

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

**IN RE:**

**CASE NO.: 05-3279-3F3**

**AVA E. CANNIE,**

**Debtor.**

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**AVA E. CANNIE,**

**Plaintiff,**

**v.**

**Adversary No.: 09-648**

**MARK FRANZONI,**

**Defendant.**

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This proceeding came before the Court upon a Complaint seeking: 1) a determination that Plaintiff's debt to Defendant was discharged; 2) the entry of an order avoiding a lien which Defendant placed on Plaintiff's homestead property; and 3) an award of sanctions against Defendant. The Court conducted a hearing on the matter on July 22, 2010 and elected to take the matter under advisement. Upon the evidence, the Court makes the following Findings of Fact and Conclusions of Law.

**Findings of Fact**

On April 1, 2005 Plaintiff filed a voluntary petition under Chapter 13 of the Bankruptcy Code in order to cure an arrearage on her home, located in the Jacksonville Golf and Country Club. In addition to the arrearage on her home, Plaintiff owed several

unsecured non-priority debts, including a debt to Defendant. Plaintiff had borrowed money from Defendant in June, 2004 in order to make a down payment on a forbearance agreement with the mortgagee on her home. The obligation was evidenced by a Mortgage Note dated June 10, 2004. The Mortgage Note provided that the balance would be paid within twelve months. The Mortgage Note listed Plaintiff's correct street address. In one place in the Mortgage Note, the lot upon which Plaintiff's home sits is incorrectly listed as being located in the Jacksonville Golf and Racquet Club. In another place in the Mortgage Note, the lot upon which the home sits is correctly listed as being located in the Jacksonville Golf and Country Club.<sup>1</sup>

Defendant, a bankruptcy petition preparer, prepared Plaintiff's bankruptcy petition. Plaintiff provided the information to Defendant to complete Plaintiff's bankruptcy schedules. Defendant was not listed as a creditor on Plaintiff's bankruptcy schedules. Defendant and his business, Express, Inc., were listed on the mailing matrix.

On April 19, 2005 Plaintiff filed a Chapter 13 plan. On April 26, 2005 Plaintiff filed an Amended Chapter 13 plan. On September 6, 2005 Plaintiff filed a Second Amended Chapter 13 Plan. Defendant prepared the three plans. Although the plans provided that unsecured creditors who timely filed a proof of claim would receive a pro rata share ranging from \$144.32 to \$9.91 per month, none of the plans listed any of Plaintiff's unsecured creditors.

Defendant did not file a proof of claim in Plaintiff's bankruptcy case. On March 2, 2006 the Court entered Order Confirming Chapter 13 Plan and Allowing Claims and

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<sup>1</sup> Plaintiff testified that she believed the loan was evidenced by a promissory note. The Court finds that the parties intended for Defendant to have a mortgage on Plaintiff's home, notwithstanding Plaintiff's testimony and notwithstanding the fact that the Mortgage Note in one location lists the home as being located in Jacksonville Golf and Racquet Club rather than Jacksonville Golf and Country Club.

Directing Distribution (the “Confirmation Order”). Exhibit A to the Confirmation Order listed the creditors who were being paid as part of the plan. Defendant was not listed on Exhibit A. On November 10, 2008 the Court entered Discharge of Debtor after Completion of Chapter 13 Plan.

Plaintiff testified that she relied on Defendant to properly prepare her bankruptcy petition and schedules. However, Plaintiff admitted that she provided Defendant with the information relating to her bills. Plaintiff also admitted that she reviewed all the forms and schedules before she signed them but testified that she saw Defendant listed as a creditor. Plaintiff also testified that she believed the debt to Defendant had been included in her Chapter 13 Plan.

Defendant testified that Plaintiff asked him not to list himself on Plaintiff’s bankruptcy schedules because the plan payments would be too high and Plaintiff wanted to pay him outside of the plan. Defendant also testified that Plaintiff asked him not to file a proof of claim. Defendant testified that he complied with her wishes. Defendant testified that he was not worried about not being paid through the plan because he had a mortgage on Plaintiff’s home.

Defendant recorded the Mortgage Note on August 20, 2009. Defendant testified that he did so because he understood that Plaintiff was going to file another bankruptcy case.

### **Conclusions of Law**

Plaintiff seeks to have the Court determine that her debt to Defendant was unsecured and therefore discharged in her Chapter 13 case. Alternatively, Plaintiff seeks

a determination that Defendant fraudulently prepared her bankruptcy petition and seeks an award of attorney's fees.

At the time Plaintiff filed her bankruptcy petition, subject to a state court determination of the enforceability of the Mortgage Note, Defendant was possibly a secured creditor.<sup>2</sup> The recordation of a mortgage provides notice of its existence but does not create the lien in the first instance. While the mortgage, which Defendant held on Plaintiff's home was not recorded, to the extent that it was enforceable, it was effective between Plaintiff and Defendant.<sup>3</sup> Section 1327 of the Bankruptcy Code does not operate to extinguish a lien on property passing through bankruptcy for which no proof of claim is filed. Southtrust Bank of Alabama, N.A. (In re Thomas), 883 F.2d 991, 998 (11<sup>th</sup> Cir. 1989).<sup>4</sup> Because Defendant's lien, to the extent that it was enforceable, was not extinguished by the bankruptcy, Defendant's recording of the mortgage did not violate the discharge injunction.

Additionally, the Court does not find that Defendant fraudulently prepared Plaintiff's bankruptcy petition. The Court finds that Plaintiff is completely incredible. The Court finds that Plaintiff instructed Defendant not to list himself as a creditor in the bankruptcy schedules, not to file a claim in the case, not to provide for payment to himself as part of the plan, and not to record the Mortgage Note. Plaintiff, not Defendant, attempted to perpetrate a fraud upon the Court. Accordingly, Plaintiff is not entitled to an

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<sup>2</sup> The Court makes no findings that the Mortgage Note is a valid and enforceable document. This determination is a matter for the state court.

<sup>3</sup> If Plaintiff had sold her home during the Chapter 13 proceeding without the buyer having knowledge of Defendant's mortgage, Defendant's mortgage would have been lost.

<sup>4</sup> Plaintiff's personal liability to Defendant was discharged by the bankruptcy discharge.

award of sanctions. The Court will enter a separate judgment consistent with these Findings of Fact and Conclusions of Law.

**DATED** this 13 day of August, 2010 at Jacksonville, Florida.

/s/ Jerry A. Funk

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**JERRY A. FUNK**  
United States Bankruptcy Judge

**Copies Furnished To:**

Robert W. Elrod, Jr., Attorney for Plaintiff  
Defendant