

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
THOMAS J. CANNETTA and) Bankruptcy Case No. 98-
31917)
JANICE K. CANNETTA,)
)
Debtors.)
_____)
)
THOMAS J. CANNETTA and))
JANICE K. CANNETTA,))
)
Plaintiffs,)
)
vs.) Adversary Case No. 98-3243
)
DENNIS E. ROBINSON and))
PHYLLIS K. ROBINSON,))
)
Defendants.)

OPINION

This matter having come before the Court for trial on a complaint entitled "Application to Avoid Lien" filed by the Debtors/Plaintiffs, on September 10, 1998; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premise, makes the following findings pursuant to Rules 7052 of the Federal Rules of Bankruptcy Procedure.

In considering the testimony of the parties at trial, on March 8, 1999, the Court found that the testimony of the Debtors/Plaintiffs was credible based upon their demeanor and their answers to questions on both direct and cross-examination as they related to other evidence presented in the Plaintiffs' case in chief and in evidence presented by the Defendants.

Upon examining all of the evidence presented at trial, both documentary and testimonial, the Court finds that the material facts in this matter are not substantially in dispute. In the Summer of 1995, the Plaintiffs agreed to purchase a home from the Defendants located at 604 Old Fayetteville Road, Freeburg, Illinois, for the sum of \$95,000. In furtherance of this agreement, the Plaintiffs obtained a loan from the Veterans Administration in the approximate amount of \$81,600. In addition, the Plaintiffs agreed to pay a further sum of \$15,060 to the Defendants above and beyond the loan from the Veterans Administration, which is evidenced by a Promissory Note signed by the Plaintiffs submitted into evidence as Plaintiffs' Exhibit No. 2 and Defendants' Exhibit No. 2. There is no dispute that the Promissory Note was signed by the Defendants on July 29, 1995, at the time they were moving in to the subject real estate. The Plaintiffs testified that, in signing the Promissory Note, they had no intention of granting the Defendants a mortgage above and beyond the mortgage which they had already granted to the Veterans Administration. The Plaintiffs testified that their intention was to organize their financial affairs and to refinance the real estate in question within the year following July 29, 1995, and to obtain a mortgage which would cover the entire balance due, not only to the Veterans Administration, but also due on the Promissory Note which the Plaintiffs signed in favor of the Defendants.

Even though the testimony of the Plaintiffs is clear and credible that they had no intention of granting the Defendants a mortgage lien above and beyond the mortgage executed with the Veterans Administration, the Defendants contend that there, in fact, was to be a

mortgage. In furtherance of this, the Defendants caused the Promissory Note, introduced into evidence as Plaintiffs' Exhibit No. 2 and Defendants' Exhibit No. 2, to be recorded with the Recorder of Deeds in St. Clair County, Illinois, on September 13, 1995, together with a separate page containing a legal description of the subject real estate. The Defendants contend that this filing creates a valid mortgage against the real estate in question in favor of them, while the Plaintiffs contend, for various reasons, that no valid lien has been created by the filing of the aforesaid document.

In examining the Promissory Note submitted into evidence as Plaintiffs' Exhibit No. 2 and Defendants' Exhibit No. 2, the Court finds that this document does not satisfy the statutory requirements of 765 ILCS 5/11 and 765 ILCS 5/20, to create a valid mortgage lien against the real estate in question. The document filed with the Recorder of Deeds of St. Clair County, Illinois, is clearly nothing more than a Promissory Note. Even though it contains a paragraph regarding security and recites that the security is real estate at 604 Old Fayetteville Road, Freeburg, Illinois, 62243, the original document does not contain a legal description of the real estate in question as is required by Illinois law. Further, the documents does not include any language which would tend to show that the instrument was intended as a mortgage or that the parties had a relationship to each other as mortgagor/mortgagee. Although a legal description was attached to the document, the evidence is clear that, at the time the document was signed, there was no such legal description. This fact bolsters the Plaintiffs' testimony that they had no intent to grant a mortgage lien in favor of the Defendants. In

addition to finding that the Promissory Note, which was filed with the Recorder of Deeds in St. Clair County, Illinois, does not comply with the statutory requirements for the form of a mortgage under 765 ILCS 5/11, the Court further finds that, pursuant to 765 ILCS 5/20, no acknowledgement of any mortgage is contained within the document. Here again, the Court finds that this fact bolsters the Plaintiffs' testimony that they did not intend, by signing the subject Promissory Note, to grant the Defendants a valid mortgage in the subject real estate. Unfortunately, the transaction between the Plaintiffs and the Defendants in this case was wholly completed without the advice of legal counsel, and the end result is typical of such transactions. Thus, based upon the credible testimony of the Plaintiffs that they had no intention of granting a mortgage to the Defendants and of the failure of the Defendants to show that the document filed with the Recorder of Deeds in St. Clair County, Illinois, meets the statutory requirements for a mortgage, the Court must conclude that the debt in the amount of \$15,060 owed by the Plaintiffs to the Defendants is entirely unsecured, and that the mortgage interest claimed by the Defendants is not legally valid. As such, the Application to Avoid Lien filed by the Plaintiffs, on September 10, 1998, must be allowed for the reasons stated in this Opinion.

ENTERED: March 19, 1999.

/s/ GERALD D. FINES
United States Bankruptcy Judge