SO ORDERED.

SIGNED this 05 day of December, 2005.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
JORGE COLON, JR. and	)	
ANTOINETTE VALENTINA ORTIZ-COLON	)	**Case No. 04-42174**
	)	**Chapter 13**
Debtors.	)	
	)	
JAN HAMILTON, as Chapter 13 Trustee	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 05-7032**
	)	
WASHINGTON MUTUAL BANK, FA.	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER
DENYING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant Washington Mutual Bank's Motion for Summary Judgment.[1] The parties have fully briefed this matter, and the Court is now prepared to rule. This matter constitutes a core proceeding,[2] and the Court has jurisdiction to decide it.[3]

I. FINDINGS OF FACT

This is an action by the Trustee to avoid the mortgage lien of Defendant Washington Mutual Bank (Washington Mutual) on the Debtors' home and to preserve the lien for the benefit of the estate.[4] The Debtors in this Chapter 13 bankruptcy proceeding purchased a home in Shawnee County, Kansas before May 2001, and executed a mortgage at that time. It apparently contained the correct legal description and was properly recorded with the Register of Deeds. Debtors then refinanced that mortgage in 2003 and gave a mortgage to Thaylor, Bean & Whitaker Mortgage Corp. That mortgage was later assigned to Defendant Washington Mutual. The mortgage that was the result of the refinancing was recorded with the Shawnee County Register of Deeds on April 14, 2003.

That mortgage describes the property in question as "LOT 29, ARROWHEAD HEIGHTS SUBDIVISION NO. 5, IN THE CITY OF TOPEKA, SHAWNEE COUNTY KANSAS. Parcel ID Number: 145-15-0-40-04-003-000 which currently has the address of 3317 SW MOUNDVIEW DR. Topeka, Kansas 66614." The only error in the description is in the lot number; the correct lot number for the property is Lot 79, not Lot 29. The street address is correct, and if one were to search the county's

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[1]Doc. 8.

[2]28 U.S.C. § 157(b)(2)(K).

[3]28 U.S.C. § 1334.

[4]Doc. 1, Complaint, ¶ 12.

tax records (which are not contained within the Office of the Register of Deeds), the Parcel ID number[5] reflected in the mortgage refers to Lot 79 of Arrowhead Heights Subdivision No. 5, at the same street address.

In a section in the Trustee's Response entitled "Further Uncontroverted Facts,"[6] the Trustee asserts as his fact number 3 that the mortgage was recorded under Lot 29, and was not recorded under Lot 79. Washington Mutual does not controvert that fact, but instead merely admits that the mortgage incorrectly refers to Lot 29. The Court believes that Washington Mutual's failure to directly controvert this statement, or to otherwise argue that it was not properly supported as required by Rule 7056(c) of the Rules of Bankruptcy Procedure, renders this an admission by Washington Mutual that the mortgage was recorded under Lot 29 and not under Lot 79. This Court's own local rule, D. Kan. LBR 7056.1(b), supports such a conclusion because it provides that "[a]ll material facts set forth in the statement of the movant will be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party." This Court thus finds that the mortgage was recorded in the title records for Lot 29, instead of Lot 79. The mortgage was properly cross- indexed in the grantor index under the Debtors' correct name.

Debtors filed their Chapter 13 petition on August 11, 2004 and claimed this real property as their homestead. Pursuant to language contained in their plan authorizing this cause of action, which plan was

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[5]The term "Parcel ID" is synonymous with "Tax Id," and is merely an identification number given to each tract of real estate for real estate taxation purposes. *See* Defendant's Exhibit 3, Page 7 of 7 (Schedule "A"). A review of Kansas recordation statutes indicate that mortgages are not recorded in the Office of the Register of Deeds by Parcel ID/Tax ID numbers. Instead, they are indexed by grantor/grantee and by legal description. *See generally* K.S.A. 19-1205 and 19-1206.

[6]Doc. 12.

confirmed on December 2, 2004 without objection by Washington Mutual, the Trustee initiated this adversary proceeding seeking to use his strong arm powers under 11 U.S.C. § 544[7] to avoid the lien against Debtors' homestead for the benefit of the bankruptcy estate. This Court has already ruled that the Trustee has standing to bring this action,[8] but reserved ruling on the remainder of Washington Mutual's summary judgment motion pending additional briefing on the substantive issues.

Additional facts will be discussed below, when necessary.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law."[9] In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[10] An issue is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way."[11] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[12]

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[7]All statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (2004), unless otherwise specified.

[8]See Doc. 15.

[9]Fed. R. Civ. P. 56(c). Fed. R. Civ. P. 56(c) is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056.

[10]*Lifewise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004); *Loper v. Loper (In re Loper)*, 329 B.R. 704, 706 (10th Cir. BAP 2005).

[11]*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[12]*Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[13] In attempting to meet that standard, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[14]

If the movant carries this initial burden, the nonmovant who would bear the burden of persuasion at trial may not simply rest upon his pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.[15] To accomplish this, sufficient evidence pertinent to the material issue "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[16] Finally, the Court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[17]

III. ANALYSIS

The Trustee is attempting to avoid the mortgage on Debtors' homestead pursuant to § 544(a), which allows trustees to avoid interests in real property that are unperfected on the date of filing. The

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[13] *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[14] *Id.* (citing *Celotex*, 477 U.S. at 325).

[15] *Id.* (citing Fed. R. Civ. P. 56(e)).

[16] *Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002).

[17] *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

purpose of this statute is to ensure the goal of equal distribution of a debtor's assets among its general nonpriority creditors. The Trustee contends that because the mortgage misidentified the lot number, the mortgage is unperfected and he can avoid the mortgage as either a hypothetical lien creditor under § 544(a)(1) or as a bona fide purchaser under § 544(a)(3).

A. The Trustee qualifies as a bona fide purchaser under § 544(a)(3).

Under 11 U.S.C. § 544(a)(3), the trustee has the rights of a bona fide purchaser of real property. State law governs who may be a bona fide purchaser and the rights of such a purchaser pursuant to § 544(a)(3). Pursuant to that subsection, the trustee may avoid any transfer of the debtor's property 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."[18] In other words, a trustee is deemed to have the same rights as a bona fide purchaser of real property from the debtor if, at the time of filing, a hypothetical buyer would have obtained bona fide purchaser status. Accordingly, under § 544(a)(3), the trustee can avoid any lien a bona fide purchaser could avoid. "As a hypothetical bona fide purchaser, the trustee is deemed to have conducted a title search, paid value for the property, and perfected its interest as a legal holder as of the date of commencement."[19]

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[18]11 U.S.C. § 544(a)(3).

[19]5 Collier on Bankruptcy, ¶ 544.08 (Lawrence P. King ed., 15th ed. rev. 2005).

A trustee's powers as a bona fide purchaser are given "without regard to any knowledge of the trustee or of any creditor" of the lien that is sought to be voided.[20] This qualification shields the trustee from actual knowledge of interests in real property but not from constructive notice of such interests.[21] The trustee's right as a bona fide purchaser does not, however, override state recoding statutes and permit avoidance of any interest of which the trustee would have had constructive notice under state law.[22]

Whether or not a buyer of land takes title with constructive notice of the contents of an instrument filed with the register of deeds is a question of law.[23] The purpose of statutes authorizing recordation of instruments of conveyance is to impart to subsequent purchasers notice of instruments that affect title to the specific tract of land in which the subsequent purchaser is interested.[24] The applicable state law in this instance is found in K.S.A. 58-2222, which creates and defines bona fide purchaser status and record notice. K.S.A. 58-2222 provides:

> Every such instrument [conveying real estate or an interest therein] in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thererof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.

Thus, the proper filing of a mortgage imparts notice of its contents to a subsequent purchaser.

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[20]11 U.S.C. § 544(a).

[21]*In re Harter, Inc.*, 31 B.R. 1015, 1020 (D. Kan. 1983), *citing McCannon v. Marston*, 679 F.2d 13 (3d Cir. 1982); *In re Lewis*, 19 B.R. 548 (Bankr. D. Idaho 1982); *In re Richardson*, 23 B.R. 434 (Bankr. D. Utah 1982); 5 Collier on Bankruptcy, ¶ 544.08 (Lawrence P. King ed., 15th ed. rev. 2005).

[22]*In re Harter, Inc.*, 31 B.R. at 1020; *City of Arkansas City v. Anderson*, 15 Kan. App. 2d 174, 180 (1991) (holding that "'one who has constructive notice of an outstanding title or right is not a bona fide purchaser.' ") (citations omitted).

[23]*Miller v. Alexander*, 13 Kan. App. 2d 543, 549 (1989).

[24]*Luthi v. Evans*, 223 Kan. 622, 629 (1978).

Subsequent purchasers are charged with constructive notice of the presence and contents of recorded interests in land, such as mortgages, if the interest is "sufficiently described," even when they were not a party to the conveyance.[25] Constructive notice is implied "when it consists of knowledge of facts so informing that a reasonably cautious person would be prompted to inquire further . . . ."[26] "If a possible cloud on the seller's title appears, the prospective purchaser must either clear the cloud or proceed at his own risk."[27] A buyer who has constructive notice of an outstanding title or right is not a bona fide purchaser and takes subject to the outstanding title or right.[28]

The issue is thus whether the real property was sufficiently described, notwithstanding inclusion of the incorrect lot number, to impart constructive notice to the Trustee. In other words, would or should the Trustee, in researching the records held by the Shawnee County Register of Deeds, have reasonably found this mortgage within the Office of the Register of Deeds, notwithstanding the inclusion of the incorrect lot number, and reasonably determined it to be a cloud on the title? The Trustee has established that the mortgage in question was not recorded in the Office of the Register of Deeds under the indices maintained for Lot 79. The question that remains is whether a reasonably cautious person, in reviewing the notations to the record for Lot 79, would nevertheless have been put on notice that he should inquire further.

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[25]*Id.* at 629.

[26]*Miller v. Alexander*, 13 Kan. App. 2d at 550.

[27]*Id.*

[28]*Id.* at 551.

The Kansas Supreme Court has provided instruction on the issue of constructive notice in the case of *Luthi v. Evans*.[29] In that case, the court stated:

> We have concluded that the statutes contained in K.S.A. Chapter 58 pertaining to conveyances of land and the statutes contained in Chapter 19 pertaining to recordation of instruments of conveyance constitute an overall legislative scheme or plan and should be construed together as statutes in pari materia (*City of Overland Park v. Nikias*, 209 Kan. 643, 498 P.2d 56.) It also seems obvious to us that the purpose of the statutes authorizing the recording of instruments of conveyance is to impart to a subsequent purchaser notice of instruments which affect the title to a specific tract of land in which the subsequent purchaser is interested at the time. From a reading of all of the statutory provisions together, we have concluded that the legislature intended that recorded instruments of conveyance, to impart constructive notice to a subsequent purchaser or mortgagee, should describe the land conveyed with sufficient specificity so that the specific land conveyed can be identified. As noted above, K.S.A. 58-2203 and 58-2204 require a deed to *describe the premises*. A description of the property conveyed should be considered sufficient if it identifies the property or affords the means of identification within the instrument itself **or by specific reference to other instruments recorded in the office of the register of deeds**. Such a specific description of the property conveyed is required in order to impart constructive notice to a subsequent purchaser.[30]

This language provides guidance for this Court's decision.

The Kansas Supreme Court, even before it decided *Luthi,* decided a case with fairly similar facts to ours. In *Hollinger v. Imperial Warehouse Co.*,[31] Imperial Mortgage gave a mortgage to John Ketchersid (who later assigned that mortgage to Appellant Hollinger) to secure a note. The parties mutually intended for Imperial to mortgage its interest in real property it owned in English Fifth's addition to the City of Wichita. Unfortunately, the mortgage mis-described the property as "Lot 26 in English's addition to the City of Wichita," a lot that actually existed in a neighboring subdivision. The mortgage omitted reference

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[29]223 Kan. at 629.

[30]*Id.* (Italicized words were so emphasized in the original; this Court has added the bolded language for emphasis)

[31]122 Kan. 709 (1927).

to the fact the property was actually located in another subdivision called "English's **Fifth** addition." Imperial had no ownership interest in the real property actually described in the mortgage, just like the Debtors here have no interest in Lot 29.

Imperial then deeded its interest to Ketchersid. In turn, Ketchersid deeded his interest, and through a series of transfers, co-defendants Miles became the owners of the property. Their immediate predecessors in interest had executed a mortgage to Wheeler-Kelly-Hagny, which was also a named defendant in the case. Wheeler-Kelly-Hagny had obtained an abstract of title prior to its receipt of the mortgage, and the earlier Imperial mortgage (that had been recorded in English's addition instead of English's Fifth addition) was not reflected, because it had not been recorded under Lot 26 of English's Fifth addition. Appellant Hollinger ultimately brought suit in an attempt to reform and enforce the mortgage, but Defendants Miles claimed to be bona fide purchasers, and Wheeler-Kelly-Hagny claimed to be an innocent mortgagee.

All defendants argued that the recordation of the mortgage in the records for Lot 26 in the incorrect city addition did not act to serve constructive notice upon them of the existence of that mortgage, and should not be enforced against them. Hollinger, conversely, argued that when the abstractor researched the record, the general index, in the column for legal description, should have given notice of the Imperial mortgage.

The Kansas Supreme Court first held that even had the abstractor seen the mortgage, the mortgage "would have referred to a lot in another addition to the city, and there would have been no reason why the

abstracter should have examined it further."[32] The Court further noted that neither the abstractor nor the defendants would be required to know what other property Imperial might own, convey or mortgage in the city of Wichita. In other words, the abstractor would not be expected to know whether Imperial happened to own Lot 26 in both English's addition and Lot 26 in English's Fifth addition.

Appellant further argued that the abstractor had the duty to actually review the actual recorded mortgage. The Court, although declining to hold such a duty existed, nevertheless held that even if the abstractor was required to do so, an examination of the actual mortgage would have disclosed that it was a lien on an entirely different lot in another addition than the property being examined for marketability. The Court ultimately held that nothing in the legal description index, or in the mortgage, itself, would have caused the abstracter to "suspect that the mortgage was intended to be a lien upon this lot,"[33] and "there was nothing in the mortgage as recorded to impart notice to subsequent purchasers and mortgagees" of the lot Imperial actually did own. That is because for a recorded instrument to serve as constructive notice to such a subsequent purchaser or mortgagee, that property "must be in the line of title of such property."[34] The Court thus refused to reform the mortgage against the subsequent bona fide purchaser and mortgagee who had no actual or constructive notice of the existence of the mortgage sought to be reformed.

Applying these holdings to our case, it is clear that an examination of the index kept under the legal description for Lot 79 of Arrowhead Heights subdivision would not have reflected the mortgage recorded under Lot 29 of the same subdivision. Even if a bona fide purchaser (the Trustee, here) had somehow

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[32] 122 Kan. at 713.

[33] *Id.*

[34] *Id.* at 218.

become aware of the existence of the mortgage on Lot 29 (by looking at grantor indices, for example), and had chosen to examine the actual mortgage, nothing in that instrument would have put the purchaser on notice that the mortgage contained an error. In other words, using the analogy of the *Hollinger v. Imperial Warehouse Co.* case, nothing in the mortgage would have told the purchaser that the Colons did not also own Lot 29 in Arrowhead Heights subdivision, along with Lot 79.

Washington Mutual heavily relies on the argument that there existed a "three-part property description" within the mortgage—the Lot number, a street address, and a tax/Parcel ID number, and so an error in the lot number should not be fatal because of the existence of the other identifiers. As a preliminary matter, the Register of Deeds does not index records by street address or tax/Parcel ID number,[35] so even if a purchaser had the duty to cross-check other records within the Register of Deed's office (the existence of which duty this Court does not today decide), no such records exist in that office by street number or tax number. Secondly, Washington Mutual does not claim there is evidence that the trustee, or a hypothetical bona fide purchaser, would have had actual notice that Lot 29 was the same as 3317 SW Moundview Drive, or that the noted Parcel ID number is actually associated with Lot 79, instead of Lot 29. The Court doubts even the owners, themselves, would know this without consulting other records. Even if there was evidence of such actual notice, § 544(a) immunizes the trustee from such actual notice.

[35] *See generally* K.S.A. 19-1205 and 19-1206 ; *also see Luthi v. Evans*, 223 Kan. at 629 (holding that description is sufficient if it references other instruments recorded in the office of the register of deeds which could be cross-referenced to clear up any confusion). Again, street addresses and tax ID numbers are not indices used by the Register of Deeds, so the *Luthi* logic doesn't assist Washington Mutual here.

There is also nothing within the mortgage, itself, that would give a purchaser constructive notice of those facts, or that would put a reasonable purchaser on notice that something was awry, and that further investigation was necessary, as was the case in the case of *Hildebrandt v. Hildebrandt.*[36] *Hildebrandt* involved a tract known as "Hildebrandt Island." The grantor conveyed the island to six of his seven children. The legal description used the wrong section number in the general description of the quarter section in which the island was located, but later in the instrument used the correct section number in the metes and bounds description of the island's exact location. Before the grantees filed a corrected deed, the grantor granted a 25-year lease to his seventh child, the defendant.

In holding that the original deed contained a sufficient description to impart constructive notice under the *Luthi* standard, the Kansas Court of Appeals stated that

> The error in the deed complained of by the defendant was a reference in the beginning of the description to 'Section 24.' This is followed, however by a metes and bounds description commencing at 'the southwest corner of Section 34' which clearly places the 5.64 acres in question in Section 34, the proper section. This description, together with the name 'Hildebrandt Island,' affords a reasonably certain and sufficient means of identification within the deed itself for identifying the property conveyed. The fact that it may not have been properly indexed by the register of deeds will not prevent constructive notice under K.S.A. 58-2222.[37]

But under the facts of this case, there is nothing within the four corners of the instrument that would put a purchaser researching the title to this property on notice that he needed to check further, assuming a purchaser would even have to review the instrument, itself.

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[36] 9 Kan. App. 2d 614 (1984).

[37] *Hildebrandt*, 9 Kan. App. 2d at 617.

Washington Mutual also references a subordination agreement that the second mortgage holder[38] gave to Washington Mutual's predecessor. But that Subordination Agreement also contained the incorrect legal description (as both documents appear to have been drafted by the same title company), and was apparently also recorded under Lot 29. So the existence of that Subordination Agreement also does not help Washington Mutual's cause.

The Court thus finds that the recorded mortgage was insufficient to impart constructive knowledge of the mortgage to the Trustee. Because the Trustee did not have constructive notice of the mortgage, he does qualify as a bona fide purchaser under § 544(a)(3). The Court thus denies summary judgment to Washington Mutual under this theory.

B. The Trustee can also avoid the mortgage as a hypothetical lien creditor.

The Trustee also asserts that the inclusion of the wrong lot number in the property description renders the mortgage unperfected, allowing him to avoid the mortgage as a hypothetical lien creditor under § 544(a)(1). Section 544 vests a trustee with the rights of a creditor with a judicial lien on all property on which a creditor could have obtained a judicial lien at the time of the bankruptcy petition, regardless of whether such a creditor actually exists.[39] The purpose of the "strong arm clause" is to cut off unperfected security interests, secret liens and undisclosed prepetition claims against the debtor's property as of the commencement of the case.[40] If the holder of a security interest in the debtor's property has not taken the

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[38]Although the original mortgage is not part of this record, the second mortgage is, and it contains the correct lot number.

[39]*Matter of Wheaton Oaks Office Partners Ltd. P'ship*, 27 F.3d 1234, 1244 (7th Cir. 1994).

[40]5 Collier on Bankruptcy, ¶ 544.03 (Lawrence P. King ed., 15th ed. rev. 2005).

necessary steps under applicable law to put other potential creditors on notice of his interest by properly perfecting his interest, then the trustee in bankruptcy, upon commencement of the case, can subordinate or "avoid" that interest, thus relegating it to a status of a general unsecured creditor of the bankruptcy estate.[41]

Because the Court has already ruled that the mortgage was not properly perfected, as a matter of state law, the Court also denies Washington Mutual's summary judgment motion under § 544(a)(1). Washington Mutual's predecessor tried, but failed, to take the necessary steps to put other potential creditors on notice of its mortgage lien on Lot 79 Arrowhead Heights Subdivision, and a hypothetical lien creditor would also not have constructive notice of what thus amounts to a "secret lien" on the property.[42]

IV. CONCLUSION

The Court finds that Washington Mutual is not entitled to judgment as a matter of law on the Trustee's claims under § 544. The mortgage's real estate description does not sufficiently describe the property in question, and thus does not impart constructive knowledge to the Trustee. Accordingly, the Trustee can avoid the mortgage as a hypothetical lien creditor under § 544(a)(1) or as a bona fide purchaser under § 544(a)(3).

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[41] *Id.*

[42] The Court decides this issue based upon an assumption that a judgment lien could attach to a debtor's homestead, as neither Washington Mutual nor the Trustee have raised this issue in this case. However, it does appear that under Kansas law, such a lien may not in fact attach to a homestead. *See Matter of Marriage of Beardslee*, 22 Kan. App. 2d 787 (1996) (holding "A judgment lien does not attach to a homestead unless it is based on one of the exceptions set out in the homestead exemption."). The Court will not decide whether this case would fall within one of the exceptions set out in the homestead exemption, or whether this portion of Kansas law is applicable in a bankruptcy case, at this time, because the issue has not been raised by either party, and because the Court's ruling under § 544(a)(3) renders this issue essentially moot, as the Trustee would prevail in this matter in any event as a bona fide purchaser.

IT IS, THEREFORE, BY THIS COURT ORDERED that Defendant's Motion for Summary Judgment (Doc. 8) is denied. Although Plaintiff Hamilton has not filed his own motion for summary judgment, and in fact has asserted that a "genuine issue of material fact exists in that the mortgage was recorded with the incorrect Lot Number in the legal description of the property description . . . and a reasonable trier of fact could find that a bona fide purchaser could take the property without notice of another's claim, due to the defect,"[43] it appears from the record presently before the Court that there are no genuine issues of material fact remaining. It further appears that if the Trustee filed a motion for summary judgment based on the facts presented within the instant motion, that the Court would likely grant summary judgment to him. Accordingly, the Court hereby will conditionally grant judgment to the Trustee on his Complaint seeking to avoid the unperfected security interest in the homestead and preserve the lien for the benefit of the estate. The Court will not enter such a judgment on the records of this Court under Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58 for a period of fourteen (14) days from the date of entry of this order, however, so that either party can demonstrate to this Court why entry of such a judgment in favor of the Trustee on his Complaint would not be just, given the Court's findings and holdings in this order and the status of the pleadings.

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[43]Doc. 23, ¶ 10.