This Instrument Prepared By:

Susan R. Limor, Trustee
2814 Dogwood Place
Nashville, TN 37204

Davidson County DEEDTRS
Recvd: 09/16/04 15:54 21pgs
Fees:108.00 Taxes:92.50
20040916-0111869

Address New Owner:	Send Tax Bills To:	Map/Parcel No.
Countrywide Home Loans 7105 Corporate Drive Mail Stop PPX-C-35 Plano, TX 75024	Same	19-042.15-0-079-00

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

IN RE:	)	
	)	
RANDY JOE MOSLEY,	)	CASE NO. 303-08045-GP3-7
	)	
Debtor.	)	

TRUSTEE'S DEED

For and in consideration of the sum of Ten 00/100 Dollars ($10.00), and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, I, Susan R. Limor, Trustee for Randy Joe Mosley, hereby bargain, sell, and convey to Countrywide Home Loans all of my interest in the following-described property located in Davidson County, State of Tennessee:

> BEING Land in Davidson County, Tennessee, being Lots Nos. 53 and 56, both inclusive of Blk. "A" on the Map of Marthonna, a Subdivision of the Cumberland Development Company of the Ezell Farm, not of record, and described according to a copy of a survey thereof made December, 1937, by J.A. Mefford, Surveyor as follows:
>
> BEGINNING at a point in the easterly margin of Marthonna Road (formerly Ezell Road) East 1229.9 feet south of the southerly margin of Marthonna Road being the common corner of Lots Nos. 52 & 53; thence with the line between said lots easterly 420.4 feet to a point; thence South 1 deg. 52' West 100 feet to a point at the common corner of Lots Nos. 56 & 57; thence with the line between said lots westerly 421.9 feet to the easterly margin of Marthonna Road; thence with the margin of the same North 2 deg. 58' East 100 feet to the point of beginning.
>
> BEING the same property conveyed to Randy Joe Mosley and wife, Claresa Anita Mosley on June 06, 1985, by deed from Herschel Henry Harrison, Jr. and wife, Shirley Harrison, filed for record in Book 6577, page 801, Register's Office for Davidson County, Tennessee.
>
> FURTHER BEING the same property conveyed to Randy Joe Mosley by Order dated and entered April 1, 2002, Docket No. 01D-1288, 4th Circuit Court for Davidson County, Tennessee.

Premises commonly known as 313 East Marthonna Road, Madison, Tennessee 37115.

TO HAVE AND TO HOLD all of my interest in the said tract or parcel of real property, with all of my interest in the appurtenances, buildings, structures, improvements, fixtures, estate, title, and interest thereto belonging to the said Countrywide Home Loans, its successors and assigns forever. Grantor conveys said property pursuant to Trustee's Motion to Sell Property, sent to all creditors and parties in interest on April 13, 2004, and no timely objections thereto having been made.

Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

WITNESS my hand this 19th day of July, 2004.

Susan R. Limor, Trustee

STATE OF TENNESSEE)
) ss:
COUNTY OF DAVIDSON)

Personally appeared before me, the undersigned, a Notary Public in and for the said State and County, Susan R. Limor, Trustee, the within-named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

WITNESS my hand and official seal at Nashville, Tennessee, this 19th day of July, 2004.

Gail D. Burch
Notary Public

My Commission Expires: 11/26/2005

GAIL D. BURCH NOTARY PUBLIC AT LARGE DAVIDSON COUNTY

STATE OF TENNESSEE)
) ss:
COUNTY OF DAVIDSON)

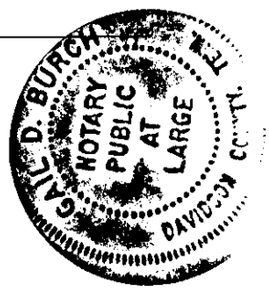
THE ACTUAL CONSIDERATION or value, whichever is greater, for this transfer is $25,000.00.

Affiant

Subscribed and sworn to before me this 19th day of July, 2004.

Notary Public

My Commission Expires: 11/26/2005



FORM B1

United States Bankruptcy Court
Middle District of Tennessee

Voluntary Petition

Name of Debtor (if individual, enter: Last, First, Middle):	Name of Joint Debtor (Spouse)(Last, First, Middle):
MOSLEY, RANDY JOE	
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names)	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all): [redacted]-5872	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code): 313 EAST MARTHONA ROAD MADISON TN 37115	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business: DAVIDSON	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):	

303-08045

FEES
☒ Pd in full
( ) Oath ( ) BOC
Part Pay: FF $_____
AF $_____
TS $_____

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)
[X] Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
[ ] There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)
[X] Individual(s)
[ ] Corporation
[ ] Partnership
[ ] Other _____
[ ] Railroad
[ ] Stockbroker
[ ] Commodity Broker

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)
[X] Chapter 7
[ ] Chapter 9
[ ] Chapter 11
[ ] Chapter 12
[ ] Chapter 13
[ ] Sec. 304 - Case ancillary to foreign proceeding

Nature of Debts (Check one box)
[ ] Consumer/Non-Business
[X] Business

Filing Fee (Check one box)
[X] Full Filing Fee attached
[ ] Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Chapter 11 Small Business (Check all boxes that apply)
[ ] Debtor is a small business as defined in 11 U.S.C. 101
[ ] Debtor is and elects to be considered a small business under 11 U.S.C. 1121(e)(optional)

Statistical/Administrative Information (Estimates only)
[ ] Debtor estimates that funds will be available for distribution to unsecured creditors.
[X] Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	[ ]	[X]	[ ]	[ ]	[ ]	[ ]

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	[ ]	[ ]	[X]	[ ]	[ ]	[ ]	[ ]	[ ]

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	[ ]	[ ]	[X]	[ ]	[ ]	[ ]	[ ]	[ ]

2004 JUN 18 PM 2:03

Attest: A True Copy
Certified this 6-8-04
U.S. Bankruptcy Court
By V. Counts
Deputy Clerk

Voluntary Petition *(This page must be completed and filed in every case)*	Name of Debtor(s): MOSLEY RANDY J (D)	FORM B1, Page 2

Prior Bankruptcy Case Filed Within Last 6 Years (if more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:
NASHVILLE TN	CHAPTER 7	1976

Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (if more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
NONE		
District:	Relationship:	Judge:

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7,11,12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specific in this petition.

X Randy Joe Mosley
RANDY JOE MOSLEY

X Not Applicable
Signature of Joint Debtor

Telephone Number (If not represented by attorney)

Date 6-4-03

Signature of Debtor (Corporate/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X Not Applicable
Signature of Authorized Individual

Not Applicable
Print or Type Name of Authorized Individual

Not Applicable
Title of Authorized Individual

Date

Signature of Attorney

X
JOHNSON ESQ ROBERT T (DA)
JOHNSON ESQ ROBERT T (DA)
Printed Name of Attorney for Debtor(s)
JOHNSON, ESQ ROBERT (DA)
Firm Name
518 SOUTH GALLATIN PIKE
Address
MADISON TN 37115

(615)860-3130
Telephone Number
6/12/03
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) or the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

[ ] Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under such chapter.

X 6/12/03
JOHNSON ESQ ROBERT T (DA) Date

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Not Applicable
Printed Name of Bankruptcy Preparer

Social Security Number

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

Not Applicable

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate official form for each person.

X
Signature of Bankruptcy Petition Preparer

Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. 110; 18 U.S.C. 156.

UNITED STATES BANKRUPTCY COURT
Middle District of Tennessee

In Re:

MOSLEY, RANDY JOE OF 313 E MARTHONA RD, MADISON TN 37115, [redacted]-5872 Case No. 303-08045-GP3-7

NOTICE OF APPOINTMENT OF INTERIM TRUSTEE AND FIXING OF BOND

Pursuant to 11 U.S.C. Sec.701, SUSAN R. LIMOR is appointed interim Trustee in the above-referenced matter and is hereby designated to preside at the meeting of creditors. Pursuant to Bankruptcy Rule 2008, the Trustee will be deemed to have accepted this appointment unless it is rejected within five (5) days of receipt of this notice. The Trustee's required bond is included under the approved existing general blanket bond. The United States Trustee shall be notified immediately in the event liquid assets exceed $720,000.

Unless creditors at the first meeting of creditors held pursuant to 11 U.S.C. Sec 341(a) elect another trustee, the Interim Trustee shall serve as Trustee without further appointment or qualification under the same bond.

Dated: 06/19/03

Richard Clippard
United States Trustee, Region 8
318 Customs House, 701 Broadway
Nashville TN 37203
615-736-2254

UNITED STATES BANKRUPTCY COURT SEAL

Attest:
A True Copy
Certified this 6-8-04
U.S. Bankruptcy Court
By V. Counts
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

RECEIVED FOR ENTRY

FEB 20 2004

BY Sharon Howard

UNITED STATES BANKRUPTCY COURT SEAL

In Re:

RANDY JOE MOSLEY
Debtor.

Case No. 03-08045
Chapter 7
Honorable George C. Paine, II

SUSAN R. LIMOR, TRUSTEE
Plaintiff,

v.

Adversary No: 303-0485A

COUNTRYWIDE HOME LOANS, and
RANDY JOE MOSLEY,
Defendants.

Attest:
A True Copy
Certified this
6-8-04
By U.S. Bankruptcy Court
V. Comte
Deputy Clerk

MEMORANDUM & ORDER

This matter is before the court on the cross motions for summary judgment filed by Susan R. Limor, Trustee (hereinafter "Trustee") and Countrywide Home Loans (hereinafter "Countrywide"). The trustee seeks summary judgment on her preferential claim against Countrywide pursuant to 11 U.S.C. § 547(b) based on untimely perfection by Countrywide with respect to the debtor's home mortgage. Countrywide seeks a determination that no preference occurred because its' perfection was timely, and even if perfection was within the preference period, the perfection of its interest on the home mortgage did not have a "preferential effect" as is required by 11 U.S.C. § 547(b). For the reasons explained more fully herein, the court GRANTS the trustee's motion for summary judgment and DENIES Countrywide's motion for summary judgment.

The parties stipulated to the following:

1. Randy Joe Mosley ("Debtor") filed a voluntary petition under Chapter 7 of Title 11 of the United States Code on June 18, 2003 (the "Petition Date") in the Bankruptcy Court for the Middle District

20

of Tennessee.

2. Trustee was duly appointed as Chapter 7 Trustee for the Debtor's estate and is currently serving in that capacity.

3. On April 9, 2003, the Debtor executed and delivered a Note and Deed of Trust conveying the property located at 313 East Marathon Road, Madison, Tennessee 37115 (the "Property") to American Title Company, Inc,, trustee for the benefit of United Financial Mortgage Corp. ("UFMC").

4. The Deed of Trust was recorded in the Register's Office for Davidson County, Tennessee on May 31, 2003 as instrument number 20030531-0073740. The Deed of Trust was recorded within ninety (90) days prior to the commencement of this case.

5. Countrywide is successor in interest to and the current beneficiary of the Deed of Trust and holder of the indebtedness secured thereby by assignment of the Deed of Trust. The amount of indebtedness Debtor owed to Countrywide as of the Petition Date was $127,679.56.

6. The loan proceeds from UFMC were used in part to satisfy certain indebtedness owed by Debtor in the amount of $101,042.59, which was secured by a deed of trust on the Property, of record as instrument number 20021105-0135623 in the Register's Office for Davidson County (the "Prior Deed").

7. UFMC and/or Countrywide disbursed funds pursuant to the Settlement Statement.

8. The Prior Deed was released on July 1, 2003, as evidenced by that Tennessee Release Deed of record as instrument number 20030707-0090826, in the Register's Office for Davidson County.

9. The Debtor and his former wife acquired the Property by Deed from Herschel Henry Harrison, Jr. et ux, Shirley Harrison, recorded June 11, 1985 in Book 6577, Page 801, Register's Office for Davidson County, Tennessee, The Debtor acquired his former wife's interest in the Property on April 1, 2002, by Court Order in Docket N. 01D-1288, Fourth Circuit Court for Davidson County, Tennessee.

10. The value for the Property listed by the Debtor on his Statements and Schedules is $128,000.00.

11. All exhibits attached [to the Stipulation] are deemed to be true and accurate copies of the originals.

The trustee argues that the Deed of Trust is avoidable pursuant to 11 U.S.C. § 547(b) because the Countrywide Deed of Trust was not recorded, and therefore Countrywide did not perfect its interest in the property, until May 31, 2003, more than ten days after the execution of the Note and within ninety days of the bankruptcy filing. Countrywide

contends when it paid the indebtedness secured by the prior Deed of Trust, Countrywide was subrogated to the first priority lien position and was therefore, at all times properly perfected.

Bankruptcy Rule 7056 states that Federal Rule of Civil Procedure 56, governing summary judgments, applies in adversary proceedings, Rule 56 provides as follows:

> The summary judgment sought shall be rendered forthwith 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.

FED.R.CIV.P. 56(c) (1993). Rule 56(c) sets forth a two-pronged test: (1) whether there is a genuine issue of material fact for trial; and (2) whether the law entitles the moving party to a judgment in the absence of a genuine dispute of a material fact.

The moving party always bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings and/or discovery materials which demonstrate that there is no genuine disputed issue of material fact. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party meets that initial burden, the burden is shifted to the nonmoving party to go beyond the pleadings, and by her own affidavits, depositions, answers to interrogatories, and admissions designate specific facts showing that a genuine issue of fact does remain for trial. ***Id.*** at 324.

The court finds that no material facts are in dispute, and must therefore only decide if either party is entitled to a judgment as a matter of law.

Countrywide argues that under 547(e)(1)(A), a transfer of an interest in real property is perfected when a bona fide purchaser of the real property from the debtor

could not acquire an interest superior to that of the transferee. Countrywide points out that courts look to state law to determine if the requirements of § 547(e)(1)(A) are met. Countrywide relies, at least in part, upon an unreported Tennessee Court Appellate decision to argue that it was equitably subrogated to Fidelity's first position because the money it loaned to the debtor was used to pay Fidelity. ***See Associates Home Equity Servs., Inc. v. Franklin National Bank***, 2002 WL 459007 (Tenn. Ct. App., Mar. 26, 2002). In ***Associates***, the Tennessee Court of Appeals held that in the context of a mortgage refinancing, when a lender advances money for the purpose of discharging a prior encumbrance and the lender's money is so used, the lender is subrogated to, and becomes the owner of, the prior encumbrance.

The trustee, on the other hand, contends that all elements of a preference have been met. Under § 547(b), the trustee may avoid a transfer if:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made -
>
> > (A) on or within 90 days before the date of the filing of the petition; or
> > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if -
>
> > (A) the case were a case under chapter 7 of this title;
> > (B) the transfer had not been made; and
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). A transfer occurs pursuant to 11 U.S.C. § 547(e)(2):

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfect at, or within ten days after, such time, except as provided in subsection (c)(3)(B).

11 U.S.C. § 547(e)(2). The trustee argues that because Countrywide did not record its Deed until 42 days after the debtor executed the Deed of Trust, and only19 days prior to the bankruptcy filing, a preference did occur. Equitable subrogation, according to the trustee, cannot save Countrywide's delay in timely recording its deed of trust.

The subrogation Countrywide seeks is an equitable remedy that is often applied to cases in law. Generally, liens are given priority based on the order in which they are recorded; liens recorded first typically have priority over those recorded at a later date. ***See*** T.C.A. § 66-26-105 (1993). Subrogation is the substitution of a party in the place of a creditor, so that the party in whose favor subrogation is exercised succeeds to the rights of the creditor in relation to the debt. ***Castleman Constr. Co. v. Pennington***, 432 S.W.2d 669, 674 (Tenn. 1968). Subrogation is a creature of equity; its purpose is to provide an equitable adjustment between the parties, based on the facts and circumstances of the case. ***Id***. at 675; ***Lawyers Title Ins. Corp. v. United American Bank***, 21 F. Supp.2d 785, 792 n .2 (W.D. Tenn. 1998). It is not a right, but a remedy whose application depends on a balancing of the equities involved. ***See Lawyer's Title***, 21 F. Supp.2d at 792; ***Castleman Constr.,*** 432 S .W.2d at 676. Subrogation is not appropriate where the equities of the parties are equal, where the parties' rights are not clear, or where it would prejudice the legal or equitable rights of another. ***Lawyer's Title***, 21 F.Supp.2d at 792. Relevant to this balancing of equities is the degree of negligence of the party seeking subrogation. ***Id***. While ordinary negligence or mistake alone is usually not a bar to subrogation, especially where the equities weigh in the favor of the party seeking subrogation, culpable negligence will generally bar such a remedy. ***See Dixon v. Morgan***, 285 S.W. 558, 562 (Tenn. 1926).

Countrywide is asking this court to exercise its equitable powers to excuse Countrywide's failure to perfect within the ten day lookback, and/or to excuse the perfection of its interest within the preference period. The court finds no basis to do so.[1] The court finds, as other bankruptcy courts have on similar facts, that equitable subrogation is not a defense to the trustee's preference action. ***See In re Lewis***, 270 B.R. 215 (Bankr. W.D. Mich. 2001) (residential refinancing lender invoked doctrine of equitable subrogation as a defense to trustee's preference action and court found failure to perfect within 20 day lookback was avoidable preference); ***In re Shreeves***, 272 B.R. 614 (Bankr. N.D. W.Va. 2001) (lender who refinanced prior vehicle loan could not utilize doctrine of equitable subrogation to step into shoe of the original lender); ***In re Brown***, 226 B.R. 39 (Bankr. W.D. Mo, 1998) (creditor was not entitled to be equitably subrogated to PMSI holder's previously perfected position when creditor refinanced mobile home loan).

Absent any fraud, misrepresentation or other compelling circumstance, the court cannot allow Countrywide to successfully defend against a preference action based upon its own failure to timely perfect. Countrywide and/or its predecessors voluntarily refinanced this loan, and lack of diligence in timely recording the Deed of Trust requires Countrywide to bear the responsibility for the status of its unperfected lien, not the creditors of this estate. ***See Lewis***, 270 B.R. at 217.

Countrywide argues that even if it was not equitably subrogated to the Fidelity Deed of Trust, no preference occurred because the recordation of its' Deed of Trust and

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[1]Although the court looks to state law to determine when 547(e) has been satisfied, the unreported decision of the Tennessee appellate court is not binding precedent. Instead, the court relies upon other decisions, also admittedly only persuasive, and concludes that equitable subrogation does not save a creditor's failure to timely perfect its interest.

the subsequent release of the Fidelity Deed of Trust had "no preferential effect." Countrywide cursorily argues that the alleged preference did not diminish the bankruptcy estate and/or that the new value preference exception expressly includes a "release" of an interest in property.

The court rejects Countrywide's "preferential effect" argument because the effect of the transfer clearly preferred Countrywide to other creditors. But for the new security interest, Countrywide would have been an unsecured creditor in this chapter 7 case. Perfection of the lien certainly enabled Countrywide to realize a greater share of the chapter 7 estate assets. ***See In re Biggers,*** 249 B.R. 873, 877 (Bankr. M.D. Tenn. 2000).

Countrywide argues, however, based in part on the ***Biggers*** decision, that the debtor's estate was not diminished or impaired by the substitution of its lien for the prior lien of Fidelity. In ***Biggers***, Judge Lundin found that a transaction involving collateral substitution or renewal of a lien by the same creditor did not have a preferential effect:

> At no time during the preference period could any creditor have prevailed over the interest held by CCC. The pickup was fully encumbered with no value available for the benefit of the estate. The refinancing lien lacked preferential effect for § 547 purposes. Another way to describe this case is that CCC documented the refinancing of the debtor's pickup in a manner that created the technical elements of a preference, but without preferential effect. Taking a wholly new security interest and perfecting a new lien were transfers for § 547(b) purposes. Releasing the prior lien enables the trustee to win the greater percentage test argument. Perfecting the refinancing lien more than 10 days after the rest of the transaction defeats use of the contemporaneous exchange defense in § 547(c)(1). ***Arnett***, 731 F.2d at 363; ***Bavely v. Petrewsky (In re Petrewsky)***, 147 B.R. 27 (Bankr. S.D. Ohio 1992); ***Bank One, Dayton, N.A. v. Bavely (In re Phillips)***, 103 B.R. 893, 895 (Bankr. S.D. Ohio 1989). But the trustee has no answer to CCC's argument that this "preference" did not diminish the expectations of other creditors under the Bankruptcy Code.

Biggers, B.R. at 878-79. The Sixth Circuit, has cited ***Biggers***, favorably in an unreported decision. The Sixth Circuit found that a bank's refinancing of its own prior

mortgage did not give the bank any greater security interest than it had before, and thus it did not diminish the bankruptcy estate. Absent such diminution, the court found that the transfer had no preferential effect. ***In re Lowe,*** 2003 WL 23172045, (6th Cir. Dec. 22, 2003).

This case is readily distinguishable. But for the recording of the deed on May 31, 2003, any creditor have could prevailed over the interest held by Countrywide. Although a creditor's interest arguably would have been junior to Fidelity's until the prior deed was released, the same is not true for Countrywide. Countrywide cannot use Fidelity's first position lien to argue that the untimely recording of its lien lacked preferential effect.[2]

Accordingly, the court finds that ***Biggers*** is distinguishable, and that the recording of Countrywide's lien during the preference period did in fact have a preferential effect.

Countrywide's final argument is that the new value preference exception expressly includes a "release" of an interest in property under § 547(a)(2). Perfecting the refinancing lien more than 10 days after the rest of the transaction defeats use of the contemporaneous exchange defense in § 547(c)(1). ***In re Biggers,*** 249 B.R. 873, 877 (Bankr. M.D. Tenn. 2000); ***In re Arnett***, 731 F.2d 358, 363 (6th Cir. 1984); ***In re Lopez***, 265 B.R. 570, 572 (Bankr. N.D. Ohio 2001); ***Bavely v. Petrewsky (In re Petrewsky)***,147 B.R. 27 (Bankr. S.D. Ohio 1992)***; Bank One, Dayton, N.A. v.***

---

[2]Furthermore, the $101,042.59 paid at closing to Fidelity to pay off the prior mortgage holder is apparently less than the value of the property. The debtor valued the property at $128,000.00 in his Statements and Schedules. To the extent that Countrywide became a second lienholder by the May 31, 2003 recording, Countrywide improved its position from unsecured to at least a second lienholder.

Bavely (In re Phillips), 103 B.R. 893, 895 (Bankr. S.D. Ohio 1989). The court finds that the failure of Countrywide to timely perfect during the lookback period precludes use of the contemporaneous exchange defense.

Based upon the foregoing, the court finds that no material facts remain in dispute and that the trustee is entitled to a judgment as a matter of law. The court, therefore, GRANTS the trustee's motion for summary judgment and DENIES Countrywide's cross-motion for summary judgment.

It is, THEREFORE, so ordered.
This ____ day of February, 2004.

FEB 20 2004

George C. Paine, II
Chief Judge
United States Bankruptcy Court

A copy of this order shall be mailed in accordance with *Fed. R. Bankr. P.* 2002, LBR 9013-1 and 9013-3 by:

[ ] Debtor or Dr's Atty [ ] Atty for Movant
[ ] Trustee or Tr's Atty [ ] _____

[✓] Clerk's Office only:

[ ] Chief Deputy [ ] Debtor and Dr's Atty
[ ] Financial Clerk [ ] Trustee &/or Tr's Atty
[ ] Judgment Book [ ] Movant &/or Mvt's Atty
[ ] Adversary Case [ ] All parties to agreed order
[ ] UST [ ] All parties in cert of svc
[✓] Judge Paine [ ] All creditors

RECEIVED
FOR ENTRY
2004 MAR 10 AM 7:22
U.S. BANKRUPTCY COURT
MIDDLE DISTRICT OF TN.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE



In Re:

RANDY JOE MOSLEY
Debtor.

Case No. 03-08045
Chapter 7
Honorable George C. Paine, II

SUSAN R. LIMOR, TRUSTEE
Plaintiff,

v.

Adversary No: 303-0485A

COUNTRYWIDE HOME LOANS, and RANDY JOE MOSLEY,
Defendants.

Attest:
A True Copy
Certified this 6-8-04
U.S. Bankruptcy Court
By V. Counts
Deputy Clerk

ORDER

This matter is before the court on Countrywide Home Loan's Motion to Amend the court's February 20, 2004 order. Specifically, Countrywide discovered an unpublished and unlisted in Westlaw and Lexis United States District Court opinion that supports its position, and furthermore, Countrywide suggests the court erred in failing to follow the unpublished decision of the Tennessee Court of Appeal in ***Associates Home Equity Servs. Inc. v. Franklin National Bank***, 2002 WL 459007 (Tenn. Ct. App.) ***app. perm. appeal denied*** (2002). For the reasons hereinafter cited, the court DENIES Countrywide's motion except as specifically limited herein.

Countrywide argues that the court was bound to follow the ***Associates*** decision as binding precedent because the Sixth Circuit has held that a federal court:

> may not disregard the decisions of a state appellate court unless [the court is] convinced by other authority that the Tennessee Supreme Court would decide otherwise, irrespective of whether a state appellate decision is published or unpublished.

Talley v. State Farm Fire & Casualty Co., 223 F.2d 323, 328 (6th Cir. 2000). The

court agrees that it is bound to follow the ***Associates*** decision, but it is not bound to do so if it is convinced by other authority that the Tennessee Supreme Court would decide against equitable subrogation. The court is persuaded that the Tennessee Supreme Court would decide otherwise based on the reported Tennessee Court Appellate decision in ***Bankers Trust Co. v. Collins***, 124 S.W.3d 576 (2003) ***app. perm. appeal denied*** (2003), ***pet. rehear denied*** (2004). In ***Collins***, the debtors took out a loan with Advanta Mortgage Corporation in February of 1999. The proceeds of that loan were used to pay off an existing mortgage held by Sterling Bank & Trust. Advanta failed to record its deeds and notes. In April of 1999, the debtors obtained a loan from Commercial Credit. Commercial Credit agreed to payoff the Advanta indebtedness, but although a payoff was attempted, it was not successful. Commercial recorded its interest in April of 1999. Sterling released its lien in June of 1999. The debtors fell behind in their payments; Commercial Credit commenced foreclosure and the property was sold to a third party bona fide purchaser.

Banker's Trust filed a declaratory judgment action requesting equitable subrogation to Sterling's interest. The court held that subrogation is an equitable remedy, not a right, and that a party is only entitled to subrogation where the equity is strong and the case clear. Where the equities are in equipose, no subrogation should be allowed. ***Id***. at 579. The Advanta loan was made specifically to refinance the Sterling mortgage, but the court found Advanta was not entitled to Sterling's rights, to the extent they existed, to protect Advanta's failure to record its own deed. ***Id.*** Advanta failed to record its deed for over a year, and even upon becoming aware of Commercial Credit's involvement with the same collateral, Advanta still did not perfect its interest. The court found equitable subrogation was not applicable.

Similarly, in the present case, Countrywide did not timely record its interest and

now seeks protection despite its own failure to act within the statutory grace period to perfect its interest. As the court stated in its earlier opinion, the court is unwilling to exercise equitable powers to excuse Countrywide's failure to timely perfect. ***Collins*** holds that "[where] [t]he equities weigh in the defendant's favor[,] [o]r, at a minimum the equities are at least in equipose, [ ] no equitable subrogation [is allowed]." ***Collins***, 124 S.W.3d at 579. Because the rationale to employ equitable subrogation is to prevent unjust enrichment, allowing equitable subrogation of Countrywide's interest would be to unjustly reward Countrywide for its lack of diligence in timely recording its security interest. ***See Collins***, 124 S.W.3d at 580.

The court therefore finds that it is not bound by the unpublished decision of the Tennessee Court of Appeals in ***Associates*** decision because the court is convinced by other authority (***Collins***) that the Tennessee Supreme Court would find equitable subrogation inappropriate in this case. ***See Talley***, 223 F.2d at 328.[1] The court therefore grants Countrywide's motion to alter or amend as it relates to footnote one in the February 20, 2004 Order, but this technical correction does not otherwise change the effectiveness of that Order.

Countrywide also seeks to alter or amend the February 20, 2004 Order based on the United States District Court for the Middle District of Tennessee's unpublished

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[1]The court agrees with Countrywide the phraseology in footnote 1 implies that the ***Associates*** is not a binding decision even if no other precedent existed on this issue. The court therefore, amends footnote 1 to read:

> Although the court looks to state law to determine when 547(e) has been satisfied, the ureported decision of the Tennessee appellate court is not binding precedent in light of the published opinion of the Tennessee appellate courts in ***Bankers Trust Co. v. Collins***, 124 S.W.3d 576 (2003) ***app. perm. appeal denied*** (2003), ***pet. rehear denied*** (2004). The court therefore relies upon ***Collins*** and other decisions, also admittedly only persuasive, and concludes that equitable subrogation does not save a creditor's failure to timely perfect its interest.

decision in ***The Chase Manhattan Bank v. Heritage Bank et. al.***, Case No. 3:00-0557 (M.D. Tenn. 2002) (unpublished and not available on Westlaw and/or Lexis). In that case, the debtors loaned money from Heritage Bank in 1992 and gave a first mortgage on their residence. In 1997, the debtors took out a second mortgage with Heritage. In 1998, the debtor applied for a third mortgage with Commonpoint Mortgage Company in order to refinance the 1992 mortgage with Heritage. Commonpoint hired a title company, and the title company missed the 1997 mortgage during the search, and reported only the existence of the 1992 mortgage. The debtor failed to reveal the mortgage in his affidavit stating no other liens existed on the property.

At closing, Commonpoint paid off the 1992 mortgage, and the 1997 deed of trust became the first lien on the property. Commonpoint timely recorded its interest believing it held the first position. The debtor defaulted on the 1997 loan, and Heritage scheduled a foreclosure sale, at which time Chase, the assignee of Commonpoint, became aware of 1992 lien. The property was sold at foreclosure to Heritage by agreement of Heritage and Chase to Heritage and the proceeds were deposited into the court's escrow. The issue for the district court was whether Chase was entitled to equitable subrogation.

The district court, relying on ***Associates***, found equitable subrogation was appropriate. This court finds the district court's decision easily distinguishable upon the facts. In that case, through no fault of Commonpoint/Chase, they ended up in the second priority position. Commonpoint/Chase timely perfected its interest and all the facts indicated that the equities favored equitable subrogation. Commonpoint/Chase was rewarded for its diligence and equitable subrogation was appropriate because neither the debtor nor the title search revealed the 1997 deed of trust.

The court finds that the present case is not ideally suited to apply an equitable remedy. Instead, the court finds the ***Collins*** case more consistent with the facts of this case and ***Associates*** and ***Chase Manhattan*** cases distinguishable. The court therefore DENIES Countrywide's motion to alter or amend except as provided herein.

It is, THEREFORE, so ordered.

This ____ day of March, 2004.

MAR 0 9 2004

George C. Paine, II
Chief Judge
United States Bankruptcy Court

A copy of this order shall be mailed in accordance with *Fed. R. Bankr. P.* 2002, LBR 9013-1 and 9013-3 by:

[ ] Debtor or Dr's Atty
[ ] Trustee or Tr's Atty
[ ] Atty for Movant
[ ] _____

[ ] Clerk's Office only:
[ ] Chief Deputy
[ ] Financial Clerk
[ ] Judgment Book
[ ] Adversary Case
[ ] UST
[ ] Debtor and Dr's Atty RTJohnson
[ ] Trustee &/or Tr's Atty Linos
[ ] Movant &/or Mvt's Atty
[ ] All parties to agreed order Jones, Roger
[ ] All parties in cert of svc
[ ] All creditors

Judge Paine

5-U.S. Bankruptcy Court, M.D. Tenn.

RECEIVED
FOR ENTRY

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE 2004 MAY 20 PM 2:4

MIDDLE DISTRICT OF TN

IN RE:	)	
	)	
RANDY JOE MOSLEY,	)	CASE NO. 303-08045-GP3-7
	)	
Debtor.	)	

UNITED STATES BANKRUPTCY COURT SEAL

ORDER TO SELL PROPERTY

The Trustee having filed with the Court a Motion to Sell Property, notice of the Motion to Sell Property being provided to the parties to which notice is required pursuant to Bankruptcy Rule 9013-1 of the Rules of this Court, and no objection to this Motion having been presented;

IT IS HEREBY ORDERED that the Trustee is authorized to sell the real property located at 313 East Marthona Road, Madison, Tennessee 37115 under the terms and conditions set forth in the Trustee's Motion to Sell Property previously filed with this Court.

ENTERED this _____ day of _____, 2004.

George C Paine II

GEORGE C. PAINE, II
United States Bankruptcy Judge

Attest:
A True Copy
Certified this 6-8-04
U.S. Bankruptcy Court
By V. Counts
Deputy Clerk

Submitted for Entry:

Susan R. Limor
Chapter 7 Trustee
2814 Dogwood Place
Nashville, Tennessee 37204
(615) 742-1304

A copy of this order shall be mailed in accordance with *Fed. R. Bankr. P.* 2002, LBR 9013-1 and 9013-5 by:

[ ] Debtor or Dr's Atty [ ] Atty for Movant
[ ] Trustee or Tr's Atty [ ] _____

[ ] Clerk's Office only:
[ ] Chief Deputy [ ] Debtor and Dr's Atty
[ ] Financial Clerk [ ] Trustee and Tr's Atty
[ ] Case Management Clerk [ ] Movant and Mov Att'y Atty
[ ] Asset Bankruptcy Clerk [ ] All parties to agreed order
[ ] USTA [ ] All parties in cert of svc
[ ] _____ [ ] All creditors

Re 13

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