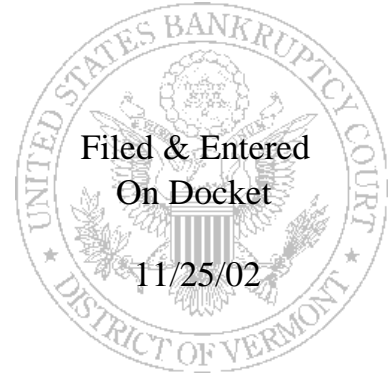


UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT

In re:

JENNIE A. DION and  
WAYNE R. DION,  
Debtors

Case # 02-10835  
Chapter 13



JENNIE A. DION & WAYNE R. DION,  
and JAN M. SENSENICH,  
Chapter 13 Trustee,  
Plaintiffs,

v.

Adversary Proceeding  
# 02-1034

P.B. INVESTMENT CORPORATION  
and OLYMPUS SERVICING L.P.,  
Defendants.

<i>Appearances:</i>	<i>Gleb Glinka, Esq.</i>	<i>Jan M. Sensenich, Esq.</i>	<i>Grant C. Rees, Esq.</i>
	<i>Cabot, Vt.</i>	<i>White River Junction., Vt.</i>	<i>Burlington, Vt.</i>
	<i>For the Debtors</i>	<i>For the Trustee</i>	<i>For the Defendants</i>

**MEMORANDUM OF DECISION**  
**Denying Defendants' Motion for Summary Judgment and**  
**Granting Plaintiffs' Cross-Motion for Summary Judgment**

Defendants P.B. Investment Corporation and Olympus Servicing L.P. filed a Motion for Summary Judgment (doc. #11) seeking a determination whether the mortgage of the Debtors, Jennie A. Dion and Wayne R. Dion, is valid and enforceable. The Debtors and Chapter 13 Trustee, Jan M. Sensenich, cross-move for summary judgment on the same issue. See doc. #13. This Court has jurisdiction over the subject motions pursuant to 28 U.S.C. §§ 157 and 1334. For the reasons stated below, the Court finds the subject mortgage to be invalid and unenforceable. Accordingly, the Cross-Motion filed by the Debtors and Trustee is granted and the Motion filed by the Defendants is denied.

## **I. BACKGROUND**

The parties stipulate that, on March 11, 1998, the Debtors executed a mortgage in favor of Platinum Capital Group to secure a promissory note documenting a \$65,000 loan from Platinum Capital Group to the Debtors. See Statement of Undisputed Facts ¶¶1, 3 (doc. #14). The parties agree that the mortgage was properly acknowledged. See id. at ¶ 5. Moreover, the parties stipulate that the mortgage “does not contain the signature of any witnesses; the lines reserved for witness signatures are blank.” Id. at ¶6. The only issue before the Court is whether the signed, acknowledged, but unwitnessed mortgage is valid and enforceable.

## **II. DISCUSSION**

### ***A. Standard for Summary Judgment***

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. A genuine issue exists only when “the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant’s favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992). In making its determination, the court’s sole function is to determine whether there is any material dispute of fact that requires a trial. See Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).

### ***B. Vermont's Requirements***

Vermont law is clear regarding the requirements of execution of an instrument representing an interest in land:

(a) Deeds and other conveyances of lands, or of an estate or interest therein, *shall be* signed by the party granting the same and signed by one or more witnesses and acknowledged by the grantor before a town clerk, notary public, master, county clerk or judge or register of probate and recorded at length in the clerk's office of the town in which such lands lie. Such acknowledgment before a notary public shall be valid without an official seal affixed to his or her signature.

VT. STAT. ANN. tit. 27, § 341(a) (Supp. 1998) (emphasis added).

### ***C. Precedential Cases***

This Court has recently ruled that, “[I]nstruments that are deemed defective because of a missing signature fail to impart constructive notice to a subsequent purchaser. . . . 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.” In re Potter, No. 00-10595, A.P. No. 01-1031, slip op. at 7 (Bankr. D. Vt. Sept. 21, 2001), aff'd, Mortgage Lenders Network, USA v. Sensenich, No. 1:01CV335, slip op. (D. Vt. Jan. 22, 2002). Indeed, contrary to the Defendants’ argument that case law has been eroding this requirement, both state and federal case law is clear that a mortgage not properly witnessed is defective and does not impart constructive notice. The law on this point is longstanding and consistent. See, e.g., Day v. Adams, 42 Vt. 510 (1869)(ruling that a mortgage lacking signatures of witnesses was “defective” under Vermont’s recording statute); In re Ryan, 851 F.2d 502 (1st Cir. 1988) (construing Vermont law and finding mortgage deed that lacked requisite signatures of witnesses was defective and could not serve as constructive notice); In re Orf, No. 90-00581, A.P. No. 90-0066, slip op. (Bankr. D. Vt. May 11, 1991) (“The language of [27 V.S.A. § 341] leaves no room for doubt that what is required of witnesses to a deed is their signatures as witnesses, not merely to be present at the signing of a deed.”).

### ***D. The Instant Case***

The parties agree that the subject mortgage deed was not witnessed. Both sides request the Court determine whether the unwitnessed mortgage is valid or void. Given the stipulated facts of this case, the state law statutory requirements for executing an instrument conveying an interest in land, and both state and federal case law, the Court must, and does, find that the mortgage at issue is void *ab initio*. The Court further finds that, under 11 U.S.C. § 544(a), the subject mortgage is unenforceable against the Chapter 13 Trustee.

### **III. CONCLUSION**

As the parties have stipulated to all of the material facts, the Court finds there is no material dispute as to any genuine fact. After considering all of the papers submitted by the parties, the Court finds the granting of summary judgment is proper in this case. Based upon the agreed facts, the Court finds the Plaintiffs are entitled to judgment as a matter of law. Since the subject mortgage was not witnessed as required by 27 V.S.A. § 341(a), the Court must declare it defective and invalid. The mortgage is *void ab initio*. Therefore, the Court grants Plaintiffs' Cross-Motion for Summary Judgment and denies Defendants' Motion for Summary Judgment.

This Memorandum constitutes the Court's finding of facts and conclusion of law.

Rutland, Vermont  
November 22, 2002



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Colleen A. Brown  
United States Bankruptcy Judge