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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. WW-08-1288-JuHMo
CORRINE J. ERICKSON,	)	Bk. No. 07-15377
Debtor,	)	Adv. No. 08-01045
_____	)	
MICHAEL R. MASTRO,	)	
Appellant,	)	
v.	)	**M E M O R A N D U M**[1]
CORRINE J. ERICKSON,	)	
Appellee.	)	
_____	)	

Argued and Submitted on May 19, 2009
at Seattle, Washington

Filed - June 5, 2009

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

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Before: JURY, HOLLOWELL and MONTALI, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

This appeal concerns the validity of a deed of trust signed by Appellee-debtor Corrine J. Erickson in favor of Appellant Michael R. Mastro ("Mastro").

In November 2002, Mastro agreed to loan $450,000 to Malibu Development Corporation and The Meridian on Bainbridge Island, LLC (collectively "Meridian") for the purpose of developing condominiums. Meridian's sole shareholders were debtor's son, John Erickson ("Erickson"), and another principal. Meridian executed the underlying promissory note and granted Mastro a second-position security interest in the real property being developed.

Before making the loan, Mastro required additional security. Consequently, at Erickson's request, debtor executed a deed of trust on her residence in favor of Mastro to secure Meridian's $450,000 obligation.

The condominium development did not proceed as planned. Eventually Meridian filed a chapter 11 petition.[2] Meanwhile, the trustee[3] under the deed of trust on debtor's property issued a Notice of Trustee's Sale. Thereafter, debtor filed a chapter 13 petition and commenced an adversary proceeding against Mastro seeking a judicial declaration that the deed of trust was void based on discrepancies between it and the underlying note.

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[2] Meridian actually filed a total of three bankruptcy petitions.

[3] The original trustee under the deed of trust was Michael C. Malnati, counsel for Mastro.

Debtor and Mastro filed cross motions for summary judgment, asserting there were no facts in dispute.[4] The bankruptcy court entered an order on October 22, 2008 granting debtor's motion on the ground that the deed of trust was void as a matter of law and denying Mastro's motion. Mastro timely appealed that order.

We hold that the deed of trust is void because debtor's agreement to guarantee Meridian's debt was not in writing as required under Washington Revised Code ("RCW") § 19.36.010(2). We also conclude that the equitable doctrine of reformation is unavailable under these circumstances. Accordingly, we AFFIRM.

I. FACTS

There are only a few undisputed facts relevant to the resolution of this appeal. On November 8, 2002 debtor executed the deed of trust which provides in pertinent part:

> THIS DEED OF TRUST IS MADE FOR THE PURPOSE OF SECURING PERFORMANCE of each covenant, agreement, term, and condition of Grantor contained herein and the prompt payment of the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS U.S. ($450,000.00), with interest thereon according to the terms of a Commercial Promissory Note, of even date, payable to Beneficiary or Holder and made by Grantor ("the Note"); all renewals, modifications, or extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of them or any of their successors or assigns, together with interest thereon at such rate as shall be stated in the Note.

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[4] Mastro has argued that parol evidence was admissible to show the intent of the parties. If parol evidence were admissible, it would likely give rise to genuine issues of disputed fact given the subjective nature of intent rendering summary judgment in favor of Mastro inappropriate. Accordingly, if we reversed summary judgment in favor of debtor, we would not reverse the court's denial of Mastro's cross motion for summary judgment. Regardless, we hold that parol evidence was not admissible under these circumstances.

The record shows that Mastro or his associates, whom debtor never met or spoke to, prepared the deed of trust. Debtor signed the deed of trust, the only document ever presented to her, at Erickson's request and without question. When debtor executed the deed of trust, she knew the loan was for $450,000 and that the obligation was Meridian's and not hers. The record also shows that debtor generally understood that if the loan went into default and was secured by a deed of trust, the lender could foreclose.

Mastro funded the loan in two stages with the first disbursement on November 15, 2002 and the second occurring on November 20, 2002. Erickson signed the final version of the note on Meridian's behalf at the time of the second disbursement. Meridian also executed an addendum to the note on July 3, 2003. The undisputed evidence shows that debtor was not a party to the note or any addendums or modifications thereto, and she never had an interest in Meridian.

The record also shows that Mastro would not have made the loan to Meridian without debtor's residence as additional collateral.

II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under §§ 28 U.S.C. §§ 1334 and 157(b)(2)(A),(B) and (K). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the deed of trust was void as a matter of law because it violated the Washington statute of frauds.

IV. STANDARD OF REVIEW

"We review de novo the bankruptcy court's grant of summary judgment." SN Ins. Servs., Inc. v. SNTL Corp. (In re SNTL Corp.), 380 B.R. 204, 211 (9th Cir. BAP) 2007.

V. DISCUSSION

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In making this determination, conflicts are resolved by viewing all facts and reasonable inferences in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Because there were no genuine issues of material fact in this matter, the bankruptcy court decided the issues as a matter of law.

Mastro argues that the bankruptcy court erred in deciding that the deed of trust was void for two reasons. First, Mastro contends that the bankruptcy court erred in refusing to consider extrinsic evidence to interpret the parties' intent regarding the deed of trust and the underlying note. Second, Mastro argues that the court erred in failing to reform the deed of trust to conform to his assertion that the parties intended to have the deed of trust secure the obligation set forth in the note.

We examine the applicable Washington state law to determine whether the deed of trust is void. Under Washington law, all

encumbrances to real property must be made by a deed of trust. RCW § 61.12.010. Washington law further provides that a deed of trust is subject to all laws relating to mortgages on real property. RCW § 61.24.020.

A deed of trust must secure an existing or future ascertainable underlying debt or obligation to be deemed valid and enforceable. See Tesdahl v. Collins, 97 P.2d 649, 652 (Wash. 1939)(mortgagor-mortgagee relationship depends on a debt that is capable of enforcement by action and which was intended to be secured by a mortgage); Wade v. Donau Brewing Co., 38 P. 1009, 1010 (Wash. 1894)(an obligation need not arise at the time the deed of trust is executed; it may be incurred in the future but in such cases the mortgage does not become effective until the obligation arises).

A grantor may execute a deed of trust to "secure the contemplated obligations of a third person even though the grantor assumes no personal responsibility for the payment of the third party's debt." Parker v. Speedy Re-Finance, Ltd., 596 P.2d 1061, 1067 (Wash. Ct. App. 1979). However, any agreement to pay the obligation of another is subject to the statute of frauds under Washington law. RCW § 19.36.010(2) provides that every "special promise to answer for the debt...of another person shall be void, unless in writing." RCW § 19.36.010(2).

A. The Statute of Frauds

Mastro urges us to conclude that the bankruptcy court erred in finding that the deed of trust was void as a matter of law because debtor admitted in deposition testimony that she intended to pledge her property to secure her son's obligation.

But his dependence on extrinsic evidence to interpret the intent of the parties and enforce the deed of trust is misplaced.

The uncontested evidence shows that debtor was acting as a guarantor (or surety)[5] with respect to Mastro's loan to Meridian. Therefore, debtor's grant of security to Mastro for the performance of the loan was a collateral agreement wholly within the statute of frauds, an area of the law which is harsh and unforgiving.

The Washington Supreme Court has stated that "[t]he statute of frauds is not a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it." Smith v. Twohy, 425 P.2d 12, 15 (Wash. 1967). To satisfy the writing requirement under the statute, "the writing . . . must be so complete in itself as to make recourse to parol evidence unnecessary to establish any material element of the undertaking." Id. "Liability cannot be imposed if it is necessary to look for elements of the agreement outside of the writing. It follows that parol evidence is not admissible or permissible to establish a central provision of the alleged agreement nor to supply deficiencies in the writing." Id.

Here, the deed of trust is unambiguous. It explicitly states that it was given as security for a commercial promissory note of even date, but there was no note dated November 8, 2002.

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[5] A surety may be bound to a creditor "by pledging of a chattel, mortgaging of a chattel or land, or by otherwise using his property to secure the creditor." Restatement of Security § 82, comment h (1941). See also Fluke Capital Mgmt. Servs. Co. v. Richmond, 724 P.2d 356 (Wash. 1986).

Rather, the actual note held by Mastro references, and was signed by, Meridian (which is not mentioned in the deed of trust) and was dated November 20, 2002. Moreover, the deed of trust referred to a note "made by Grantor", which identified debtor herself as the maker of the note.

The terms "Grantor," "Borrower" and "Guarantor" are not synonymous under Washington law. A "Grantor" is defined as a "person...who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations." RCW § 61.24.005(1). A "Borrower" is defined as "a person...that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations...." RCW § 61.24.005(5). Finally, a "Guarantor" is defined as "any person...who is not a borrower and who guarantees any of the obligations secured by a deed of trust in any written agreement other than the deed of trust." RCW § 61.24.005(6).

Although the plain language of the deed of trust properly identified debtor as the Grantor, it improperly identified the obligation secured because it failed to mention the commercial promissory note dated November 20, 2002, with Meridian as the Borrower. The inaccuracies in the deed of trust are further compounded by the lack of any other written agreement between debtor and Mastro evidencing debtor's intent to act as a guarantor for the obligation referred to in the deed of trust. See generally Putnam v. Ferguson, 502 S.E.2d 386, 388 (N.C. Ct. App. 1998)(determining that the deed of trust was invalid

because the it did not properly identify the obligation secured; it identified the defendant as the debtor, yet the promissory note of the specified date and amount was signed by third parties).

Under these facts, we conclude as a matter of law that the deed of trust is void because there is no writing that evidences an underlying debt owed by debtor to Mastro. Even when construed with the note in the record, the deed of trust is not complete and recourse to extrinsic evidence would be necessary to establish the material elements of the agreement between the parties. However, under Washington law, liability cannot be imposed on debtor if it is necessary to look for elements of the parties' agreement outside the deed of trust and the note, which are the only two writings that were before the bankruptcy court or in the record before us. Smith, 425 P.2d at 15 ("[P]arol evidence is not admissible or permissible to establish a central provision of the alleged agreement nor to supply deficiencies in the writing.").

B. The Doctrine of Reformation

We consider next whether Mastro should prevail on the equitable remedy of reformation, which brings a writing that is materially different than the parties' agreement into conformity with that agreement.[6] Akers v. Sinclair, 226 P.2d 225, 230 (Wash. 1950). A party may seek reformation of a contract if (1) the parties made a mutual mistake or (2) one of them made a

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[6] The statute of frauds is "neither a basis for denying nor one for granting reformation." Restatement (Second) of Contracts § 156 (1981).

mistake and the other engaged in inequitable conduct. Wash. Mut. Sav. Bank v. Hedreen, 886 P.2d 1121, 1123 (Wash. 1994). "However, reformation is justified only if the parties' intentions were identical at the time of the transaction." Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 991 P.2d 1126, 1130-1131 (Wash. 2000). The party seeking reformation must prove the facts supporting it by clear, cogent and convincing evidence. Akers, 226 P.2d at 231; Kaufmann v. Woodard, 163 P.2d 606, 609 (Wash. 1945).

Under these facts, no inequitable conduct is alleged, so we only consider whether there was a mutual mistake. A mistake is "a belief not in accord with the facts." Simonson v. Fendell, 675 P.2d 1218, 1121 (Wash. 1984)(quoting Restatement (Second) of Contracts § 151 (1981)). However, "the mutual mistake doctrine may not be invoked to correct knowing errors of parties, because if such errors were always corrected, the statute of frauds would be eviscerated." Halbert v. Forney, 945 P.2d 1137, 1140 (Wash. App. 1997).

Viewing the facts and reasonable inferences in the light most favorable to Mastro, the record does not support a conclusion that there was a mutual mistake. Mastro or his attorney drafted the deed of trust misidentifying debtor as the borrower on an underlying note that did not exist. Debtor was not involved in formulating the deed of trust, nor did she contribute in any way to its drafting errors. Moreover, she did not sign the note that Mastro relies on now. When she executed the deed of trust, debtor never met or spoke to Mastro or his associates. She signed the deed of trust at her son's request

without question. We conclude that these circumstances do not add up to a "mutual mistake".

In sum, we hold that the equitable doctrine of reformation is not available to Mastro. As the bankruptcy court correctly observed, we would have to do "all kind[s] of reforming" that the law does not permit.

VI. CONCLUSION

For the reasons stated above, we AFFIRM.