

11/2/04

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

|| CASE NO. 01-63186

Eva G. Owens,

CHAPTER 7

Debtor.

JUDGE MASSEY
||

Eva G. Owens,

Plaintiff,

v.

Adversary Proceeding No. 04-6108

Citifinancial Services, Inc.

Defendant.
_____||

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

On March 21, 2001, Defendant Citifinancial Services, Inc. filed a proof of a secured claim for \$11,915.27 (which it amended in 2002) in Plaintiff's main bankruptcy case, showing that it holds a deed to secure debt on Plaintiff's residence. In this adversary proceeding, Eva Owens, Plaintiff and Debtor, demands a judgment determining that the lien asserted by Defendant on Debtor's residence is void, based on a judgment against Defendant that Plaintiff obtained in an earlier adversary proceeding. Plaintiff also seeks a determination that Defendant's claim is unsecured. Defendant did not respond to the complaint, and the Clerk has made an entry of default. The certificate of service of the summons and complaint filed by Plaintiff shows that

Defendant was properly served. Plaintiff moves for a default judgment to which she would be entitled if the complaint stated a claim for relief.

Unfortunately for Plaintiff, a careful reading of the complaint and the default judgment in adversary proceeding no. 01-6193 on which she relies shows that her claim is without merit. The Court takes judicial notice of all of the documents filed in A.P. No. 01-6193, as well as in the main case.

Debtor's bankruptcy petition filed on March 9, 2001 initiated a case under Chapter 13 of the Bankruptcy Code. The case has since been converted to one under Chapter 7. In a Chapter 13 case, a debtor funds a plan from current net disposable income to pay debt in accordance with the plan's terms. In this case, Ms. Owens' Schedule J showed that her net disposable income on a monthly basis at the time she filed her petition was \$172.27. That is the amount she proposed to pay the Chapter 13 Trustee under her plan filed on April 4, 2001. Her plan was silent about regular monthly payments (as opposed to arrearages) to creditors secured by her residence, but it indicated that she would file an objection to Citifinancial's claim. She amended the plan on May 17, 2001 to raise the plan payments to \$335.60 per month. She did not amend Schedules I and J to show where she would obtain the additional funds necessary to make the higher payment. Her amendment raised the dividend to unsecured creditors from one cent on the dollar to five cents for each dollar of an allowed unsecured claim.

Section 1322 of the Bankruptcy Code deals with what a plan may contain and subsection (b)(2) provides:

(b) Subject to subsections (a) and (c) of this section, the plan may -

...

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims[.]

Under section 1322(b)(2), a Chapter 13 plan may not modify the rights of the holder of “a claim secured only by a security interest in real property that is the debtor’s principal residence.” To apply this section correctly, one must determine whether a claim is one “secured by a security interest in real property.” The majority view, and the one adopted by the Eleventh Circuit, is that section 506(a) of the Bankruptcy Code provides the analytic methodology for determining whether or not a claim is secured for purposes of section 1322(b)(2). Section 506(a) provides in relevant part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, ... and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

In *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000), the Eleventh Circuit held:

... [T]he only reading of both sections 506(a) and 1322(b)(2) that renders neither a nullity is one that first requires bankruptcy courts to determine the value of the homestead lender's secured claim under section 506(a) and then to protect from modification any claim that is secured by any amount of collateral in the residence. See *In re Bartee*, 212 F.3d at 290, *In re McDonald*, 205 F.3d at 611. Any claim that is wholly unsecured, however, would not be protected from modification under section 1322(b)(2)

Id. at 1360. Thus, except to bring the debt owed to Citifinancial current, *In re Hoggle*, 12 F.3d 1008 (11th Cir. 1994), Ms. Owens could not have altered its rights under her plan if Citifinancial had been deemed secured by the Property for purposes of section 1322(b)(2). Hence, if Citifinancial was secured for purposes of section 1322(b)(2), she would have had to pay current

payments on the note in accordance with its terms. Defendant's amended proof of claim reduced its claim to \$10,422.98, and the amended proof of claim shows that the monthly payment on the claim was \$339.76. The provision indicating that she would seek to classify Citifinancial's claim as unsecured was obviously due to the fact that she lacked sufficient income to fund the plan if she had to pay that debt.

Plaintiff commenced adversary proceeding no. 01-6193 on May 17, 2001 to obtain a declaration that Citifinancial was unsecured for purposes of section 1322(b)(2). In her complaint, she alleged that a federal tax lien had attached to her residence located at 5305 Forest Downs Lane, College Park, Georgia (the "Property") prior to the date on which Defendant filed the deed to secure debt on the Property that is the basis for its secured claim. She further alleged that there was no equity in the Property above the tax lien and hence that Defendant should be deemed unsecured.¹ Defendant failed to respond to the complaint, and the Court entered a default

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The first mortgagee filed a secured claim in the amount of \$79,910.80. In her initial plan, Debtor indicated that the I.R.S. had a secured claim in the amount of \$4,791.57. (In a consent order entered on October 1, 2001, the Debtor and the I.R.S. agreed that it held a secured claim in the amount of \$4,842.57.) Thus, for the allegation that Citifinancial's claim to be unsecured, the Property had to have a value no greater than \$84,702.37. In her schedules, Ms. Owens swore under oath that the fair market value of the Property was \$93,000. The proof of claim filed by Citifinancial on March 21, 2001 stated that the value of the Property was \$86,000 based on a 6/19/00 appraisal. Ms. Owens alleged in her complaint that "the Defendant's debt is completely unsecured, notwithstanding the Deed to Secure Debt, on account of the fact that there is no value to the estate's interest in the property upon which the Deed to Secure Debt attaches." Complaint, document no. 1 in A.P. No. 01-6193, ¶ 6. Perhaps she reconsidered her valuation stated in her Schedule A, but the proper course of action was to amend it if the valuation was wrong. If the fair value of the Property on the petition date was as much as only one cent greater than the sum of the debt owed to the I.R.S. and the first mortgagee, the filing of the complaint would have been improper. The documents filed in this adversary proceeding do not reconcile the sworn statements of Ms. Owens in her Schedules with her allegations in the complaint.

judgment in Plaintiff's favor, which stated in relevant part, "(a) Citifinancial's Proof of Claim is disallowed to the extent it asserts a secured claim; (b) Citifinancial shall be deemed to be and treated as a general unsecured creditor in this case and for all purposes; and (c) Citifinancial is not entitled to the protections of 11 U.S.C. § 1322(b)(2)."

All that the judgment in A.P. No. 01-6193 accomplished was to render Citifinancial's claim unsecured for purposes of section 1322(b)(2), thereby permitting her to pay that claim as an unsecured claim. Had she completed payments under the plan, the present adversary would never have been filed. But she was unable to perform her plan, and the case was converted to one under Chapter 7 on her own motion in December 2003. The judgment does state that "Citifinancial shall be deemed to be and treated as a general unsecured creditor in this case and for all purposes." The Court interprets this language in the context of the complaint to mean that Citifinancial would not have a secured claim in the case but would receive distributions only as an unsecured creditor. To say that a claim secured by property is unsecured means only that there is not sufficient equity in the property securing the claim, if such property were liquidated, to pay any portion of the claim. The judgment did not address or otherwise affect Citifinancial's lien.

The plan also failed to deal with the lien. Had Ms. Owens completed her plan payments, she might have contended that its lien would be extinguished, but the plan did not specifically so state.

Section 506(d) of the Bankruptcy Code does not aid Debtor with respect to her contention that the judgment in A.P. No. 01-6193 extinguished Citifinancial's lien. It provides:

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless -

- (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title;
or
- (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

In *Dewsnup v. Timms*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), the Supreme Court held that Chapter 7 debtors could not redeem property securing a claim by paying the secured creditor the fair market value of the property, thereby stripping down the secured claim. The Supreme Court decided that the words "allowed secured claim" in section 506(d) do not refer to the portion of an allowed claim deemed "secured" by section 506(a). "Because there is no question that the claim at issue [in that case] has been "allowed" pursuant to § 502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d), which voids only liens corresponding to claims that have *not* been allowed and secured." *Id.*, 502 U.S. at 415. The meaning of section 506(d) is the same in a Chapter 13 case as it is in a Chapter 7 case. The judgment in A.P. No. 01-6193 disallowing Citifinancial's claim as a secured claim, deeming it to be a general unsecured creditor "in this case and for all purposes," and declaring that it was not entitled to protection under section 1322(b)(2) had only one effect, which was to classify the claim as unsecured for purposes of distribution of property of the estate to unsecured creditors. That judgment did not affect Citifinancial's lien in any way whatsoever, and section 506(d) did not void that lien as a result of the reclassification of the claim as unsecured.

Section 348 of the Bankruptcy Code deals with conversion. Section 348(f) states:

f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title -

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

Subsection (f)(1)(B) does not aid Plaintiff. Even if the judgment entered in A.P. 01-6193 is deemed to value the Property or the secured claim, valuation of the collateral would not affect Defendant's lien.

In summary, the complaint fails to state a claim upon which relief can be granted.

For these reasons, it is

ORDERED that Plaintiff's motion for a default judgment is DENIED. The Court will enter a separate judgment dismissing the case.

Dated: October 29, 2004.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE