



IT IS ORDERED as set forth below:

Date: July 01, 2009

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 08-86062

Edwin W. Ades and Teresa B. Ades,

CHAPTER 7

Debtors.

JUDGE MASSEY

Southwick Real Estate LLC,

Movant,

v.

CONTESTED MATTER

Edwin W. Ades and Teresa B. Ades,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted an evidentiary hearing on June 29, 2009 on the motion of Southwick Real Estate LLC to Dismiss for Abuse under 11 U.S.C. § 707(b). At the conclusion of the hearing, the Court stated orally findings of fact and conclusions of law. The following findings of fact and conclusions of law replace the oral statements in their entirety.

Findings of Fact

1. The Court adopts the stipulations of facts made by the parties on the record at the hearing.

2. Debtors filed this Chapter 7 case on December 19, 2008.

3. Debtors owned several residences before they purchased a home located at 4432 Whitewater Creek Road, Atlanta, Georgia in 1996, but they did not construct any of those homes.. Debtors have no experience in construction or renovation of residences. In the past Debtors owned with relatives three resort properties. They and their co-owners sold the first one and bought the second one and the sold the second one and bought the third one. Debtors sold their interest in the third vacation home and made a profit They decided to use these funds to invest either in renovating the house at 4432 Whitewater Creek Road or building a new house on that site.

4 In 2006, Debtors consulted with Studie Young, who is a real estate agent, Mark Stevens, who is Movant's principal, and friends concerning whether to renovate the house at 4432 Whitewater Creek Road or to tear it down and build a new one. Mr. Stevens and Mr. Ades knew each other from having coached a youth baseball team together. Mr. Stevens introduced Ms. Young to Debtors.

5. Ms. Young advised Debtors that if they renovated, they would not recoup their cost when they sold the house because of its age and smaller size relative to other houses nearby. Debtors were further told by Ms. Young and Mr. Stevens that building a much larger house would be the right thing to do, given the size of other houses in the neighborhood.

6. Mr. Stevens and Mr. Ades had several conversations prior to entering into a contract concerning Movant's success with constructing and selling "spec" houses (where work was done prior to having a buyer), which was approximately one-third of the business of Movant at the time. Mr. Ades testified that Studie Young had acted as broker for Movant in selling spec houses.

7. Debtors selected Movant as the builder after being advised by Movant that another contractor that they were considering had financial problems.

8. As part of the contract for construction of a new house, Movant provided to Debtors plans that Movant had used to build a 8,000 square foot house in a different neighborhood a year or two earlier. Movant had paid an architect approximately \$40,000 for those plans. Debtors met with that architect and, in consultation with Mr. Stevens, modified those plans, because they believed that the changes to be made would make the house more saleable. In part, Debtors relied on advice of Mr. Stevens in making changes. They had multiple conversations with Mr. Stevens about what would help in selling the house, adding "things" that he said would make the house more saleable. The size of the completed house was approximately 11,000 square feet.

9. Mr. Ades testified that in 2006, the real estate market was doing well. He stated that Movant was building and selling houses, which was the reason he did not second guess Mr. Stevens. Mr. Ades acknowledged that the final decision as to what to do was made by Debtors, however.

10. Mrs. Ades made certain purchases of fixtures for the house that reflected her own personal tastes, but she also had advice from a decorator.

11. The fact that Debtors modified the plans Mr. Stevens had used to build a spec house in a different neighborhood is not alone proof that Debtors intended to occupy their new house or did not intend to build that house as an investment to be sold upon completion. That Mr. Stevens might not have made all, or any, of the changes to the plans made by Debtors had he owned 4432 Whitewater Creek Road does not prove that Debtors were not building the new house as an investment to sell.

12. Mr. Ades credibly testified that Mr. Stevens, Ms. Young and the architect knew from the beginning that Debtors were building a “spec” house. Mr. Ades asked the architect to refer anyone he knew who might be interested in buying the house, and the architect brought a couple to look at the house two or three times.

13. Mr. Stevens testified that it was his “understanding” that the Debtors were designing a house to live in and “eventually” to sell. Mr. Stevens was present in the courtroom when Mr. Ades testified. The use of the word “understanding,” which was a part of the question put to him by his attorney, was unsupported by any substantial testimony or other evidence concerning conversations with either Debtor. Mr. Stevens did not explain how he got his understanding. The only testimony he provided that might support a theory that Debtors intended to occupy the house without also putting in on the market was as follows: (1) Debtors modified a bedroom ceiling to accommodate shelving that might be used for trophies, (2) the Ades’ son, Josh, (who had not lived with them for several years) won some sports trophies, (3) one of the Debtors referred to the bedroom as “Josh’s room,” and (4) Mr. Ades ordered an extension to the driveway so that the distance from the edge to the goal, which would enable one to take a three-point shot from the pavement, and Mr. Stevens stated that Mr. Ades said that Josh would shoot baskets at

the house. This evidence is insufficient to prove that Debtors incurred the debt to construct the house with the intention of making personal use of the house. Adding height to a ceiling to permit additional shelving and lengthening the driveway area are arguably consistent with the idea advanced by Debtors that these changes made the house more saleable to a family with children. It is possible that Mr. Stevens conflated discussions of the Ades' son with the ideas related to changes that would be attractive to a family with children. In any case, Mr. Stevens' testimony was unpersuasive and speculative on the issue of whether the Ades intended at the time of the closing of the construction loan to live in the house for an indefinite period of time after the house was completed, particularly in view of Mr. Stevens' failure to directly challenge Mr. Ades' testimony that Mr. Stevens knew all along that the house was being constructed as a "spec" house.

14. Debtors are well-educated professionals who are fully capable of understanding the arithmetic involved in making payments on the house they had built in 2006-2007. In 2008, Debtors' combined monthly income, after taxes, was approximately \$16,000; there is no evidence that their income was any higher in 2006 and 2007. The mortgage payment on the loan was approximately \$20,000. Debtors knew at the time they obtained the initial construction loan from SunTrust Mortgage, Inc. in March 2006 that they could not afford the mortgage payment. During the relevant time period, Debtors owned two certificates of deposit at SunTrust Bank that they used to make mortgage payments. Debtors used all of their available funds in investing in the house and did so expecting to be able to sell the house..

15. There is no evidence to support a theory that Debtors recklessly disregarded the fact that their monthly after-tax earnings were less than the monthly mortgage payment on loan they

obtained in 2006 to pay off the then existing mortgage and to fund construction of a new house at 4432 Whitewater Creek Road. Movant advanced no such theory.

16. Debtors did not intended at the time they obtained the initial loan from SunTrust Mortgage, Inc. in 2006 or thereafter to live in the new house and did not borrow those funds for personal, family or household purposes. Instead, they borrowed to make an investment in real estate that they intended to sell as soon as they could find a buyer, a purpose known to Movant from the beginning of their relationship.

17. In early May 2007, Debtors entered into a listing agreement with Harry Norman Realtors, which was signed by Studie Young on behalf of the realty company, even though construction was incomplete. The certificate of occupancy was not obtained until the fall of 2007. During construction Debtors rented a house from Mr. Stevens. They moved into the new house at 4432 Whitewater Creek Road in the fall of 2007 so as not to have to make both rent and mortgage payments, which they could not afford to do. Further, Mr. Ades believed it would be easier to sell the house with someone living it. They still live in the house. The automatic stay has been lifted, but the lender has yet to foreclose.

18. In the summer of 2008, SunTrust Mortgage, Inc. agreed to temporarily reduce the mortgage payments from approximately \$20,000 per month to \$11,666, the amount of the monthly mortgage payment listed on Schedule I.

19. Debtors consented to a judgment in favor of Movant prior to filing this case for the balance due on the construction contract.

20. The total amount of new debt incurred by Debtors in building the new house (not counting the payoff of the old mortgage) was \$2,075,434.75, which was incurred by Debtors for

investment purposes and not primarily for personal, family or household purposes. The remaining debt owed by Debtors, all of which is consumer debt, totals in the aggregate \$1,432,273.50.

Conclusions of Law

1. Movant brings this motion to dismiss pursuant to section 707(b) of the Bankruptcy Code, 11 U.S.C. § 707(b). Section 707(b)(1) provides:

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, *may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts*, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)). (Emphasis added.)

2. “The term ‘consumer debt’ means debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8).

3. A debtor has “primarily consumer debts” if more than half of that debtor’s total debts are consumer debts. *In re Johnson*, 318 B.R. 907, 914 n.5 (Bankr. N.D. Ga. 2005).

4. Movant had the burden of proving that more than half of Debtors’s debts are consumer debts. *In re Cribbs*, 387 B.R. 324 (Bankr.S.D.Ga.2008); *In re Roll*, 400 B.R. 674, 677 (Bankr. W.D.Wis. 2008); *In re Christiansen*, 2009 WL 159361, 2 (Bankr. M.D.N.C. 2009).

5. Because more than one half of Debtors’ debts are not consumer debts, Movant failed to carry its burden of proof under section 707(b). Movant’s motion was brought only under section 707(b).

END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW