UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re
Freddie Gladney,
Debtor

Case No.: 03-31411-svk
(Chapter 7)

Memorandum Decision on Trustee's Motion to Withdraw Abandonment

The Trustee seeks to withdraw her abandonment of certain real property so that she may pursue a preference action against a mortgage holder on the property. The mortgage creditor has objected. The Trustee abandoned the property by affirmative notice dated March 9, 2004, believing in reliance on the Debtor's schedules that the property was fully and validly encumbered. However, the Trustee later discovered that the mortgage was not recorded until 175 days after the date of the loan, which was within 90 days of the bankruptcy petition. On May 27, 2004, the Trustee filed a notice of withdrawal of the abandonment. Meanwhile, the property had been sold, and on May 5, 2004, in reliance on the abandonment, the mortgagee accepted proceeds totaling $64,656.16 and satisfied its mortgage.

The Trustee makes two arguments: that the abandonment of the real estate did not include abandonment of the avoidance action, and that under established principles of bankruptcy law, she should be allowed to revoke the notice of abandonment. The first claim is without merit. In *Keller v. C.I.T. Group/Consumer Finance, Inc. (In re Keller)*, the trustee abandoned property subject to a defective mortgage. The court stated: "But for the abandonment of the Property, there is no doubt that 11 U.S.C. § 544(a)(3) would have allowed the Trustee to avoid the unperfected mortgage of CIT as to the unrecorded parcel. However, the effect of the abandonment is clear. Whether the property be abandoned under § 554(a) or (c), it is removed

from the estate, thereby divesting the trustee of control, and divesting the bankruptcy court of jurisdiction over matters concerning the abandoned property." 229 B.R. 900, 902 (Bankr. S.D. Ohio 1998) (citations omitted). As in *Keller*, the Trustee's abandonment of the real estate included abandonment of the avoidance action as to liens on the real estate.

On the Trustee's second claim, *In re Lintz West Side Lumber, Inc.*, 655 F.2d 786 (7th Cir. 1981) provides a two-part test for allowing the revocation of abandonment.[1] Under *Lintz*, the trustee's abandonment must have been an inadvertent mistake, and the parties affected by the abandonment must not have been prejudiced. The mistake here is similar to the mistake in *Lintz*; there the trustee abandoned property to a Bank, only to later discover that the Bank's purported security interest in the property was defective because the Bank had filed its financing statement against the principals rather than the corporate debtor.

In *Rameker v. Berning Garage, Inc. (In re Alt)*, 39 B.R. 902 (Bankr. W.D. Wis. 1984), the trustee inadvertently abandoned a preference claim. Following *Lintz*, the court allowed the trustee to revoke the abandonment to pursue the avoidance action. The bankruptcy court noted that the Seventh Circuit did not define "undue prejudice" but that the preference defendant in *Alt* did not claim that it had been unduly prejudiced.

Neither *Lintz* nor *Alt* involved a creditor who relied on the abandonment to its detriment. The creditor in this case consented to the sale of the mortgaged property, received sale proceeds and satisfied its mortgage. Accordingly, the "no prejudice" test has not been satisfied.

This case is distinguishable from those cited by the Trustee. In *In re Buckner,* 224 B.R. 760, 762 (Bankr. E.D. Mo. 1998), the court stated the general rule for revocation of

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[1] Although decided under the former Bankruptcy Act, *Lintz* is apparently still the law in the 7th Circuit. *See In re UAL Corp.*, 299 B.R. 509, 522 (Bankr. N.D. Ill. 2003) (citing *Lintz* for the proposition that the trustee will be relieved of mistakes which prejudice the estate).

abandonments: "Absent certain limited circumstances, a trustee's decision to abandon property, once accomplished, is irrevocable. However, if the trustee's decision was based on incorrect information provided by another entity, or on misinformation that was reasonably relied upon, or on a material omission by a debtor, the abandonment may be set aside to permit administration of the asset." In *Bruckner*, the debtor failed to disclose that an option existed to purchase the debtor's property at a price greater than the amount of the secured debt. The debtor scheduled the property and testified at the meeting of creditors that the property was worth less than the amount of the lien. The court held that although abandonment of estate property was usually irrevocable, the abandonment could be set aside because the trustee reasonably relied on the debtor's responses.

This case lacks the reasonable reliance element present in *Buckner*.[2] Here, the Debtor scheduled his homestead property at its correct value, and, in the schedule of creditors, gave the date of the mortgage as November 1, 2002. Although Local Bankruptcy Rule 1007.4 requires the debtor to provide the trustee with copies of recorded mortgages for all real estate at least ten days prior to the first scheduled meeting of creditors, the Debtor apparently failed to do so in this case, and the Trustee did not press the issue. Also, the file reveals that some six months prior to the abandonment, the Trustee discovered that the Debtor had omitted a parcel of property from the schedules, and the Trustee filed a complaint objecting to the Debtor's discharge.[3] Under these circumstances, the trustee's reliance on the Debtor's schedules with respect to the date of the

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[2] Absent evidence that the Debtor knew of and intentionally withheld information about the claim or participated in the recording of the mortgage, failing to list the preference claim created by the late recordation of the mortgage does not constitute a material omission by the Debtor.

[3] In February 2004, prior to the abandonment, the Debtor waived his right to a discharge.

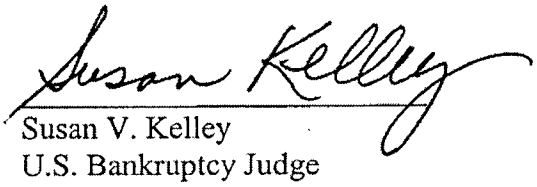
mortgage on the homestead property was not reasonable. Prior to abandoning the property in March 2004, the trustee should have insisted that the Debtor comply with Local Rule 1007.4 and produce a copy of the recorded mortgage.

Applying *Lintz*'s two-element test, it is apparent that the creditor in this case will be prejudiced if the trustee is allowed to "unabandon" the property. The creditor has already allowed the property to be sold, and accepted the proceeds of sale to satisfy the outstanding indebtedness. Moreover, under *Buckner* and the other cases cited by the Trustee, the Trustee has failed to show reasonable reliance on the information contained in the Debtor's schedules. In general, the Debtor has no control over the recordation of a mortgage; the Debtor here was approximately right as to the date he signed the mortgage. It is the Trustee's duty to unsecured creditors to determine that the mortgagee timely recorded the mortgage. Local Rule 1007.4 exists to assist trustees with this duty. Also, in this case, the Trustee had already challenged the Debtor's discharge for omitting property that should have been listed on his schedules. Reliance on the accuracy of the schedules as to the date of recordation of the mortgage was not reasonable under these circumstances.

For the foregoing reasons, the Trustee's Motion to withdraw the abandonment of the property is denied. A separate order will be entered.

Dated: August 3, 2004

By the Court:



Susan V. Kelley
U.S. Bankruptcy Judge