

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

IN RE:

ROBERT J. MULLINS
TINA A. MULLINS

CASE NO. 10-10577

PHAEDRA SPRADLIN, *as Chapter 7 Trustee*

PLAINTIFF

v.

ADV. NO. 11-1002

GMAC MORTGAGE, LLC *et al.*

DEFENDANTS

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART
TRUSTEE'S MOTION FOR SUMMARY JUDGMENT**

The two issues presented in the Trustee's Memorandum in support of the Motion for Summary Judgment, (Doc. 11), are: (1) whether, pursuant to § 544 of Title 11 of the United States Code (the "Bankruptcy Code"), Chapter 7 Trustee Phaedra Spradlin may assert priority as a judicial lien creditor over the unperfected lien of GMAC Mortgage, LLC against the Debtors' 2002 Clayton manufactured home and (2) whether Trustee may sell the manufactured home, together with the real property on which the home sits, free and clear of all liens, encumbrances, claims, or interests pursuant to § 363(f)(3) of the Bankruptcy Code. In the Response, (Doc. 14), GMAC does not contest Trustee's priority as a judicial lien creditor and agrees the lien on the manufactured home is unperfected under Kentucky law. GMAC does, however, contest Trustee's authority to sell the real property, on which GMAC holds a lien secured by a valid recorded mortgage.

In the Complaint, (Doc. 1), and Memorandum, Trustee relies on 11 U.S.C. §§ 544(a) and 551 as authority to assert, as a judicial lien creditor, a first position priority over the unperfected lien on the manufactured home and to preserve the priority position for the benefit for the

bankruptcy estate.¹ Trustee attached to the Complaint a copy of the certificate of title for the manufactured home issued by the Commonwealth of Kentucky Transportation Cabinet.

Under Kentucky law K.R.S. § 186A.190 governs the only means of perfection of a security interest in a manufactured home for which a certificate of title exists. According to K.R.S. § 186A.190(1),

Except as provided in subsection (4) of this section and in K.R.S. § 355.9-311(4), the perfection and discharge of a security interest in any property for which has been issued a Kentucky certificate of title shall be by notation on the certificate of title. *The notation of the security interest on the certificate of title shall be in accordance with this chapter...*

K.R.S. § 186A.190(1) (Emphasis added.). Further, K.R.S. § 186A.190(2) states,

... the sole means of perfecting and discharging a security interest in property for which a certificate of title is required by this chapter is by notation on the property's certificate of title under the provisions of this chapter...

K.R.S. § 186A.190(2).

The evidence of record is clear that the certificate of title for Debtors' manufactured home does not contain a notation of the GMAC security interest in the manufactured home. Therefore, under Kentucky law the GMAC security interest in the manufactured home is unperfected and subject to a loss of priority to the Chapter 7 Trustee pursuant to 11 U.S.C. § 544(a).

Trustee also requests authorization to sell the manufactured home and the land on which it sits pursuant to 11 U.S.C. § 363(f) (collectively, the manufactured home and land are the "Property"). Trustee maintains in the Complaint and Memorandum that the combined sale of the Property is in the best interests of the bankruptcy estate and its creditors. In its

¹ The parties make reference to lien avoidance; however, Trustee is not seeking to avoid any transfer of property by the Debtors to GMAC. No challenge is made to the validity of the GMAC security interest in the manufactured home, *i.e.*, the relationship between a debtor and a creditor. Trustee is challenging GMAC's failure to perfect the security interest in the manufactured home, *i.e.*, the relationship between a creditor and other creditors. Therefore, Trustee's second cause of action is regarded in this Opinion and Order as an action to assert the rights and powers of a judicial lien creditor having a first priority lien in the manufactured home pursuant to 11 U.S.C. § 544.

Response, GMAC objects to the proposed sale of the land stating Trustee has failed to satisfy the requirements of § 363(f) in order to sell the property free and clear.

Section 363(f)(3) provides a trustee may sell property free and clear of any interest, only if such interest is a lien and the sale price of the property is greater than the aggregate value of all liens on the property. 11 U.S.C. § 363(f)(3). The evidence of record establishes GMAC has a lien, although unperfected and second in priority to the judicial lien of the estate, on the manufactured home and a lien on the land secured by a valid recorded mortgage. Therefore, in order to rely on § 363(f)(3) as authorization to sell the Property free and clear, Trustee must establish the sale price of the Property is greater than the aggregate value of all liens on the Property.

In her Reply, (Doc. 15), Trustee relies on an assumption of accuracy of Debtors' valuations in their schedules. Debtors' Schedule A listed the current value of the real property as \$10,000.00. Debtors' Schedule B listed the current value of the manufactured home as \$35,000.00. In contrast to Debtors' valuations, GMAC filed an uncontested proof of claim in the amount of \$63,851.36.

The values listed in Debtors' schedules are not credible evidence of the value of the Property. Neither Debtors nor Trustee have filed any credible evidence of record providing proof of valuation or establishing the anticipated sale price of the Property. The record also lacks evidence of the value of the GMAC mortgage on the real property. The record lacks sufficient proof to establish, as required by § 363(f)(3), that the "price at which such property is to be sold is greater than the aggregate value of all liens." As a matter of law, without such proof Trustee will not prevail pursuant to 11 U.S.C. § 363(f)(3).

There being no questions of material fact in the record and having determined that oral arguments are not required, based on the foregoing reasons,

IT IS HEREBY ORDERED:

(1) The Trustee's Motion for Summary Judgment is SUSTAINED IN PART to the extent Trustee seeks to assert priority, pursuant to 11 U.S.C. § 544, as a judicial lien creditor over the unperfected lien of GMAC Mortgage, LLC against the 2002 Clayton manufactured home; and

(2) The Trustee's Motion for Summary Judgment is DENIED IN PART to the extent Trustee seeks permission to sell the manufactured home together with the land on which it sits free and clear of all liens, claims, encumbrances and interests.

IT IS FURTHER ORDERED that the summary judgment hearing scheduled for Wednesday, June 1, 2011, is HEREBY STRICKEN FROM THE DOCKET.

Copies to:
J. Wesley Harned
John O. Morgan, Jr,
Glenn E. Algie

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Tuesday, May 31, 2011**  
**(jms)**