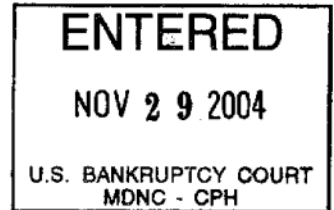


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)
)
Elizabeth Moss Strickland,) Case No. 03-12672C-7G
)
Debtor.)
)
_____)
)
Dixie Lee Booth,)
)
Plaintiff,)
)
v.) Adversary No. 04-2004
)
Elizabeth Moss Strickland and)
Branch Banking & Trust Co.,)
)
Defendants.)
)



MEMORANDUM OPINION

This adversary proceeding came before the court on November 9, 2004, for hearing upon a motion for summary judgment filed on behalf of Branch Banking & Trust Company and for hearing upon plaintiff's motion for partial summary judgment. Robert L. McClellan appeared on behalf of the plaintiff and Elizabeth M. Repetti appeared on behalf of Branch Banking & Trust Company ("BB&T"). For the reasons that follow, the court has concluded that BB&T's motion should be granted and that the plaintiff's motion should be denied.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District

Court for the Middle District of North Carolina on August 15, 1984. The motions for summary judgment now before the court are matters which this court may hear and determine by means of final orders.

FACTUAL BACKGROUND

The Debtor, Elizabeth Strickland, and Benjamin Earl Strickland acquired real property located at 2349 Brandt Village in Greensboro ("the Real Property") in 1989, pursuant to a warranty deed which was recorded on April 26, 1990 and which named the grantees as "Benjamin Earl Strickland, unmarried and Elizabeth Allison Moss, unmarried." The Debtor married Benjamin Earl Strickland at some point after they acquired the Real Property. Thereafter, in 1997, the Stricklands granted to BB&T a deed of trust ("the BB&T deed of trust") on the Real Property as security for a \$50,000.00 equity line of credit. The BB&T deed of trust was recorded on March 24, 1997, and named the grantors as "Earl Strickland and wife Elizabeth M. Strickland."

In 1998 the Stricklands sold the Real Property to the plaintiff, Dixie Lee Booth. Ms. Booth's attorney at the time performed a title search but did not locate the BB&T deed of trust. The same attorney drafted a general warranty deed conveying the Real Property from the Stricklands as husband and wife to Ms. Booth. The transaction was then closed without securing a release of BB&T's deed of trust. The deed from the Stricklands to Ms. Booth was recorded on September 1, 1998. This deed named the

grantors as "Benjamin Earl Strickland and wife Elizabeth Moss Strickland, formerly known as Elizabeth Allison Moss."

The Stricklands continued making payments to BB&T after they sold the property to Ms. Booth. However, they eventually defaulted on the BB&T indebtedness and BB&T then filed a foreclosure action in Guilford County Superior Court. It was at the point of the foreclosure proceeding that the Ms. Booth learned of the existence of the BB&T deed of trust. Demand was made upon the Stricklands that the Real Property be cleared of the BB&T deed of trust. However, when the Debtor filed for Chapter 7 relief on August 8, 2003, the BB&T indebtedness remained unpaid and the BB&T deed of trust had not been satisfied.

This adversary proceeding was filed by Ms. Booth on January 7, 2004 against both the Debtor and BB&T. The complaint alleges that the Debtor is indebted to Ms. Booth based upon the Debtor having conveyed the Real Property without disclosing the BB&T deed of trust and having continued to draw down on the BB&T line of credit after the conveyance of the Real Property to the plaintiff. The complaint alleges that such conduct constitutes fraud and that Ms. Booth's claim against the Debtor is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code. In her claim against BB&T, the plaintiff seeks a declaratory judgment against BB&T declaring that the BB&T deed of trust is ineffective against her based upon the manner in which the Stricklands are identified in the BB&T deed

of trust. The motions now before the court were filed following the completion of discovery. BB&T supported its motion for summary judgment with an affidavit from attorney Norman L. Nifong. The plaintiff supported her motion for summary judgment with affidavits from attorneys Alan E. Ferguson and Edward L. McVey.

ANALYSIS

This adversary proceeding, in which the plaintiff seeks a declaratory judgment that the BB&T deed of trust is ineffective against her, in effect is an action to remove a cloud from title. In order to prevail in an action to remove a cloud on title, the plaintiff has the burden of proving that her title is "good against the whole world." Faucette v. Griffin, 35 N.C. App. 7, 10, 239 S.E.2d 712, 714 (1978). The specific question at issue between the plaintiff and BB&T is whether the BB&T deed of trust is effective against the plaintiff as a subsequent purchaser for value of the Real Property. The answer to this question, in turn, depends upon whether the BB&T deed of trust, as recorded in the office of the Register of Deeds of Guilford County, is in the chain of title for the Real Property. The standard for determining whether a recorded deed or deed of trust is in the chain of title for a particular tract of real property in North Carolina is whether such an instrument is indexed in a manner which would put a careful and prudent title examiner upon inquiry, and if upon such inquiry the instrument would be found by the careful and prudent examiner. See

B.C. Cuthrell v. Camden County, 254 N.C. 181, 184, 118 S.E.2d 601, 603 (1961), where (quoting Dorman v. Goodman, 213 N.C. 406, 196 S.E. 352, 355 (1938)), the Court stated:

The primary purpose of the law requiring the registration and indexing of conveyances is to give notice, and it has been repeatedly stated by those writing on this subject that an index will hold a subsequent purchaser or encumbrancer to notice if enough is disclosed by the index to put a careful and prudent examiner upon inquiry, and if upon such inquiry the instrument would be found.... The cardinal purpose of the registration and indexing laws is to provide records that shall themselves be sufficient, on careful and proper inquiry, to disclose the true state of the title to real estate.

It is undisputed that the BB&T deed of trust was recorded on March 24, 1997 in the office of the Register of Deeds of Guilford County in Book 4518 at Pages 1851-1853. Therefore, the only question in determining whether the deed of trust is in the chain of title is whether it is indexed in a fashion that a careful and prudent examiner would find it. BB&T submitted the affidavit of Norman Nifong in support of its contention that the deed of trust is so indexed. Mr. Nifong's affidavit reflects that he is an expert real estate attorney who is personally familiar with the records in the office of the Register of Deeds of Guilford County and with the manner in which the BB&T deed of trust is recorded and indexed. Mr. Nifong's affidavit details the steps which, in his expert opinion, would have been taken by a careful and prudent examiner who was researching the title to the Real Property at the

time of the purchase of the Real Property by the plaintiff. Mr. Nifong states that a careful and prudent title searcher would begin by searching the grantor index under the names "Strickland" and "Moss." Since those searches yield such a numerous list of names, Mr. Nifong states that the careful and prudent searcher would then narrow the search by searching the grantor index under five possible combinations of last name and first initial: "Moss, A.," "Moss, E.," "Strickland, A.," "Strickland, B.," and "Strickland, E." Mr. Nifong's report and attached exhibits show that these searches reveal fourteen names which could possibly be relevant grantors and which a careful and prudent title searcher would therefore examine more closely. Two of these fourteen names which appear on the grantor index are "Strickland, Earl" and "Elizabeth M. Strickland," which are the names by which the grantors are identified on the BB&T deed of trust. A further search of the documents corresponding to these names reveals the recorded BB&T deed of trust. Mr. Nifong expresses the opinion that the index in the Guilford County Registry does reveal enough information to allow a careful and prudent searcher to find the BB&T deed of trust and that the deed of trust thus is in the chain of title to the Real Property.

Under Rule 56, summary judgment is appropriate where the pleadings, any discovery in the file, and the affidavits in support of and in opposition to the motion establish that there is no

genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The party opposing a summary judgment motion may not rest on the pleadings, but must come forward with specific facts or affidavits to show the existence of a genuine issue of material fact. Fed. R. Civ. Proc. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Nat'l Solid Wastes Mgmt v. Voinovich, 959 F.2d 590, 592 (6th Cir.1992); Mojica Escobar v. Roca, 926 F. Supp. 30, 33 (D.P.R. 1996); Cooper v. United States, 903 F. Supp. 953, 955 (D.S.C. 1995). Mere conclusory allegations will not defeat a motion for summary judgment. Mojica Escobar, 926 F. Supp. at 33; American National Fire Ins. Co. v. Rose Acre Farms, Inc., 911 F. Supp. 366, 369 (S.D. Ind. 1995). Furthermore, an expert opinion may be disregarded by the court if it is unsupported by facts. See Story v. Latto, 702 F. Supp. 708, 709 (N.D. Ill. 1989); Rohrbough by Rohrbough v. Wyeth Labs., Inc., 719 F. Supp. 470, 474 (N.D. W. Va. 1989). If the non-moving party fails to make a sufficient showing on an element of her case with respect to which she will bear the burden of proof at trial, summary judgment will be appropriate. Celotex Corp., 477 U.S. at 323.

In presenting the affidavit of Mr. Nifong, BB&T made a showing under which it would be entitled to judgment in its favor as a matter of law. Once such a showing was made, it became incumbent

upon the plaintiff to come forward and show the existence of an issue of material fact or that the law relied upon by BB&T is not applicable. The plaintiff, who concedes that the critical inquiry in this case is whether the BB&T deed of trust is in the chain of title, presented the affidavits of attorneys Alan E. Ferguson¹ and Edward L. McVey in opposition to BB&T's motion for summary judgment and in support of her own motion for summary judgment. These experts make what is essentially a policy argument that, because of the complexity of the recording and indexing system, drafters should bear the burden of ensuring that the names they set forth upon real estate conveyances will enable a title searcher to find the instrument. While they insist that the names set forth on the BB&T deed of trust make the deed of trust difficult to find, neither Mr. Ferguson nor Mr. McVey states that a careful and prudent title searcher would be unable to find the BB&T deed of trust or that the BB&T deed of trust is not in the chain of title to the Real Property. Mr. McVey's affidavit does not raise a material issue of fact by stating that a search under just the names "Benjamin Earl Strickland" and "Elizabeth Allison Moss" does not reveal the BB&T deed of trust. The relevant question in this

¹Although Mr. Ferguson's report was not presented in the form of an affidavit, the plaintiff requested at the hearing on the motion for summary judgment that it be considered by the court as an affidavit. Plaintiff filed a verification of Mr. Ferguson's report after the hearing on the motions for summary judgment.

proceeding is whether a careful and prudent search would disclose the BB&T deed of trust and none of the affidavits suggest that a reasonable and prudent search would be limited to just looking under those names or that a careful and prudent examiner would limit herself to a search of only those names. The bottom line is that the affidavits submitted by the plaintiff do not dispute Mr. Nifong's statements that a careful and prudent examination does disclose the BB&T deed of trust and that the BB&T deed of trust is in the chain of title to the Real Property. Those affidavits are therefore insufficient to defeat BB&T's motion for summary judgment.

CONCLUSION

The test under North Carolina law for whether a deed of trust is effective against subsequent purchasers is whether it is in the chain of title to the property in question. The pertinent inquiry in determining whether an instrument is in the chain of title is whether a careful and prudent examiner would find it. BB&T presented the affidavit of an expert showing that the BB&T deed of trust is in the chain of title and that a careful and prudent examiner would locate it. Although Ms. Booth submitted opposing affidavits, such affidavits did not raise any material issues of fact as to whether a careful and prudent examiner would find the BB&T deed of trust or whether it is in the chain of title to the Real Property. Summary judgment in favor of BB&T therefore is

appropriate. Accordingly, an order shall be entered contemporaneously with the filing of this memorandum opinion granting BB&T's motion for summary judgment and denying the plaintiff's motion for summary judgment.

This 23rd day of November, 2004.



WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:

Elizabeth Moss Strickland,
Debtor.

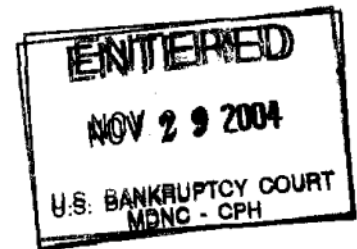
Case No. 03-12672C-7G

Dixie Lee Booth,
Plaintiff,

v.

Adversary No. 04-2004

Elizabeth Moss Strickland and
Branch Banking & Trust Co.,
Defendants.



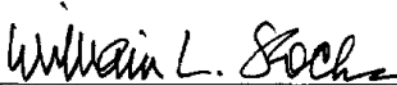
ORDER

In accordance with the memorandum opinion filed contemporaneously with the entry of this order, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Plaintiff's motion for partial summary judgment is hereby denied; and

(2) The motion for summary judgment filed by Branch Banking & Trust Company is hereby granted and this adversary proceeding is dismissed with prejudice as to Branch Banking & Trust Company.

This 23rd day of November, 2004.



WILLIAM L. STOCKS
United States Bankruptcy Judge