IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
V.	:	C.A. NO. 04-3478
	:	
WILLIAM JACONO, DECEASED, AND ANY HEIRS, EXECUTORS OR ASSIGNS OF SAID WILLIAM JACONO	:	
AND	:	
ROBERT MILLER, TRUSTEE UNDER IRREVOCABLE LIVING TRUST OF WILLIAM JACONO	:	

PADOVA, J. March 3, 2006

MEMORANDUM OPINION AND ORDER

I. Introduction.

The United States brought this action against the heirs, executors and assigns of William Jacono deceased (hereinafter "William"), seeking to foreclose a mortgage it holds as the assignee of the Hart Mortgage Corporation. By order of

October 3, 2005, Robert Miller, the trustee under an irrevocable living trust of William Jacono, was permitted to intervene in the action as an additional party defendant. Presently before the court is the government's motion for summary judgment based on its administrative record. Responses to the motion have been filed by both Trustee Miller and James Jacono (hereinafter "James"), the son and heir of William Jacono. For the reasons that follow, the government's motion is granted.

II. Summary Judgment Standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325.

After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F.Supp.2d 402, 407 (E.D.Pa.2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n. 11 (3d Cir.1999) (citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir.1993)).

III. The Facts.

The following facts appear from the administrative record and parties' submissions to be undisputed. William died on October 11, 2003. Before he died he lived at 4178 Oliver Avenue a/k/a/ Lane, Boothwyn, Pennsylvania. At the time he died, he had no surviving spouse. (AR 94[1]) Some ten years earlier, on June 11, 1993, William took out a home equity line of credit secured by a Home Equity Conversion Mortgage (the "HECM"). In connection with the loan he executed several

[1]"AR" refers to the Administrative Record filed by the United States as Exhibit B to Plaintiff's Motion for Summary Judgment. All other exhibits are referred to by their exhibit number.

documents: (1) a loan agreement with Hart Mortgage Corporation of Fort Washington, Pennsylvania, allowing him to draw on the home equity line of credit (AR 24-28); (2) an adjustable rate note in favor of Hart Mortgage Corporation (AR 20-21); (3) an open ended mortgage, the HECM, creating a lien on the property at 4178 Oliver Avenue in favor of Hart Mortgage Corporation, securing the line of credit, (AR 2-8); (4) an additional adjustable rate note in favor of the United States Department of Housing and Urban Development ("HUD") (AR 22-23); (5) and an additional mortgage on the property at 4178 Oliver Avenue in favor of HUD (the "HUD mortgage") (AR 14-18). The HECM was duly recorded on July 1, 1993 at Volume 1113, page 0933 of the real estate records of Delaware County, Pennsylvania. The HUD mortgage was duly recorded on the same day at page 0940.

There is no dispute that William remained competent to handle his own affairs when he executed the mortgage documents. Exhibit E to Plaintiff's Motion for Summary Judgment at pp. 23-24.

The HECM was insured by the United States through HUD. According to the Declaration of Ray Phillip Mitchell, a Single Family Housing Specialist in HUD's Tulsa Office, HUD's note and mortgage do not represent a separate monetary obligation. Rather, they protect HUD's interest in the Hart HECM obligation, but separate and apart from the private lender's interest. As such, Mitchell avers, the obligations under the two mortgages cannot be combined or commingled. Instead, HUD's mortgage simply becomes moot upon assignment of the private lender's

mortgage to HUD, and is thereafter released. Exhibit C to Plaintiff's Motion for Summary Judgment.

Hart assigned the HECM to Wendover Funding, Inc. of Greensboro, North Carolina, on July 1, 1993. Complaint, Exhibit 3. Wendover then assigned it to HUD on February 4, 2000. Complaint, Exhibit 4. As a result, HUD became the owner of the HECM. The HUD mortgage was thereafter released and stamped as satisfied of record on June 7, 2000. Answer, Exhibit C. The release makes no reference to the HECM.

The HECM is a reverse mortgage. Exhibit A to Plaintiff's Motion for Summary Judgment. Under the terms of the home equity loan, William could draw up to 150% of the appraised value of the property. He in fact drew $79,489.03 during his lifetime. Complaint ¶ 10. The loan did not require that repayment be made during William's lifetime, but interest at the rate of 5.18%, service fees of $50 per month, and mortgage insurance premiums accrued each month and were added to principle. At the time the loan was assigned to HUD, the principle amount outstanding had increased to $137,502.43. Exhibit C to Plaintiff's Motion for Summary Judgment. The outstanding balance due as of February 28, 2005 was $184,970.54. Exhibit G to Plaintiff's Motion for Summary Judgment. From that day to present, a $13.00 per day per diem continued to accrue on the account. Id. The outstanding balance as of March 3, 2006 is $189,754.54 ($184,970.54 plus $4,784.00).

Under the HECM, the death of the mortgagor is deemed an event of default, which by its very nature cannot be cured, and after which the mortgagee's interest can be redeemed through foreclosure.

Prior to closing the mortgage, Hart obtained a Residential Mortgage Credit Report, which indicated that William had been interviewed concerning his ownership of the property, and that the reporting agency certified that a review of the public records indicated that William was the owner of the property. Exhibit B at ¶. 67-68. William signed a certificate verifying that he had received counseling regarding the financial implication of entering into the HECM and his other financial options. Id. at 80. Hart also certified that it conducted a pre-screening of William. Id. at 79. A title search conducted by Penn Title Insurance Company showed no encumbrances on the property, Id. at 111, and that William and his deceased wife were the owners of record of the property. Id. at 112.

James Jacono and Trustee Miller assert that on August 11, 1992, some eleven months before the Hart mortgage was executed, William deeded the property at 4178 Oliver Avenue to James Jacono, as Trustee under an Irrevocable Living Trust Agreement of William Jacono. Exhibit A to Answer of Robert Miller, Trustee. It is undisputed that this deed was not filed of record with the Recorder of Deeds until January 31, 2003. Exhibit B to Plaintiff's Motion for Summary Judgment at ¶. 9-13.

James and Miller assert that the government had constructive knowledge that William was no longer the owner of the mortgaged premises, and thus the

government's lien priority is subordinate to the Trust's interests, based upon the following facts:

1. The Uniform Residential Loan Application, submitted to the government's predecessor in interest Hart, is in the handwriting of an employee of Hart, Dolores Keeton. Exhibit B to Response of Robert Miller, Trustee.

2. The handwritten application states the purpose of the loan was to "establish trust." Id.

3. The application's "schedule of real estate owned" is alleged to contain the notation "ET" next to the listing of 4178 Oliver Avenue, which the defendants contend disclosed to the government's predecessor that the form of ownership of the property was "establish trust." Id.

4. The application indicates that William claimed to own a checking account at Fidelity Bank. The administrative record shows that William gave Hart a copy of his bank statement as part of the application process. The statement shows that the irrevocable trust, and not William, was the owner of the checking account. Exhibit C to Response of Robert Miller, Trustee.

5. The proceeds of the loan were to be electronically deposited into the Fidelity account pursuant to an Electronic Transfer Request. Attached to the Request was a voided check showing the irrevocable trust was the owner of the account. The Request states that "Only persons who are

named on the Mortgage and Note can be named on the bank account." Exhibit E to Response of Robert Miller, Trustee.[2]

6. The application package also included a designation of nearest living relatives that showed that James lived in the house. James testified at his deposition that, if had been asked by the lender, he would have let it be known that the house was in the name of the trust. He also testified that he first learned of the loan when the loan proceeds check was received at the house. He avers he contacted Hart and told employee Merilee Wolacheck that the house was owned by the trust.

7. William allegedly did not receive in-home financial counseling required by the HUD regulations before applying for the HECM. If he had, James would have advised the counselor that the house was in the name of the trust.

IV. Discussion.

a. Constructive Notice and Bona Fide Creditors.

Pennsylvania's recording statutes, 21 P.S. § 351 and 21 P.S. § 444, are intended to protect bona fide purchasers. See generally, Land v. Pennsylvania Housing Finance Agency, 101 Pa.Cmwlth. 179, 515 A.2d 1024 (1986). The

[2]It appears from the record that, because the owner of the checking account, the Trust, was not named in the HECM that the electronic transfer request was disregarded. This is apparent from the fact that the loan proceeds were distributed by a paper check, rather than by electronic transfer.

recording of a deed serves to provide public notice in whom the title resides. Mancine v. Concord-Liberty Sav. & Loan Ass'n, 299 Pa.Super. 260, 445 A.2d 744 (1982). An unrecorded deed is deemed to be void as to any subsequent bona fide purchaser. A bona fide purchaser is one who pays valuable consideration, has no notice of the outstanding rights of others, and acts in good faith. Carnegie Natural Gas, 597 A.2d at 288. In addition, under Pennsylvania law, all conveyances of land must be recorded within ninety days after the execution of the conveyance, and any conveyance which shall not be so recorded is deemed fraudulent and void against a creditor. United States v. Craig, 936 F.Supp. 298, 300 (E.D.Pa. 1996).

James and Miller, as the parties asserting unrecorded rights in the mortgaged premises, thus have the burden of proving that the lender had notice of the unrecorded deed transferring title in the premises to the Trust. Carnegie Natural Gas Co. v. Braddock, 142 Pa.Cmwlth. 383, 597 A.2d 285, 288 (1991). We find that James and Miller have failed to come forward with sufficient evidence to establish the existence of constructive notice, an element essential to their affirmative defense, and on which they must bear the burden of proof at trial.

Simply stated, their asserted indicia of notice, both individually and collectively, amount to mere speculation that Hart had constructive notice that William did not own the premises. The first indicia, the disclosed intention to use the loan proceeds to *establish* a trust, cannot be reasonably interpreted to put a potential lender on notice that the premises was *already* owned by a trust, when the prospective borrower has affirmatively stated that he himself is the seized of the title. More

importantly, the bona fides of the lender's reliance on the borrower's assertion of ownership was established by the title report on the property.

The second alleged indicia is the notation "ET" next to William's name on the schedule of real estate owned. There is nothing to indicate that a reasonable lender would interpret these initials as designating ownership in a trust, rather than in the name of the person – William – actually listed on the very line that asks who owns the property. It also would not be reasonable to expect the lender to understand that the initials "ET" referred to "establish trust," a term used on page one of the application in an entirely different context, and without any reference to the initials later inscribed on page three. Finally, the initials were inserted in a space designated to be used to indicate if the property was to be sold, or if it was held as rental property, not to indicate a type of ownership. In short, no reasonable jury could conclude that the inscription "ET" placed the lender on notice of an unrecorded deed.[3]

The third indicia, the checking account and electronic deposit request, can reasonable be considered to have placed the lender on notice only that the *proceeds* of the loan were to be donated to the trust, not that the mortgaged premises already had been. Significantly, the fact that the account was in the name of a trust rendered the electronic deposit request unusable, requiring the lender to issue a paper check to dispense the proceeds. The check was issued in William's name.

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[3]It is also unclear that the alleged inscription are actually the initials "ET." The "E" is written as a Greek sigma, not a Latin "E." We note that nowhere else in the loan application did the scrivener use a similar hand to inscribe the letter "E."

Finally, to the extent the fact issue of whether William received pre-loan counseling is relevant to the legal issue of constructive notice, we find that James and Miller have failed to establish a triable issue of fact. James argues that Henry Cruz, the person who signed the Borrower Certificate of Counseling contained in the administrative record, testified at his deposition his agency, the Philadelphia Council for Community Advancement, "stopped doing the requisite counseling face-to-face in borrowers' homes" some two years prior to William's loan, because this procedure was a great waste of time and HUD wouldn't reimburse the cost. James contends

> It is therefore clear that William did not receive the pre-loan counseling which is required before a "reverse mortgage" transaction can legally be undertaken. Nor was there any attempt to discuss the transaction with James, a very close relative residing in the Home, who could undoubtedly had enlightened the counselor about the ownership of the Home.

Response of James Jacono to Motion for Summary Judgment at 2. Cruz did not, however, testify that William did not receive the required pre-loan counseling. He testified only that his agency did the counseling by telephone or in its office, not in the applicant's home and that, although he signed the certification that William was counseled, could not remember counseling William some twelve years after the fact. Deposition of Henry Cruz, Exhibit B to Response of James Jacono to Motion for Summary Judgment at p. 28 l. 1-4, p. 35 l. 2-23.

We find that the regulations governing the reverse mortgage program do not require in-home counseling, but rather state that "counselors should make every effort to provide HECM counseling on a face-to-face basis," and "make every effort

to conduct counseling sessions in the home of the potential borrower." See Exhibit C to Response of James Jacono to Motion for Summary Judgment at § 2-5 C, D. Further, there is no requirement that the borrower's relatives, even ones living in the home, be present during the counseling. Only where the borrower lacks legal competency may the counselor speak with a relative, and then only if the relative has power of attorney to act for the borrower. Id. at § 2-4; Exhibit B to Response of James Jacono to Motion for Summary Judgment at p. 29 l. 12 - p. 30 1. 14.

In addition, the fact that James was living in the property does not itself create constructive notice that he had an unrecorded interest in the property. While the general rule under Pennsylvania law is that clear and open possession of real property constitutes constructive notice to subsequent purchasers of the rights of the party in possession, see In re Graves, 33 F.3d 242, 250 (3d Cir. 1994) (citing McCannon v. Marston, 679 F.2d 13, 17 (3d Cir.1982) and Overly v. Hixson, 169 Pa.Super. 187, 82 A.2d 573, 575 (1951)), "an exception to the rule provides that where a possessor lives with a record owner in a manner consistent with the record ownership, no constructive knowledge is imputed." Graves, 33 F.3d at 250 (citing Overly, 82 A.2d at 575). The Pennsylvania Superior Court explained the rule, stating:

> There can be no doubt whatever of the proposition that where the land is occupied by two persons . . . and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other. . . . The rule is universal that, if the possession be consistent with the recorded title, it is no notice of an unrecorded title. Indeed, this conclusion is but an application of the general principle that, in the absence of proof to the contrary, actual possession is presumed to be in him who has the record title. It would be intolerable to require an intending

> purchaser or incumbrancer to ask every person living in a property, be they many or few, whether or not he has a better title than the record owner, who is also in possession.

Overly, 82 A.2d at 575. Accordingly, we find that: (1) James and Miller have failed to demonstrate a genuine issue of material fact that the government's predecessor in interest had constructive notice that William was not seized of title in the mortgaged premises; and (2) the government's predecessor had no duty to make further inquiry beyond the public record before concluding that William was the record owner.

b. Satisfaction of the HUD mortgage.

James and Miller also assert it is undisputed that HUD's mortgage has been marked satisfied, and thus, the government cannot foreclose the mortgage. We find that the satisfaction of HUD's mortgage is legally irrelevant to the government's right to foreclose on the HECM.

The summary judgment record establishes that William executed two mortgages, the HECM to secure the promissory note to Hart, and a mortgage in favor of HUD, who insured the note. Since the loan was eventually assigned to HUD, its roles as mortgagee and insurer merged, making the additional mortgage superfluous. Under its policies, as described in the Declaration of Ray Phillip Mitchell, the HUD mortgage was released. It was the HUD mortgage, and only the HUD mortgage, that was marked satisfied in the records of Delaware County. James and Miller have come forward with no evidence to raise a triable fact that the HECM remains viable.

Accordingly, the motion of the United States for summary judgment is granted.

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UNITED STATES OF AMERICA	:	
	:	
V.	:	C.A. NO. 04-3478
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WILLIAM JACONO, DECEASED, AND ANY HEIRS, EXECUTORS OR ASSIGNS OF SAID WILLIAM JACONO	:	
AND	:	
ROBERT MILLER, TRUSTEE UNDER IRREVOCABLE LIVING TRUST OF WILLIAM JACONO	:	

ORDER

The motion of the United States of America to Substitute Attachments to the Complaint (# 33) is GRANTED.

The motion of the United States for summary judgment (#15) is GRANTED.

Judgment on the merits is ENTERED in favor of plaintiff United States of America and against defendants William Jacono, Deceased, and any Heirs, Executors or Assigns of said William Jacono, and Robert Miller, Trustee under Irrevocable Living Trust of William Jacono in the amount of $189,754.54, plus $13.00 per day from the date of this order.

The mortgage lien of the United States of America against the residential property located at 4178 Oliver Avenue a/k/a Lane, Boothwyn Pennsylvania 19061, duly recorded on July 1, 1993 at Volume 1113, page 0933 of the real estate records of Delaware County, Pennsylvania is FORECLOSED against the subject property.

Defendants William Jacono, Deceased, and any Heirs, Executors or Assigns of said William Jacono, and Robert Miller, Trustee under Irrevocable Living Trust of William Jacono, as well as any and every person whose conveyance or encumbrance is subsequent, or subsequently recorded, to the interest of the United States of America, is forever BARRED and FORECLOSED of all rights, claims, liens, and equity of redemption in the mortgaged premises.

The mortgaged premises may be sold accordingly to law and the monies from such foreclosure sale are to brought into Court. The United States of America shall be paid therefrom the amount adjudged due including all accumulated interest and fees, together with the expenses of sale, to the extent that such proceeds shall be sufficient to pay said amounts. Any excess amount shall be paid as directed by the Court.

IT IS SO ORDERED.

March 3, 2006

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JOHN R. PADOVA, J.