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Post-petition Assignments

Recently, more and more debtors and their attorneys have been arguing that the post-petition assignment of a mortgage represents a violation of the automatic stay pursuant to Section 362(a) of the U.S. Bankruptcy Code (herein, "the Code") and/or a post-petition transfer of the estate pursuant to Section 549 of the Code. Fortunately, several cases help point out that these arguments lack merit.

In *In re Samuels*,[1] the U.S. Bankruptcy Court for the District of Massachusetts stated the rule quite simply:

> The postpetition assignment of a mortgage and the related note from one holder to another is not a transfer of property the estate. The mortgage and note are assets of the creditor mortgagee, not of the debtor. Nor is the postpetition assignment of a mortgage and the related note an act to collect a debt; the assignment merely transfers the claim from one entity to another.[2]

Not only did the debtor in *Samuels* fail to cite any particular subsection of Section 362(a) that such an assignment violates, the court said it was "aware of none."[3] Other courts are in agreement.[4]

In *In re Patton*,[5] U.S. Bankruptcy Judge Robert Berger held that an assignee of mortgage on a debtors' homestead took no action to create, perfect, or enforce its perfected lien against property of the estate or of the debtor, and therefore did not violate the automatic stay. The mortgage in *Patton* had been properly perfected under Kansas law prepetition, and its subsequent assignment did not change the nature of the creditor's interest in the homestead. Furthermore, the creditor had not sought to record either assignment of the mortgage. Nevertheless, any act to record the assignment

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[1] 415 B.R. 8 (Bankr. D. Mass. 2009)(Bailey, J.).

[2] *Id.,* at 22.

[3] *Id.*

[4] *See, e.g., In re Cook*, 457 F.3d 561, 567 (6th Cir. 2006)(Assignee's recording of the assignment of the mortgage interest to it after mortgagors filed bankruptcy petition did not violate automatic stay; assignee did not transfer or attempt to perfect legal title to the mortgagors' property, but recorded only the bank's equitable interest in the property, which did not belong to the mortgagors).

[5] 314 B.R. 826 (Bankr. D. Kan. 2004)(Berger, J.).

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of a previously perfected mortgage in Kansas would likely have been ministerial in nature and would not have been stayed.[6]

The Eleventh Circuit Court of Appeals explained more than ten years ago that the trustee succeeds only to those rights as the debtor possessed, and the trustee is subject to all claims and defenses that might have been asserted against the debtor but for the filing of the petition.[7] In other words, the bankruptcy estate enjoys the same rights that the debtor held immediately before the filing of the bankruptcy case.[8] Therefore, the post-petition assignment of a mortgage perfected prior to the filing of the bankruptcy case does not involve a "transfer of the property of the debtor" that would trigger a trustee's strong-arm powers pursuant to Section 544 of the Code.[9] Similarly, the post-petition assignment of a mortgage perfected prior to the filing of the bankruptcy case does not involve a transfer of property of the estate. Thus, Section 549 of the Code is unavailable to a trustee.[10]

It seems only appropriate to conclude this article by quoting U.S. Bankruptcy Judge Arthur Federman, who said in June, 2010: "there is no rule prohibiting a postpetition assignment of a claim to another party."[11]

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[6] *Id.,* at 834. Accord 3 Collier on Bankruptcy ¶ 362.03[8][a] (15th ed.2002) (citing *Morgan Guaranty Trust Co. of New York v. American Sav. & Loan Ass'n*, 804 F.2d 1487 (9th Cir.1986), *cert. denied*, 482 U.S. 929, 107 S.Ct. 3214, 96 L.Ed.2d 701 (1987)).

[7] *Kapila v. Atlanta Mortgage & Investment Corp. (In re Halabi)*, 184 F.3d 1335, 1337 (11th Cir. 1999)(*citing Bank of Marin v. England*, 385 U.S. 99, 101, 87 S. Ct. 274 (1966)).

[8] *Id.*, *citing In re Kemp*, 52 F.3d 546, 553 (5th Cir. 1995).

[9] *Id.*, at 1337.

[10] *Id.*

[11] *In re Box,* 2010 WL 2228289, * 5 (Bankr. W.D. Mo. 2010)(Federman, J.).