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BANKRUPTCY; AVOIDANCE; DEFECTIVE NOTARIZATION: Although a secured claim may be represented by a defectively notarized instrument, the Trustee may not avoid the claim if there is another basis for constructive notice, such as a recorded notice of default, in the record.

BowlNebraska LLC v. Omaha State Bank (In re BowlNebraska), (MLW No. /Case No. 10-6016 - 8 pages) (U.S. Bankruptcy Appellate Panel, 8th Circuit, Federman, J.) (7/1/10) (no Westlaw cite could be found)

A principal of debtor, prior to bankruptcy, had executed and recorded a series of notes and modifications of notes, all secured by deeds of trust, to Bank. The principal's signature on all these documents was notarized by a the bank's president, who was a licensed notary, but was also the brother in law of the principal.

One of the deeds of trust (the first one) had also been executed by another officer of the Debtor, but the signature was also notarized by the brother in law of his co-signor.

Under Nebraska law, a notary is disqualified from performing notarial functions "if the notary is a spouse, ancestor, descendent, or sibling of the principal, including in-law, step, or half relatives." Further, an improperly notarized document does not provide constructive notice under Nebraska law. The lower courts upheld the avoidance, even of the first deed of trust, since they ruled that the "infection" of the brother in law also disqualified him from notarizing another signature on the same document.

When Debtor went bankrupt, the Trustee attempted to avoid the various mortgages on the basis that the Debtor was a "hypothetical BFP" and took free of all liens not properly recorded. The BAP agreed with this analysis, but took the case a step further, reversing the lower courts on the grounds that the Trustee had an alternate form of constructive notice of the liens.

The BAP noted that the Bank had recorded properly notarized notices of default on all the relevant secured claims before the filing of the bankruptcy. The court commented:

"[E[ven assuming for these purposes that the recorded deeds of trust did not provide constructive notice of the Bank's liens, the notices of default constitute suspicious circumstances which would put a prudent person on inquiry that the Bank claimed an interest in [Debtor's] prooperty. In addition, Nebraska law provides that a 'notice of default, . . . when acknowledged as provided by law, shall be entitled to be recorded, and shall, from the time of filing the same with the register of deeds for record, impart notice of the contents

thereof, to all persons, including subsequent purchasers and encumbrancers for value.'"

Consequently, the Trustee could not exercise the avoidance power. The lack of proper notarization of the original documents did not render them void, but only avoidable by a BFP. Consequently, since the Trustee was not a BFP due to the recorded notices, the claims would bind the estate.

Comment: The case provides an excellent tactic for avoiding the "faulty notarization" trap that is cropping up around the country. In some cases, it might even be easier to file some instrument such as a notice of default that to try to redo and refile the original defectively notarized documents, even if the creditor discovers them.

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