



IT IS ORDERED as set forth below:

Date: July 15, 2016

James R. Sacca
U.S. Bankruptcy Court Judge

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

IN RE:

BILLY MARK YEARWOOD AND
AMY HAYES YEARWOOD,

Debtors.

CHAPTER 13

CASE NO. 14-21835-jrs

BILLY MARK YEARWOOD AND
AMY HAYES YEARWOOD,

Plaintiffs/Counter
Defendants,

v.
REGIONS BANK,

Defendant/Counter
Plaintiff.

ADVERSARY NO.:

14-02087-JRS

ORDER

This matter came on for oral argument on May 18, 2016 on Defendant Regions Bank's Motion for Partial Summary Judgment (Doc. 52 in the adversary case).¹ In the Motion, Regions

¹ Plaintiffs' Motion to Compromise Claim (Doc. 50 in the main case) and Jason B. Schwartz, Esq.'s Objection to Subpoena and Motion to Quash (Doc. 57 in the adversary case) came on for

Bank sought summary judgment with respect to Plaintiffs' complaint and Counts I and II of its counterclaims. In their complaint, Plaintiffs seek to reduce the extent of Regions' lien on what they allege to be their former residence to the fair market value of the property, which value is allegedly less than the amount owed to Regions. With respect to the counterclaims, Count I is to recover money or property, or to determine the validity, priority or extent of a lien in insurance proceeds or a proceeding to obtain a declaratory judgment under Fed. R. Bankr. P. 7001(1), (2) and (9) and Count II is for breach of contract. The Court having considered the briefs and argument of the parties, and all other matters of record, and being fully apprised in the premises and good cause appearing therefor, enters its findings of fact, conclusions of law, and order pursuant to Fed.R.Bankr.P. 7052 and Fed.R.Civ.P. 52(c) as follows:

FINDINGS OF FACT

1. Billy Yearwood, Amy Yearwood, and Regions Bank d/b/a Regions Mortgage ("Regions") are parties to a valid and existing contract in the Security Deed dated November 6, 2007 and recorded at Deed Book 835, Page 33 et seq., Stephens County, Georgia records (the

an evidentiary hearing at the same time, but the Motion for Partial Summary Judgment only came on for oral argument. The Court heard them on the same calendar to accommodate the lawyers and because the basis for the objection to the Motion to Compromise included some of the same issues involved in the motion for partial summary judgment. Based on the testimony of Messrs. Schwartz and Massey at the hearing on the Motion to Compromise, which testimony made it clear that Cotton States Mutual Insurance Company entered into a separate agreement with Regions Bank with respect to Region Bank's claims as loss payee under a home insurance policy and that Cotton States was not requiring the release of any of the Debtors' claims under the policy in consideration for the payment to Regions Bank, the Debtors counsel orally withdrew the Motion to Compromise at the conclusion of the hearing. The Court concluded the hearings by advising the parties it would enter an order authorizing, but not directing, Cotton States to issue a check directly to Regions in settlement of its claims as loss payee under the policy without prejudice to the any claims the Debtors may have against Cotton States and that it would take the remainder of the issues in Regions' Motion for Partial Summary Judgment under advisement. The Court is now prepared to rule on remainder of that Motion.

“Security Deed”).

2. The Security Deed was given by the Yearwoods to secure the repayment of a loan from Regions in the original principal amount of TWO HUNDRED FORTY THOUSAND AND NO/100 DOLLARS (\$240,000.00) (the “Regions Loan”).

3. The real property conveyed under the Security Deed as collateral for the Regions Loan is located at and commonly known as 29 Up the Creek Drive, Toccoa, Stephens County, Georgia 30577 (the “Property”).

4. Pursuant to the terms of the Security Deed, the Yearwoods obtained the Home Insurance Policy number G10K6965314 issued by Cotton States Mutual Insurance Company (“Cotton States”), which is at issue in this case (the “Policy”). The Policy names Regions as the insured mortgagee therein.

5. The Policy contains what is commonly referred to as a “New York Standard” or “Union” mortgage clause.

6. Paragraph 5 of the Security Deed provides in part that

“[i]f the restoration or repair is not economically feasible or Lender’s security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to the borrower.”

7. In January 2011 and July 2011, the Property suffered fire losses. As a result of the July 2011 fire (the “Second Fire”), the dwelling on the Property was totally destroyed. Restoration or repair of the Property following the Second Fire is not economically feasible.

8. In December 2012, the Yearwoods, through their attorneys Frederick V. Massey and the law firm of Hicks, Massey & Gardner, LLP, filed a lawsuit against Cotton States in the Superior Court of Stephens County, Georgia as case number 12SUCV891 (the “State Court

Lawsuit”) with respect to matters related to coverage under the Policy.

9. In May 2014, Regions, through counsel, filed a Motion to Intervene in the State Court Lawsuit. No order has yet been entered with respect to this Motion to Intervene.

10. In June 2014, Regions, through counsel, resolved its claims and entered into an agreement with Cotton States, whereby Cotton States agreed to pay Regions \$186,552.78 (the “Mortgagee Proceeds”) in consideration for a release from Regions of Regions’ claims as the insured mortgagee under the Policy (the “Regions Settlement”).

11. The Mortgagee Proceeds are the subject of Regions’ counterclaims in this action.

12. Neither the Yearwoods nor their attorneys were involved in negotiating the Regions Settlement.

13. Neither the Yearwoods nor their attorneys are parties to the Regions Settlement, nor did they agree to the amount of or terms of said settlement.

14. The Regions Settlement did not involve, nor was it conditioned upon the release of any of the Yearwoods’ claims against Cotton States in the State Court Lawsuit.

15. In the absence of an express agreement from the Yearwoods to the contrary, Cotton States was required under the terms of the Policy to issue the original settlement checks arising out of the Regions Settlement (the “Regions Settlement Checks”) in the names of Regions and the Yearwoods “as their interests appear.”

16. The Yearwoods, through their attorneys, refused to agree to allow Cotton States issue the Regions Settlement Checks to Regions, alone, despite a request that they do so.

17. On August 4, 2014, the Yearwoods filed this bankruptcy case. Thereafter, Cotton States issued the Regions Settlement Checks jointly payable to Regions, the Yearwoods,

and their respective attorneys.

18. The Yearwoods, through their attorneys, refused to endorse the Regions Settlement Checks over to Regions once they were issued, despite a request that they do so.

19. The Yearwoods are, and have been since March 2011, in default of their payment obligations under the Security Deed and the promissory note that instrument secures. The chapter 13 plan filed by the Yearwoods in this case provides for the cram-down of Region's secured claim to the amount of \$20,000.00 and for the payment of this amount to Region during the plan term. So far, the Yearwoods have made the proposed payments in accordance with that plan pending its confirmation, which confirmation hearing has been continued pending the resolution of this adversary proceeding.

20. The balance due under the Regions Loan has at all times exceeded the amount of the Regions Settlement Proceeds, which amount was negotiated by Regions.

21. At the time the Regions Loan was entered into by the parties, the Yearwoods intended to reside on the Property. The Yearwoods did not, however, reside on the Property at the time of the filing of the bankruptcy petition nor have they resided on it since the fires in 2011 because it is has not been habitable. Although the Yearwoods would like to reside on the Property at some point in the future due to an emotional and family attachment to the Property, that is not likely to occur in the foreseeable future due to the condition of the Property and the status of the litigation with Cotton States. The fact that the Yearwoods did not reside on the Property at the time of the bankruptcy filing is not part of a scheme on their part to manipulate the bankruptcy laws to provide them with the factual basis to attempt to cram down Regions' lien to the value of the Property.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. *Id.* The Court “should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his favor.” *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (citations and punctuation omitted). The court may not weigh conflicting evidence or make credibility determinations. *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 919 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (1994) (en banc).

For issues upon which the moving party bears the burden of proof at trial, he must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of his claim on that legal issue. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). He must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. *Id.* If the moving party makes such a showing, he is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of material fact. *Id.*

CONCLUSIONS OF LAW

The Court having made the foregoing findings of fact, concludes as a matter of law as follows:

1. The subject matter of this action is within the jurisdiction of this Court and venue is proper herein.

2. The New York Standard mortgage clause in the Policy creates a separate and distinct contract of insurance on the mortgagee's interest between Regions, as the named mortgagee, and Cotton States and gives to Regions an independent status. The Yearwoods do not have any interest in that contract, either as parties or third-party beneficiaries, and, consequently, the Yearwoods also do not have any interest in the Regions Settlement Proceeds, nor would they have any interest in any claims Regions may have against Cotton States if it fails to perform under the Regions Settlement. *Decatur Federal Sav. & Loan Ass'n v. York Ins. Co.*, 147 Ga.App. 797, 798, 250 S.E. 2d 524, 526 (1978). See also, *U.S. v. Fishing Vessel Mary Ann*, 330 F.Supp. 1102, at 1105 (S.D.Texas 1970)(mortgagor acquires no rights under this type of mortgage clause as a third party beneficiary).

3. Any policy defenses arising out of the Policy, including any contractual suit limitation period, are exclusively for the benefit of Cotton States, as the insurer. *SavaSeniorCare, LLC v. Beazley Ins. Co., Inc.*, 309 F.R.D. 692, 698 (N.D.Ga. 2015). As such, and because they are neither parties to nor third-party beneficiaries of the contract of insurance between Cotton States and Regions, the Yearwoods do not have standing to raise any such defenses in relation to the Regions Settlement. See, *Arrow Financial Services, LLC v. Wright*,

311 Ga.App. 319, 321, 715 S.E.2d 725 (2011). See also, O.C.G.A. § 9-2-20(a).

4. The Yearwoods' attorneys are not entitled to any lien against the Regions Settlement Proceeds under state law, nor would this Court approve payment of those fees from the Regions Settlement Proceeds under any applicable bankruptcy law, because their work did not produce that recovery, and that recovery was not for their clients or the estate, in any event. *In re Douglas Asphalt Co.*, 483 B.R. 560 (Bankr.S.D.Ga. 2012).

5. The New York Standard mortgage clause in the Policy acts as a pre-appropriation of the Regions Settlement Proceeds to the Yearwoods' mortgage debt to Regions, to which an attorney's lien cannot attach. *Lieden v. General Motors Acceptance Corp.*, 136 Ga.App. 268, 269-70, 220 S.E.2d 716, 717-18 (1975). Therefore, even if the Yearwoods' attorneys had satisfied the requirements of a perfected lien, that lien could not attach to the Regions Settlement Proceeds as a matter of law. See also, *Buckeye Cellulose Corp. v. Sutton Const. Co., Inc.*, 907 F.2d 1090 (11th Cir. 1990) ("the lien of [an attorney can] not attached to property in which his client [has] no interest.") The property interest at issue here from which the Regions Settlement Proceeds are derived is the distinct contract between Regions and Cotton States under the Policy.

6. Further, even if the Regions Settlement Proceeds were considered property of the estate, Regions would have a perfected security interest in the Regions Settlement Proceeds under the Georgia Commercial Code, which security interest holds priority over any lien, including any lien for attorney's fees. O.C.G.A. §§ 11-9-203(f); 11-9-315; 11-9-109; 11-9-333(a). See also, *In re Brantley*, 286 B.R. 918 (Bankr.S.D.Ga. 2002), and *Buckeye Cellulose Corp.*, supra, at n.3.

7. Regions is entitled to settle any and all claims it has against Cotton States without

this Court's approval, and any such settlement shall have no effect whatsoever on the rights of the Yearwood's or the Bankruptcy Estate against Cotton States. Neither the Yearwoods nor their attorneys have any interest in the Regions Settlement Proceeds. Accordingly, Regions is entitled to all of the Regions Settlement Proceeds, to be applied pursuant to the terms of the parties' contracts.

8. The Property is not the Yearwoods' residence for purposes of § 1322(b)(2) because the Property was not the Yearwoods' principal residence on the date of the filing of the bankruptcy case nor will it be the Yearwoods' principal residence in the foreseeable future, if ever. It is the bankruptcy petition date, and not the date of the loan, which is the applicable date for purposes of determining whether a property is the debtor's principal residence for purposes of § 1322(b)(2) unless it appears the debtor is trying to manipulate the Bankruptcy Code. *In re Kelly*, 486 B.R. 882 (Bankr. E.D. Mich. 2013); *In re Howard*, 220 B.R. 716, 718 (Bankr. S.D. Ga.1998); *In re Lebrun*, 185 B.R. 665, 666 (Bankr. D. Mass.1995); *In re Wetherbee*, 164 B.R. 212, 215 (Bankr.D.N.H.1994); *In re Churchill*, 150 B.R. 288, 289 (Bankr.D.Me.1993); *In re Salmeron*, 2010 WL 1780119 (Bankr. D. Md. 2010). Accordingly, the Yearwoods could modify the Regions Loan and reduce the value of the secured claim to the value of the Property (including any further insurance proceeds on account of the value of the Property as opposed to other claims the Debtors may have against Cotton States related to the Policy) in a confirmed Chapter 13 plan, subject to the Yearwoods satisfying all other requirements for confirmation of a plan.

9. Questions of fact do exist, however, with respect to the value of the Property which will necessitate that the issue be tried if not otherwise resolved by the parties.

If any finding of fact set forth herein is more appropriately considered a conclusion of law, it shall be deemed as such. Likewise, if any conclusion of law set forth herein is more appropriately considered a finding of fact, it shall be deemed as such.

CONCLUSION

The Court having made its findings of fact and conclusions of law, and good cause appearing therefor, it is hereby

ORDERED as follows:

1. Regions Partial Motion for Summary Judgment is granted with respect to Count I of the Counterclaim.² Because neither the Yearwoods nor their attorneys have any interest in the Regions Settlement Proceeds, or any claims Regions may have against Cotton States for failure to pay the Regions Settlement Proceeds to Regions pursuant to the Regions Settlement, Cotton States (now Country Financial) is authorized to re-issue the Regions Settlement Checks to Regions with Regions as the sole payee, or to otherwise disburse the Regions Settlement Proceeds directly to Regions, alone, and Regions shall be authorized to accept that payment without further order of this Court. Any such payment by Cotton States to Regions shall be without prejudice to any of the rights, claims or defenses of the Yearwoods or the bankruptcy estate with respect any rights, claims or defenses of the Yearwoods or the bankruptcy estate that are currently pending, or which could be brought, against Cotton States in the State Court Lawsuit.

² It appears to the Court that Count II of the Counterclaim is moot because the relief which has been granted to Regions in the Order under Count I of the Counterclaim is the same as it is requesting in Count II. If Regions contends it is not moot, it must file a written notice with the Court within 21 days from the entry of this Order explaining why it believes it is not moot and the Court will consider the matter at trial.

2. Because there is no just relay for delay, the judgment with respect to the relief granted herein shall be a final judgment.
3. The Court shall try the matters not disposed of by this Order on August 31, 2016, which trial date has been set by separate order of the Court.

END OF DOCUMENT