

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
MOSS FAMILY LIMITED PARTNERSHIP)	Case No. 12-32540 HCD
and BEACHWALK, L.P.)	Chapter 7
Debtors)	Jointly Administered
_____)	
)	
YVETTE GAFF KLEVEN, TRUSTEE)	
Plaintiff)	
vs.)	Proc. No. 13-3019
)	
ALEXANDER GAYDASCH, CLAIRE)	
GAYDASCH, J. RICHARD CHILDERS,)	
JOHN L. TURNER, SUZANNE TURNER,)	
THOMAS J. MOSS, HORIZON BANK, N.A.)	
TRUST NUMBER 08-1292)	
Defendants)	
)	
and)	
)	
LAPORTE SAVINGS BANK)	
Intervenor-Defendant)	
_____)	
and)	
)	
THOMAS J. MOSS)	
Third Party Plaintiff)	
vs.)	
)	
CHICAGO TITLE INSURANCE)	
COMPANY, HORIZON BANK, N.A.,)	
TRUST NUMBER 08-1292)	
Third Party Defendants)	
_____)	
and)	
)	
HORIZON BANK, N.A., TRUST NUMBER)	
08-1292)	
Counter - Claimant)	
)	
vs.)	
)	
THOMAS J. MOSS)	
Counter - Defendant)	

Appearances

Douglas R. Adelsperger, Esq., 111 West Wayne Street, Fort Wayne, Indiana 46802, for Yvette Gaff Kleven.

Laura M. Boyer King, Esq. and Grant F. Shipley, Esq., 233 West Baker Street, Fort Wayne, Indiana 46802, for Thomas J. Moss.

Rebecca Hoyt Fischer, Esq., 401 East Colfax, Suite 305, South Bend, Indiana 46617, for Horizon Bank, N.A., Trust Number 08-1292.

C. Daniel Motsinger, Esq., 1 Indiana Square, Suite 2800, Indianapolis, Indiana 46204, for Horizon Bank, N.A., Trust Number 08-1292.

J. Richard Ransel, Esq. and Lisa Gilkey Schoetzow, Esq., 228 West High Street, Elkhart, Indiana 46516, for LaPorte Savings Bank.

Jennifer ElBenni, Esq. and Jeffrey A. Johnson, Esq., 4100 Edison Lakes Parkway, Suite 100, Mishawaka, Indiana 46545, for LaPorte Savings Bank.

Tammy L. Ortman, Esq., One Indiana Square, Suite 1500, Indianapolis, Indiana 46204, for Chicago Title Insurance Company.

MEMORANDUM OF DECISION AND ORDER

At South Bend, Indiana, on November 10, 2015.

The matters now before the court are cross motions for summary judgment filed by plaintiff Beachwalk Limited Partnership (Trustee Beachwalk)¹, the debtor in case

¹Subsequent to taking under advisement the matters in this adversary proceeding now before the court, the court held an evidentiary hearing in the jointly administered Moss Family bankruptcy case on the United States trustee's motions to convert the cases to chapter 7, the debtors' motions to voluntarily dismiss the cases, and creditors' joint motion to appoint a chapter 11 trustee. The court granted the United States trustee's motions to convert the cases on September 23, 2015 [Moss Family ECF No. 898]. Yvette Kleven was appointed as chapter 7 trustee for both Moss Family and Beachwalk. As chapter 7 trustee, Kleven was substituted as plaintiff on October 13, 2015 pursuant to Bankruptcy Rule 7025. Although Kleven has been substituted as named plaintiff, she has not otherwise participated in this adversary proceeding. Because this adversary proceeding was initiated by Beachwalk LP while the case was pending under chapter 11, the court will use the

(continued...)

number 12-32547, and intervenor-defendant LaPorte Savings Bank's (LaPorte) response and cross motion for summary judgment. For the reasons set out below, the court grants the motion of Trustee Beachwalk and denies the motion of LaPorte.

Jurisdiction

The court finds it has jurisdiction to decide the matters before it pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157, and the Northern District of Indiana Local Rule 200.1. Venue is proper pursuant to 28 U.S.C. § 1409(a). The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (F), (K), and (O).

Findings of Fact

This adversary proceeding involves a real estate parcel the parties refer to as Dune Top that adjoins a residential property development in LaPorte County, Indiana. Beachwalk owns Dune Top. The development is owned by Moss Family Limited Partnership (Moss Family). Both Beachwalk and Moss Family are debtors in cases pending before this court. There is some overlap in ownership interests between the Moss Family and Beachwalk limited partnerships in the person of Thomas J. Moss (Moss).

The Dune Top real property at the center of this adversary proceeding was originally owned by the individual defendants in this adversary proceeding as beneficiaries under Trust No. 08-1292.² In July 2005 Beachwalk purchased Dune Top for \$1.5 million, paying cash and issuing mortgages to the sellers. The parties do not dispute that these mortgages were never recorded. The record indicates neither Beachwalk nor the individual defendants were responsible for this omission. When the individual defendants authorized

¹(...continued)
term "Trustee Beachwalk" to properly distinguish the plaintiff from the debtor Beachwalk LP (Beachwalk).

²Trust No. 08-1292 was formed November 10, 1980.

the transfer of Dune Top to Beachwalk in 2005, technically the title was transferred from Trust No. 08-1292 to an existing land trust, Trust No. 08-3923.³ The parties have not questioned Beachwalk's ownership interest in Dune Top.

LaPorte lent \$149,875.50 to Beachwalk on November 30, 2007.⁴ LaPorte made an additional loan of \$1,200,000.00 on December 19, 2008,⁵ and \$550,000.00 on April 15, 2010.⁶ When Beachwalk, Moss, and Trust No. 08-3923 defaulted on their obligations under the notes and guarantees, LaPorte filed actions in the LaPorte Superior Court No. 2. The state court entered judgments in favor of LaPorte in five cases on October 18, 2011,⁷ and

³Trust No. 08-3923 is dated January 8, 1990.

⁴Loan number 6011566. The loan document states this is a renewal of loan number 1500092051. It is secured by a mortgage on 210 Beachwalk dated October 12, 2004.

⁵Loan number 5013237. The loan document states that the loan is secured by a mortgage dated October 13, 2005 and the guarantee of Moss dated December 19, 2008.

⁶Loan number 5013852. The loan document states this is a renewal of loan number 5013837. It is secured by a mortgage dated April 15, 2010, on 2.5 acres.

⁷On October 18, 2011, the LaPorte Superior Court No. 2 entered judgments in the following cases against Beachwalk.

- Cause No. 46D02-1104-MF-050, for \$1,065,795.07. Paragraph 6 of the judgment states that LaPorte "has a valid lien, superior to all other liens."
- Cause No. 46D02-1104-MF-052, for \$238,027.67. Paragraph 5 of the judgment states that LaPorte "has a valid lien, superior to all other liens."
- Cause No. 46D02-1104-MF-053, for \$62,649.52. Paragraph 5 of the judgment states that LaPorte "has a valid lien, superior to all other liens."
- Cause No. 46D02-1104-MF-054, for \$135,253.15. Paragraph 6 of the judgment states that LaPorte "has a valid lien, superior to all other liens."
- Cause No. 46D02-1104-MF-055, for \$377,679.82, plus interest. Paragraph 6 of the judgment states that LaPorte "has a valid lien, superior to all other liens."

another in its favor on April 16, 2012.⁸ The total stated amount of the state court judgments is \$3,120,050.22. The first of these judgments was rendered more than six years after the 2005 Dune Top sale. The record here does not suggest any reason to doubt the finality of these judgments.

Moss Family filed for relief under chapter 11 on July 17, 2012, in case number 12-32540. On July 18, 2012, Beachwalk filed a separate chapter 11 petition, case number 12-32547. Also on July 18, 2012, the debtors in both cases filed motions for an order directing joint administration [Moss Family bankruptcy ECF No. 9, Beachwalk bankruptcy ECF No. 10]. The court granted these motions on August 13, 2012, and ordered that the cases be jointly administered [Moss Family bankruptcy ECF No. 72, Beachwalk bankruptcy ECF No. 40]. The order granting the motion for joint administration designated Moss Family as the lead bankruptcy case.

Summary Judgment Standard

The questions before the court at this time concern Trustee Beachwalk's motion for summary judgment and LaPorte's cross motion for summary judgment. "Summary-judgment proceedings in bankruptcy court are governed by Rule 56 of the Federal Rules of Civil Procedure. See Fed. R. Bankr. P. 7056; Fed. R. Bankr. P. 9014(c)" *Archdiocese of Milwaukee v. Doe*, 743 F.3d 1101, 1105 (7th Cir. 2014). In considering summary judgment, the court is well aware that it "is such a drastic procedure that it should be used sparingly so that no party having a scintilla of merit to his claim or defense should be denied his day in court." *In re Freeman*, 68 B.R. 904, 910 (Bankr. M.D. Pa. 1987).

⁸LaPorte Superior Court No. 2, Cause No. 46D02-1104-MF-061, for \$1,240,644.99, plus interest. This is a nunc pro tunc order correcting the court's judgment and decree of foreclosure dated October 18, 2011. The state court found that LaPorte "has a valid lien, superior to all other liens." See ¶6 of the court's order.

The standard for summary judgment is well established: with the court drawing all inferences in the light most favorable to the non-moving party, the moving party must discharge its burden of showing that there are no genuine questions of material fact and that he is entitled to judgment as a matter of law. If the moving party has properly supported his motion, the burden shifts to the non-moving party to come forward with specific facts showing that there is a genuine issue for trial.

Spieler v. Rossman, 798 F.3d 502, 507 (7th Cir. 2015) (internal citations omitted).

As observed by District Judge Springmann of this district, when the question before the court is summary judgment, the role of the court

is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact.

Boyer v. Gildea, 475 B.R. 647, 651 (N.D. Ind. 2012).

In ruling on a motion for summary judgment the Supreme Court instructs that “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Discussion

Trustee Beachwalk and LaPorte have each moved for summary judgment. The parties do not disagree as to the essential facts. Their interpretations of how the law applies to those facts, however, are quite different. Where, as here, both parties in an action have moved for summary judgment, the court is not required to grant judgment as a matter of law for one side or the other. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2nd Cir. 1993); *Judsen Rubber Works, Inc. v. Manufacturing, Prod. & Serv. Workers Union Local No. 24*, 889 F.Supp. 1057, 1060 (N.D. Ill. 1995). Rather, the court must evaluate each party’s motion on its own merits, resolving factual uncertainties and drawing all reasonable inferences against the party whose motion is under consideration. *Heublein*, 996 F.2d at 1461; *Judsen*,

889 F.Supp. at 1060; *Buttitta v. City of Chicago*, 803 F.Supp. 213, 217 (N.D. Ill. 1992), *aff'd*, 9 F.3d 1198 (7th Cir. 1993). The court will consider the merits of the competing summary judgment motions separately.

Trustee Beachwalk summary judgment motion

Trustee Beachwalk's complaint asks this court to avoid the unrecorded mortgages of the individual defendants pursuant to 11 U.S.C. § 544(a)(3). This section empowers a bankruptcy trustee to avoid any transfer of property that is avoidable by a bona fide purchaser of real property. The complaint also alleges the unrecorded mortgages constitute preferential transfers on account of an antecedent debt that benefit the individual defendants and Trust No. 08-1292. Furthermore, the alleged unrecorded mortgages may be avoided under § 547(b). The complaint asks that any avoided transfers be preserved for the benefit of the estate under § 551. LaPorte has not challenged the applicability of Code §§ 544, 547, and 551.

In its *Memorandum of Law in Support of Motion for Summary Judgment*, Trustee Beachwalk notes the mortgages from the 2005 closing of the Dune Top sale, meant to secure the payment of the purchase price by Beachwalk to the individual defendants, were never recorded. Trustee Beachwalk states that this deficiency was not discovered until a title search in April 2012. See ECF No. 68, ¶ 20. An April 2012 title search would have occurred many months after LaPorte's state court judgments. *Intervenor-Defendant The LaPorte Savings Bank's Designation of Evidence in Support of Its Response in Opposition to Plaintiff Beachwalk Limited Partnership's Motion for Summary Judgment and The LaPorte Savings Bank's Cross Motion for Summary Judgment* motion confirms the fact that no mortgages from the 2005 sale appear in the chain of title. See ECF No. 85, Exhibit C. The

court finds the parties are in agreement that mortgages relating to the 2005 sale have not been recorded. There is no dispute as to this material fact.

In its *Designation of Materials in Support of Motion for Summary Judgment*, Trustee Beachwalk references various documents related to the 2005 Dune Top sale: the closing statement, trustee's deed, and checks issued to the individual defendants. Trustee Beachwalk also cites the land trust agreement for Trust No. 08-1292. The material facts listed by LaPorte include promissory notes, the state court judgments, and the title search reflecting the lack of recorded mortgages on the Dune Top property.

Viewing the record in the light most favorable to the non-movant LaPorte, there is no genuine issue of material fact present in this adversary proceeding concerning fact of the 2005 Dune Top sale and the unrecorded mortgages from that sale. Dune Top was transferred in July 2005 from Trust No. 08-1292 to Trust No. 08-3923. There are no recorded mortgages relating to the 2005 Dune Top sale. LaPorte holds judgment liens that are subsequent to the sale. Trustee Beachwalk has met the first part of the test for summary judgment by showing "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Trustee Beachwalk must still establish that it is entitled to judgment as a matter of law. *Id.*

Avoiding transfers – §544

In its summary judgment motion Trustee Beachwalk contends that it has the standing of a bona fide purchaser under § 544(a)(3), the "strong-arm" clause of the Code. This section expressly grants this status to a trustee. Section 1107(a) grants a debtor-in-possession the rights, powers, functions and duties of a trustee. LaPorte has not contested this point. The court finds as debtor-in-possession under chapter 11, Beachwalk had proper authority to raise § 544 issues when it filed this adversary proceeding. See 11 U.S.C.

§ 1107(a). Here § 544(b) grants Trustee Beachwalk the powers of an actual or hypothetical unsecured creditor with allowable claim that could have avoided an obligation under a mortgage. 5 *Collier on Bankruptcy* ¶ 544.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

As applicable to this adversary proceeding, the strong-arm section of the Code empowers Beachwalk (now succeeded by chapter 7 trustee Kleven) to avoid transfers that could have been voided by certain creditors or a bona fide purchaser, whether or not such purchasers or creditors exist. 11 U.S.C. § 544(a)(3); *In re Crane*, 742 F.3d 702, 706 (7th Cir. 2013) (“[T]he key is that a bankruptcy trustee may avoid any obligation or transfer of the debtor’s property that a hypothetical bona fide purchaser could avoid, ‘without regard to any knowledge of the trustee or of any creditor.’ State law governs who would count as a bona fide purchaser and what constitutes constructive notice sufficient to defeat a bankruptcy trustee’s section 544(a)(3) power.”) A bona fide purchaser for value from Beachwalk would have an interest in Dune Top ahead of the individual defendants and their unrecorded mortgages. But as discussed below, a judgment lien is not a bona fide purchaser for value in Indiana and cannot defeat these mortgages under Indiana law. Section 544(a)(3) allows Trustee Beachwalk to recover for the estate not only property actually owned by it, but also property that Beachwalk could have conveyed under applicable Indiana law. *Sagamore Park Centre Associates L.P. v. Sagmore Park Properties*, 200 B.R. 332, 337 (N.D. Ind. 1996) (citing *Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir. 1989), *cert. denied sub nom. Belisle v. Anzivino*, 493 U.S. 893 (1989)). “The statute mentions ‘transfer’ only in the sense of the *hypothetical* transfer that measures the trustee’s rights: if a hypothetical bona fide transferee from the debtor would come ahead of the ‘true’ owner’s rights, then the trustee takes ahead of the true owner.’” *Belisle*, 877 F.2d at 515 (emphasis in the original).

Judgment lien

Because the property at issue in this adversary proceeding pertains to the Indiana real estate, the court must look to the law of Indiana in assessing the effect of the LaPorte judgment liens against the unrecorded mortgages of the individual defendants. In particular, Indiana law “governs who would count as a bona fide purchaser and what constitutes constructive notice sufficient to defeat a bankruptcy trustee’s section 544(a)(3) power.” *Crane*, 742 F.3d at 706.

Under Indiana law, mortgages take priority according to the time of filing. I.C. § 32-21-4-1(b).⁹ The purpose of the recording statute is to protect subsequent purchasers, mortgagees, and lessees of real property. *ABN AMRO Mortg. Group, Inc. v. American Residential Services, LLC*, 845 N.E.2d 209, 218 (Ind. App. 2006).

In Indiana, all final judgments constitute a lien upon real estate when the judgment has been duly entered and indexed in the judgment docket. I.C. § 34-55-9-2.¹⁰ The proper entry and indexing of LaPorte’s judgments has not been challenged. “A judgment lien is purely statutory in Indiana.” *Arend v. Etsler*, 737 N.E.2d 1173, 1175 (Ind. App. 2000). It is

⁹I.C. 32-21-4-1(b) reads: “A conveyance, mortgage, or lease takes priority according to the time of its filing. The conveyance, mortgage, or lease is fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration if the purchaser’s, lessee’s, or mortgagee’s deed, mortgage, or lease is first recorded.”

¹⁰I.C. § 34-55-9-2 reads: “All final judgments for the recovery of money or costs in the circuit court and other courts of record of general original jurisdiction in Indiana, whether state or federal, constitute a lien upon real estate and chattels real liable to execution in the county where the judgment has been duly entered and indexed in the judgment docket as provided by law: (1) after the time the judgment was entered and indexed; and (2) until the expiration of ten (10) years after the rendition of the judgment; exclusive of any time during which the party was restrained from proceeding on the lien by an appeal, an injunction, the death of the defendant, or the agreement of the parties entered of record.”

a lien on an interest in the land, and a prior equitable interest will prevail over a judgment lien. *Id.*, at 1174. See also *State Bank of Indiana v. Backus*, 67 N.E. 512, 516 (Ind. 1903) (“It is settled in this State that, in the absence of express fraud, the failure of a mortgagee to record a mortgage within the time fixed by the statute will not, as against the general creditors of the mortgagor, either prior or subsequent, render it invalid.” citing *Hutchinson v. First National Bank of Michigan City*, 30 N.E. 952, 955 (Ind. 1892)).

A judgment lien in Indiana is a statutory lien that cannot be judicially expanded or changed. *In re Callahan*, 2013 WL 169275, *3 (Bankr. S.D. Ind. Jan. 16, 2013). (“Indiana case law makes clear that courts are without authority to enlarge statutory lien rights.”) Indiana’s recording statute operates to protect only subsequent good faith purchasers, lessees, or mortgagees for valuable consideration. I.C. § 32-21-4-1(b). “Liens for judgments are subordinate to all prior legal or equitable liens.” *Huntingburg Prod. Credit Ass’n v. Griese*, 456 N.E.2d 448, 452 (Ind. App. 1983). The Indiana Supreme Court has held that the lien of an unrecorded mortgage has priority over that of a subsequent judgment.

A mortgage of real estate, though not recorded in season, is a valid conveyance, except so far as its validity may be affected by statute; and the statute on the subject renders such conveyances not recorded in time void only as to subsequent purchasers and mortgagees for value, whose deeds are first recorded. It has no relation to judgment-creditors.

Sparks v. State Bank, 7 Blackf. 469, 472 (1845). Under long established Indiana precedent, as between the parties to the 2005 Dune Top sale, the lack of recording does not affect the validity of the transaction. *See, e.g., Dempsey v. Auditor of Marion County*, 871 N.E.2d 1031, 1037 (Ind. App. 2007). (The absence of a recorded deed does not affect its validity.) Indiana only protects subsequent good faith purchasers for value against a prior unrecorded mortgage. I.C. § 32-21-4-1(b). “In order to qualify as a bona fide purchaser, one must

purchase in good faith, for valuable consideration, and without notice of the outstanding rights of others.” *Bank of New York v. Nally*, 820 N.E.2d 644, 648 (Ind. 2005). A judicial lien is not the same as a purchase for valuable consideration. Judicial liens are not consensual but creatures of the statute. “A judgment lienholder, whose lien attaches to property by operation of law, does not take for value.” *In re J.T. Real Estate Investments, LLC*, 498 B.R. 869, 872 (Bankr. N.D. Ind. 2013).

A reading of the plain wording of the recording statute shows an unrecorded mortgage in Indiana may only be avoided as to a subsequent purchaser who has without notice, in good faith, and for valuable consideration acquired a legal interest in the land. *Runyan v. McClellan*, 24 Ind. 165, 169 (Ind. 1865). The Indiana Supreme Court explains

As against the mortgagor and the estate while it remains in his hands, the lien is as perfect without registry as it is with it. It is so, also, against his general creditors while he lives, and after his death. No change was wrought in the rights of the mortgagee with respect to the other creditors by his decease. The administrator was his personal representative, and, of course, took no better right than the intestate had.

Kirkpatrick v. Caldwell's Adm'rs, 32 Ind. 299, 299-300 (Ind. 1869). There is no reason to make a distinction in the interest of the administrator in *Kirkpatrick* and Beachwalk. Both have general responsibility to administer property for the benefit of creditors. Neither qualifies as a purchaser for value.

LaPorte argues that *Runyan* is inapplicable to this adversary proceeding. LaPorte states Beachwalk conceded that Moss rather than Beachwalk was the owner of record of Dune Top when LaPorte received its judgments. However, LaPorte has not directed the court to anything in the record to support this assertion of ownership.¹¹ Giving LaPorte

¹¹The court should not have to scour the record or speculate about which portion
(continued...)

the benefit of any uncertainty, the court finds its characterization does not present the full context of the complex financial and business relationships involving Beachwalk, Moss, and the Trusts.

Both Trustee Beachwalk and LaPorte agree the mortgages given in connection with the 2005 Dune Top sale were not recorded. The fact of that sale is undisputed. According to unchallenged testimony of Moss, Beachwalk acted through Trust No. 08-3923 to effect the sale of Dune Top. See Trustee Beachwalk's *Designation of Materials in Support of Motion for Summary Judgment*, Exhibit A, at ¶¶ 12 and 14 (Moss Affidavit). The mortgage and notes relating to the real estate transaction all show Beachwalk as a mortgagor or maker. The court also notes LaPorte named both Beachwalk and Moss as defendants in the state court foreclosure litigation. The court is unclear why LaPorte would name Beachwalk as a party to the foreclosure litigation if Beachwalk did not have an interest in the real estate. Even if Moss rather than Beachwalk was the owner of Dune Top, this fact does not alter the outcome under Indiana law. The mortgages are valid against a subsequent judgment lien. LaPorte's judgment liens are subject to unrecorded mortgages. Not upholding the unrecorded mortgages both here and in *Kirkpatrick* would work to provide a windfall to some creditors at the expense of others who had no part in the failure to record. *Kirkpatrick*, 32 Ind. at 300 ("Why should general creditors derive an advantage from the administrator's ignorance of a fact? They have not acted upon it to their injury.")

While LaPorte accurately references *Johnson v. Johnson*, 920 N.E.2d 253, 256 (Ind. 2010) for the proposition that the first lien in time takes priority, that proposition is not

¹¹(...continued)
of the record LaPorte relies on. *Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 654 (7th Cir. 2007).

germane here. The *Johnson* case involved an annually renewed secured line of credit covering the operations of a farm, and the parties' later divorce settlement calling for the one operating the farm (Robert) to make periodic payments to the other (Gina). A dispute arose when Robert attempted to renew the line of credit after the divorce to be able to restructure the farm's debt to pay Gina. The bank sought Gina's agreement that its lien for the refinancing would be superior to Gina's from the divorce settlement, and she refused. Robert resorted to the courts in an effort to subordinate Gina's lien to that of the bank. The Indiana Supreme Court found that while Gina's interest was subordinate to the bank's prior lien for the operating loan, requiring Gina to do more by "subordinating her lien to allow Robert to finance his divorce obligations constituted a modification and was impermissible." *Johnson*, 920 N.E.2d at 258. In short, the court found Gina's lien took priority over a lien to secure refinancing as this was a new undertaking rather than a continuation of a prior course of dealing.

This court finds *Johnson* is inapposite to the facts in this adversary proceeding. *Johnson* involved a prior lien for sustaining operations at an ongoing business, a subsequent junior judgment lien based on a divorce settlement, and an effort to grant priority for a refinancing of existing debt over the junior judgment lien. These facts are distinguishable from this adversary proceeding where the controversy centers on whether the unrecorded mortgages have priority over the subsequent judgment liens of LaPorte. The *Johnson* case involved a lender's attempt to improve its position on a refinancing over a prior interest. *Johnson* does not address unrecorded mortgages relative to judgment liens. As discussed above, statutory judicial liens in Indiana do not have priority over a prior unrecorded mortgage.

Under Indiana law, LaPorte's judicial liens are subordinate to the unrecorded mortgages of the individual defendants. As the holder of a judicial lien in Indiana, LaPorte cannot be considered a bona fide purchaser for value. Under § 544(a)(3), Trustee Beachwalk is empowered to avoid these unrecorded mortgages of the individual defendants for the benefit of the estate. Trustee Beachwalk may properly avoid these unrecorded mortgages and effectively recover their priority status for the benefit of the bankruptcy estate. The interest of LaPorte in the Dune Top property is secondary and subject to Trustee Beachwalk's recovered interest.

Recovery of preferences – § 547

Under Indiana law the mortgages of the individual defendants have priority over the judgment liens of LaPorte. Trustee Beachwalk asks this court to view these mortgages as transfers that are deemed perfected as of the commencement of the bankruptcy case and therefore avoidable under §547(b).

A transfer of an interest of a debtor in property satisfies § 547(b) if it (1) was made to or for the benefit of a creditor, (2) was on account of an antecedent debt, (3) was made while the debtor was insolvent, (4) was made on or within 90 days before the date of the filing of the petition, and (5) allowed the creditor to receive more than it would have under Chapter 7 of the Bankruptcy Code.

In re Jones, 226 F.3d 917, 921 (7th Cir. 2000). To avoid a transfer under this section, Trustee Beachwalk has the burden to establish all the elements of the statute by a preponderance of the evidence. LaPorte has the burden of showing the nonavoidability of § 547(c). See 11 U.S.C. § 547(c, g); *In re Jines*, 2011 WL 2133841, *3 (Bankr. S.D. Ind. May 25, 2011).

The Bankruptcy Code definition of 'transfer' is very broad. Transfers include the creation of a lien, the retention of title as a security interest, the foreclosure of the

debtor's equity of redemption, or "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with – (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54). The perfection of a security interest clearly qualifies as a transfer under the Bankruptcy Code. *See, e.g., In re Brame*, 26 B.R. 309, 311 (Bankr. W.D. Ky. 1982); *In re Enlow*, 20 B.R. 480, 482 (Bankr. S.D. Ind. 1982). Direct transfers by a debtor as well as indirect transfers made by third parties to creditors on behalf of a debtor are all avoidable. *Warsco v. Preferred Technical Group*, 228 F.3d 557, 564 (7th Cir. 2001). By granting mortgages to the individual defendants as part of the 2005 Dune Top sale, Beachwalk transferred an interest in property. Exactly falling within the Code's definition of a transfer, these mortgages benefitted the individual defendants by enabling them to look to the Dune Top property as security for the payment of the purchase price by Beachwalk. Thus satisfying the first element of the preferential transfer test.

The granting of the mortgages to the individual defendants was not recorded at the time of the sale. Under Indiana law the unrecorded mortgages were not perfected as against a subsequent bona fide purchaser for value. As applicable here, § 547(e)(2)(C) provides that, for purposes of recovery of preferences, an unperfected transfer is deemed perfected as of the commencement of the case. This deemed perfection of a security interest in July 2012, related to the Dune Top sale in 2005, was clearly an antecedent debt, thus satisfying the second test for a preference under § 547(b).

Regarding preferential transfers, a debtor "is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." 11 U.S.C. § 547(f); *In re McGuane*, 305 B.R. 695, 702 (Bankr. N.D. Ill. 2004). When it comes to preferences, a transfer is made

- (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);
- (B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or
- (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—
 - (i) the commencement of the case; or
 - (ii) 30 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2). This statutory presumption of insolvency means that mortgages meet the third requirement for preferential transfer.

The last element of a preference is that it enables a creditor to receive more than the creditor would receive in a case under chapter 7. In Indiana, the unrecorded mortgages are subordinate to a subsequent bona fide purchaser or mortgagee for value. *Sparks*, 7 Blackf. at 472. Since the record in this case does not reflect such an intervening interest, the individual mortgages are valid security interests. But for the avoiding powers under the Code, this security interest enables individual creditors to receive more than they would have received had the transfer not been made, the kind of transfer that the Code permits Trustee Beachwalk to avoid.

Preservation of avoided transfer – § 551

The Code provides that any transfers avoided under §§ 544 and 547 are automatically preserved for the benefit of the estate, but only with respect to property of the estate. 11 U.S.C. § 551. By avoiding the mortgages of the individual defendants, Trustee Beachwalk steps into the shoes of the individual defendants. “Section 551 enables the bankruptcy estate to acquire the rights of the holder of the avoided lien so that junior lien holders do not benefit from the avoidance to the detriment of the estate.” *In re Wegner*, 210 B.R. 799, 801-02 (Bankr. D. N.D. 1997). That is, as determined by Indiana law, Trustee

Beachwalk has a secured interest in the Dune Top property that is superior to the judgment liens of LaPorte. Trustee Beachwalk's prior interest recovered for the benefit of the estate extends to value of the avoided mortgages held by individual defendants. The judgment liens of LaPorte attach to the extent the value of the Dune Top property exceeds the amount of the mortgages.

LaPorte summary judgment motion

In its cross motion for summary judgment, LaPorte references many of the same facts noted by Trustee Beachwalk. This includes agreement that the mortgages of the individual defendants relating to the Dune Top sale were not recorded. LaPorte also includes specific information about its state court judgments. The court finds no dispute as to material facts. The dispute here is over the application of the law to the uncontested facts. LaPorte only argues the superiority of its judicial liens. LaPorte has not contested the issues of lien avoidance or preference recovery under the Code.

LaPorte's response and cross motion argues its judgment lien has priority over any unrecorded mortgages. Trustee Beachwalk has not challenged the validity, finality, entry or indexing of the state court foreclosure judgments.¹²

LaPorte argues that Trustee Beachwalk has failed to produce executed copies of the mortgages. Trustee Beachwalk offered the affidavit of Moss in support of its summary judgment motion. The Moss affidavit states the documents from the 2005 Dune Top closing "were probably lost as a result of a basement flood" at the office of the title company where the closing occurred. See Moss Affidavit at ¶ 18. Trustee Beachwalk's designation of material facts includes copies of checks, closing statement and related sale documents supporting its

¹²Even if Beachwalk or Trustee Beachwalk had questioned the state court judgments, this court is not the appropriate forum to raise such an objection.

position as to the mortgages. LaPorte has not pointed to evidence suggesting the sale did not take place. Viewing the evidence in the light most favorable to the non-movant Trustee Beachwalk, and drawing reasonable inferences from this evidence leads the court to accept the existence of the mortgages as true for purposes of this summary judgment motion.

The court finds LaPorte and Trustee Beachwalk are in accord as to the relevant facts. A sale of the Dune Top property took place in 2005. The seller, Beachwalk, granted mortgages to the sellers, the individual defendants, to secure its payment of the purchase price. The mortgages given to the individual defendants were not recorded. LaPorte obtained judgments and concomitant judgment liens against Beachwalk in 2011 and 2012.

The point of contention between LaPorte and Trustee Beachwalk relates to whether the unrecorded mortgages of the individual defendants have priority over LaPorte's judgment liens. As the court discussed above, mortgages in Indiana take priority according to the time of filing. I.C. § 32-21-4-1(b). A subsequent mortgage granted in good faith for value that is recorded before a prior mortgage will take priority over the prior unrecorded mortgage. *Id.* The absence of recording does not render these mortgages invalid. Indiana, however, makes a distinction between consensual liens, such as mortgages, and non-consensual liens, such as judgment liens. Indiana's recording statute, I.C. § 32-21-4-1(b), operates to only protect subsequent good faith purchasers, lessees, or mortgagees for value. A judgment lienholder in Indiana is not a purchaser in good faith for value. Indiana law supplies an unrecorded mortgage with priority over a subsequent judgment. *Sparks*, 7 Blackf. at 472. The interest of LaPorte in the Dune Top property is secondary to that of the individual defendants.

As discussed above in connection with Trustee Beachwalk's summary judgment motion, the Bankruptcy Code permits Trustee Beachwalk to avoid the transfer of a

security interest in Dune Top to the individual defendants. The Code allows Trustee Beachwalk to occupy the priority of the individual defendants and obtain a priority position over the judgment liens of LaPorte. Section 551 of the Code preserves the avoided transfer and recovered preference for the benefit of the estate.

Miscellaneous related matters

Two other parties, Moss and Horizon, have responded to the summary judgment motions. Moss has not offered any evidence in opposition to either of the summary judgment motions. He merely submits that resolution of the summary judgment motions will leave unresolved his third-party claims. The resolution of any third-party issues is not before the court, and the court makes no decision as to those issues at this time.¹³

Horizon only challenges paragraph 21 in Trustee Beachwalk's statement of material facts as unsupported by any affidavit. As the subject of paragraph 21 is immaterial to the resolution of the summary judgment motions, the court, without ruling on Horizon's challenge, will not consider the subject addressed in paragraph 21.

The court notes that, with the exception of Moss, the individual defendants have not been involved with the summary judgment motions now before the court, nor have these individual defendants participated in this adversary proceeding generally. The court

¹³Moss began a civil tort action to recover damages in LaPorte Superior Court 1 on November 1, 2013, seven months after this adversary proceeding was filed. The state court action was based on the circumstances surrounding the 2005 Dune Top sale. After a defendant in the state court litigation raised the lack of jurisdiction because Beachwalk and not Moss was the real party in interest and pendency of this bankruptcy case, the parties to that action agreed to dismiss the state suit and to litigate in this court.

The third-party complaint seeks to recover damages for breach of contract, professional negligence, recovery under lenders' title insurance, and breach of fiduciary duties related to the failure to record the mortgages from the 2005 Dune Top sale. In large measure the allegations in the third-party complaint mirror those found in the complaint in this adversary proceeding.

finally notes that recently substituted plaintiff, chapter 7 trustee Kleven, has only filed an appearance. This is due, the court presumes, to the status of this adversary proceeding when the underlying bankruptcy cases were converted from chapter 11 to chapter 7.

Conclusion

The parties agree, and the court concurs, there is no dispute as to any material fact in this adversary proceeding. The court finds that Trustee Beachwalk is entitled to judgment as a matter of law. Under Indiana law the unrecorded mortgages of the individual defendants have priority over the judgment liens of LaPorte. The Code grants Trustee Beachwalk the powers of a bona fide purchaser for value. Using that status, Trustee Beachwalk may avoid those mortgages as a preference under § 547(b). Section 551 operates to preserve the avoided mortgages for the benefit of the estate. The unrecorded mortgages are preferential transfers that are avoided for the benefit of the bankruptcy estate. Trustee Beachwalk may take on the superior position of the individual defendants relative to the judgment liens of LaPorte for the benefit of the bankruptcy estate. The court grants Trustee Beachwalk's motion for summary judgment.

The court also finds that LaPorte has not successfully carried its burden of showing it is entitled to a judgment as a matter of law on its summary judgment motion. Under established Indiana law, the judgment liens of LaPorte are subordinate to the mortgages of the individual defendants that Trustee Beachwalk has avoided for the benefit of the estate. As discussed above, the Code enables Trustee Beachwalk to recover for the benefit of the bankruptcy estate any avoided transfers or recovered preferences. LaPorte's cross motion for summary judgment is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT