

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In Re:

**Michael J. Rebello and
Rose M. Rebello,**
Debtors.

**Case #02-10288 cab
Chapter 13**

Jan M. Sensenich, as Chapter 13 Trustee
of the Estate of Michael J. Rebello and
Rose M. Rebello; Michael J. and
Rose M. Rebello,

Plaintiffs,

v.

Peoples Trust Company of St. Albans,
Defendant

Adversary Proceeding
#02-01015

Order Granting Cross-Motion for Summary Judgment

Peoples Trust Company of St. Albans ["Peoples Trust"] has filed a Motion for Summary Judgment (doc# 12) , pursuant to Fed. R. Bankr. P. Rule 7001(2), seeking a determination of the validity of a mortgage which the debtors executed in favor of Peoples Trust. The chapter 13 trustee and the debtors have cross-moved for summary judgment (doc#15), claiming that, as a matter of law, the mortgage is defective, and, as a result, is avoidable. The Court has jurisdiction over this dispute under 28 U.S.C. §§ 157 and 1334.

Based upon the parties' Stipulated Statement of Undisputed Facts, the Court finds that there are no material facts in dispute. Based upon the parties' memoranda of law and this Court's decision in In re Potter, A.P. # 01-1031 (Sept. 21, 2001), aff'd, Mortgage Lenders Network, USA v. Sensenich, No. 1:01CV335 (D. Vt. Jan. 22, 2002), the Court holds that the mortgage is void *ab initio*. Accordingly, the Court denies the Peoples Trust's Motion for Summary Judgment and grants the Cross-Motion for Summary Judgment filed by the chapter 13 trustee and the debtors.

The mortgage in question was not properly acknowledged as statutorily required under Vermont law. Thus, although it was properly witnessed, the Court must declare it to be defective and invalid. See In re Potter at p.5. ("Vermont law is clear that an invalid mortgage is not sufficient to put someone on notice and

that a deed or mortgage that is improperly witnessed or acknowledged is deemed invalid . . .”). Moreover, Vermont law requires that a defective mortgage be treated as if it had never been recorded. See id. at p.4 (citation omitted). Likewise, under the law, such a mortgage fails to impart constructive notice to a subsequent purchaser. Therefore, any document recorded after the recording of the mortgage is deemed outside the chain of title. See In re Ryan, 815 F.2d 502, 511 (1st Cir. 1988) (interpreting Vermont law and instructing that any document stemming from the recording of a defective mortgage was an invalid record and, therefore, not within the chain of title from the debtor to the trustee); see also In re Potter at pp.4-5 (citing In re Ryan with approval). Hence, the fact that the uniform mortgage rider was properly executed, contained curative language, and was recorded five minutes after the mortgage was recorded does not succeed in curing the mortgage’s fatal defect.

Accordingly,

IT IS ORDERED that Motion for Summary Judgment filed by Peoples Trust’s is denied; and

IT IS FURTHER ORDERED that the Cross-Motion for Summary Judgment filed by the chapter13 trustee and the debtors is granted; and

IT IS FURTHER ORDERED that any lien on the subject premises arising from Peoples Trust’s invalid mortgage is avoided, subject to the caveat that if this bankruptcy case is dismissed prior to the completion of all payments under the debtors’ plan the avoided lien is reinstated under 11 U.S.C. § 349(b)(3);

IT IS FURTHER ORDERED that the Order of Lien Avoidance shall provide that it not be entered on the real estate records of the subject property until an order of discharge has been entered in this case; and

IT IS FURTHER ORDERED that the subject property not be transferred or encumbered in the interim without the further order of this Court.

SO ORDERED.

August 7, 2002
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge