UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

JAMES RICHARD SUSCHIL and RENEE SUE SUSCHIL,

Debtors.
_____/

Case No. DG 05-17246
Hon. Scott W. Dales
Chapter 7

JEFF A. MOYER, chapter 7 trustee,

Plaintiff,

v.

LEE VANPOPERING,

Defendant.
_____/

Adversary Pro. No. 19-80045

MEMORANDUM OF DECISION AND ORDER

PRESENT: Chief Judge Scott W. Dales

I. INTRODUCTION

Chapter 7 trustee Jeff A. Moyer (the "Trustee") filed suit against Lee VanPopering ("Mr. VanPopering" or the "Defendant") to avoid and recover a post-petition transfer of commercial property in Plainfield Township (the "Property") that the Trustee regards as a transfer of estate property without authority. He also seeks recovery of the rents and sale proceeds related to the Property accruing after chapter 7 debtors James and Renee Suschil (the "Debtors") filed their voluntary petition in 2005. The Trustee's rights depend on (1) his succeeding to the Debtors'

interests in the Property on the Petition Date pursuant to 11 U.S.C. § 541(a)(1);[1] and (2) the Trustee's strong-arm powers under § 544(a)(1) and (a)(3).

The Trustee and Mr. VanPopering have each timely filed motions for summary judgment, and the matters have been fully-briefed and argued during a hearing held on June 1, 2020 by telephone due to the COVID-19 public health emergency. For the following reasons, the court will grant Mr. VanPopering's motion and deny the Trustee's.

II. JURISDICTION AND AUTHORITY

The court has jurisdiction over the Debtors' chapter 7 bankruptcy case pursuant to 28 U.S.C. § 1334(a). That case and this adversary proceeding have been referred to the bankruptcy court under 28 U.S.C. § 157(a) and W.D. Mich. LGenR 3.1. Because this adversary proceeding involves a dispute about the Debtors', the Trustee's, and Mr. VanPopering's rights in the Property, it falls within the court's core authority under 28 U.S.C. § 157(b)(2)(A), (E), (K) and (O), and the court is authorized to enter final judgment. Neither party has suggested otherwise.

III. ANALYSIS

A. Background

The Property is the subject of two quit claim deeds, one that Mr. VanPopering executed before the Debtors filed their joint voluntary bankruptcy petition on October 12, 2005 (the "Petition Date") and the other that the Debtors executed while their case remained pending. The first deed, executed and recorded in 2002 (the "2002 Deed") purported to convey the Property from Mr. VanPopering to James Suschil; the second deed, executed in 2014 (the "2014 Deed") but recorded in August 2017 after the court closed the case, quitclaimed any interest the Debtors had in the Property to Mr. VanPopering, the supposed grantor under the 2002 Deed.

[1] Unless otherwise indicated, all chapter and section references in this opinion are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

Shortly after entry of the final decree, Mr. VanPopering arranged to record the 2014 Deed that he says was necessary to cleanse title in preparation for a transaction involving the Property's undisputed co-owner, Dr. Frank Hoffmeister. In August 2017, Mr. VanPopering and Dr. Hoffmeister's son, who had succeeded to his father's half interest, sold the Property to a third party, resulting in $152,500.00 in proceeds the Trustee says are attributable to the bankruptcy estate's interest.

In 2018, after the Trustee learned of the two deeds, the court reopened the case under § 350 on motion of the United States Trustee to permit further administration of the Debtors' estate including the prosecution of this adversary proceeding against Mr. VanPopering.

B. The Parties' Positions in Brief

In his summary judgment motion, the Trustee contends that the estate acquired the Debtors' interest in the Property under § 544(a)(1) and 544(a)(3) using the Trustee's "strong arm" powers as hypothetical lien creditor or bona fide purchaser of the Property, as of the Petition Date, and that the Debtors' supposed re-transfer of the Property back to Mr. VanPopering in 2014 is an unauthorized post-petition transfer avoidable under § 549. The Trustee also claims that he is entitled to recover the proceeds of Mr. VanPopering's subsequent sale of the estate's interest to an innocent third party in 2017, estimated at $152,500.00, and the post-petition rents derived from the Property (from the Petition Date until the 2017 sale), on the theory that the estate's interest in the Property relates back to the Petition Date, under § 544(a). Finally, the Trustee argues that Mr. VanPopering converted the estate's property, subjecting himself to treble damages under M.C.L. § 600.2919a. The Trustee detailed the various forms of relief in his eight-count complaint against Mr. VanPopering.

Mr. VanPopering opposes the Trustee's motion and filed a cross motion effectively seeking dismissal of all counts. *See infra* at n.3. Despite the passage of so many years between the Petition Date and the Trustee's filing of his complaint, Mr. VanPopering's summary judgment motion does not seek relief based on the timing of the filing. Instead, he argues that the 2002 Deed never took effect because he never delivered it and Mr. Suschil never accepted it. Mr. VanPopering contends that he drafted and recorded the 2002 Deed for estate planning purposes so that his friend, Mr. Suschil, would have the Property when Mr. VanPopering died. In response to Mr. VanPopering's motion, the Trustee ascribes more reprehensible motives, suggesting that Mr. VanPopering recorded the 2002 Deed in an effort to hinder, delay, or defraud Charles Swanson, his estranged business partner and adversary in other litigation taking place in state court at the time of the recording. The Trustee contends that Mr. VanPopering's intent in connection with the 2002 Deed presents a genuine issue of material fact precluding summary judgment for the Defendant.

C. Summary Judgment Standards

On a motion for summary judgment under Rule 56,[2] "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), applicable per Fed. R. Bankr. P. 7056. On such a motion, the court must identify whether genuine disputes of material fact exist; it must not make factual findings or resolve factual disputes. And, in determining whether a factual issue is genuinely in dispute, the court draws inferences in favor of the non-moving party. The rule further provides:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

[2] The court will refer to any Federal Rule of Bankruptcy Procedure or Federal Rule of Civil Procedure simply as "Rule ___," relying on the numbering convention for each set of rules to identify the intended reference.

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
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> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Whether a factual dispute is material or not depends on applicable law:

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Here, as in most disputes in civil litigation before this court, Michigan law (specifically Michigan's real estate law) supplies the rule of decision, as the parties both argue in their respective filings. Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There has been sufficient time for discovery, as the deadline set at the Rule 16 conference has passed.

Here, because both parties have filed summary judgment motions, the analysis applies to each motion, viewed separately. Of course, the court's application of the law applies uniformly to both motions; the difference in addressing cross-motions arises only in connection with the inferences to be drawn and the locus of the burden of proof on a particular issue.

D. Role of State Law

The parties agreed that although federal law gives the Trustee the rights and powers of a lien creditor or bona fide purchaser, state law (in this case the law of Michigan) defines the extent of those rights and powers. *In re First Mortgage Fund, Inc.*, 498 B.R. 180 (E.D. Mich. 2013) (law

of state in which property is located determines scope of trustee's strong-arm rights as hypothetical bona fide purchaser of property under § 544(a)(3)); *Select Portfolio Services, Inc. v. Burden (In re Trujillo)*, 378 B.R. 526, 531-32 (6th Cir. BAP 2007) (same).

Where, as here, Michigan law supplies the rule of decision, the federal court looks to "the final decisions of [Michigan's] highest court, and if there is no decision directly on point, then we must make an *Erie* guess to determine how that court, if presented with the issue, would resolve it." *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC*, 912 F.3d 316, 334 (6th Cir. 2018) (citing *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 358–59 (6th Cir. 2013)). A federal court consults the decisions of the intermediate appellate courts when the supreme court has not definitively ruled, unless it appears the state's highest court would rule otherwise. *Id.* State statutes, of course, also apply where applicable. *See generally* 28 U.S.C. § 1652 (Rules of Decision Act).

E. Mr. VanPopering's Motion

Mr. VanPopering's motion relies on the premise, which the Trustee disputes, that each of the Trustee's eight counts depends, directly or indirectly, on the validity of the 2002 Deed, and that notwithstanding the recording of the deed, it was never delivered or accepted.[3]

Michigan real property law generally makes a deed conveying real property effective only when delivered (by or on behalf of the grantor) and accepted (by or on behalf of the grantee). *Meade v. Robinson*, 208 N.W. 41, 42 (Mich. 1926) ("A deed executed in due form does not become effective until delivery and acceptance."). Moreover, as Mr. VanPopering argues, recording an

[3] On page 5 of his reply brief in support of his motion (ECF No. 40), Mr. VanPopering states that "Trustee's Brief is correct that any Counts of the First Amended Complaint based upon Trustee's bona fide purchaser or judicial lien creditor 'hats' are outside the scope of Mr. VanPopering's Motion for Summary Judgment," yet the last line of that brief (and his other briefs) make it quite clear that he seeks summary judgment in his favor as to all counts. During oral argument, the court addressed the confusion with the parties and the Trustee agreed that he was on notice that the court might grant relief independent of the motion, including with respect to the counts related to the Trustee's strong-arm powers. *See* Fed. R. Civ. P. 56(f).

undelivered deed does not make it effective, but only raises a presumption of delivery and acceptance. *Gibson v. Dymon*, 274 N.W. 739, 740 (Mich. 1937) ("If a grantor without the knowledge or assent of the grantee places a deed on record, that will not constitute a delivery for the reason the grantee has not assented to receive the deed, and it is well settled that it is essential to the legal operation of a deed that the grantee assents to receive it.").

In a relatively recent (though unpublished) summary of Michigan's basic principles governing the conveyance of real estate, the Michigan Court of Appeals wrote:

> A deed becomes effective when delivery occurs, not when the deed is executed or recorded. *Ligon v. Detroit*, 276 Mich.App 120, 128; 739 NW2d 900 (2007). Delivery is required to show that the grantor intended to convey the property described in the deed. *Energetics, Ltd. v. Whitmill*, 442 Mich. 38, 53; 497 NW2d 497 (1993). Acceptance is necessary for a deed to be valid, as there can be no delivery without acceptance. *Gibson v. Dymon*, 281 Mich. 137, 140–141; 274 NW 739 (1937). Delivery may be presumed from recording of a deed during a grantor's lifetime. MCL 600.2110; *Finstrom v. Baldwin*, 356 Mich. 552, 556; 96 NW2d 798 (1959). However, a deed can be set aside when the presumption of delivery is overcome. *Creller v. Baer*, 354 Mich. 408, 412; 93 NW2d 259 (1958). . . .

In re Buchinger Revocable Living Trust, Slip Op. No. 295544, 2011 WL 521183, at *3 (Mich. App. Feb. 15, 2011). There is no serious controversy on these first principles.

In support of his summary judgment motion, Mr. VanPopering argues that he never delivered the deed to the Debtors, but simply intended to make a testamentary transfer. In support of his assertion, he points to his own deposition but, more important in the court's view, to the Debtors' 2004 Examination in which they disclaim any knowledge of the 2002 Deed. *See* Brief in Support of Defendant Lee VanPopering's Motion for Summary Disposition at pp. 7-9 (ECF No. 32-1). As the Michigan Supreme Court observed in *Meade*, a grantee ignorant of a deed cannot accept it. *Meade*, 208 N.W. at 42 ("While in utter ignorance of the existence of the deed, Mrs.

Bailey, of course, could not assent to the deed."). The court concludes that the deposition testimony of Mr. VanPopering and the 2004 Examination testimony of the Debtors would be sufficient, at trial, to rebut the presumption of delivery that otherwise would have relieved the Trustee of the burden of establishing delivery. *Dymon*, 274 N.W. at 140 (the effect of the presumption of delivery that accompanies recording "is to cast the burden on the opposite party of going forward with the proof."); *Havens v. Schoen*, 310 N.W.2d 870, 871 (Mich. App. 1981) (same).

In response to this showing, the Trustee offers no evidence of delivery and acceptance of the 2002 Deed, but only seeks to raise questions about Mr. VanPopering's intent. Although the Trustee is certainly more familiar with Mr. VanPopering than the court is, the only basis in the record that he offers for his speculation about Mr. VanPopering's motives in executing the 2002 Deed are the unseemly and gratuitous, though fleeting, remarks about Mr. Swanson's death that Mr. VanPopering made during his deposition. And, even assuming the Trustee has correctly identified Mr. VanPopering's impure motive, he has nevertheless failed to offer any objective evidence that Mr. VanPopering delivered the 2002 Deed to Mr. Suschil or that the latter accepted it.[4] By conceding that Mr. VanPopering did not deliver the 2002 Deed to Mr. Suschil before the Petition Date, the Trustee can no longer assert any interest in the Property under § 541(a). Without delivery no title passed to the Debtors under the 2002 Deed, so they had no title to pass to the Trustee (as the estate's representative) under § 541(a): "[t]he estate cannot possess anything more than the debtor itself did outside bankruptcy." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019).

[4] At oral argument, Trustee's counsel candidly conceded that the record contains no evidence that the 2002 Deed was ever delivered or accepted. Instead, he argued that delivery of the deed was immaterial given its recording and his reading of the recording act.

Consequently, not only is the Trustee's supposition supported by a rather slim reed -- the single citation to Mr. VanPopering's unkind remark about Mr. Swanson's death -- the supposed question of Mr. VanPopering's intent is immaterial in the absence of any evidence of acceptance of the 2002 Deed by Mr. Suschil. In other words, without a showing of delivery, the court need not reach the matter of Mr. VanPopering's intent.

As for the Trustee's contention that Mr. VanPopering's intent to hinder his creditors should estop him from disclaiming the 2002 Deed, the court is not persuaded. First, the Trustee offers no authority for the proposition, and second, the estoppel the Trustee advocates would be inequitable: it would remove the Property from the reach of the very creditors the Trustee contends Mr. VanPopering was trying to hinder, delay, or defraud and give it to a different set of creditors – the Debtors' creditors. It would, in effect, perfect the supposed scheme. The court rejects the estoppel argument.

Because the Trustee, as the party relying on the effectiveness of the 2002 Deed has offered no evidence of delivery and acceptance and has in fact conceded the point, the court finds no genuine dispute on the material question of whether Mr. VanPopering delivered the 2002 Deed: he did not. The 2002 Deed, therefore, was not effective under Michigan law to convey any interest to the Debtors, whether directly or indirectly (*e.g.*, in the nature of dower).

Mr. VanPopering contends that the ineffectiveness of the 2002 Deed disposes of each and every count in the Trustee's eight-count complaint. For example, because the 2002 Deed was not effective, the Trustee had no right to any post-petition rents or profits derived from the Property because the Property was not included within the estate under § 541. Moreover, the 2014 Deed -- a quit claim -- effected no transfer for the Trustee to avoid under § 549. There were simply no property interests within the estate associated with the Property that Mr. VanPopering could be

required to turnover to the Trustee, whether under §§ 542, 550, or otherwise. When Mr. VanPopering sold the Property in 2017, he argues that he was selling his (and his partner's) interest, not the estate's interest, so the Trustee has no claim to the $152,500.00 in proceeds that the Trustee traced to the 2002 Deed to the extent his claims depend on stepping into the Debtors' shoes under § 541.

The Trustee, however, contends that the status and powers he enjoys as a hypothetical lien creditor or *bona fide purchaser* (a "BFP") under § 544(a)(1) and (a)(3) give him the right to the same property interests he would have enjoyed directly under the 2002 Deed and § 541(a), had the prepetition deed been effective. This is so, he argues, because as a BFP or lien creditor under Michigan law, he is entitled to rely on the record title, and to take whatever property interest the land records showed the Debtors as holding, irrespective of the effectiveness of the 2002 Deed. Mr. VanPopering disagrees, and so does the court.

There is no denying that under § 544(a), the Trustee (as the estate's representative) enjoys the rights and powers of:

> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists; . . . or
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> (3) 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.

11 U.S.C. § 544(a)(1) and (a)(3).[5] The Trustee relies on these "strong arm" powers to defeat the interest that Mr. VanPopering contends he retained in the Property, notwithstanding his recording of the undelivered 2002 Deed. The Trustee reminds the court that "Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests." *Lakeside Assoc. v. Toski Sands*, 346 N.W.2d 92, 95 (Mich. App. 1983).

As a matter of Michigan law, the "holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers." *Richards v. Tibaldi*, 726 N.W.2d 770, 780 (Mich. App. 2006) (citing M.C.L. § 565.29). Quoting Michigan's leading authority on real estate law, the Trustee argues:

> A subsequent purchaser in good faith and for valuable consideration, or what is known as a bona fide purchaser for value, is a person who purchases or acquires some interest in real estate for valuable consideration in good faith, without notice that some third party claims a right to or an interest in it. A bona fide purchaser takes the property free from, and not subject to, the right of interest of that third party.

John G. Cameron, Jr., Michigan Real Property Law: Principles and Commentary, § 11.20 at 395-96 (3d ed. 2005) (citation omitted). From these bedrock "race-notice" principles, and citing *Geygan v. World Savings Bank (In re Nolan)*, 383 B.R. 391, 397 (6th Cir. BAP 2008), the Trustee concludes that it does not matter whether Mr. VanPopering delivered the deed or not. He contends that Michigan's race-notice recording statute wipes out all unrecorded or "secret" interests. The Trustee's argument, however, proves too much, and requires the recording act to bear more weight than the text of the statute permits.

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[5] The parties have not called to the court's attention any material difference between the Trustee's rights under § 544(a)(1) and (a)(3), and because the Property is real estate, they have focused their presentation on § 544(a)(3) and Michigan's recording statute. The court will do likewise, although differences may exist in other contexts. *See, e.g., Otis v. Sprague*, 76 N.W. 154, 154 (Mich. 1898) ("an unrecorded deed is good as against an execution levy, in the absence of fraud").

In the main, the Trustee's argument depends on Michigan's recording statute, specifically M.C.L. § 565.29, but the language of that statute simply does not apply to the situation at bar. It provides in relevant part as follows:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

M.C.L. § 565.29. To apply the statute, the court must first identify the "conveyance of real estate" that the legislature intended to invalidate against a subsequent purchaser. Under M.C.L. § 565.29, a "conveyance" is, strictly speaking, the only transaction the statute purports to invalidate. Clearly, the Trustee cannot rely on the conveyance purportedly effected through the 2002 Deed because (i) that deed was recorded (albeit improperly) and (ii) voiding the supposed conveyance would establish Mr. VanPopering's interest in the Property.

Further, Mr. VanPopering is not claiming any interest based on an unrecorded conveyance: the summary judgment record establishes that the 2002 Deed was never delivered, so he retained, (i.e., did not convey), his interest in the Property. The Trustee is asking the court to treat what is clearly not a conveyance under state case law (the recording of an undelivered deed) as a conveyance for purposes of a state statute. The court is unwilling to stretch the recording act that far.

The text of M.C.L. § 565.29 clearly contemplates an evaluation of two conveyances from the same grantor (or from a grantor in the grantor's chain of title), yet in our case, as determined above, only one conveyance has occurred -- the theoretical conveyance by the Debtors to the Trustee as BFP that § 544(a)(3) requires the court to hypothesize. The court reads the recording act as addressing priority disputes involving two conveyances, one recorded and one not. This

provision, upon which the Trustee's case depends, cannot be read as addressing every dispute about title, nor is the court willing to rely simply on the policy of the act to ignore other legal precepts, including the role of delivery and acceptance in the transfer of real estate in Michigan.

Evidently recognizing the textual problem, the Trustee nevertheless endeavors to bring the facts of the case within the scope of M.C.L. § 565.29 by equating Mr. VanPopering's "intention" not to convey as itself a conveyance:

> To the extent Defendant had some *secret intention* that was not evident from the four corners of the Deed to Debtor, such alleged interest is, at best, an unrecorded conveyance which is void as against the Trustee's perfected judicial lien. Mich. Comp. Laws § 565.29.

See Plaintiff's Brief in Support of Motion for Summary Judgment (ECF No. 33-2) at p. 18 (original emphasis). An "intention," however, is not a "conveyance" under the recording acts. *See* M.C.L. § 565.35 ("The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned. . . "). Although there is no factual dispute that Mr. VanPopering signed the 2002 Deed and recorded it, there is also no dispute about its delivery or acceptance -- neither occurred. Michigan law is quite clear that one cannot convey an interest in property through an unaccepted and undelivered deed, and that grantees cannot accept deeds of which they are ignorant. As a result, there are no multiple conveyances upon which the priority scheme of M.C.L. § 565.29 could operate. The Trustee makes an excellent policy argument for amending M.C.L. § 565.29, but he is making the argument to the wrong branch of the wrong government.[6]

[6] The argument should be addressed to the state legislature, not a federal court. The court agrees that Mr. VanPopering's recording of the 2002 Deed, for whatever reason, resulted in the land records misrepresenting the state of title, creating the opportunity for subsequent purchasers to be duped and exemplifying the proverbial secret interest. The court agrees, further, that M.C.L. § 565.29 aims to address the problem of undisclosed interests. But sympathy for a litigant's policy arguments does not authorize a court to rewrite a statute by applying a strained judicial gloss.

Next, the Trustee's argument -- that a BFP takes whatever title the land records show in the grantor -- writes out of Michigan law the concept of constructive notice based on possession. As Judge Nims explained in 1985, and Judge Stevenson reiterated in 1996, "constructive knowledge of a claim on real property will defeat bona fide purchaser status" under Michigan real property law, including a trustee's status as BFP under § 544(a)(3). *Remes v. McGee (In re McGee),* 196 B.R. 78, 81 (Bankr. W.D. Mich. 1996) (citing *Robbins v. Lenz (In re Perrin's Marine Sales, Inc.),* 63 B.R. 4 (Bankr. W.D. Mich. 1985)). Although the court agrees with the Trustee that the rule announced in *Bloomer v. Henderson*, 8 Mich. 396 (1860), probably precludes Mr. VanPopering's arguments about constructive notice,[7] the point is that Michigan law has never held that a BFP may rely exclusively on the record title, as the Trustee seems to contend.

Second, the Trustee's argument that a BFP can rely exclusively on the record title would allow a BFP to acquire clean title to property even though he claims through a grantor whose own title depends on a forged deed, so long as the BFP relies on the public record. That is clearly not the law in Michigan. *Adams v. Brown*, Slip Op. No. 346503, 2020 WL 1492550 (Mich. App. March 24, 2020) (person claiming through forged deed is not a BFP); *Special Property VI v. Woodruff*, 730 N.W.2d 753, 756 (Mich. App. 2007) (person claiming under forged deed takes no title despite fact that the deed is recorded); *In re Sutter*, 665 F.3d 722, 728 (6th Cir. 2012) (same).

The implications of the argument show that it reads too much into Michigan's race-notice recording act because, as the Michigan Supreme Court observed years ago in a case not involving a forged deed but an ordinary invalid conveyance, "the recording of an instrument cannot, of itself, make an invalid grant valid." *von Meding v. Strahl*, 30 N.W.2d 363, 369 (Mich. 1948) (easement at issue merged into dominant estate and a BFP of the easement has no rights under the deed, even

[7] The court does not need to resolve the dispute that arose during oral argument regarding the importance of delivery in the *Bloomer* court's analysis.

if predecessors recorded it); *Countrywide Home Loans, Inc. v. Peoples Choice Home Loan Inc.*, Slip Op. No. 298399, 2011 WL 6118597, at *6 (Mich. App. Dec. 6, 2011) ("It is axiomatic that a conveyance by a party with no interest in the property conveys nothing," and the recording of a mortgage from one who lacks title does not change the result); *Special Property VI, LLC*, 730 N.W.2d at 756 (recording invalid deed cannot validate it); *Richards v. Tibaldi*, 726 N.W.2d 770, 781 (Mich. App. 2006) (rejecting the argument that a grantee's recording of ineffective deed under M.C.L. § 565.29 validated the conveyance). The court sees no reason to reach a different result when the supposed invalidity of a conveyance depends on failure of delivery as opposed to, say, another ancient common law rule governing conveyances, including the principle of *nemo dat qui non habet*. *Cf. In re Spiech Farms, LLC*, 592 B.R. 152, 163 (Bankr. W.D. Mich. 2018) ("nothing can confer what it does not possess"), *aff'd*, Slip Op. No. 1:18-CV-1366, 2019 WL 6872874 (W.D. Mich. Dec. 17, 2019).

Nor, for that matter, is *Nolan* especially persuasive. The Trustee cites the decision for the proposition that "[t]he trustee can use section 544(a) even against interests in property in which the debtor actually has no rights when the petition is filed." *Nolan*, 383 B.R. at 397. The statement is probably *dicta*, [8] and even if a holding it does not mean that a trustee can use § 544(a) to create property interests in a debtor where applicable state law would not recognize such interests. As the foregoing discussion makes clear, because the Debtors never had any interest in the Property (because they never accepted the 2002 Deed), there could be no "purchaser" of the Property under Michigan law, which all parties agree applies.

[8] The *Nolan* panel itself observed that even though the debtors in that case transferred the property prepetition (and therefore did not hold *legal title* on the petition date), they retained an equitable interest under Sixth Circuit decisions and Ohio law. *Nolan*, 383 B.R. at 397 ("[I]t is clear that as of the bankruptcy filing the Debtors had an interest in the Property, notwithstanding the previous fraudulent transfers"); *but see Spradlin v. Khouri (In re Bruner)*, 561 B.R. 397, 404 (6th Cir. BAP 2017) (challenging notion that fraudulently conveyed property remains in the transferor).

Under Michigan's recording act the term "purchaser" includes "every person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration, and also every assignee of a mortgage, or lease or other conditional estate." M.C.L. § 565.34. In other words, to enjoy the protections of a "bona fide purchaser" under the recording act, the person claiming protection must actually "purchase" an interest. If the Debtors had no interest to convey because Mr. VanPopering never delivered the 2002 Deed, they had no interest to convey notwithstanding the recording of the deed. *Tibaldi*, 726 N.W.2d at 781. Michigan Land Title Standards 3.18 and 23.1 (Problem C) do not contradict this principle.[9]

This court routinely authorizes avoidance of prepetition transfers by a debtor upon a proper showing, but the prerequisite for such avoidance is the transfer of an interest of the debtor in property that the debtor had an interest in, in the first place. *See, e.g.*, 11 U.S.C. §§ 547(b) (authorizing avoidance of transfer of debtor's former interest in property) and 548(a) (same); M.C.L. § 565.31(b) (defining "asset" as "property of a debtor") and (q) (defining "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset").

Here, the Trustee is not trying to avoid a prepetition transfer but instead he is trying to augment the estate by bringing into it a third party's property that the Debtors never had any

[9] The grantor described in Michigan Land Title Standard 3.18 (6th ed.) retained a sufficient interest to convey to the BFP after delivering the deed to the first grantee because the first grantee did not record the deed, rendering his deed "void." In order to "perfect" a transfer of real estate in Michigan the deed must be recorded. *Simon v. JP Morgan Chase Bank (In re Lebbos)*, 455 B.R. 607 (Bankr. E.D. Mich. 2011). Because the legislature regards an unrecorded deed as "void" as to a BFP -- the transfer is not perfected until recorded-- it follows that the grantor named in an unrecorded deed retains an interest that a BFP could later "purchase." Similarly, Standard 23.1 (Problem C), which the Trustee cites for the principle that a BFP is not subject to an action for reformation of a deed, involves the straightforward application of the principle that a deed containing an unambiguous legal description conveys the property described, even if the grantor intended to convey a different parcel. The court in *Juif v State Highway Comm'r*, 282 N.W. 892 (1939), applied a version of the parol evidence rule to bar evidence of the undisclosed intent, so title clearly passed to the first grantee under the deed, such that the first grantee obtained an interest in the property sufficient for a BFP to "purchase." Contrary to the Trustee's argument, Standard 23.1 does not stand for the principle that a person can transfer an interest that he does not have.

interest in. The *Nolan* panel recognized that "Section 544(a)(3) does not require that the debtor have *legal title* to the real property in question, only that the hypothetical bona fide purchaser be a 'purchaser of real property . . . from the debtor' at the time of the bankruptcy filing." *Nolan,* 383 B.R. at 397 (original emphasis to distinguish legal title from the debtors' residual equitable title). If the Debtors had no interest to convey because Mr. VanPopering never delivered the 2002 Deed, as the court has concluded, they had no interest to convey notwithstanding the recording of the deed, *see discussion, supra* at 9, and the Trustee cannot be a "purchaser" of the Property, bona fide or otherwise, as a matter of Michigan law. The court believes that a debtor must have a more substantial nexus with property upon which a trustee's strong-arm powers may operate, beyond merely being named as grantee within an invalid instrument.

The Trustee's concern in this case is not an unrecorded conveyance (the target of the recording statute he cites) but the recording of an invalid instrument reflecting a non-conveyance, resulting in a misleading public record. Under the circumstances, the court predicts that a BFP in Michigan who is duped by his grantor's deed of property reflected in the land records but never legally conveyed would be left with a quiet title action against the grantor's grantor seeking an order declaring the first priority of the plaintiff's claim to the real estate. In such an action, the court predicts that Michigan's Supreme Court, if called upon to resolve the question, would agree that, as a textual matter, M.C.L. § 565.29 does not address the situation. Instead, if asked about the effect of the recording of an undelivered deed, the high court would likely conclude that recording of the 2002 Deed simply raises a presumption of delivery, and that the presumption may be rebutted, as Mr. VanPopering has done in this case. At that point, the Trustee would be obligated to establish delivery of the 2002 Deed in order to prove that he purchased any interest

from the Debtors. On a record such as the present one, which precludes a finding of delivery, Michigan's highest court would likely quiet title in Mr. VanPopering.

For these reasons, the court agrees with Mr. VanPopering that his undisputed failure to deliver the 2002 Deed precludes the Trustee from any recovery altogether, regardless of whether the latter stands in the shoes of the Debtors under § 541(a) or enjoys the status and powers of a BFP under § 544(a)(1) and (a)(3). The court will grant Mr. VanPopering's motion as to all counts, even those relying directly or indirectly on § 544(a).

F. The Trustee's Summary Judgment Motion

The legal conclusions the court reached in considering Mr. VanPopering's motion for summary judgment preclude relief to the Trustee in connection with his own motion, and the court will therefore deny it. More specifically, the undisputed fact that Mr. VanPopering never delivered the 2002 Deed renders all other factual disputes immaterial. Although the Trustee has the better argument as a matter of policy, the law is with Mr. VanPopering, and Rule 56 requires the court to grant moving parties the relief to which they are entitled "as a matter of law," not simply as a matter of policy.

IV. CONCLUSION AND ORDER

After carefully reviewing Michigan case law and other authorities to make its "*Erie* guess," the court predicts that the Michigan Supreme Court would approach the title problems resulting from a recorded, undelivered deed by relying on the presumption of delivery that arises upon recording, rather than M.C.L. § 565.29.

The court shares Mr. VanPopering's view that under the circumstances of this case, the Trustee's right to recovery under any count within the complaint depends, ultimately, on the validity of the 2002 Deed under Michigan law, which in turn depends on the presumption of

delivery. Because Mr. VanPopering did not deliver the 2002 Deed and Mr. Suschil did not accept it, the court will enter judgment in Mr. VanPopering's favor.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

(1) The Trustee's motion for summary judgment (ECF No. 33) is DENIED;

(2) Mr. VanPopering's motion for summary judgment (ECF No. 32) is GRANTED as to all counts in the Trustee's complaint;

(3) The Clerk shall enter separate judgment dismissing the Trustee's complaint on the merits.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Andrew J. Gerdes, Esq., and Thomas A. Hoffman, Esq.

END OF ORDER

IT IS SO ORDERED.

Dated June 19, 2020

Scott W. Dales
United States Bankruptcy Judge