

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

IN RE:	)	In Proceedings
TIMOTHY SANDERSON and	)	Under Chapter 13
VICTORIA SANDERSON,	)	
	)	No. BK 95-31793
Debtor(s).	)	
	)	
TIMOTHY SANDERSON and	)	
VICTORIA SANDERSON,	)	Adv. No. 95-3237
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
FEDERAL DIVERSIFIED SERVICES,	)	
	)	
Defendant.	)	

OPINION

After entering into an installment contract and mortgage intended to secure the purchase and installation of windows for their home, plaintiffs filed for bankruptcy relief and initiated this adversary proceeding challenging defendant's claim to a security interest in the windows being purchased and in plaintiffs' real estate and improvements.<sup>1</sup> At issue is whether defendant created a valid mortgage under Illinois law when it failed to include the legal description of the real estate on the face of the mortgage instrument but, instead, attached it on a separate sheet of paper which was recorded with the mortgage instrument.

The facts are not in dispute. Prior to filing their chapter 13 bankruptcy petition, plaintiffs executed an instrument entitled "Retail Installment Contract and Mortgage" in order to have defendant finance the purchase and installation of windows for their residence. The

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<sup>1</sup> Plaintiffs admit in their complaint that the windows, having been installed, became permanent improvements to their real property.

instrument listed plaintiffs' "Address" as 504 Bayer Ln. in Collinsville, Illinois, and described the goods and services being purchased. The instrument also contained a provision granting defendant a security interest in:

1. the goods, services and property being purchased, and
2. my real estate and improvements, including my house, all at my "Address" designated above.

Under the terms of the instrument, plaintiffs each agreed:

I hereby mortgage and warrant to you, as Mortgagee, my real estate and house located at my "Address" designated on the other side of this contract as security for all amounts due to you under this Retail Installment Contract.

The instrument also contained the following provision:

LEGAL DESCRIPTION: The above described goods and services are to be installed and placed upon the "Address" designated above, and the legal description for said "Address" is: 504 Bayer Ln.

Collinsville, Il. 62234

If Legal Description is not available at the time this contract is executed, Buyer grants Seller the right to obtain and insert the Legal Description at a later date.

The instrument was executed on February 14, 1994, and recorded on February 24, 1994, at book 3859, pages 0005 through 0008, in the Madison County, Illinois, Recorder's Office. Attached to the instrument, and recorded with it at page 0007, was a sheet of paper bearing a legal description of the real estate.

The sole issue to be determined in this adversary proceeding is whether the "Retail Installment Contract and Mortgage," recorded together with the legal description on a separate piece of paper, constitutes a valid mortgage under Illinois law. Plaintiffs offer no authority to support their argument that the mortgage is defective because the legal description of the real estate is absent from the

face of the instrument, albeit attached to it and recorded with it. The Court's own inquiry reveals that Illinois mortgage law does not elevate form over function and that plaintiffs' hyper-technical argument is without merit.

In Illinois, a mortgage is sufficient with respect to the property it describes if it contains "a reasonably certain description of the premises intended to be covered by it." 27 I.L.P. § 53, at 135 (1956) (footnote omitted).<sup>2</sup> Even a mistake as to, or a misdescription of, the property intended to be covered by the mortgage will not invalidate the instrument if the property is capable of identification and is clearly identified. 27 I.L.P. § 53, at 135. So long as the description

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<sup>2</sup> Section 5/11 of the Conveyances Act indicates that a mortgage need not take a prescribed form so long as all essential elements are present. It states in pertinent part:

Mortgages of lands may be **substantially** in the following form:

The Mortgagor (here insert name or names), mortgages . . . to (here insert name or names of mortgagee or mortgagees), to secure the payment of (here recite the nature and amount of indebtedness, showing when due and the rate of interest, and whether secured by note or otherwise), **the following described real estate (here insert description thereof)**, situated in the County of \_\_\_\_\_, in the State of Illinois.

Dated \_\_\_\_\_, 19\_\_

(signature of mortgagor or mortgagors)

. . . .

Such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient mortgage in fee to secure the payment of the moneys therein specified . . . .

765 ILCS 5/11 (1994) (emphasis added).

contains information from which a certain description can be ascertained, or can be amplified by extraneous evidence and applied to its intended subject, it will be judged effective. Id. See also Richey v. Sinclair, 47 N.E. 364, 366 (Ill. 1897) ("[A]ny description . . . by which the premises intended to be conveyed may be found and identified is sufficient").

In this case, plaintiffs do not challenge the accuracy of the legal description which is set forth on the separate sheet of paper and, further, do not dispute that the legal description describes the real property commonly known as 504 Baver Ln. in Collinsville, Illinois. Moreover, they do not argue that the description of the real property which is subject to the mortgage has been rendered ambiguous as a result of the legal description's placement on an attached sheet of paper.<sup>3</sup> They contend only that the mortgage is invalid because the legal description does not appear, literally, on the face of the mortgage, but rather as an addendum to the mortgage instrument. As a result, according to plaintiffs, the legal description does not constitute a term of the mortgage, which is incomplete and ineffective to create a security interest in their real estate and improvements.

When construing a mortgage, Illinois adheres to the commonly accepted rule of construction that "where other instruments are

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<sup>3</sup> Nor does the Court find that any ambiguity exists as to which real estate is described by the recorded mortgage. The Court is convinced that a third party searching the title of the plaintiffs' real property would not be confused or misled as to the description of the real property which is subject to the defendant's mortgage.

executed contemporaneously with a mortgage and are part of the same transaction, a mortgage may be modified by other instruments and all the documents are to be read together to determine and give effect to the intention of the parties." Lake County Trust Co. v. Two Bar B, Inc., 606 N.E. 2d 258, 262 (Ill. App. Ct. 1992). Accord Matter of Bailey, 999 F. 2d 237, 241 (7th Cir. 1993); Farm Credit Bank of St. Louis v. Biethman, 634 N.E. 2d 1312, 1318 (Ill. App. Ct. 1994). "Contemporaneous" means "so proximate in time as to grow out of, elucidate and explain the quality and character of the transaction, or an occurrence within such time as would reasonably make it a part of the transaction.'" Tepfer v. Deerfield Sav. and Loan Ass'n, 454 N.E. 2d 676, 679 (Ill. App. Ct. 1983) (quoting Elsberry Equip. Co. v. Short, 211 N.E. 2d 463, 468 (Ill. App. Ct. 1965)). To be considered contemporaneous, documents need not be executed simultaneously. Id.

In this case, the legal description of plaintiffs' real estate was prepared and recorded with defendant's mortgage instrument on February 24, 1994, within ten days of execution of the mortgage instrument itself. The parties clearly intended the reduction of the legal description to writing to be a contemporaneous part of the transaction. This intent is underscored by the provision in the mortgage instrument which reserved to the defendant the right to obtain and insert the legal description at a later date in the event it was not available when the mortgage was executed.<sup>4</sup> Therefore, the Court finds that the

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<sup>4</sup> See Schmalzer v. Jamnik, 95 N.E.2d 347, 350-51 (Ill. 1950) (contract for sale of land described by street address alone held to be enforceable notwithstanding absence of legal description where parties to contract expressly reserved in contract the right to insert the

legal description constitutes a term of the mortgage despite its appendage to the mortgage instrument and that the mortgage is valid and enforceable against the plaintiffs' real property and improvements.

**DATED: JANUARY 30, 1996**

/s/ KENNETH J. MEYERS  
UNITED STATES BANKRUPTCY JUDGE

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legal description later). Although a land sale contract, rather than a mortgage, was at issue in Schmalzer, "[t]he general rules employed to construe contracts are applicable to the construction of a mortgage." Lake County Trust Co. v. Two Bar B, Inc., 606 N.E. 2d at 262.