

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
DEBORAH ANNETTE WHITAKER,)	CASE NO. 04-90810 - MHM
)	
Debtor.)	
)	
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DEBORAH ANNETTE WHITAKER,)	
)	ADVERSARY PROCEEDING
Plaintiff,)	NO. 09-9000
)	
v.)	
)	
EMC MORTGAGE CORPORATION,)	
)	
Defendant.)	

ORDER REGARDING DISMISSAL

The complaint in this adversary proceeding was filed January 8, 2009. Plaintiff, who is proceeding *pro se*, received a discharge in her main Chapter 13 bankruptcy case January 21, 2009, and the main bankruptcy case was closed February 13, 2009. Defendant filed an answer by special appearance and a motion to dismiss February 9, 2009. Plaintiff filed no response.

Plaintiff's complaint challenges a Release and Compromise Settlement Agreement and a Loan Modification Agreement executed by the parties post-petition in April or May,

2008 (collectively, the "Agreements"). The undated and unexecuted copies of the Agreements attached to Plaintiff's complaint show that the original principal balance of the loan between Plaintiff and Defendant was \$84,000, with an unpaid principal balance on the loan at the time of the Agreements of \$78,257.18. The loan was secured by real estate located at 862 Oakhill Ct., Stone Mountain, Georgia. The Agreements provided that, in return for Plaintiff's release of all her claims against Defendant, Defendant modified the loan agreement to provide for a 6.5% interest rate and a new unpaid principal balance of \$75,858.31.

Plaintiff asserts in her complaint that her agreement to the loan modification was premised upon Defendant's promise to remove certain unspecified unauthorized charges from the loan and to provide her with an escrow analysis. Plaintiff alleges that instead of removing the unauthorized charges, Defendant added additional charges of \$1500; and that Defendant failed to provide the promised escrow analysis. In seven counts to the complaint, Plaintiff asserts breach of contract, fraud in the inducement, a right to rescission due to fraud, promissory estoppel, and violation of the Georgia Deceptive Trade Practices Act, the federal Real Estate Settlement Procedure Act, and the Truth-in-Lending Act ("TILA").

Defendant filed an answer by special appearance, attaching to its answer a copy of the Release and Compromise Settlement Agreement that is undated and unsigned by Plaintiff, and a copy of the Loan Modification Agreement showing it was signed by

Plaintiff May 13, 2008. Defendant also filed a motion to dismiss on the grounds that (1) the court lacks subject matter jurisdiction; (2) the court lacks personal jurisdiction over Defendant due to insufficient service of process; and (3) failure to state a claim upon which relief can be granted.

1. Subject Matter Jurisdiction

Defendant asserts that when Plaintiff received her Chapter 13 discharge, the bankruptcy court lost subject matter jurisdiction of this adversary proceeding. Although Defendant's brief does not include a discussion of whether this adversary proceeding is a core or non-core proceeding, Defendant suggests that it is a non-core proceeding.

Core proceedings include, but are not limited to—

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not litigation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property to the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;

- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;
- (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
- (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(2).

Bankruptcy courts have also subject matter jurisdiction to hear cases that are **non-core** proceedings under § 157(c). Bankruptcy courts may hear a non-core matter if it arises under Title 11 or is related to a case under Title 11. The criteria for determining if a proceeding is related to a bankruptcy case are substantially broader than the criteria required to find a proceeding is a core proceeding. The test for related proceedings is set forth in *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th Cir. 1990).¹ In *In re Lemco Gypsum, Inc.*, the Eleventh Circuit established the threshold for related

¹*Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th Cir.1990), is the seminal case in this Circuit on the scope of the bankruptcy court's 'related to' jurisdiction." *Continental Nat'l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340 (11th Cir. 1999).

proceedings as “whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or the debtor's property.” *Id.* at 788 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

This adversary proceeding appears to be a non-core proceeding. At the time this adversary proceeding was filed, this court had subject matter jurisdiction, as the Property subject to Defendant’s claim was property of the estate. Subject matter jurisdiction is determined as of the commencement of the proceeding. *In re Casamont Investors, Ltd.*, 196 B.R. 517 (9th Cir. BAP 1996). Upon dismissal, however, usually subject matter jurisdiction appears to evaporate and dismissal of a core or non-core proceeding is appropriate. *In re Morris*, 950 F. 2d 1531 (11th Cir. 1992). The bankruptcy court has the discretion to retain jurisdiction, however. *Id.* Those courts that have examined the circumstances under which discretionary jurisdiction of an adversary proceeding should be exercised have utilized the following factors in determining whether jurisdiction should be retained: (1) judicial economy; (2) fairness and convenience to the litigants; (3) the degree of difficulty of the related legal issues involved; and (4) comity. *Querner v. Querner*, 7 F. 3d 1199 (5th Cir. 1993); *Morris*, 950 F. 2d 1531; *Smith v. Commercial Banking Corp*, 866 F.2d 576 (3d Cir. 1989); *Stardust Inn Inc. v. Doshi*, 70 B.R. 888 (Bankr. E.D. Penn. 1987); *Auto Auction, Inc. v. Pocklington*, 21 B.R. 199 (Bankr. S.D. Cal. 1982).

This adversary proceeding contains one very significant factual difference from the above-cited cases and the cases cited by Defendant. Plaintiff's main bankruptcy case was not dismissed. Plaintiff received her Chapter 13 discharge after successfully completing her Chapter 13 plan. The distinction between dismissal and discharge is a significant jurisdictional distinction. A bankruptcy discharge is intended to provide a debtor with a fresh start. The conduct alleged by Plaintiff, which occurred while the bankruptcy case was pending, may deprive Plaintiff of her fresh start. Preservation of Plaintiff's fresh start provides grounds for retention of jurisdiction in this proceeding and arguably provides a ground for concluding this proceeding is a core proceeding. Therefore, Defendant's assertion that this court lacks subject matter jurisdiction is without merit.

2. Personal jurisdiction and service of process

Defendant alleges and the record shows that Plaintiff failed to serve Defendant as required by Bankruptcy Rule 7004, which provides:

(b) Service by first class mail

Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows: ...

- (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant....

- (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.
- (8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

Plaintiff served only Defendant's attorney. Although Defendant's attorney had appeared on behalf of Defendant in the main bankruptcy case, that appearance does not provide sufficient evidence to establish that the attorney's agency was broad enough to authorize Defendant's attorney to accept service of process on behalf of Defendant. Insufficient service of process, however, is an amendable defect and Plaintiff will be allowed sufficient time to properly serve Defendant as required under Bankruptcy Rule 7004.

3. Failure to state a claim

Finally, Defendant alleges Plaintiff failed to set forth a claim upon which relief can be granted because (a) she failed to allege damages with specificity; (b) she failed to plead fraud with specificity; and (c) her claim under the TILA is without merit.

Many non-lawyers fail to understand that in most situations, the allegation of violation of a statutory or common law right must also allege specific damages to the plaintiff resulting from that violation. Plaintiff appears to seek equitable remedies, including an accounting, rescission and perhaps reformation, and Plaintiff also alleges that she suffered actual damages, but fails to adequately describe the nature of those damages. This failure, however, is an amendable defect and Plaintiff will be allowed sufficient time to amend her complaint.

Defendant alleged that Plaintiff failed to plead fraud with specificity. Plaintiff alleged specific representations that were made to her, that the representations were made with the intent to deceive and to induce her to enter into the Agreements with Defendant, and that she relied on those representations. Plaintiff's allegations regarding fraud are sufficiently specific, except with respect to damages. As discussed above, Plaintiff's allegations about damages are conclusory and should be described more fully. This failure, however, is an amendable defect and Plaintiff will be allowed sufficient time to amend her complaint.

Finally, Defendant asserts that Plaintiff is not entitled to rescission under the TILA. Plaintiff, however, does not seek rescission under the TILA. Plaintiff's claim for rescission is included in a separate count and seeks rescission as an equitable remedy without reference to the TILA. Rescission is not the only remedy available under the TILA;

damages, including statutory damages available without respect to actual damages, are available.

Except for the amendable defects discussed above, Defendant's motion to dismiss is without merit. Accordingly, it is hereby

ORDERED that within 21 days of the date of entry of this order, Plaintiff may amend the complaint to more fully describe the damages she seeks to recover. That amended complaint must be served, together with a reissued summons, upon Defendant *and* Defendant's attorney in accordance with Bankruptcy Rule 7004. Plaintiff must file a certificate of service of the reissued summons and the amended complaint within the time limit set forth above. If Plaintiff fails to comply with this order within the time allowed, this adversary proceeding shall stand dismissed.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the ____ day of October, 2009.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE