

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

CASE NO. 05-1037-3P3

SYBIL D. VANCE

Debtor.

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**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

This Case is before the Court upon Debtor's Objection to Claim Eleven (11) of Ameriquest Mortgage Company. After a hearing held on November 22, 2005, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Debtor filed her Chapter 13 petition in bankruptcy on February 2, 2005.
2. On November 7, 2003, Debtor executed a note and mortgage in favor of the Creditor in the amount of \$162,500. The proposed loan was subject to a right of rescission, which Debtor exercised timely.
3. On November 20, 2003, Debtor executed a mortgage in favor of the Creditor in the amount of \$173,600. [D Ex. 1] The mortgage encumbers Debtor's homestead, located in Clay County, Florida. [D Ex. 1]
4. Creditor failed to record the Mortgage in the public records of Clay County, Florida.
5. On March 14, 2004, Creditor filed its proof of claim in the amount of \$189,224.56. Instead of attaching the mortgage executed on November 20, 2003, Creditor mistakenly attached a copy of the mortgage dated November 7, 2003, that the Debtor had rescinded.
6. On August 21, 2005, Ameriquest filed a Motion for Leave to File an Amended Proof of Claim. On September 1, 2005, the Court entered an order granting Creditor's motion. Creditor subsequently filed an Amended Proof of Claim in the amount of \$189,224.56.

CONCLUSIONS OF LAW

The issue before the Court is whether the Creditor has an enforceable mortgage that is entitled to be treated as a secured claim.

Pursuant to Florida law, it is not required that a mortgage be recorded in order to be enforceable. Gevertz v. Gevertz, 566 So. 2d 541, 544 (Fla. 3d DCA 1990). Further, although an unrecorded mortgage is not enforceable against subsequent purchasers without notice an unrecorded mortgage is valid between the parties to the mortgage themselves. In re Forfeiture of United States Currency in the Amount of Ninety-one Thousand Three Hundred Fifty-seven and 12/100 Dollars, 595 So. 2d 998, 999 (Fla. 4th DCA 1992). Therefore, Creditor's failure to record the Mortgage has no effect on its ability to enforce it as to the Debtor.

Florida law also no longer requires that homestead mortgages be witnessed. Raymar Dev. Corp. v. Barbara, 404 So. 2d 813, 814 (Fla. 2d DCA 1981). "Since the 1968 revision of article X, section 4, of the Florida Constitution, it is no longer required that homestead mortgages be witnessed." Id. The court in Raymar also held that although a mortgage being notarized entitles it to be recorded, so as to bind subsequent purchasers and creditors without actual notice, the absence of notarization does not affect the liability of the parties to the mortgage. Id. Therefore, Debtor's assertion that the Mortgage was not properly witnessed or notarized has no effect on the validity of the Mortgage as between Debtor and Creditor.

Florida law provides that tax statutes are to be construed strongly in favor of the tax payer and against the government. Associates Commercial Corporation v. Sel-O-Rak Corporation, 33 B.R. 394 (S.D. Fla. 1983). aff'd, 746 F. 2d 1441 (11th Cir. 1984). All ambiguities and doubts are to be resolved strongly in favor of the taxpayer. Id. In Associates, the court held that once the creditor paid the documentary stamp tax, that it was entitled to enforce its security interest and the fact that the tax was paid post-petition was of no consequence. Id. at 397.

Florida Statute § 199.133(1) imposes a tax of two mills per dollar on all notes which are secured by a mortgage or other lien on real property in Florida. Florida Statute § 199.282 states that a mortgage shall not be enforceable in a Florida court until the tax has been paid. Debtor argues that pursuant to Florida Statute § 199.282, Creditor's security interest cannot be perfected due to the

assertion that Creditor failed to pay or failed to pay in full the intangible tax on the property secured by the mortgage. However, the Court does not have before it any documentary evidence in support of Debtor's assertion. Further, even if the Court did have the necessary supporting documentary evidence, the Court finds Debtor's argument to be an erroneous interpretation of Florida law. "In the absence of some clear expression otherwise by the legislature, courts should not impose additional penalties nor eliminate well-established commercial rights under the Uniform Commercial Code." Associates, 33 B.R. at 398. Thus, the Court finds that a creditor's failure to pay the requisite intangible tax due would at most prohibit the enforcement of a perfected security interest on the mortgage until the tax was paid but it would not void the perfected status of the mortgage altogether. Additionally, the Court adopts the sound reasoning set forth by the district court in Associates, and finds that it is of no consequence whether a required tax is paid post-petition vs. pre-petition. Based upon the above, the Court finds the Debtor clearly has not provided the Court with a valid basis for disallowing Claim Eleven (11) as a secured claim. Thus, the Court finds Claim Eleven (11) is entitled to be treated in its entirety as a secured claim.

CONCLUSION

Based upon the above, the Court will enter a separate order Overruling Debtor's Objection to Claim Eleven (11).

Dated this 13 day of February, 2006 in Jacksonville, Florida.

/s/ George L Proctor
George L. Proctor
United States Bankruptcy Judge

Copies to:
Debtor
Adrian J. Villaraos
John S. Winkler
Chapter 13 Trustee
Unites States Trustee