IT IS ORDERED as set forth below:

Date: January 6, 2016

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re:	:	CASE NUMBER:
JORGE MENDEZ,	:	**15-41560-MGD**
Debtor.	:	CHAPTER 13
JORGE MENDEZ,	:	
Movant,	:	
v.	:	CONTESTED MATTER
WELLS FARGO HOME MORTGAGE,	:	
Respondent.	:	

ORDER DENYING DEBTOR'S MOTION TO DETERMINE SECURED STATUS OF WELLS FARGO HOME MORTGAGE

The Court held a hearing on November 10, 2015 for Debtor's Motion to Determine Secured Status of Wells Fargo Home Mortgage and Strip Lien Effective upon Discharge (Doc. 29) ("Motion") and the Response to the Motion (Doc. 30). Joseph Kassab appeared for Debtor

and Andy Owens appeared for Respondent Wells Fargo Home Mortgage. At the hearing, the Court ordered briefing, and Debtor filed his brief on December 3, 2015. (Doc. 31). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(B) and (K) and venue is proper under 28 U.S.C. § 1409(a).

I. Background

The Motion alleges that Debtor's principal residence located at 259 Brownsville Road, Powder Springs, Paulding County, Georgia ("Residence") is encumbered by two liens held by Respondent and that there is no equity to which the second lien can attach. From the face of the Motion, however, it appears that both "liens" refer to the same security instrument. (Motion at 4, Doc. 29). At the hearing, Debtor's counsel explained that the basis for the Motion was a Loan Modification Agreement entered into on September 1, 2010 which deferred $31,900 of the principal balance. (Claim 5-2 at 31). In addition to asserting that this deferred principal balance constituted a separate lien which was wholly unsecured, Debtor advanced for the first time a new argument not raised in the Motion — that Respondent's entire claim, or a portion of it, should be reclassified as unsecured based on the fact that the Loan Modification was not witnessed or notarized under Georgia law.

The parties do not dispute the following facts: that Debtor granted Respondent's predecessor-in-interest a Security Deed for his Residence on July 2, 2004 (Claim 5-2 at 1), that this Security Deed secured a Note also executed on July 2, 2004 (Claim 5-2 at 18), and that Debtor and Wells Fargo Bank, N.A. entered into a Loan Modification Agreement on September 1, 2010. Debtor does not contend that the July 2, 2004 Security Deed was improperly attested or acknowledged.

II. Discussion

Debtor argues that the Loan Modification's deferral of principal materially modified the July 2, 2004 Security Deed without following Georgia law on attestation of real estate conveyances. Nonetheless, Debtor has not made payments on the deferred principal and Respondent has not required those payments. The result, Debtor asserts, is that the Security Deed was altered by the parties' conduct, and not by the Loan Modification, to no longer secure the deferred principal. Thus, argues Debtor, the deferred principal is at best an underwater "Second Mortgage" which may be modified under Bankruptcy Code Section 1322(b)(2) and/or stripped off under Section 506(d).

Debtor's logic is flawed by several mistaken assumptions about Georgia law. First, loan modification agreements need not be attested or acknowledged. Second, in most circumstances, loan modifications do not affect the validity or priority of Security Deeds.

A. The Loan Modification is enforceable absent attestation.

First, a clarification about "attestation." The Court uses this term to refer to the requirements of Georgia Code Section 44-5-30, specifically that "a deed to lands shall be an original document, in writing, signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness." *see also* OCGA § 44-14-61 (identical requirements for deeds to secure debt). Proper attestation is required in order for a recorded deed to provide constructive notice. *U.S. Bank Nat. Ass'n v. Gordon*, 289 Ga. 12, 12, 709 S.E.2d 258, 260 (2011). However, attestation bears only on recordation, not enforcement. "A deed not executed in precisely the manner prescribed in OCGA § 44-5-30 is not properly recordable and therefore does not give constructive notice to all the world. As between the parties themselves,

however, the deed is valid and binding, absent fraud and certain other conditions which do not obtain here." *Duncan v. Ball*, 752, 324 S.E.2d 477, 479 (Ga. App. 1984) (citing *Higdon v. Gates*, 231 S.E.2d 345 (Ga. 1976) and *Hoover v. Mobley*, 31 S.E.2d 9 (Ga. 1944)); *see also Eason v. PNC Bank, Nat. Ass'n*, 617 F. App'x 942, 944 (11th Cir. 2015) ("[T]hose requirements are prerequisites to the recordation of the security deed; failure to comply with those sections does not negate the validity, as to the parties, of the security deed.").

If a security deed is enforceable between the parties even without attestation, there is no basis for the conclusion that a loan modification is not. Attestation of a loan modification may not even be necessary as against third parties: the Georgia Court of Appeals found no "authority for the proposition that a loan modification agreement is not valid or enforceable unless it is recorded." *Gibson Const. Co. v. GAA Acquisitions I, LLC*, 705 S.E.2d 913, 915 (Ga. App. 2011). If loan modifications need not be recorded to be enforceable, then it follows that recording requirements such as attestation are likewise unnecessary.

B. The Loan Modification did not affect the priority or validity of the Security Deed.

Having concluded the Loan Modification is enforceable, the remainder of Debtor's contentions are controlled by the modification's terms. Under Georgia law, "[a] security deed, like any other deed, may be corrected or modified by a new deed or by a subsequent instrument in the form of a modification agreement, changing the terms of the indebtedness." *Gibson Const. Co. v. GAA Acquisitions I, LLC*, 705 S.E.2d 913, 915 (Ga. App. 2011) (citing *Aetna Cas. & Sur. Co. v. Valdosta Fed. Sav. & Loan Ass'n*, 333 S.E.2d 849, 850 (Ga. App. 1985). While "[t]he cancellation of the old security deed and the execution of a new one between the same parties may have the effect of a novation, so as to promote junior liens to superior rank, [] a

modification agreement will not have such an effect where the original security deed is not cancelled." *Id.*; *cf. Albany Loan & Fin. Co. v. Tift*, 160 S.E. 661, 661 (Ga. App. 1931) ("In order that the taking of a new note and a new lien to secure same, between the same parties, will operate to discharge or displace the pre-existing lien, it is essential that the new lien embrace different property, or that it be based upon a new and distinct consideration.").

The plain language of the Loan Modification shows that the parties did not intend to cancel or subordinate any portion of the Security Deed. The Loan Modification states that Debtor (as borrower)

> "understands and agrees that . . . [a]ll covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect except as herein modified, and none of the Borrower's obligations or liabilities under the Note and Security Instrument shall be diminished or released by any provisions hereof . . . . Nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument."

(Claim 5-2 at 32). Thus, notwithstanding the Loan Modification, the July 2, 2004 Security Deed continues to secure both the deferred and non-deferred principal.

III. Conclusion

Because the July 2, 2004 Security Deed secures both the deferred and non-deferred principal of Respondent's secured claim, the entire balance is protected from modification by 11 U.S.C. § 1322(b)(2). Accordingly, it is

ORDERED that Debtor's Motion to Determine Secured Status of Wells Fargo Home Mortgage and Strip Lien Effective upon Discharge (Doc. 29) is **DENIED**.

The Clerk is directed to serve a copy of this Order on Debtor, the Chapter 13 Trustee and the attached distribution list.

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