

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE:

CASE NO.: 05-13930

KENNETH H. MEAD,

Debtor.

KENNETH H. MEAD,

Plaintiff,

v.

Adversary No.: 06-14

UNITED STATES OF AMERICA,

et al.

Defendant.

**ORDER DENYING MOTION FOR
ORAL ARGUMENT ON PLAINTIFF'S
MOTION FOR REHEARING AND
DENYING PLAINTIFF'S MOTION FOR
REHEARING**

This proceeding came before the Court upon Plaintiff's Motion for Rehearing and Plaintiff's Request for Oral Argument. On April 13, 2007 the Court entered an order in which it deferred ruling on Plaintiff's request for oral argument on Plaintiff's Motion for Rehearing until the time for filing a response to the Motion for Rehearing had expired. Partner's Trust Bank filed an objection to Plaintiff's Motion for Rehearing and Plaintiff filed a reply thereto. Having reviewed the pleadings, the Court finds that oral argument on Plaintiff's Motion for Rehearing would not be beneficial and will therefore deny that request.

The Court now turns to the Motion for Rehearing. Plaintiff filed this adversary proceeding seeking to determine the validity, priority or extent of liens held by various creditors as to certain real property in Marion County Florida owned by Plaintiff (the "Florida Properties"). Thereafter Plaintiff filed a motion for summary judgment. After the summary judgment motion was filed, but prior to the entry of an order by the Court, the case was converted

from Chapter 11 to Chapter 7. By Order dated March 28, 2007 (the "Summary Judgment Order") the Court found that certain judgments obtained by BSB Bank & Trust Company in New York (the "BSB Judgments")¹ were a lien on the Florida Properties despite the listing of an incorrect address for the debtor in an affidavit accompanying the BSB Judgments.² Specifically the Court found that Plaintiff had actual notice of the BSB Judgments. (Summ. Judg. Order at 8.) The Court also found that those creditors who filed judgments in the Marion County public records after the filing of the BSB Judgments were on notice of the BSB Judgments, notwithstanding the fact that the addresses set forth in the accompanying affidavits were ultimately determined to be incorrect. (*Id.* at 8 n.7.)

In his Motion for Rehearing, Plaintiff points out that he filed the adversary proceeding as a debtor-in-possession and that a debtor-in-possession has the power of a bona fide purchaser of real property under 11 U.S.C. § 544(a)(3). Plaintiff asserts that whether he had actual notice of the BSB Judgments is irrelevant and does not affect his avoidance powers as a hypothetical bona fide purchaser. Plaintiff seeks to have the Court revisit the issue of whether, under Florida law, recordation of a foreign judgment without compliance with the Florida Uniform Enforcement of Foreign Judgments Act gives constructive notice and thus prevents him from avoiding the BSB Judgments pursuant to § 544(a)(3).

Partner's Trust Bank objects to the relief sought on the bases that: 1) Plaintiff has no standing to file the Motion for Rehearing because upon conversion of the case, Plaintiff lost his standing to administer the case as the debtor-in-possession; 2) Even if Plaintiff has standing to file the Motion for Rehearing, he has not established grounds to grant the Motion; 3)

¹ BSB was Partners Trust Bank's predecessor in interest.

² The Florida version of the Uniform Enforcement of Foreign Judgment Act (the "Florida UEFJA"), Fla. Stat. § 55.505, provides that "[a]t the time of the recording of a foreign judgment, the judgment creditor shall make and record with the clerk of the circuit court an affidavit setting forth the name, social security number, if known, and last known post office address of the judgment debtor and of the judgment creditor."

Rule 9023 is not applicable; and 4) the doctrine of res judicata bars Plaintiff's new legal argument because Plaintiff could have but failed to include § 544(a)(3) as a separate cause of action in the Complaint when he did have standing to sue. The Court finds it necessary to only address Partner's Trust Bank's first two arguments.

Paragraph (a) of § 323 of the Bankruptcy Code provides that "the trustee in a case under this title is the representative of the estate." Paragraph (b) of § 323 provides that "the trustee in a case under this title has capacity to sue and be sued." "As such, the only party who can pursue a claim on behalf of the bankruptcy estate is the trustee, thus the debtor lacks standing." Griffin v. Beaty (In re Griffin), 330 B.R. 737, 740 (W.D. Ark. 2005). Upon conversion of the instant case from Chapter 11 to Chapter 7, Plaintiff lost his standing to administer the bankruptcy case as the debtor-in-possession. Any arguments contesting the correctness of the Summary Judgment Order should have been raised by the Trustee, not Plaintiff. Accordingly, the Motion for Rehearing is due to be denied on that basis.

Even if Plaintiff had standing to seek reconsideration of the Summary Judgment Order, he failed to establish grounds to grant the Motion to Reconsider. A party may move for reconsideration of orders issued by bankruptcy courts within ten days of the entry of an order or judgment. FED. R. CIV. P. 59. A court exercises its discretion when deciding whether to grant a Rule 59(e) motion. Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc., 169 F.R.D. 680, 684 (M.D. Fla. 1996). "A motion to alter or amend a judgment must demonstrate why the court should reconsider its prior decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" Id. (quoting Cover v. Wal-Mart Stores, Inc., 148 F.R.D. 294 (M.D. Fla. 1993)). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and the conservation of scarce judicial resources." Id. (citing Pennsylvania Ins. Guar. Ass'n v. Trabosh, 812 F. Supp. 522 (E.D. Pa. 1992)). A court can grant a motion for reconsideration when the moving party shows one of three criteria: (1) there is newly available evidence; (2) there is an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or to

prevent manifest injustice. Id. Plaintiff does not assert that there is newly available evidence or that there has been an intervening change in the controlling law. However, Plaintiff does contend that the Court did not fully address the issue of whether the defective filing by BSB gave constructive notice to subsequent purchasers and thus implicitly asserts that the Court erred in its application of the law.

Section 544(a)(3) of the Bankruptcy Code provides that:

(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 11 U.S.C. § 544(a)(3) (West 2006). "Pursuant to [§ 544(a)(3)] the trustee is given the rights and powers of a bona fide purchaser of real property from the debtor if at the time of the commencement of the case a hypothetical buyer could have obtained bona fide purchaser status, so the trustee can avoid any liens or conveyances that a bona fide purchaser could avoid... The trustee under this subsection is deemed to have conducted a title search, paid value for the property, and perfected its interest as a legal title holder as of the date of the commencement of the case." Henry J. Sommer, 2 Collier Bankruptcy Manual ¶ 544.08, at 544-16.1 (3d ed. rev. 2007).

While a trustee's actual knowledge is irrelevant under § 544(a)(3), In re Sandy Ridge Oil Co., 807 F.2d 1332, 1336 (7th Cir. 1986), the trustee cannot avoid a claim to which an otherwise bona fide purchaser would be subject because of constructive notice. Watkins v.

Watkins, 922 F.2d 1513, 1514 (10th Cir. 1991). See also In re Hagendorfer, 803 F.2d 647, 649 (11th Cir. 1986) (holding that trustee is bound by erroneous, defective or incomplete matters of record). Whether or not constructive notice exists is determined by state law. In Florida a recorded document “is constructive notice to creditors and subsequent purchasers not only of its own existence and contents, but of such other facts as those concerned with it would have learned from the record, if it had been examined, and inquiries suggested by it, duly prosecuted, would have disclosed.” Sapp v. Warner, 141 So. 124, 127-128 (Fla. 1932).

There are no reported cases which address the issue of whether the recordation of a foreign judgment whose accompanying affidavit contains an incorrect address for the judgment debtor constitutes constructive notice to potential purchasers. The Court finds that it does. As the Court intimated in the Summary Judgment Order, the purpose of the requirement in the Florida UEFJA of the recordation of an affidavit containing the judgment debtor’s last known address is to ensure that a judgment debtor: 1) receives notice that someone is seeking to enforce a judgment against him in a Florida court and 2) to permit him to voice any objections he has to the enforcement of the judgment. While the affidavit accompanying the BSB Judgments contained an incorrect address for Plaintiff, they were nonetheless sufficient to put potential purchasers on notice of a prior claim. A hypothetical buyer of the Florida Properties could not have obtained bona fide purchaser status because he would have had constructive notice of the BSB Judgments.³ Accordingly, the

trustee could not have avoided the BSB Judgments as to the Florida Properties pursuant to § 544(a)(3). Upon the foregoing, it is

ORDERED:

1. Plaintiff’s Motion for Oral Argument on Plaintiff’s Motion for Rehearing is denied.

2. Plaintiff’s Motion for Rehearing is denied.

DATED this 27 day of June, 2007 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

³ Plaintiff cites several cases, which he asserts stand for the proposition that the recordation of a defective document in Florida imparts no notice of its contents to anyone, regardless of whether the defect is latent or patent. See Reed v. Fain, 145 So. 2d 858 (Fla. 1961); Yaist v. United States, 656 F.2d 616 (Ct. Claims 1981); Lassiter v. Curtiss-Bright Co., 177 So. 201 (Fla. 1937). The Court finds that the cases stand for the proposition that a document, which is not within the contemplation of the recording statute (i. e. a forged deed, an uncertified copy of an agreement, or an unacknowledged contract), does not constitute constructive notice. See 38 Fla. Jur.2d Notice and Notices § 12 (2007). The Court finds these cases unpersuasive to the issue at hand. Despite the incorrect address for Plaintiff in the affidavit accompanying the BSB Judgments, the BSB Judgments were within the contemplation of the recording statute.