UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

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In re:	
JOAN M. LADOUCEUR,	Case No. 98-11427 FGC
Debtor.	Chapter 13
JOAN M. LADOUCEUR,	
Plaintiff,	
v.	Adv. Proc. No. 98-01083
KEY BANK, N.A., and FIRST AMERICAN EQUITY LOAN SERVICES, INC.,	
Defendants.	

MEMORANDUM OF DECISION
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

S. L. Knudson, Esq., Dinse, Knapp & McAndrew, P.C., Burlington, VT for First American Equity Loan Services, Inc., ("First American").

D. R. Edwards, Esq., Lynch & Edwards, Burlington, VT for Joan Ladouceur ("Debtor").

This adversary proceeding is before us[1] on Cross Motions for Summary Judgment. Debtor seeks to avoid a mortgage because of mutual mistake. First American argues that although the mortgage as currently written does not describe the correct parcel of land, the parties' intent should govern, and the mortgage should be reformed to reflect that intent. From the bench, we denied Debtor's Motion for Summary Judgment and granted First American's Cross-Motion for Summary Judgment. We write to elaborate on our holding.

FACTS

On or about November 21, 1996, Debtor granted a Mortgage Deed (the "Mortgage") to Key Bank of Vermont ("Key Bank") as security for a loan in the principal amount of $20,000.00. The Mortgage was recorded in the land records of the Town of Jericho, Vermont on December 5, 1996. At the time the Mortgage was recorded, Debtor owned the property formerly known as 415A Skunk Hollow Road. The property was renumbered for 911 emergency purposes and is now known as 51 Skunk Hollow Road (the "Skunk Hollow Property"). Debtor owns no other real property in Jericho. It is undisputed by the parties that Debtor and Key Bank intended to create a Mortgage on the Skunk Hollow Property.

Although the Skunk Hollow Road address is recited on two separate instances in the Mortgage, the metes and bounds description of the real property described a parcel of land located on Mill Street in Jericho.[2] Debtor has never owned real property on Mill Street. Key

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[1]Our subject matter jurisdiction over this controversy arises under 28 U.S.C. §1334 (b), and the General Reference to this Court by the District of Vermont. This is a core matter under 28 U.S.C. §157(b)(2)(A), (K), and (O). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bkrtcy.P. 7052.

[2] Key Bank of Vermont Mortgage, Page 1.
3. NOTE AND MORTGAGE.
A certain piece of land in Jericho in the County of Chittenden and State of Vermont, described as follows, viz:

Bank assigned the Mortgage to First American on October 22, 1998, after the filing of Debtor's petition.

The Mortgage contains a "subject and subordinate" clause referencing a prior mortgage held by TMS Mortgage, Inc. (the "TMS Mortgage"). [3] The TMS Mortgage correctly describes the Skunk Hollow Property.

On March 3, 1998, Debtor filed a voluntary chapter 13 petition. Debtor argues that the mistake in the description of the property in the mortgage makes the mortgage avoidable by Debtor.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only if there is no genuine dispute as to any material

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Being the same lands and premises conveyed to * David J. Ladouceur* and Joan Ladouceur by Warranty Deed dated September 21st, 1990 and recorded September 24th, 1990 in Liber 104 Page 55.

Being all and the same lands and premises conveyed to David J. Ladouceur and Agnes M. Ladouceur (now deceased) by warranty deed of Cecile Ladouceur dated May 13, 1976 and recorded in Book 52 on pages 175-177 of the Land Records of the Town of Jericho. Said land and premises are more particularly described in said deed as follows:

'A parcel of land, with all buildings thereon, being the homeplace of the grantor located on Mill Street in said Jericho Village and being all and the same land and premises which were conveyed to Ibroe Ladouceur (now deceased) and Cecile Ladouceur by Chester S. Moody and Grace M. Moody by Warranty Deed dated August 17, 1948 and recorded in Book 30 page 465 of the Land Record of the Town of Jericho.

** The said David J. Ladouceur died a resident of Chittenden County on August 17th, 1992. The property is improved by a 1-2 family dwelling.

Joan Ladouceur
415A Skunk Hollow Road
Jericho, Vermont 05465

[3] Key Bank of Vermont Mortgage, Page 3
9. PRIOR MORTGAGE.
...[t]his Mortgage is Second and Subordinate to a Mortgage held by TMS Mortgage, Inc. a/k/a The Money Store, amounting to $108,000.00 dated July 5th, 1996 and recorded in Liber 147 page 399 in the County of Chittneden on July 11th, 1996.

fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).; **Celotex Corp. v. Catrett**, 477 U.S. 317, 323 (1986). A fact is material when it affects the outcome of the suit under governing law. **Anderson v Liberty Lobby, Inc.**, 477 U.S. 242, 248 (1986).

There is a genuine dispute over a material fact when the "evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." **Id.** at 249 (quoting **First National Bank of Arizona v. Cities Services Co.**, 391 U.S. 253, 288-289 (1968)). In deciding a motion for summary judgment, the court must resolve all ambiguities and inferences in favor of the nonmoving party. **Foucher v. First Vermont Bank & Trust Co.**, 821 F. Supp. 916, 922 (D.Vt. 1993) (citing **Levin v. Analysis & Technology, Inc.**, 960 F.2d. 314, 316 (2d Cir. 1992)). The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate the absence of a genuine issue of material fact. **Celotex**, 477 U.S. at 323 In addition to establishing the absence of disputed material facts, F.R.Civ.P 56 also imposes on the movant the burden to establish that summary judgment is warranted as a matter of law. **Boazman v. Economics Laboratory, Inc.**, 537 F.2d 210, 214 (5th Cir. 1976). The fact that both sides move for summary judgement does not guarantee that there is no material issue of fact to be tried. **Eatman Machine Company, Inc.**, 841 F.2d 469, 473 (2nd Cir. 1988); **Schwabenbauer v. Board of Education**, 667 F.2d 305, 313-14 (2nd Cir. 1981). We conclude that summary judgment is appropriate in this adversary proceeding as there are no genuine issues of material fact to be decided. This proceeding may be decided as a matter of law.

DISCUSSION

Debtor filed this adversary proceeding to have us declare the Mortgage an unsecured loan or paid in full. Debtor argues that the Mortgage describes a parcel of land on Mill Street, which she has never owned. As a result of the incorrect description of the Skunk Hollow Property, Debtor claims no valid lien was created. Debtor contends that permitting a reformation of the Mortgage would violate the automatic stay.

As we said in **Trustee v. Davis (In re Davis)**, 109 B.R. 633, 637 (Bankr.D. Vt. 1989), "[s]tate law defines the nature and extent of a debtor's property and therefore the bankruptcy estate's interest in the property." See also **In re Hagendorfer,** 803 F.2d 647, 648 (11th Cir. 1986) (noting that state law should be applied, even in a bankruptcy proceeding, where it must be determined whether a mortgage may be reformed because state law defines the property interests and rights); **Watkins v. Watkins**, 922 F.2d 1513 (10th Cir. 1991). Accordingly, Vermont law governs the issues in this case.

When an agreement for land is tainted by mutual mistake, the intent of the parties, if ascertainable, should govern a court's decision with respect to that agreement. The Vermont Supreme Court has declared:

> In relation to conveyances of real estate or attempts to that end, it makes no difference to a court of equity whether the mistake or omission is in regard to a statutory or common-law requisite; it makes no difference whether the parties failed to execute such an instrument as they intended, or mistook the operative effect of the one they did execute. The court of chancery will carry into effect their intention.

Dutton v Davis, 156 A. 531, 532 (1931) (citing **Beardsley v. Knight**, 10 Vt. 185, 190 (1838)).

In an attempt to make the incorrect Mill Street description controlling, Debtor relies on **Spooner v. Menard**, 124 Vt. 61, 63, 196 A. 2d 510, 512 (1963) for the proposition that a specific description in a deed should govern over a general description. Debtor, however, has offered no evidence to suggest that it was not her intention to create a valid lien on the Skunk Hollow Property at the time the Mortgage was executed. We find there was an intention to create a valid lien.

Having determined that the parties intended to create a valid lien on the Skunk Hollow Property we must now determine whether the Mortgage is reformable. This determination requires us to look at two preliminary issues. The first question is whether reformation is an appropriate remedy under Vermont law. Second, because Debtor seems to be claiming powers under the "strong-arm" provision of the Bankruptcy Code, we must determine whether such a Mortgage would be avoidable as to a *bona fide* purchaser of the property.

The first question is easily addressed. Vermont property law provides that when mutual mistake mars the formal embodiment of a previous agreement, that instrument is modifiable to reflect the true intentions of the parties. **Bourne v Lajoie,** 149 Vt. 45, 49, 540 A.2d 359, 362 (1987).

The Vermont Supreme Court in **Olcott v. Southworth** defines mutual mistake as one " ... common to all the parties to the written instrument, and a mistake of a scrivener acting for all of them is mutual on their part." 115 Vt. 421, 423, 63 A.2d 189, 191 (1949). The Supreme Court of Vermont elucidated the law of the state when it declared

> Reformation is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction in writing, either through the mistake common to both parties, ... the written instrument fails to express the real agreement or transaction.

LaRock v. Hill, 131 Vt. 528, 530-31, 310 A.2d 124, 126 (1973) (quoting 2 J. Pomeroy, Equity Jurisprudence § 870 (3d ed. 1905)).

There is no dispute that the parties intended to create a valid mortgage on the Skunk Hollow Property. In reducing the agreement to writing, however, there was a mistake in the legal description of that property. This is precisely the type of error the Vermont Supreme Court envisioned when it opined that where a deed was not drafted "in conformity with the parties' intentions...[t]he deed [was] marred by a mistake ...which became mutual when the deed was executed and accepted, and reformation of the deed was appropriate." **Bourne v Lajoie,** 149 Vt. at 50, 540 A.2d at 362.

Although unclear from the pleadings, it appears that Debtor seeks to invoke the "strong arm clause" of the Bankruptcy Code. To do so, Debtor must first establish that the Mortgage would not be valid as to a *bona fide* purchaser for value. See **In re Davis,** 109 B.R. at 637 (discussing 11 U.S.C. §544(a)(3) and the definition of *bona fide* purchasers, their rights and obligations).

The central issue here is whether a *bona fide* purchaser would have had notice of Key Bank's lien on the Skunk Hollow Property at the time of the filing of the petition, thus being unable to avoid the lien. See **In re Davis,** 109 B.R. at 639 (noting that the rights a trustee or debtor in possession receives under § 544(a)(3) are subject to the effect of any constructive notice that state law deems is to a *bona fide* purchaser). It is clear that under Vermont law a

bona fide purchaser with constructive notice of a lien may not avoid that lien. **See Haner v. Bruce**, 146 Vt. 262, 499 A.2d 792 (1985); **Allen v. Gates,** 50 A. 1092 (1900). In **In re Davis,** we pontificated on constructive and inquiry notice:

> "Inquiry notice" is a form of constructive notice. It follows from the duty of a purchaser when he has "actual" or "constructive" notice of facts that would lead a reasonably prudent person to suspect that another person might have an interest in the property to conduct a further investigation into the facts. The most common type of 'inquiry notice' is present when some person other than the grantor is in actual possession of the property. In that situation, the purchaser is charged with constructive knowledge of the possession. As a result, the purchaser is 'on inquiry' to determine whether the possessor has some interest in the property.

In re Davis, 109 B.R. at 639 (citations omitted)

A potential purchaser is charged with knowledge that would have been revealed through a reasonably diligent inquiry. **Morse v. Murphy**, 157 Vt. 410, 599 A.2d 1367 (1991). At the very least a "reasonably diligent inquiry" would require a potential purchaser to examine the record of title. Such an examination would have undoubtedly revealed the Mortgage. Vermont land records are indexed by the name of the grantor and grantee. Anyone searching the land records would search under Debtor's name. Such a search would reveal the Key Bank Mortgage. The reference in the Mortgage to 415A Skunk Hollow Road (the previous name of the property now in question) and to the TMS Mortgage is sufficient to put a potential purchaser on inquiry notice of the lien. See **In re Watkins**, 922 F.2d at 1515 (holding that a bona fide purchaser, having constructive notice of the ex-wife's security interest, could not have avoided ex-wife's lien. Likewise, the trustee in bankruptcy could not avoid ex-wife's lien.)

> The "strong arm clause" does not set aside the [Debtor's] duty, as a hypothetical judicial lien creditor, to examine the record of title. Since (sic) the Trustee has the duty [under state law] to examine the record, he may be bound by erroneous, defective or incomplete matters of record, the discovery

of which would lead to further inquiry.

In re Hagendorger, 803 F.2d at 649.

Debtor has no more rights than a hypothetical *bona fide* purchaser. Reformation of the mortgage merely reduces to writing the clear intentions of the parties, it does not create a new lien. Thus, this reformation is not barred by the automatic stay.

CONCLUSION

We hold that the Mortgage constitutes a valid lien on the Skunk Hollow Property and the Mortgage is reformable to express this fact. Debtor's Motion for Summary Judgment is denied and First American's Motion for Summary Judgment is granted.

Dated at Rutland, Vermont, this 16th day of April, 1999.

Francis G. Conrad
FRANCIS G. CONRAD
UNITED STATES BANKRUPTCY JUDGE