

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

In re:

IVEY AND ASSOCIATES GROUP, INC.,

Case No. 6:10-bk-07028-ABB

Chapter 11

Debtor.

ORDER

This matter came before the Court on the Motion for Relief from Automatic Stay (Doc. No. 56) filed by Philip Fiegler, as Trustee of the Philip M. Fiegler Living Trust (“Movant”), seeking relief from the automatic stay pursuant to 11 U.S.C. Section 362(d)(1). A preliminary hearing was held on September 13, 2010 at which the principal of the Debtor Ivey and Associates Group, Inc., Debtor’s counsel, Movant’s counsel, and counsel for the Office of the United States Trustee appeared.

The Debtor did not file an objection, but asserted in open Court Movant does not have standing to seek stay relief because the mortgage at issue is unperfected. The Debtor and Movant filed post-hearing briefs pursuant to the Court’s directive (Doc. Nos. 69, 70). The facts are undisputed. The issues for resolution are legal issues: (i) whether Movant has an enforceable security interest in the Debtor’s real property; and (ii) whether grounds exist for granting Movant relief from the automatic stay pursuant to 11 U.S.C. Section 362(d). Movant’s Motion is due to be denied for the reasons set forth herein.

Loan Transaction

Debtor borrowed \$50,000.00 from Movant in December 2008 and, as security for the loan, granted Movant a mortgage interest in the Debtor’s apartment building located

in Volusia County, Florida at 145 South Lincoln Street, Daytona Beach, Florida, 32114 (the "Property"), and more particularly described as:

Lot 2, and the Southerly 115 feet of Lot 3, HULIN SUBDIVISION IN BLOCK 33, HODGEMAN'S MAP OF DAYTONA, FLA., according to the plat recorded in Map Book 6, at Pages 31 and/or 100, of the Public Records of Volusia County, Florida.

Hemis N. Ivey ("Ivey"), as the Debtor's President, executed on December 16, 2008: (i) a Promissory Note in favor of Movant for \$50,000.00; and (ii) a Mortgage Deed granting Movant a security interest in the Property. The Note contains a guarantee pursuant to which Ivey personally guaranteed payment of the Note. The Debtor delivered the Note and Mortgage Deed to Movant. Movant is the holder of these documents.

The Mortgage Deed was not recorded in the Volusia County land records due to an oversight and remains unrecorded. Two documents entitled "Claim of Lien" were recorded in the Volusia County land records:

- (i) Philip Fiegler, individually, executed a Claim of Lien on December 16, 2008 asserting he is a "Lienor" and holds a lien interest in the amount of \$50,000.00 on the Property. The Claim of Lien was recorded in the Volusia County public records on May 4, 2009.
- (ii) Philip Fiegler, individually, executed a Claim of Lien on July 27, 2009, which is virtually identical to the December 16, 2008 Claim of Lien with the exception of a correction of the legal description of the Property. The July 27, 2009 Claim of Lien was recorded in the Volusia County public records on August 5, 2009.

The Debtor filed a Chapter 11 petition on April 26, 2010 and the automatic stay of 11 U.S.C. Section 362(a) arose by operation of law. The automatic stay, among other things, prevents any act to create, perfect, or enforce a prepetition lien claim against property of the estate or property of the Debtor. 11 U.S.C. §§ 362(a)(4), (a)(5).

The case docket reflects the Property is encumbered by: a Construction Mortgage for \$825,006.35 held by Fidelity Bank of Florida, N.A. and recorded in the Volusia County land records on April 2, 2008; a mortgage for \$27,000.00 held by Mary Guidi; and a judgment for \$117,858.27 held by Kevin McKinney, *et al.*, Claim No. 6-1. Other debts may encumber the Property.

Movant's Motion for Stay Relief

Movant filed a Motion seeking relief from the automatic stay pursuant to 11 U.S.C. Section 362(d) “for cause.” It requests stay relief be granted for the purpose of recording the Mortgage Deed in the Volusia County land records. It does not request stay relief for any other purpose, including enforcement of any foreclosure rights.

Movant asserts it holds an enforceable security interest in the Property pursuant to the Mortgage and Claims of Lien. “The ‘basic federal rule’ in bankruptcy is that state law governs the substances of claims.” Raleigh v. Illinois Dep’t of Revenue, 530 U.S. 15, 20 (2000) (*quoting* Butner v. U.S., 440 U.S. 48, 57 (1979)). The Note sets forth the loan agreement is governed by Florida State law. Florida State statutory and case law govern the determination of what interest Movant has in the Property.

The Mortgage:

Florida statutory law defines mortgages as:

- (1) All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

- (2) Provided, however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee, for value without notice, holding under the grantee.

FLA. STAT. § 697.01. “A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.”

FLA. STAT. § 697.02. A mortgage becomes valid and operative upon execution and delivery by the mortgagor to the mortgagee. In re Forfeiture of U.S. Currency in Amount of Ninety-one Thousand Three Hundred Fifty-seven and 12/100 Dollars, 595 So.2d 998, 999 (Fla. 4th DCA 1992).

Florida law does not require a mortgage be recorded to be enforceable. Gevertz v. Gevertz, 566 So.2d 541, 544 (Fla. 3d DCA 1990). An unrecorded mortgage is still enforceable as between the mortgagor and mortgagee, but it is not enforceable against subsequent purchasers for valuable consideration who are without notice of the encumbrance. In re Forfeiture, 595 So.2d at 999; FLA. STAT. § 695.01(1).

Florida’s recording statute, Fla. Stat. Section 695.01(1), provides:

- (1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

FLA. STAT. § 695.01. The purpose of recording an interest in real property pursuant to Florida’s recording statute is to place subsequent purchasers and creditors on notice of such interest. Luria v. Bank of Coral Gables, 142 So. 901, 908 (Fla. 1932).

The Mortgage Deed constitutes a mortgage. FLA. STAT. § 697.01. It was executed and delivered by the Debtor to Movant on December 16, 2008. It constitutes a valid enforceable mortgage as between the Debtor and Movant as of that date. Movant's failure to record the Mortgage Deed does not invalidate Movant's mortgage, but the mortgage is not enforceable against subsequent purchasers for valuable consideration who are without notice of the encumbrance. FLA. STAT. § 695.01(1).

Claims of Lien:

Movant asserts the Claims of Lien create an equitable mortgage against the Property. An instrument, to be enforceable as an equitable mortgage, must reflect on its face the parties' intent to create a security interest. Van Eepoel Real Estate Co. v. Sarasota Milk Co., 129 So. 892, 900 (Fla. 1930). The Claims of Lien do not constitute enforceable equitable mortgages.

The parties, based upon the plain and unambiguous language of the Note and Mortgage Deed, intended the Debtor, Ivey, and Movant to be the parties to the loan transaction. The Note and Mortgage Deed were executed in favor of Movant, specifically "Philip Fiegler, as Trustee of the Philip M. Fiegler Living Trust dated August 26, 2003," as the lender and mortgagee. Fiegler was not a party to the loan transaction.

The Claims of Lien name Fiegler individually, not Movant, as the lienor. The Debtor did not execute the Claims of Lien and there is no evidence they were delivered to the Debtor. Fiegler is not the holder of Mortgage Deed. Fiegler holds no mortgage, in fact or equitably, as to the Property.

Relief from Stay:

Movant requests stay relief pursuant to 11 U.S.C. Section 362(d) “for cause” to record the Mortgage Deed in the Volusia County land records. It is unclear whether Movant filed the Motion on its behalf or on the behalf of Fiegler individually.

A motion for relief from the automatic stay must be prosecuted in the name of the real party in interest. 11 U.S.C. § 362(d); FED. R. BANKR. P. 7017. Fiegler, individually, has no standing to seek stay relief because he is not the mortgagee or the holder of the Note and Mortgage Deed. Movant, as the mortgagee and holder of the Note and Mortgage Deed, has standing to seek relief from the automatic stay.

The Debtor is a debtor in possession and the Property is the Debtor’s most significant asset. The Debtor, as of the petition date, was vested with the powers of a bona fide purchaser of real property for value pursuant to 11 U.S.C. Section 544(a)(3). Section 544(a) allows the Debtor to invalidate unperfected security interests, absent some viable affirmative defense. The Debtor may seek to avoid Movant’s unperfected security interest through the exercise of its Section 544 avoidance powers.

Movant has not established cause exists for granting it stay relief pursuant to 11 U.S.C. Section 362(d). The Motion is due to be denied.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Movant’s Motion (Doc. No. 56) is hereby **DENIED**.

Dated this 5th day of October, 2010.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge