purpose of argument that the Truth in Lending law required some disclosures that were not included in the loan documents. The failure to include them does not show a lack of intent to create a mortgage. It indicates only that the credit union's employees did not know the correct procedure or used the wrong pre-printed forms.

At the hearing, the debtors' attorney argued that the mortgage is void due to the credit union's violations of the Truth in Lending law, specifically the failure to give the debtors notice of their right to rescind. Failure to disclose the right to rescind does not render a mortgage

void. It extends the rescission period from three days to three years (at most). *Lombardi v. Domestic Land and Investment Bank (In re Lombardi)*, 195 B.R. 569 (Bankr. D. R. I. 1996); *Rodrigues v. U. S. Bank (In re Rodrigues)*, 278 B.R. 683 (Bankr. D. R. I. 2002). The right to rescind may or may not require the debtor to tender the amount of the loan. See *Rudisell v. Fifth Third Bank*, 622 F.2d 243 (6th Cir. 1980); *Williams v. BankOne (In re Williams)*, 291 B.R. 636, 655–622 (Bankr. E. D. Pa. 2003); *Wepsic v. Josephson (In re Wepsic)*, 231 B.R. 768 (Bankr. S. D. Cal. 1998). The debtors have not attempted to rescind. Truth in Lending violations do not automatically make the mortgage void. *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9th Cir. 2003); *In re Hill*, 103 B.R. 121 (Bankr. N. D. Miss. 1989).

The court concludes that the parties intended to create a mortgage on the real property in question, and the mortgage is not void due to Truth in Lending violations.

The debtors' main argument is that the agreement fails to create a mortgage because it does not adequately identify the property. A mortgage must clearly specify the mortgaged property, but when an unclear description provides a key to the identity of the land, the court can allow parol evidence to aid in making a complete identification. 2 Daniel F. Hinkel, *Pindar's Georgia Real Estate Law and Procedure* § 20-8.

The debtors signed the front page of the security agreement that identifies the property as "U. S. Highway #41 State Route #3". This description is clearly inadequate and contains no information that is a key for identifying the property with the aid of parol evidence. The debtors also signed a UCC-1 financing statement with a more detailed description.

With regard to the financing statement, the first question is whether the security agreement and the financing statement can be taken together as one agreement that amounts to a mortgage. Georgia law requires no particular form for a mortgage. Ga. Code Ann. §§ 44-14-

31. A mortgage can be made up of several documents executed contemporaneously and with cross-references to each other or that are clearly part of the same transaction. *Grant v. Fourth National Bank*, 229 Ga. 855, 194 S.E.2d 913 (1972).

The security agreement provided that the debtors could be required to execute a financing statement. The debtors signed two financing statements, one for personal property (boat, motor and trailer) and another for real property. The financing statements are not dated, but the debtors and the credit union have stipulated that they are part of the credit union's records regarding the loan. According to the testimony of Mrs. Harmon, this is the only loan the debtors ever had with the credit union. The financing statements are clearly related to the security agreement. The one covering personal property lists the same collateral – a boat – that is listed in the security agreement. The other financing statement gives a longer description of real property but does not include the identification on page 1 of the security agreement – "U.S. Highway #41 State Route #3". The security agreement and the financing statements do, however, give the debtors' address as 1701 Highway 41, Ringgold, Georgia. Furthermore, the parties have stipulated that the loan documents include a property drawing, and the drawing identifies "U.S. Highway #41 State Route #3" in large type. The court concludes that the financing statement and the security agreement are part of a single agreement, and therefore, the financing statement's description of the property is part of the agreement.

The court also concludes that the property drawing included in the loan documents is part of the agreement.

The financing statement describes the property as follows:

Property described in Warranty Deed Book 0763 Page 585 Security Deed on Land Lot 39 & 70 in the 28th District and 3rd Section of Catoosa County, Ga being a part of that property conveyed by Deed recorded in Deed Book 341, Page 214.

(Tract of Land being Original Land Lot 39 & 70)

This description refers to the deed by which the debtors received the property. It was already recorded in Book 0763 at page 585. This deed transferred to the debtors a tract of land roughly in the shape of a parallelogram. The debtors subsequently transferred a large portion of the tract to the county fire department. This left the debtors with a tract that was roughly in the shape of an inverted L. The debtors owned this tract when they executed the agreement with the credit union. By referring to the deed to the debtors, the description in the financing statement includes the larger tract without attempting to exclude the portion previously transferred to the county fire department.

In this regard, the description in the financing statement also refers to another deed that preceded the deed to the debtors. Obviously, this even earlier deed would not show the effect of the transfer to the county fire department.

These facts raise the question of whether the description in the financing statement is inadequate because it described a larger tract of land that included more than the L-shaped tract the debtors still owned.

Numerous Georgia cases deal with attempts to transfer part of a tract of property by describing the whole tract and a part to be excluded. If the description does not clearly identify the excluded part or provide a key for identifying it with the aid of parol evidence, then the description is not adequate.

Some cases involve an attempt to exclude from the described property a part that has not yet been selected. In such a case the description is clearly insufficient to create a mortgage. *Plantation Land Co. v. Bradshaw*, 232 Ga. 435, 207 S.E.2d 49 (1974); *Smith v. Wilkinson*, 208 Ga. 489; 67 S.E.2d 698 (1951). The facts of this case do not fit that pattern with

regard to the present question – whether the agreement identifies the entire L-shaped tract, or provides a key to identify it with the aid of parol evidence. These cases are more appropriate to the debtors’ other argument – that they intended to mortgage only an unidentified part of the tract worth about \$5,000. The court will deal with that question later.

In other cases, the question is whether or not the property description provides workable directions for dividing the property or excluding a particular part from the transfer. See *Rowland v. Mathews*, 153 Ga. 849, 113 S.E. 442 (1922) (workable); *Payton v. McPhaul*, 128 Ga. 510, 58 S.E. 50 (1907) (workable); *Atlanta & W.P.R. Co. v. Atlanta, B. & A. R. Co.*, 125 Ga. 529, 54 S.E. 736 (1906) (workable); *Burgin v. Moye*, 212 Ga. 370, 93 S.E.2d 9 (1956) (unworkable); *Darley v. Starr*, 150 Ga. 88, 102 S.E. 819 (1920) (unworkable); *Weatherly v. Parr*, 74 Ga.App. 526, 40 S.E.2d 445 (1946) (unworkable). The facts of this case also do not fit that pattern.

The facts of this case present a significantly different problem. The description does not attempt to describe the property still owned by the debtors and then exclude a portion of it. The description includes the entire tract the debtors owned earlier – the property they still owned and the property they had previously transferred to the county fire department. The parties’ agreement, however, includes the property drawing, and it shows with dotted lines the part of the larger tract that was transferred to the county fire department and the part still owned by the debtors. Furthermore, the deed to the county fire department can be used to exclude its portion of the larger tract, leaving just the land still owned by the debtors. Taken together, the description in the financing statement and the drawing are sufficient to identify the mortgaged property as the L-shaped tract owned by the debtors, and its exact dimensions can be determined by using the deed to the debtors and the deed to the county fire department. See *Perkins v. Perkins*, 147 Ga. 122, 92 S.E. 875 (1917); *Simmons v. Wooten*, 241 Ga. 518, 246 S.E.2d 639 (1978); *Commodity*

Credit Corp. v. Wells, 188 Ga. 287, 3 S.E.2d 642 (1939); *Grant v. Fourth National Bank*, 229 Ga. 855, 194 S.E.2d 913 (1972).

The debtors argue they did not intend to give a mortgage on the entire L-shaped tract. They intended to give a mortgage on some part of the tract that would be worth \$5,040.43, and the description is inadequate because it fails to identify or give a key to the identity of the portion that was to be mortgaged.

At more than one place in the documents, the real property is valued at \$5,040.43. This does not indicate the parties' intent to mortgage only a portion of the property worth that amount. There is no other language in the documents that reveal an intent to limit the mortgage in that way. The property description certainly does not reveal any such intent. The valuation of the real property – \$5,040.43 – equaled the amount of one of the checks written by the credit union. The other check was \$14,000. This made the total of the loan \$19,040.43, which was also the limit on the line of credit. The collateral valuations were \$5,040.43 for the real property and \$15,840.00 for the boat, for a total of \$20,880.43. Based on these facts, the court concludes the real property was valued at \$5,040.43 for the purpose of making the loan, not for the purpose of limiting the mortgage to a portion of the property worth that amount. The parties did not intend to mortgage only a portion of the tract worth \$5,040.43.

In this situation, the debtors can not prove mutual mistake as a ground to reform or rescind the agreement. *Williams v. Fayette County*, 270 Ga. 528, 510 S.E.2d 825 (1999); *Curry v. Curry*, 267 Ga. 66, 473 S.E.2d 760 (1996).

In summary, the court concludes that the credit union has a mortgage on the property. This limits the debtors' exemption to the equity over and above the secured debt, if there is any equity. If the trustee avoids the mortgage, the avoidance will not increase the debtors' exemption rights. 11 U.S.C. §§ 551 & 522(g). The debtors can not avoid the mortgage under §

522(h) because it was a voluntary transfer. 11 U.S.C. § 522(g), (h). The court will enter an order accordingly.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 1/7/04)