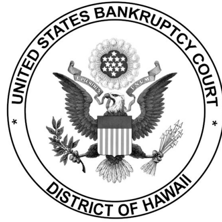
Date Signed:
January 16, 2014



SO ORDERED.

Robert J. Faris
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re KATHLEEN MARGARET AIWOHI, Debtor.	Case No. 12–01950 Chapter 13
KATHLEEN MARGARET AIWOHI, Plaintiff, vs. BANK OF AMERICA, N.A., et al., Defendants.	Adv. Pro. No. 13-90038 Re: Docket No. 25

TENTATIVE RULING ON MOTION FOR SUMMARY JUDGMENT

Based on the filings, and subject to oral argument and further reflection, I am inclined to grant the debtor's motion for summary judgment.

Ms. Aiwohi borrowed money from a predecessor in interest of Bank of

America, N.A. ("BANA"). She signed a mortgage to secure the debt but the mortgage was never filed with the Land Court, so the mortgage lien is unperfected. The proceeds of the loan were used to repay a prior loan that was secured by a perfected mortgage lien.

Ms. Aiwohi relies on section 544(a)(3) which provides that:

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor . . . that is voidable by . . . a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Under the applicable Hawaii recording statute (Haw. Rev. Stat. § 501-82(a)), a purchaser of Land Court property "who takes a certificate of title for value and in good faith . . . hold[s] the same free from all encumbrances except those noted on the certificate . . . ."

Although section 544(a)(3) speaks only of the trustee's avoidance rights, I am inclined to rule that the debtor in a chapter 13 case has standing to maintain lien avoidance actions, at least where avoidance will benefit unsecured creditors. I find *Houston v. Eiler (In re Cohen)*, 305 B.R. 886 (B.A.P. 9th Cir. 2004), persuasive.

BANA argues that *Cohen* does not apply because avoidance will not benefit

anyone other than the debtor. I am inclined to disagree with both the premise and conclusion. Under chapters 7 and 11, trustees (including debtors in possession) can maintain avoidance action even if only equity holders or the individual debtor would benefit. I see no reason why chapter 13 should be different. Further, this avoidance will benefit creditors. Ms. Aiwohi's confirmed plan is premised on the avoidance of BANA's lien. This increases the potential distribution to unsecured creditors in two ways: first, because eliminating a secured debt payment to BANA increases the disposable income available for unsecured creditors; and second, because avoiding the lien creates equity in the home which increases the minimum payment to unsecured creditors required by the so-called "best interests" test of section 1325(a)(4).

BANA argues that Ms. Aiwohi is not a bona fide purchaser under the applicable Hawaii recording statute. BANA points out that the Land Court issued the current certificate of title when Ms. Aiwohi conveyed the property to herself and her son, Kawainui Lagunte, as joint tenants. BANA's argument is correct under state law but inapplicable under section 544(a)(3). Under that section, the trustee (or, as in this case, the debtor acting for the benefit of the state) has the rights and powers of a hypothetical bona fide purchaser, regardless of any notice to or knowledge of the debtor or the trustee. *Chase Manhattan Bank USA, N.A., v.*

Taxel (In re Deuel), 594 F.3d 1073, 1077 (9th Cir. 2010) ("we are talking about a metaphysical and not a real person."). (Ms. Aiwohi's son is not entitled to the benefit of section 544(a)(3), so my decision would not affect BANA's claims against his half interest in the property.)

BANA argues that it is entitled to a lien on the property under the equitable lien and equitable subrogation theories. I am inclined to disagree, for the reasons given in *Deuel*, 594 F.3d at 1079-80. If this were a dispute between only the debtor and BANA, equity might intervene to relieve BANA of its predecessor's mistake. But this case involves the interests of third parties – Ms. Aiwohi's other innocent creditors – and there is no equity in giving priority to one victim over others.