

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

IN RE:

JOE W. GRIFFIN and
ELAINE L. GRIFFIN,

Debtor(s).

CARLA J. RANDOLPH,
CHAPTER 7 TRUSTEE,

Plaintiff,

v.

WILMINGTON FINANCE,
a division of AIG FEDERAL
SAVINGS BANK and
MOREQUITY, INC.,

Defendant.

In Proceedings
Under Chapter 7

Case No. 05-30928

Adv. No. 05-03166

OPINION

The Chapter 7 Trustee in this case seeks to avoid, as a preference, the lien of Morequity, Inc. (“Morequity”) on the debtors’ real estate. Morequity received an assignment of the lien from Wilmington Finance (“Wilmington”). Wilmington acquired its lien when it refinanced the debtors’ obligation to another creditor, Fieldstone Mortgage Company (“Fieldstone”). Wilmington perfected its lien more than ten (10) days after the closing of Wilmington and debtors’ refinancing transaction and within ninety (90) days of the debtors filing their Chapter 7 petition. As a result, the Trustee contends that Wilmington’s perfection of the lien constituted a transfer of the debtors’ interest in property on account of antecedent debt and that the lien can

therefore be avoided under 11 U.S.C. § 547(b).¹ Wilmington responds that the “substantially contemporaneous exchange” defense of 11 U.S.C. § 547(c)(1) applies to prevent the Trustee from avoiding its lien.

The facts are not in dispute.

On December 31, 2004, the debtors, Joe and Elaine Griffin, entered into a loan agreement with Wilmington, a division of AIG Federal Savings Bank, for the sole purpose of refinancing a debt to Fieldstone that was secured by real estate in Madison County, Illinois. (Wilmington Aff. 1) As part of this transaction, Wilmington agreed to pay off the prior mortgage held by Fieldstone in exchange for a lien on the real estate, but only after a quit claim deed was executed by debtors and returned to the title company, Freedom Title, L.L.C. (“Freedom Title”).² (Wilmington Aff. 2)

On Thursday, January 13, 2005, after the debtors executed the quit claim deed and returned it to Freedom Title, the loan was funded and Fieldstone’s mortgage was satisfied by Wilmington. (Freedom Aff. ¶ 7-8) Four days later, on Monday, January 17, 2005, the mortgage documents, including the quit claim deed, were forwarded from Freedom Title’s main office in Creve Coeur, Missouri to their branch office in Swansea, Illinois so that the documents could be recorded. (Freedom Aff. ¶ 9) At the branch office, the documents were reviewed and placed at the disposal of a carrier for his regularly scheduled pick up and delivery to the Madison County,

¹Section 547(b) allows for the avoidance of a transfer of debtors’ property that is made for or on account of antecedent debt and within 90 days of bankruptcy. *See* 11 U.S.C. § 547(b)(2).

²At the time of the prior mortgage, Joe and Elaine Griffin were not married. Joe Griffin was the sole owner of the real estate. When Wilmington executed its mortgage, the debtors were married. Since the debtors were married, it was necessary to have both of them execute a quit claim deed transferring Joe Griffin’s interest in the real estate individually, to the debtors as joint tenants with a right of survivorship.

Illinois Recorder of Deeds Office (“Recorder’s Office”). (Freedom Aff. ¶ 10) The carrier picked up the documents and delivered them to the Recorder’s Office on Monday, January 24, 2005.

(Freedom Aff. ¶ 11; Ex. G at line 28)

After being delivered to the Recorder’s Office, the documents were recorded on January 31, 2005. On March 7, 2005, the debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code. On April 6, 2005, Wilmington assigned the mortgage to Morequity who properly recorded the assignment. (Ex. H)

On June 27, 2005, the Trustee filed a complaint to avoid the mortgage lien given by the debtors to Wilmington as a preferential transfer under section 547(b). A trustee may avoid a pre-petition transfer by a debtor of an interest in the debtor’s property as a “preference” by proving all six elements of section 547(b).³

The defendant, Wilmington, does not dispute that the required elements of section 547(b) are satisfied, but contends that an affirmative defense applies under section 547(c)(1). Under section 547(c), certain transactions are excepted from avoidance. The first of those exceptions protects transfers between a debtor and transferee where (1) the transfer was intended to be a “contemporaneous exchange for new value given to the debtor” and (2) the exchange was in fact

³Section 547(b) provides:

the trustee may avoid any transfer of an interest of the debtor in property 1) to or for the benefit of a creditor; 2) for or on account of antecedent debt owed by the debtor before such transfer was made; 3) made while the debtor was insolvent; 4) made ... on or within 90 days before the date of the filing of the [bankruptcy] petition; ... and 5) that enables such creditor to receive more than such creditor would receive if ... the case were a case under chapter 7 of this title; ... the transfer had not been made; and ... such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

“substantially contemporaneous.”⁴ Wilmington argues that the transaction between it and the debtors was a “substantially contemporaneous exchange for new value” and as a result, the Trustee is prevented from avoiding Wilmington’s lien. The issue before the Court is whether the transfer to Wilmington came within the “contemporaneous exchange” exception under section 547(c)(1).

With respect to the first element of section 547(c), there appears to be no dispute that the refinancing transaction between the debtors and Wilmington was intended to be a contemporaneous exchange pursuant to which Wilmington would have a perfected security interest in the debtors’ real estate in exchange for its payoff to Fieldstone. (Wilmington Aff. ¶ 4) Thus, the second element remains the only issue in this matter, i.e., whether the transfer between the debtors and Wilmington was in fact “substantially contemporaneous.”

The Seventh Circuit Court of Appeals held that a case-by-case inquiry is necessary to determine whether or not a transfer was in fact “substantially contemporaneous” under section 547(c)(1). *Pine Top Ins. Co. v. Bank of America Nat. Trust & Sav. Ass’n*, 969 F.2d 321, 328 (7th Cir. 1992). Relevant factors to be considered in each case include the length of the delay, the nature of the transaction, the intentions of the parties, and the possible risk of fraud. *Id.* After examining such factors, the Court in *Pine Top* found that the contemporaneous exchange

⁴Section 547(c)(1) states that a “trustee may not avoid a transfer . . . to the extent that such transfer was (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange.”

exception applied despite a two to three week delay between the parties' loan agreement and perfection of the creditor's security interest. *Id.* at 328.

In this case, the Trustee argues that the transfer was not "substantially contemporaneous" because Wilmington failed to perfect its mortgage until thirty (30) days after Wilmington and debtors entered into their agreement on December 31, 2004.⁵ Wilmington argues that the transaction with debtors was not complete until the loan was funded on January 13, 2005 and thus, the length of delay was only eighteen (18) days.

This Court agrees with Wilmington that the length of delay is only eighteen days. In Illinois, a mortgage takes effect as a lien when money is advanced in the course of dealing between the parties. *See e.g., Freutel v. Schmitz*, 132 N.E. 534, 535 (Ill. 1921); *see also Peterson Bank v. Langendorf*, 136 Ill. App. 3d 537, 539 (Ill. App. 1 Dist., 1985) ("a mortgage is security for a debt and without a debt it has no effect as a lien.") In this case, Wilmington advanced the money to fund the debtors' loan on January 13, 2005. Before that date, the mortgage could not have taken effect as a lien since no value had been given to the debtors. *See In Re Crossen*, 325 B.R. 787, 791 (Bankr. W.D. Wisc. 2005)(Court held that the transfer of a mortgage lien took effect between parties on the date the creditor advanced funds, not on the date the mortgage agreement was signed, since Wisconsin law describes a mortgage as securing a debt, not just the mortgage agreement). Illinois law further provides that perfection occurs upon recordation. 765 ILL. COMP. STAT. 5/30 (2005). Thus, applying Illinois law, the length of

⁵After the Court took the matter under advisement, the Trustee submitted a supplemental brief. In the supplemental brief, the Trustee noted a discrepancy in Wilmington's exhibits. The date of the notary public's signature on the quit claim deed is December 31, 2005, but Joe Griffin stated that he executed the deed as grantor on January 11, 2005. (Griffin Supplemental Aff. ¶ 4) The date of the notary public's signature is the same date the debtors entered into the loan agreement with Wilmington. The Trustee contends that any argument by Wilmington that the delay in recording is based on the requirement of having a quit claim deed executed is irrelevant since it appears that the loan agreement and quit claim deed are of equal date. The Trustee's argument is unpersuasive since the relevant date to consider, when determining the length of delay, is not the date of execution or notarization, but rather the date the loan was funded. *See supra text.*

delay in this case is only eighteen (18) days since the money was advanced when the loan was funded by Wilmington on January 13, 2005 and the mortgage was recorded on January 31, 2005.

In addition to the length of delay and other factors cited in *Pine Top*, this Court has also focused on the diligence of the transferee in attempting to cause perfection and whether the delay in perfection was prompted by factors beyond the transferee's control. *See In Re Wright*, 2003 WL 22038425 at *2 (Bankr. S.D. Ill. 2003); *In Re Messamore*, 250 B.R. 913, 920 (Bankr. S.D. Ill. 2000); *see also In Re Marino*, 193 B.R. 907, 915 (9th Cir. BAP 1996), *aff'd* 117 F.3d 1425 (9th Cir. 1997)(“when the delayed perfection of a security interest can be satisfactorily explained, the transfer may be characterized as ‘substantially contemporaneous’ in fact.”) Here, the eighteen-day delay was due to factors beyond Wilmington's control. A mere four days passed between the loan being funded and the documents being forwarded to the appropriate branch office of Freedom Title, including two weekend days. *See In Re Nolan*, 1997 WL 33479209 at *3 (Bankr. C.D. Ill. 1997)(where Court found an exchange to be “substantially contemporaneous” even though an eleven day delay existed, in part because four of the eleven days were weekend days). Once at the branch office, the process of moving title along was at the discretion of that office's procedures and personnel. The facts seem to indicate the title was picked up by carrier on a regularly scheduled pick up. Once the title was received at the Madison County Recorder's office, the process of actually recording Wilmington's lien was also subject to that office's discretion .

It is unreasonable, nor has any party suggested, that Wilmington could have or should have acted to speed up the process of recording its mortgage. After the mortgage documents were turned over to Freedom Title, the delay was clearly out of Wilmington's hands, and solely

caused by the standard operating procedures of two independent offices.

Having considered the Seventh Circuit Court of Appeals' decision in *Pine Top*, and having examined the surrounding circumstances in this case and determining that the delay in perfecting was reasonable and occasioned by factors beyond Wilmington's control, this Court holds that the transfer between debtors and Wilmington was substantially contemporaneous. Accordingly, the Court will enter judgment for Morequity and against the Trustee on the Trustee's complaint to avoid Morequity's lien as a preference.

JUDGMENT TO ENTER.

ENTERED: December 15, 2005

/s/ Kenneth J. Meyers
UNITED STATES BANKRUPTCY JUDGE