UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: RANDY HUGH CHISM and
PATRICIA ANN CHISM — CASE NO. 05-10357

RANDY HUGH CHISM and PATRICIA ANN CHISM — PLAINTIFFS

VERSUS — ADV. PROC. NO. 05-1165-DWH

SOUTHERN MORTGAGE COMPANY, INC., et al — DEFENDANTS

OPINION

On consideration before the court is a motion for summary judgment filed by the debtors, Randy Hugh Chism and Patricia Ann Chism, (hereinafter "plaintiffs"); a joint response thereto having been filed by Ocwen Loan Servicing, LLC, as successor to Ocwen Federal Bank, FSB, ("Ocwen"), and JP Morgan Chase Bank, N.A., f/k/a Chase Manhattan Bank, N.A., ("Chase"); and the court, having considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the subject matter of and the parties to this adversary proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined by 28 U.S.C. §157(b)(2)(A), (B), (K), and (O).

II.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must

examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.29 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An issue is genuine if "there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party." Phillips, 812 F.2d at 273. A fact is material if it would "affect the outcome of the lawsuit under the governing substantive law." Phillips, 812 F.2d at 272.

III.

On August 12, 1998, the plaintiffs refinanced their residence with Southern Mortgage Company, ("Southern Mortgage"). They borrowed $40,500.00 under the terms of a thirty-year fixed rate note that required monthly payments in the amount of $364.43. The plaintiffs executed a deed of trust in favor of Southern Mortgage conveying a security interest in their real property located in New Albany, Mississippi.

According to the plaintiffs' responses to requests for admission, the sum of $36,385.95 was applied from the loan proceeds in order to pay the plaintiffs' existing debts, and $2,914.03 was applied to settlement charges. The balance of the loan proceeds in the sum of $1,200.00 was paid directly to the plaintiffs.

Through their complaint, the plaintiffs seek to invalidate the Southern Mortgage deed of trust for the following reasons:

(1) The deed of trust designated James Ward Amos as trustee notwithstanding that he "had no knowledge of being named a trustee in any deed of trust...whereby Southern Mortgage Company was the named beneficiary..."

(2) Neither plaintiff appeared before Leslie Ponder who purportedly acknowledged their signatures on the deed of trust.

(3) An individual identified as Cynthia A. Edwards did not witness their signatures on the deed of trust.

(4) While the plaintiffs admit that neither Ocwen nor Chase played any role in the loan origination or closing, they contend that the assignment of the Southern Mortgage deed of trust ultimately to Chase is invalid and/or fraudulent. As such, the plaintiffs assert that the effort by Ocwen and Chase to claim an interest through the deed of trust constitutes a cloud on the title to their real property.

IV.

The court is of the opinion after having reviewed the plaintiffs' motion for summary judgment and the response filed by Ocwen and Chase that several genuine issues of material fact remain in dispute. Addressing specifically the allegations set forth in the plaintiffs' complaint, the court would offer the following comments:

(1) As to the alleged lack of knowledge of the designated trustee, §89-1-63, Miss. Code Ann., contains no requirement that the person named as trustee give consent or otherwise have any knowledge of being appointed. The trustee designated in a deed of trust has no duty or responsibility until after a default has occurred. The beneficiary of the deed of trust may then request the designated trustee to enforce the remedies provided by the deed of trust or, alternatively, may substitute another trustee. *See*, *Peoples Bank and Trust Co. v. L & T Developers, Inc.*, 434 So.2d 699 (Miss. 1983), corrected, 437

So.2d 7 (Miss. 1983), and *Webb v. Biles*, 6 So.2d 117 (Miss. 1942). Succinctly stated, the fact that Amos did not know that he was the designated trustee is not a sufficient reason to invalidate the deed of trust.

(2) The plaintiffs' affidavit states that to "the best of their knowledge they were never introduced to any person named Leslie Ponder either before, during, or after the affiants affixed their signatures to that document." "[T]he introduction of a properly acknowledged deed into evidence establishes a prima facie case that such deed is genuine. Such an acknowledgment can only be overthrown by evidence so clear, strong, and convincing as to exclude all reasonable controversy as to the falsity of the certificate." *Arnold v. Bird*, 220 So.2d 410, 411 (Miss. 1922). The proper acknowledgment of a deed of trust is required for the recordation of the instrument in order to protect the priority of the lien as to succeeding creditors. The security interest is created by the execution of the promissory note and the related security documents including the deed of trust. The perfection of the security interest as to potential competing creditors is achieved by the recordation of the deed of trust in the official land records. Even if the deed of trust is unrecorded, the security interest and the lien remain valid and enforceable between the borrowers and the secured party. Consequently, as to this issue, there are both factual and legal questions remaining in dispute.

(3) Likewise, the plaintiffs have cited no authority that a witness to the borrowers' signatures is a necessary party to validate the subject deed of trust. "The law is well established in Mississippi that this court is not required to address any issue that is not supported by reasons and authority." *Varvaris v. Perreault*, 813 So.2d 750, 752 (Miss.

App. 2001); *Hoops v. State*, 681 So.2d 521, 535 (Miss. 1996)(*citing Pate v. State*, 419 So.2d 1324, 1325-26 (Miss. 1982).

(4) Insofar as the "fraudulent" assignment is concerned, Ocwen and Chase indicated that they recently discovered an unrecorded assignment from American National Home Mortgage, Inc., to IMC Mortgage Company. The existence of this document establishes, without question, that there are material legal and factual issues remaining in dispute as to this part of the plaintiffs' complaint. As a corollary, Ocwen and Chase will be called upon to explain why Ocwen, as the purported attorney in fact for Southern Mortgage, executed and recorded an assignment of the subject deed of trust to IMC Mortgage Company on December 27, 2001. Summary judgment could not be granted as to this issue regardless of which party filed the motion.

For the reasons cited hereinabove, the court is of the opinion that the motion for summary judgment filed by the plaintiffs is not well taken, and it must be denied as a matter of law.

The court would also note that it has the discretion to deny motions for summary judgment and allow the parties to proceed to trial in order to more fully develop the record for the trier of fact. *Kunin v. Keofanov*, 69 F.3d 59, 61 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Services, Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989).

This the 24th day of April, 2007.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE