

Cite as 2010 Ark. 242

SUPREME COURT OF ARKANSAS

No. 09-1410

FREDERICK S. WETZEL, III,
PETITIONER,

VS.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
RESPONDENT,**Opinion Delivered** MAY 20, 2010CERTIFIED QUESTION FROM THE
UNITED STATES BANKRUPTCY
COURT, EASTERN DISTRICT OF
ARKANSASCERTIFIED QUESTION ANSWERED.**DONALD L. CORBIN, Associate Justice**

We are presented with a question of law certified to us from the United States Bankruptcy Court, Eastern District of Arkansas, in accordance with Ark. Sup. Ct. R. 6-8 (2010), and accepted on January 21, 2010. *Wetzel v. Mortgage Elec. Reg. Sys. Inc.*, 2010 Ark. 31, ___ S.W.3d ___ (2010) (per curiam). The question certified is

[w]hether an affidavit of lost mortgage with a copy of the mortgage appended, or merely a copy of an admittedly lost original mortgage, separately or collectively recorded, constitutes constructive notice sufficient to defeat the claim of a bona fide purchaser under the laws of the State of Arkansas.

For the reasons explained herein, we conclude that the answer to this question is no.

The facts are these. Pirlee Fox filed for Chapter 7 bankruptcy protection, and Petitioner Frederick S. Wetzel, III, was appointed Chapter 7 trustee. In her bankruptcy petition, Fox scheduled two parcels of real property in which she had an interest, including property located at 408 Highway 300 in Perryville, Arkansas. Fox further indicated that she intended to surrender her interest, listed as \$75,000, in this property.

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Prior to the bankruptcy court scheduling a first meeting of creditors, Respondent Mortgage Electronic Registration Systems, Inc. (MERS), filed a motion seeking to lift the automatic stay on the property located at 408 Highway 300.¹ In its motion, MERS asserted that it had a perfected lien of \$70,000 against the property based on a mortgage executed on December 29, 2005. MERS admitted that it initially failed to record the mortgage with the Perry County Circuit Clerk but stated that it subsequently filed an “Affidavit of Lost Mortgage,” with a copy of the mortgage appended thereto, with the clerk on April 30, 2007. The affidavit provided in relevant part:

1. I, J.J. Melton, am over 18 years of age and am Litigation Supervisor for NovaStar Mortgage, Inc. I am action [sic] on behalf of the Mortgagee, and have personal knowledge of the facts stated herein:
2. I make this Affidavit after determining the Mortgage attached as Exhibit A has not come of record with the Perry County Register of Deeds in the state of Arkansas and if called upon to testify, would confirm the following:
3. The attached mortgage was executed on December 29, 2005 by Pirlee Fox, in favor of Mortgage Electronic Registration System, Inc., solely as nominee for NovaStar Mortgage, Inc. The Legal Description encumbered by this mortgage is as follows:

[A legal description of the property was attached to the affidavit.]
4. This mortgage has not been paid, satisfied, or discharged.

¹MERS pursued this action as nominee for Bank of America, successor by merger to LaSalle National Bank Association as trustee under Pooling and Servicing Agreement GAMP Trust 2007-HE1.

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5. NovaStar Mortgage, Inc. hereby asserts its interest in the above-referenced property as evidenced by the attached mortgage.

The affidavit was signed by Melton, witnessed by two individuals, and notarized.

MERS withdrew its motion and, thereafter, Wetzel brought an adversary action seeking to avoid the lien held by MERS. Wetzel asserted that MERS's lien was unperfected because it failed to record the mortgage and, thus, he as trustee held a prior lien on the property pursuant to his status as a bona fide purchaser, granted pursuant to 11 U.S.C. § 544. The parties tried the matter to the bankruptcy court on stipulations and exhibits. The bankruptcy court took the matter under advisement and then certified the instant question to this court.

Now before this court, Wetzel asserts that MERS's filing of an affidavit of lost mortgage, with a copy of the mortgage appended, does not constitute constructive notice of MERS's asserted lien on Fox's property. Thus, according to Wetzel, because he, as trustee, is given the status of a bona fide purchaser pursuant to 11 U.S.C. § 544(a), he may avoid the unrecorded lien held by MERS. MERS counters that the affidavit of lost mortgage recorded in Perry County was properly drafted, acknowledged, and recorded and, thus, became part of the mortgage chain of title thereby giving constructive notice of its lien on the debtor's property. Both parties agree that there is nothing specifically in this state's recording statutes that allows for the filing of an affidavit of lost mortgage. They each point, however, to different provisions in those recording statutes in support of their respective positions.

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Arkansas is a recording state. Notice of transactions in real property is provided by recording. See Ark. Code Ann. § 14-15-404 (Supp. 2007). Generally, an instrument in writing that affects real property shall not be valid against a subsequent purchaser unless it is filed of record in the county where the real estate is located. See *Killam v. Tex. Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990). Arkansas Code Annotated section 14-15-402 (Supp. 2009), governs instruments to be recorded and provides in relevant part as follows:

(a) It shall be the duty of each recorder to record in the books provided for his or her office *all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, affidavits, powers of attorney, assignments, contracts, agreements, leases, or other instruments of writing* of, or writing concerning, any lands and tenements or goods and chattels, which shall be proved or acknowledged according to law, that are authorized to be recorded in his or her office.

(Emphasis added.)

Here, Wetzel acknowledges that an affidavit is specifically mentioned in section 14-15-402(a) as a recordable document, but asserts that an affidavit may be recorded for the limited purpose of allowing perfection of materialman's liens or other matters specifically listed in Title 18 of the Arkansas Code. Wetzel asserts that an affidavit stating that a mortgage is lost and not recorded is not an instrument conveying title such that it provides constructive notice under section 14-15-404. MERS counters that not only is an affidavit specifically set forth in section 14-15-402 as an instrument to be recorded but also the affidavit of lost mortgage is an "other instrument of writing affecting title to property" as set forth in section 14-15-404(a)(1).

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We turn to section 14-15-404(a)(1), which addresses the effect of recording instruments and provides the following:

Every deed, bond, or instrument of writing affecting the title, in law or equity, to any real or personal property within this state which is or may be required by law to be acknowledged or proved and recorded shall be constructive notice to all persons from the time the instrument is filed for record in the office of the county recorder of the proper county.

While this section does not specifically provide that an affidavit once recorded shall be constructive notice, we must determine whether an affidavit such as this one falls within the meaning of “instrument of writing affecting title” such that it would constitute constructive notice. We hold that it does not. While the affidavit of lost mortgage is an instrument of writing, it clearly does not affect title. An affidavit is generally defined as a written statement affirmed or sworn to by some person legally authorized to administer an oath or affirmation. *See Save Energy Reap Taxes v. Shaw*, 374 Ark. 428, 288 S.W.3d 601 (2008). The purpose of the affidavit in this case was to give notice that there was a mortgage executed and that it was lost. It in no way affected the title of the property at issue in the bankruptcy proceeding.

Moreover, an instrument affecting real estate must be acknowledged before it shall be admitted to record. Ark. Code Ann. § 16-47-101 (Repl. 1999). This court discussed the proper method for the acknowledgment of a signed instrument in *Jones v. Owen*, 2009 Ark. 505, ___ S.W.3d ___. There, we explained that

[t]he notary public who takes an acknowledgment must “know or have satisfactory evidence that the person making the acknowledgment is the person described in and who executed the instrument.” Ark. Code Ann. § 16-47-205 (Repl. 1999). For any deed or instrument affecting real property, an

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acknowledgment is taken “by the grantor appearing in person before a court or officer having the authority by law to take the acknowledgment and stating that he had executed the deed or instrument for the consideration and purposes therein mentioned and set forth.” Ark. Code Ann. § 16-47-106(a) (Repl. 1999). We have held that the grantor may, at some time after signing an instrument, appear before a notary public in person to acknowledge his or her signature on the document. *O’Kane v. First Nat’l Bank of Paris*, 189 Ark. 396, 72 S.W.2d 537 (1934). The grantor may even acknowledge his or her signature via a telephone conversation with the notary public. *Abernathy v. Harris*, 183 Ark. 22, 34 S.W.2d 765 (1931). However, if the grantor never appears to acknowledge his or her signature on the instrument, but the notary public falsely certifies that the grantor did appear, the acknowledgment is void. *Lytton v. Johnson*, 236 Ark. 277, 365 S.W.2d 461 (1963); *Nevada County Bank v. Gee*, 130 Ark. 312, 197 S.W. 680 (1917).

Id. at 5, ___ S.W.3d at ___.

In the case of an affidavit such as this one, there is no requirement of, nor was there any, acknowledgment by the grantor, Pirlee Fox. The affidavit was witnessed and notarized but only for the purpose of attesting to the signature of an employee of the lender who stated that the mortgage was lost and that the bank was claiming an interest in the property described therein.

In sum, the affidavit of lost mortgage is not an instrument affecting title to real property pursuant to section 14-15-404(a)(1), and although accepted for recording by the Perry County Circuit Clerk, it was not entitled to recordation pursuant to section 14-15-402. Accordingly, we hold that the recording of the affidavit of lost mortgage does not constitute constructive notice sufficient to defeat the claim of a bona fide purchaser.

Certified question answered.