

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARK O'MALLEY

CASE NO. 03-63315

Debtor

Chapter 13

APPEARANCES:

ROSICKI, ROSICKI & ASSOCIATES, INC.
Attorneys for Citimortgage, Inc.
152 Islip Avenue, Ste. 18
Islip, New York 11751

GETNICK, LIVINGSTON, ATKINSON
GIGLIOTTI & PRIORE, LLP
MARY E. JOHNSON, ESQ.
Of Counsel

RICHARD P. RUSWICK, ESQ.
Attorney for Debtor
401 E. State Street, Suite 306
Ithaca, New York 14850

LYNN HARPER WILSON, ESQ.
Staff Attorney for Chapter 13 Trustee
250 South Clinton Street, Suite 203
Syracuse, New York 13202

PHILLIPS LYTLE, LLP
For Amicus Curiae NBT Bank
1400 First Federal Plaza
Rochester, NY 14614

JOHN T. SULLIVAN, JR., ESQ.
Of Counsel

SHAPIRO, ROSENBAUM, LIEBSCHUTZ
& NELSON, LLP
For Amicus Curiae Marc E. Perosio
Two State Street, Suite 1100
Rochester, New York 14614

DAVID H. EALY, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is a motion (“Motion”) filed by Citimortgage, Inc. (“Movant”) on August 14, 2003, seeking relief from the automatic stay pursuant to § 362(d) of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), in order to continue an action it had commenced in New York State Supreme Court, Broome County (“State Court”) against Mark C. O’Malley (“Debtor”). On August 21, 2003, opposition to the Motion was filed by L. David Zube, Esq., the then chapter 7 trustee. The Motion was scheduled to be heard on August 28, 2003, but was adjourned several times prior to conversion of the case to chapter 13 on March 4, 2004. The Debtor filed opposition to the Motion on April 5, 2004, supplementing it on May 6, 2004. Opposition to the Motion was also filed by the chapter 13 trustee, Mark W. Swimelar, Esq. (“Trustee”), on May 5, 2004.

The Court heard oral argument on the Motion on May 11, 2004, at its regular motion term in Binghamton, New York. The Motion was adjourned to June 8, 2004, for further argument. At the June 8th hearing, the Court agreed to take the Motion under submission and provided the parties with an opportunity to file memoranda of law.¹ The matter was submitted for decision on June 30, 2004.

¹ By letter dated June 2, 2004, a request was made on behalf of NBT Bank N.A., a defendant in an adversary proceeding in the case of Marc E. and Debra J. Perosio, Case No. 03-67641, to file an *amicus* brief in the matter herein since the debtors in that case were seeking to avoid a mortgage lien due to “apparent scrivener’s errors” pursuant to Code § 544(a)(3). The Court agreed to allow an *amicus* brief to be filed on behalf of NBT Bank N.A. On July 8, 2004, the Court also agreed to allow an *amicus* brief to be filed on behalf of the Perosios by July 16, 2004.

By letter dated June 25, 2004, counsel for the Trustee indicated that she would not be submitting a memorandum of law on behalf of the Trustee because of her belief that she was unable to counter the legal arguments made on behalf of Citimortgage.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(B), (G), (K) and (O).

FACTS

On June 30, 2000, the Debtor executed a Note and Mortgage in the amount of \$128,000 in favor of HCI Mortgage. *See* Exhibit A, attached to the Motion. Both the Note and Mortgage make reference to 1290 Upper Front Street, Binghamton, New York, as being the property address subject to the mortgage lien, as well as the address of the borrower, the Debtor. *Id.* According to the Movant, the description of the real property actually transferred to the Debtor by deed on June 30, 2000, is that of 1920 Upper Front Street, Binghamton, New York (the “Premises”). However, the real property described in the Mortgage is that of 1290 Upper Front Street.² According to the Movant, the loan to the Debtor of \$128,000 was used to finance the purchase of the Premises on June 30, 2000.

The Movant, to whom the Mortgage was allegedly assigned by HCI Mortgage, indicates that the Debtor defaulted on the Note and Mortgage in October 2001. On or about April 18, 2003, the Movant allegedly commenced an action in State Court seeking to reform and foreclose

² Allegedly, the parcel description identified as “1290 Upper Front Street” was a portion of the property transferred by the same grantors on June 30, 2000, to Sharon T. Nelson. The Debtor has no legal interest in 1290 Upper Front Street. The two pieces of real property apparently are contiguous parcels.

on the Mortgage. The Movant also filed a Notice of Pendency or *lis pendens* in the Broome County Clerk's office at or about the same time, attached to which is a copy of the description of the Premises, as originally set forth in the deed dated June 30, 2000. *See* Exhibit C, attached to Debtor's Memorandum of Law, filed May 6, 2004. The Movant contends that the Mortgage contained an incorrect legal description through the inadvertent and mutual mistake of HCI and the Debtor.

The Debtor filed a voluntary petition pursuant to chapter 7 of the Code on May 12, 2003. According to the petition, the Debtor resided at 70 Mason Avenue, Binghamton, New York (the "Residence"). The only real property listed in Schedule A, attached to the Debtor's petition, was that of his Residence. Movant was not listed as a creditor.

As noted above, the case was converted to chapter 13 on March 4, 2004. On April 21, 2004, the Debtor filed amended schedules in which he lists the Premises, as well. *See* Amended Schedule A. Movant is listed on Amended Schedule F as an unsecured creditor with a claim of \$159,740.17 on a personal loan.

DISCUSSION

It is the Debtor's position that the Movant is not entitled to relief from the automatic stay as it did not have a perfected mortgage lien on the Premises as of the petition date. The Movant asserts that the State Court should be permitted to determine whether to allow the reformation of the Mortgage. The Movant acknowledges that the Trustee has the status of a hypothetical lien

creditor as of the filing date pursuant to Code § 544(a)(1).³ However, it is the Movant's position that by seeking reformation, it is not asking that the State Court create a lien; rather, it is simply asking that the lien be found valid. According to the Movant, if the State Court were to grant its request to reform the Mortgage, Movant's lien would be effective retroactive to June 30, 2000, citing to *United States v. Gelb*, 783 F. Supp. 748, 755 (E.D.N.Y. 1991).

As noted previously, counsel for the Trustee, after researching the issues, concluded that she was unable to counter the arguments made on behalf of Citimortgage. Given the fact that the Trustee has concluded that he does not have the ability to avoid the Movant's lien pursuant to Code § 544(a) and has basically withdrawn his opposition, the Court must now consider whether the Debtor acting alone has standing to oppose the Motion.

The Debtor's standing is based on his argument that the Movant's mortgage lien is avoidable. However, the majority of courts to have considered whether a chapter 13 debtor has the right to exercise the avoidance powers of the trustee pursuant to Code § 544(a) have concluded that, except in limited circumstances, a debtor does not. *See In re Reese*, 194 B.R. 782, 787 (Bankr. D.Md. 1996) (noting that the debtor's powers generally are limited to those expressly enumerated in Code § 1303); *In re Merrick*, 151 B.R. 260, 262 (Bankr. D. Idaho 1993) (indicating that a debtor's avoidance powers are limited to involuntary transfers of exempt property pursuant to Code § 522(h)); *In re Driver*, 133 B.R. 476, 480 (Bankr. S.D. Ind. 1991)

³ The argument made by NBT Bank in its *amicus* brief focuses on Code § 544(a)(3) and a trustee's status as a bona fide purchaser. At the hearing on June 8, 2004, the Court made it clear that Code § 544(a)(3) was inapplicable to the matter pending before it because the *lis pendens* filed on behalf of Citimortgage prepetition provided notice to the Trustee of Citimortgage's position with respect to the Premises, thereby negating his status as a bona fide purchaser. *See In re Collins*, 292 B.R. 842 (Bankr. S.D. Ohio 2003); *In re Borison*, 226 B.R. 779 (Bankr. S.D.N.Y. 1998).

(discussing and analyzing the split in opinions taken by the courts and concluding that a chapter 13 debtor does not have standing to exercise the trustee's transfer avoidance powers for his/her benefit except to the extent allowed by Code § 522(g) and (h); nor does a debtor have standing "to exercise the trustee's lien avoidance powers for the benefit of unsecured creditors"); *In re Perry*, 131 B.R. 763, 769 (Bankr. D. Mass. 1991). *Cf. In re Freeman*, 72 B.R. 850, 854 (Bankr. E.D. Va. 1987) (allowing the chapter 13 debtors to exercise the trustee's "strong arm" powers pursuant to Code § 544(a) after the trustee had not acted with respect to the debtors' automobile). This Court agrees with the majority and concludes that the Debtor lacks standing pursuant to Code § 544(a) to oppose the Motion.

The Debtor also contends that the Movant's filing of the *lis pendens* on or about April 18, 2003, just a month prior to the commencement of the Debtor's case, constitutes a preference that is avoidable pursuant to Code § 547.⁴ However, the Debtor's standing in making this argument is also at issue because the Debtor's power to avoid a transfer pursuant to Code § 547 is limited.

Code § 522(h) allows a debtor to avoid a preference only if the transfer involved property in which the debtor was entitled to claim an exemption. In this case, the Premises are not the Debtor's residence and, therefore, there is no statutory basis for exempting the property. Thus, the Court need not address the Debtor's arguments, or those made on behalf of Perosio, as to whether the filing of a *lis pendens* constitutes a transfer that may be avoided pursuant to Code § 547 as a preference.

The Court concludes, under the circumstances before it, that the Movant is entitled to

⁴ This position is also one asserted in the *amicus* brief of Marc E. Perosio ("Perosio"), filed on July 15, 2004.

relief from the automatic stay in order to proceed in State Court with reformation of its mortgage. The Court is mindful of the fact that the purpose of recording a mortgage in order to perfect the mortgagee's lien is to afford protection, not to the debtor/mortgagor, but rather to entities intending to enter into a transaction with the debtor/mortgagor involving the same real property.⁵ The Debtor, who obtained financing from the Movant's predecessor-in-interest to purchase the Premises, should not be afforded a windfall as long as the Movant is successful in having the Mortgage reformed based on a mutual mistake.

Based on the foregoing, it is hereby

ORDERED that the Motion to the extent that it seeks relief from the automatic stay to proceed in State Court to simply reform its mortgage is granted; it is further

ORDERED that the Motion is denied without prejudice insofar as it seeks relief from the automatic stay to foreclose on the mortgage and proceed with eviction.

Dated at Utica, New York

this 5th day of August 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁵ The Debtor indicates that prior to filing his petition on May 12, 2003, Citibank (South Dakota) N.A. had filed a judgment lien in the amount of \$4,844.41 on January 14, 2003, and Chase Manhattan Bank USA, N.A. had filed one in the amount of \$7,112.76 on April 3, 2003. *See* Debtor's Memorandum of Law, filed May 6, 2004. It is the Debtor's position that they should have received notice of this Motion as they would potentially be impacted by the outcome. *Id.* at 1 n.1. The Debtor points out that if the Movant's request were to be denied, they would move up in priority and would have to be paid in full upon sale of the real property, as proposed by the Debtor in his plan. However, this argument lacks merit. *See In re Wilkinson*, 186 B.R. 186, 192-93 (Bankr. D.Md. 1995) (citing to Code § 551 for the premise that a subordinated lien creditor would not be permitted to receive a windfall upon a successful avoidance of a prior lien).