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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

AMERICAN SAVINGS & LOAN ASSOCIATION, a Federal Association, Appellant, vs. DUANE H. GILLMAN, Trustee of the Estate of CFS FINANCIAL CORP., et al., Appellee.	86-914 SSPC-317 OPINION AND ORDER Civil No. 89-C-1005J

I. INTRODUCTION

On April 11, 1990, the court heard argument on a bankruptcy appeal filed by defendant/appellant American Savings & Loan Association ("American"). American appeals a decision of the bankruptcy court denying a Motion for Summary Judgment filed by American and granting a Motion for Summary Judgment filed by plaintiff/appellee Duane H. Gillman ("Gillman"), Trustee of the Estate of CFS Financial Corporation. Having carefully considered the memoranda and arguments of counsel, and for the reasons set forth below, the court hereby REVERSES the order of the bankruptcy court granting summary judgment to Gillman.

II. FACTS

On December 17, 1984, CFS Financial Corporation ("CFS") executed a promissory note in favor of American. As security for repayment of the promissory note, CFS executed a Deed of Trust in favor of American on real property located in Weber County, State of Utah (the "Property"). When CFS signed the Deed of Trust, an "individual" acknowledgment was executed rather than a "corporate" acknowledgment. Nevertheless, the Deed of Trust was recorded in the Weber County Recorder's Office. CFS defaulted under the terms of the promissory note by failing to repay the note when due. Notice of Default was made November 15, 1985.

On March 6, 1986, CFS filed a petition in bankruptcy pursuant to 11 U.S.C. Chapter 7 and Gillman was appointed Trustee of the CFS bankruptcy estate. On November 17, 1986, American filed in bankruptcy court a Motion for Relief from the Automatic Stay to permit it to foreclose on the Property. No interested party, including Gillman, filed an objection to American's Motion for Relief from the Automatic Stay. There being no objection, on December 30, 1986, the bankruptcy court entered an Order granting American's Motion for Relief. American subsequently foreclosed on the Property by selling the same at a trustee's sale after publication of notice. American purchased the Property at the Trustee's Sale and received a Trustee's Deed dated February 26, 1987. The record before the court is void of any details of the Trustee's Sale or the circumstances under which it was held. The record does contain an affidavit from an American assistant vice-

president attesting that the Property was sold at the Trustee's Sale to the highest bidder "pursuant to statute."[1] The parties by agreement supplemented the record and furnished a copy of the Deed to the court which recites the factual sequence.

On March 4, 1988, more than a year after the foreclosure sale, Gillman filed an adversary proceeding in bankruptcy court against American. At that time Gillman sought to avoid the lien which had been held by American pursuant to its Deed of Trust. Gillman filed an adversary proceeding asserting two causes of action: 1) to avoid American's lien pursuant to 11 U.S.C. § 544;[2] and 2) to

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[1] Presumably the statute to which American's affidavit refers is that governing Trustee's Sales of trust deeds. See Utah Code Ann. § 57-1-23 to -36.

[2] Section 544 provides in pertinent part:

(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.

11 U.S.C. § 544.

recover property of the estate pursuant to 11 U.S.C. § 549.[3] American and Gillman filed cross Motions for Summary Judgment which were heard by the bankruptcy court on July 13, 1988 and again on August 17, 1989. The bankruptcy court denied American's Motion for Summary Judgment, granted Gillman's Motion for Summary Judgment and at that time voided American's lien on the Property. This appeal followed.

III. DISCUSSION

The issue considered by the bankruptcy court was the validity of the individual acknowledgment rather than a corporate acknowledgement of CFS Financial Corporation on the Deed of Trust. Utah law in effect at the time the Deed of Trust was executed required that an instrument affecting title to real property bear an acknowledgment in "substantially" the form as that set forth in Utah Code Ann. § 57-2-7.[4] In July 1988, the Utah Legislature

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[3] Section 549 provides in pertinent part:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

11 U.S.C. § 549.

[4] Section 57-2-7 provides:

A certificate of acknowledgment to any instrument in writing affecting the title to any real property in this state may be substantially in the following form:

State of Utah, County of _____

On the _____ day of _____, 19____, personally appeared before

adopted the Uniform Recognition of Acknowledgments Act which requires only that a written instrument affecting title to real property bear an acknowledgment containing the words "acknowledged before me" or their substantial equivalent. Utah Code Ann. § 57-2a-6 (1988).

American argued before the bankruptcy court that the acknowledgment on the Deed of Trust executed in 1986 substantially complied with the Utah statute as it then existed, or alternatively, that the Recognition of Acknowledgments Act applied retroactively to the Deed of Trust. Gillman argued that American's acknowledgment on the Deed of Trust was fatally defective, did not comply with the acknowledgments statute, and therefore was not entitled to be recorded. He further asserts that if it was not entitled to recordation, that it did not impart notice. Gillman claimed in the court below that he was not seeking to set aside the Trustee's Sale, but rather to avoid American's lien and recover

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me _____, the signer of the above instrument, who duly acknowledged to me that he executed the same.

The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of Utah, County of _____
On the _____ day of _____, 19____, personally appeared before me _____, who being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent, as the case may be), of (naming the corporation), and that said instrument was signed in behalf of said corporation by authority of its bylaws (or of a resolution of its board of directors, as the case may be), and said _____ acknowledged to me that said corporation executed the same.

Utah Code Ann. § 57-2-7 (1953).

from American whatever it has received by virtue of that lien.

The bankruptcy court based its ruling on its interpretation of the Utah acknowledgments statutes and determined that American's defective acknowledgement did not substantially comply with the Utah statute in effect at the time the Deed of Trust was executed, that the Recognition of Acknowledgement Act did not apply retroactively, and that Gillman could avoid American's lien on the Property. The parties present and argue these same issues to this court on appeal. The court finds it need not reach the issues before it on appeal, and reverses the order of the bankruptcy court on other grounds. The Deed of Trust, a consensual deed, to secure the payment of a note for some $285,000.00, was placed of record. It appeared of record for all the world to see. The issue of whether it should have been placed of record is a different question. As a matter of fact, historic fact, it was of record. A bona fide creditor, a most favored lien creditor, the status occupied by Gillman, would have notice of what as a matter of historic fact was of record.

Gillman contends that he does not seek to nullify the Trustee's Sale, but only to avoid American's lien. At the time the adversary proceeding was commenced, the Property had been sold pursuant to the Trustee's Sale. After the Foreclosure Sale, there was then no lien for Gillman to avoid.[5] The Trustee's Deed

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[5] Gillman also argues that under 11 U.S.C. § 546, the trustee in bankruptcy has two years after his appointment to commence an action under § 544. As the lien which Gillman seeks to avoid was extinguished at the time of the Trustee's Sale and prior to the expiration of the two year statute of limitations there is, again,

conveyed the property and, at the time of this conveyance, the American lien was extinguished.

There is some parallel in mortgage foreclosures. Generally, when one person obtains both a greater and a lesser interest in the same property, and no intermediate interest exists, a merger occurs and the lesser interest is extinguished. Mid Kansas Federal Savings and Loan Ass'n of Wichita v. Dynamic Development Corp., 804 P.2d 1310, 1317 (Ariz. 1991). Thus, a merger occurs when a mortgagee's interest and the fee title are owned by the same person. Id. A mortgage foreclosure sale terminates the relationship between mortgagor and mortgagee, and the mortgage lien merges into the decree foreclosing it. Application of Small Business Admin., 797 P.2d 879, 883 (Kan. App. 1990). Thus, when American obtained relief from the automatic stay and foreclosed on the Property, its lien merged into the Trustee's Deed of Conveyance and the lesser interest was extinguished.

American obtained relief from the automatic stay, after giving the required notice to Gillman, to enable it to initiate foreclosure proceedings against the Property. Its reasons for seeking the stay lift were stated in its Motion. It was granted without opposition. Having received notice that American intended to enforce its rights in the Property under state law, Gillman elected to do nothing. He neither attended the sale, bid at the sale, nor attempted to stay the sale. Thus the foreclosure sale

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no lien for Gillman to avoid.

is effective against Gillman. Indeed he acknowledges as much.

Thus the question as to the form of the acknowledgment is belated. It need not be decided. The facts have changed. Time marches on.

The order of the bankruptcy court is REVERSED.

IT IS SO ORDERED.

Dated this 27 day of August 1991

BY THE COURT:

Bruce S. Jenkins

BRUCE S. JENKINS, CHIEF JUDGE
UNITED STATES DISTRICT COURT