



IT IS ORDERED as set forth below:

Date: August 31, 2009

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
RICKY NED GODFREY	:	BANKRUPTCY CASE
KIMBERLY RENEE GODFREY,	:	NO. 08-10409-WHD
	:	
Debtors.	:	
-----	:	
	:	
RICKY NED GODFREY	:	
KIMBERLY RENEE GODFREY,	:	
	:	
Plaintiffs,	:	ADVERSARY PROCEEDING
	:	NO. 08-1032
v.	:	
	:	
INTERNAL REVENUE SERVICE,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Summary Judgment, filed by Ricky and Kimberly Godfrey (hereinafter the "Plaintiffs") against the Internal Revenue Service (hereinafter the

“Defendant”). The Motion is opposed. This matter arises from a complaint filed by the Plaintiffs seeking a determination of the validity of a tax debt and constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 11 U.S.C. § 157(b)(2)(O); § 1334.

FINDINGS OF FACT

1. On or about August 17, 2005, the Plaintiffs refinanced an existing mortgage on their residence located at 280 Weatherly Drive, Fayetteville, Georgia (hereinafter the "Property") with Option One Mortgage Company (hereinafter "Option One"). The resulting mortgage debt was secured only by the Property. *See* Plaintiffs' Statement of Undisputed Facts, ¶ 2; Defendant's Response to Plaintiffs' Statement of Undisputed Facts, ¶ 2.
2. In November or December 2005, Option One sold the promissory note executed by the Plaintiffs to EMC Mortgage Company (hereinafter "EMC"). *See* Plaintiffs' Statement of Undisputed Facts, ¶ 3; Defendant's Response to Plaintiffs' Statement of Undisputed Facts, ¶ 3.
3. In April 2006, the Plaintiffs received notice of impending foreclosure on the Property from EMC's attorneys, Morris, Schneider & Prior, LLC. Said foreclosure was scheduled for and did occur on the first Tuesday of June 2006. *See* Plaintiffs' Statement of Undisputed Facts, ¶ 5; Defendant's Response to Plaintiffs' Statement of Undisputed Facts, ¶ 5. EMC sold the Property for \$170,000. *See* Defendant's Statement of Undisputed Facts, ¶ 5. At the

time of the foreclosure, the amount of the debt owed by the Plaintiffs to EMC was \$189,898.88. *See* Defendant's Statement of Undisputed Facts, ¶ 6.

4. In March 2007, EMC notified the Defendant that EMC had forgiven \$19,898.00 of debt owed by the Plaintiffs. The notification stated that the fair market value of the Property was \$170,000.00. The notification did not include any documentation regarding a judicial confirmation of the foreclosure sale conducted in accordance with OCGA §44-14-161 *et seq.* Plaintiffs' Statement of Undisputed Facts, ¶ 7; Defendant's Response to Plaintiff's Statement of Undisputed Facts, ¶ 7.

5. On February 13, 2008, the Plaintiffs filed a Chapter 7 bankruptcy, Case No. 08-10409. The Court entered a discharge order in this case on June 5, 2008. *See* Case Number 08-10409, Docket Number 15.

6. The IRS audited the Plaintiffs' 2006 tax return. Plaintiffs' Statement of Undisputed Facts, ¶ 9; Defendant's Response to Plaintiffs' Statement of Undisputed Facts, ¶ 9. The Defendant adjusted the Plaintiffs' 2006 income to include an additional \$19,898 to reflect EMC's reporting of the forgiveness of the Plaintiffs' debt. *See* Defendant's Statement of Undisputed Facts, ¶ 10.

CONCLUSIONS OF LAW

The Plaintiffs have filed this complaint to obtain a determination as to whether taxes assessed by the Defendant for tax year 2006 are dischargeable. The basis for the Plaintiffs'

argument, however, is not that the taxes are dischargeable under the provisions of section 523(a)(1), but rather that the tax debt was improperly assessed by the Defendant. In essence, the Plaintiffs assert that the income upon which the tax debt was calculated was less than the amount asserted by the Defendant because EMC failed to confirm the foreclosure sale of the Property and, under state law, the failure to do so resulted in the lack of a valid claim against the Plaintiffs for the deficiency between the amount of the debt and the amount obtained from the sale of the Property.

In response, the Defendant contends that the failure of a mortgage lender to seek confirmation of a foreclosure does not prevent the Defendant from treating the difference between the foreclosure sale proceeds and the amount of the original debt as "debt forgiveness" income. According to the Defendant, if the mortgage lender decides not to pursue the remaining balance of the debt and fails to seek confirmation, it is appropriate for the mortgage lender to report the forgiven debt to the Defendant as income. Consequently, the Defendant has filed a cross motion for summary judgment and urges the Court to find that, as a matter of law, the Plaintiffs' complaint must fail.

Rule 7056 of the Federal Rules of Bankruptcy Procedure makes Rule 56(c) of the Federal Rules of Civil Procedure applicable to adversary proceedings. Rule 56(c) provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

Not only is the Court to ensure that no material fact is in dispute, but the Court must “view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party.” *Maniccia v. Brown*, 177 F.3d 1364, 1367 (11th Cir. 1999). Moreover, “the party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going through the pleadings, that there exist genuine issues of material fact.” *Fleet Credit Card Services v. Kendrick (In re Kendrick)*, 314 B.R. 468, 471 (N.D. Ga. 2004) (quoting *Hairston v. Gainesville Sun. Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993)).

The first concern of the Court is the fact that the Plaintiffs seek a determination regarding the dischargeability of this tax debt, when in fact, they argue not that the debt is dischargeable, but rather that the debt was improperly assessed. As noted by the Defendant, the Plaintiffs should have filed a complaint to determine the legality of a tax under section 505(a) of the Bankruptcy Code or, alternatively, they could have challenged the tax in the tax court or paid the tax and filed a suit for a refund in the district court. That being said, requiring the Plaintiffs to file an amended complaint to seek the appropriate relief would serve no purpose.¹

¹ Section 505(a) provides that the Court "may" determine the amount or legality of a any tax. *See* 11 U.S.C. § 505(a). Consequently, it is not uncommon for the

Having considered the arguments of both parties, the Court concludes that the Defendant's position is better taken. For the reasons stated in *In re Higgins*, 403 B.R. 537 (E.D. Tenn. 2009), a case involving identical facts and law, the Court agrees that the mortgage lender's failure to confirm the foreclosure sale does not prevent the Plaintiffs' realization of "discharge-of-indebtedness" income. *See also In re Jones*, 396 B.R. 638 (Bankr. W.D. Pa. 2008) (rejecting the argument that a lender's failure to confirm a foreclosure sale under Pennsylvania law resulted in the conclusion that the debtor no longer owed a debt that could be forgiven by the lender). Consequently, there being no factual dispute, as a matter of law, the Defendant is entitled to judgment in its favor.

CONCLUSION

For the reasons stated above, the Motion for Summary Judgment filed by Ricky and Kimberly Godfrey is hereby **DENIED**. The Motion for Summary Judgment filed by the Internal Revenue Service, is hereby **GRANTED**.

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defendant in such a suit to request that the bankruptcy court abstain from making such a determination. *See United States v. Paolo*, 2009 WL 2208094 (D.R.I. Jul. 23, 2009) (citing *In re Millsaps*, 133 B.R. 547 (Bankr. M.D. Fla. 1991)); *In re Wood*, 1994 WL 759753 (Bankr. N.D. Ga. 1994) (Brizendine, J.). *But see In re Luongo*, 259 F.3d 323 (5th Cir. 2001) (abstention may not be appropriate if a determination would further the bankruptcy goal of providing the debtor with a fresh start). As the Defendant has not requested that the Court abstain from hearing this matter, the Court need not address whether abstention would be appropriate in this case.