

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-33046

NICOLAS DOMINGUEZ
a/k/a NICOLAS DOMINGUEZ VERGARA
HORTENCIA DOMINGUEZ

Debtors

**MEMORANDUM ON MOTION
FOR RELIEF FROM AUTOMATIC STAY**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This contested matter is before the court on the Motion for Relief From Automatic Stay (Motion for Relief) filed by National City Mortgage Company (National City Mortgage) on August 10, 2004, requesting relief from the automatic stay pursuant to 11 U.S.C.A. § 362(d) (West 1993 & Supp. 2004) so that it may foreclose upon its interest in real property owned by the Debtors.¹ The Chapter 7 Trustee (Trustee), Maurice K. Guinn, opposes the Motion for Relief, arguing that National City Mortgage is not entitled to relief from the stay because its interest in the real property is avoidable based upon an improperly acknowledged Limited Power of Attorney.

The facts and documents essential to the resolution of the Motion for Relief are before the court upon the Stipulations filed by the parties on September 29, 2004, the Brief of National City Mortgage Company filed on October 12, 2004, and the Memorandum Brief Supporting the Trustee's Objection to National City Mortgage Company's Motion for Relief From Automatic Stay filed on October 13, 2004. The parties agree that an evidentiary hearing is not required.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(G) (West 1993).

I

The Debtors filed the Voluntary Petition commencing their case under Chapter 7 of the Bankruptcy Code on June 8, 2004. National City Mortgage is a creditor of the Debtors,

¹ The Motion for Relief also requests that the court order the Trustee to abandon the real property pursuant to 11 U.S.C.A. § 554(b). For reasons hereinafter discussed, the court will not direct that the Trustee abandon the real property.

holding a lien encumbering real property located at 100 Greenbriar Lane, Oak Ridge, Roane County, Tennessee (Real Property), pursuant to a Deed of Trust executed on October 25, 2001, and recorded with the Roane County Register of Deeds on November 6, 2001 (2001 Deed of Trust). The 2001 Deed of Trust, pledging the Real Property as collateral to secure a \$160,000.00 loan, was executed by Mrs. Dominguez, individually, and as attorney-in-fact for Mr. Dominguez by virtue of a Limited Power of Attorney dated October 17, 2001, and recorded with the Roane County Register of Deeds on November 6, 2001. At the time he executed the Limited Power of Attorney, which was acknowledged by David C. Schroeder, Vice Consul of the United States of America, Mr. Dominguez was working in Mexico City, Mexico.

National City Mortgage filed its Motion for Relief, arguing that the Debtors failed to make their mortgage payments from May 2004 through August 2004, thus entitling it to exercise its rights to foreclose upon the Real Property. As of August 10, 2004, the outstanding principal balance owed by the Debtors to National City Mortgage was \$155,417.81, including \$6,256.99 in past due mortgage payments, late charges, and attorney's fees. In support of its Motion for Relief, National City Mortgage attached a copy of an earlier deed of trust executed by the Debtors on January 25, 1999, and recorded with the Anderson County Register of Deeds on February 1, 1999, to secure a loan in the amount of \$129,000.00.

The Trustee filed his Reply to Motion for Relief From Automatic Stay (Reply) on August 17, 2004, arguing that National City Mortgage was not entitled to relief from the automatic stay because the deed of trust attached to its Motion for Relief was recorded in

Anderson County, but the Real Property was located in Roane County. Accordingly, the Trustee averred that the deed of trust was avoidable.²

The court held a preliminary hearing on the Motion for Relief on September 9, 2004. Following the preliminary hearing, the parties submitted a Joint Statement of Issues on September 29, 2004, stating that the only issue to be decided was “[w]hether the person who took the acknowledgment of debtor Nicolas Dominguez on the Limited Power of Attorney dated October 17, 2001, was a proper person to do so pursuant to Tennessee Code Annotated §§ 66-22-102, -104, and/or -115.”³

II

Mrs. Dominguez executed the 2001 Deed of Trust both individually and as attorney-in-fact for Mr. Dominguez. Her authorization for executing the 2001 Deed of Trust on behalf of our husband was the Limited Power of Attorney executed by Mr. Dominguez on October 17, 2001, while he was in Mexico City, Mexico. The Limited Power of Attorney was acknowledged by David C. Schroeder, Vice Consul of the United States of America. The Trustee argues that Mr. Schroeder’s acknowledgment is invalid under Tennessee law.

² The 2001 Deed of Trust was apparently located by National City Mortgage after the Motion for Relief was filed. It is this Deed of Trust that is now relied upon by National City Mortgage in support of the Motion for Relief.

³ Based upon the Joint Statement of Issues, the parties do not appear to dispute that if the Limited Power of Attorney was validly acknowledged, National City Mortgage is entitled to relief from the automatic stay pursuant to 11 U.S.C.A. § 362(d).

Powers of attorney are among the documents eligible for registration pursuant to Tennessee Code Annotated section 66-24-101(a)(2) (Supp. 2003). In order to be validly registered, however, such documents must be authenticated and acknowledged. TENN. CODE ANN. § 66-22-101 (1993). A recorded document must be acknowledged and authenticated so that creditors or purchasers can be assured that the document “is valid, that is, free from apparent forgery or fraud.” *Limor v. Fleet Mortgage Group (In re Marsh)*, 12 S.W.3d 449, 453 (Tenn. 2000).

The Tennessee General Assembly has addressed acknowledgment requirements in title 66, chapter 22 of the Tennessee Code Annotated, identifying which persons are authorized to take acknowledgments within the state, in other states or territories, and in foreign countries. See TENN. CODE ANN. §§ 66-22-102, -103, and -104 (1993). Specifically, the two sections at issue in this contested matter are 66-22-102 and -104, which state, in material part, as follows:

Persons authorized to take acknowledgments within state. – If the person executing the instrument resides or is within the state, the acknowledgment shall be made before the county clerk, or legally appointed deputy county clerk, or clerk and master of chancery court of some county in the state or before a notary public of some county in this state.

TENN. CODE ANN. § 66-22-102.

Acknowledgment in foreign countries. – (a) If the person executing the instrument resides or is beyond the limits of the union and its territories, the acknowledgment may be made:

....

(3) Before a consul, charge d'affaires, envoy, minister, or ambassador of the United States in the country to which such person is accredited and where the acknowledgment is made.

TENN. CODE ANN. § 66-22-104.

In his brief, the Trustee argues that, based upon the wording of section 66-22-102, the Limited Power of Attorney is not validly authenticated because Mr. Dominguez, as a resident of Tennessee, was required to have it acknowledged by either a county clerk, deputy county clerk, clerk and master, or notary public in Tennessee. He argues that the General Assembly's use of the word "shall" in subsection 102 makes it clear that "the mandatory and exclusive method for Tennessee residents to have their signatures acknowledged" is by one of the aforementioned officials. With respect to the seemingly contradictory language of section 66-22-104, the Trustee argues that it does not apply to Tennessee residents, but only to residents of other states or countries that own property in Tennessee. On the other side, National City Mortgage argues that the focus of these statutes is not the residency of the party having his signature acknowledged, but instead, is the designation of who may acknowledge a signature.

While the court agrees with the Trustee's assertions that it must follow the clear wording and plain meaning of the statutes in question, after reviewing them, the court cannot agree with the Trustee's narrow interpretation thereof, particularly when doing so would produce an absurd result. Under Tennessee's registration scheme, in order for documents to be validly recorded and ensure that all parties have sufficient constructive notice of the legal rights afforded by virtue of the documents in question, they must be authenticated in one of two ways: acknowledgment by the maker or attestation by two witnesses. *See* TENN. CODE ANN. § 66-22-101. Chapter 22 of title 66 also details the requirements necessary for a proper

authentication, which include personal identification, specific certification forms, and the affixation of the acknowledging officer's seal. See TENN. CODE ANN. §§ 66-22-106 through -110 and §§ 66-22-114 through -115 (Supp. 2003). Authentication of documents by witnesses is expressly addressed in title 66, chapter 23.

Encompassed within chapter 22 are those statutes at issue here, which address who may validly authenticate documents through acknowledgment pursuant to section 66-22-101. Section 66-22-102 unambiguously sets forth which officials within the State of Tennessee are authorized to acknowledge legal documents to be registered in accordance with section 66-24-101. Section 66-22-103 unambiguously sets forth which officials of other states or territories of the United States are authorized to acknowledge legal documents to be registered in accordance with section 66-24-101. Section 66-22-104 unambiguously sets forth which officials of foreign countries are authorized to acknowledge legal documents to be registered in accordance with section 66-24-101. Each section's first sentence mirrors that of the other two, expressly stating that either residents of or those present in Tennessee, another state, or another country may have their documents acknowledged only by those officials named in the statutes.⁴

The court believes that by including all three scenarios within chapter 22 of title 66, the Tennessee General Assembly desired to give full faith and credit to documents that are executed by Tennessee citizens and residents, as well as for any person that is a resident and

⁴ The focus of these statutes is further evidenced by their titles, which all specifically address acknowledgments rather than residency or execution.

citizen of another state or country that is physically located (1) within the State of Tennessee by virtue of section 66-22-102; (2) outside the State of Tennessee but still within the United States or one of its territories by virtue of section 66-22-103; and/or (3) outside the United States and its territories by virtue of section 66-22-104. To read these statutes as the Trustee suggests leads to an absurd result, as it would preclude any Tennessee resident or citizen from having a legal document otherwise eligible for registration in Tennessee under section 66-24-101 from being executed and acknowledged outside the State of Tennessee because an official notary public, county clerk, deputy county clerk, or clerk and master granted his authority by the State of Tennessee did not acknowledge the execution of the document. This result cannot reflect the General Assembly's intent when it enacted section 66-22-102. In fact, it seems obvious to the court that by enacting sections 66-22-103 and -104 to immediately follow subsection -102, the General Assembly expressly sought to preclude this result by offering its residents and citizens, as well as those residents and citizens of other states and countries, a means by which their legal documents requiring acknowledgment pursuant to section 66-22-101 would still be eligible for registration under section 66-24-101.

The Limited Power of Attorney executed by Mr. Dominguez was acknowledged by Mr. Schroeder, the Vice Consul of the United States of America in Mexico City, Mexico, who is an authorized person to do so pursuant to section 66-22-104, and it is irrelevant whether Mr. Dominguez was, at the time, a resident of the State of Tennessee. Because the parties do not appear to dispute National City Mortgage's entitlement to relief from the automatic stay upon

a finding by the court that the Deed of Trust and underlying Limited Power of Attorney are valid, the Motion for Relief shall be granted.

By the Motion for Relief, National City Mortgage also requests an order directing the Trustee to abandon the Real Property.⁵ Because National City Mortgage avers in the Motion for Relief that the Real Property has a value of \$180,000.00, there is apparent equity and the court will not, therefore, direct abandonment.

An order consistent with this Memorandum will be entered.

FILED: October 19, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁵ See *supra* note 1.

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Case No. 04-33046

NICOLAS DOMINGUEZ
a/k/a NICOLAS DOMINGUEZ VERGARA
HORTENCIA DOMINGUEZ

Debtors

ORDER

For the reasons set forth in the Memorandum on Motion for Relief From Automatic Stay filed this date, containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this contested matter by Rule 9014 of the Federal Rules of Bankruptcy Procedure, the court directs the following:

1. The Motion for Relief From Stay filed August 10, 2004, by National City Mortgage Co. requesting modification of the automatic stay to allow it to foreclose its lien encumbering the Debtors' real property at 100 Greenbriar Lane, Oak Ridge, Tennessee, is GRANTED.

2. The automatic stay of 11 U.S.C.A. § 362(a) (West 1993) is modified to allow National City Mortgage Co. to foreclose its lien encumbering the 100 Greenbriar Lane, Oak Ridge, Tennessee real property in accordance with the laws of the State of Tennessee and the Deed of Trust executed by the Debtors on October 25, 2001, recorded on November 6, 2001, in the office of the Register of Deeds for Roane County, Tennessee, in Trust Book 752, at pages 339 - 354.

3. Proceeds realized by National City Mortgage Co. from its foreclosure of the 100 Greenbriar Lane property in excess of the amount necessary to satisfy the lien shall be paid to the Chapter 7 Trustee, Maurice K. Guinn.

SO ORDERED.

ENTER: October 19, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE