

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:) Chapter 13 Case
) Number 93-10136

WILLIAM C. JONES, JR.)

Debtor)
_____)

BANKERS FIRST FEDERAL SAVINGS)
AND LOAN ASSOCIATION, N/K/A)
BANKERS FIRST SAVINGS BANK, FSB)

Movant)

vs.)

WILLIAM C. JONES, JR.)

Respondent)
_____)

IN RE:)

WILLIAM CLINTON JONES, JR.)

Debtor)
_____)

WILLIAM CLINTON JONES, JR.)

Plaintiff)

vs.)

BANKERS FIRST SAVINGS AND)
LOAN ASSOCIATION, N/K/A)
Bankers First Savings, FSB)

Defendant)

FILED
at 2 O'clock & 14 min. P.M.
Date: 7-20-93

Chapter 13 Case
Number 93-10136

Adversary Proceeding
Number 93-1007

ORDER

This order consolidates for resolution related matters pending in the

above adversary proceeding and the underlying case. Bankers First Federal Savings and Loan Association, n/k/a Bankers First Savings Bank, FSB (Bankers First), moves for dismissal of the adversary proceeding, contending debtor lacks standing to bring it. In the underlying case, Bankers First objects to debtor's claimed exemption for his residence, contending there is no legal basis for the exemption.

The debtor, William C. Jones, Jr., filed bankruptcy under Chapter 13 on January 28, 1993. In his petition, schedule "C", debtor claims as exempt the entire value of his residence,¹ One Hundred Sixty-Six Thousand Nine Hundred and No/100 (\$166,900.00) Dollars. On March 22, 1993 the Chapter 13 trustee conducted and concluded the meeting of creditors pursuant to 11 U.S.C. §341(a). Bankers First appeared through counsel at the meeting of creditors.

Bankers First alleges that at the meeting of creditors it orally objected to the debtor's claimed exemption for his residence.² On April 22, 1993, 31 days after the conclusion of the meeting of creditors, Bankers First filed a written objection to debtor's

claimed exemption for his residence. Bankers First contends that debtor's homestead exemption is limited to Five Thousand and No/100 (\$5,000.00) Dollars under applicable law.

On February 3, 1993 debtor filed this adversary proceeding. According to debtor's complaint, he was formerly indebted to Bankers First in the approximate amount of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, which was secured by a second mortgage held by Bankers First against his residence.³

¹Debtor's residence consists of 2.01 acres of land and a house, located at 5191 Mill Branch Road, Grovetown, Georgia 30815.

²According to Bankers First, a transcript of the meeting was requested, but Bankers First learned from the trustee that the tape of the meeting is unintelligible and cannot be transcribed.

³When standing is challenged by a motion to dismiss, all material allegations of the complaint are accepted as true and the complaint is construed in favor of the complaining party.

Centerbank Mortgage Company held the first mortgage in the approximate amount of Seventy-Eight and No/100 (\$78,000.00) Dollars. Bankers First foreclosed on the house on January 5, 1993, obtaining a sales price of approximately One Hundred Two Thousand and No/100 (\$102,000.00) Dollars. The property was worth over One Hundred Sixty-Two Thousand and No/100 (\$162,000.00) Dollars on the day of the foreclosure sale. Debtor contends the sale did not bring the property's "reasonable equivalent value" under 11 U.S.C. 548(a)(2)(A) and seeks to set aside the foreclosure sale as a fraudulent transfer pursuant to 548(a)(2).⁴ Debtor seeks to recover

from Bankers First sixty Thousand and No/100 (\$60,000.00) Dollars, the alleged equity in the house prior to the foreclosure sale. Bankers First maintains that the avoidance powers conferred on the trustee under 11 U.S.C. §548 are not available to a Chapter 13 debtor and, therefore, that the debtor lacks standing.⁵ According to Bankers First, "no standing is provided a chapter 13 debtor [under the Bankruptcy Code] to bring avoidance actions, except to the extent of exempt property under Section 522." Bankers First's brief in support of motion to dismiss, p. 2.

As the resolution of Bankers First's objection to debtor's claimed exemption is dispositive of its motion to dismiss the adversary proceeding, the objection is addressed first. Although Bankers First interposed a written

Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993).

⁴The complaint does not cite any Bankruptcy Code section pursuant to which the transfer of debtor's residence house may be set aside as fraudulent. I note, however, the filed complaint may be missing its final page. Defendant's answer responds to 37 numbered paragraphs of the complaint; the filed complaint contains only 33 numbered paragraphs. For the purposes of this order only, I assume debtor's cause of action for avoidance of the alleged fraudulent transfer is brought pursuant to 11 U.S.C. §548(a)(2).

⁵Bankers First's motion for dismissal and supporting brief do not address the debtor's alleged cause of action in the complaint for wrongful foreclosure under state law.

objection to the claimed exemption of debtor's residence, it is undisputed that the written objection was filed on the 31st day following the conclusion of the meeting of creditors.⁶ The Bankruptcy Code states in pertinent part as follows:

The debtor shall file a list of property that the debtor claims is exempt under subsection (b) of this section [522]. . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C. §522(1) (emphasis added). The Bankruptcy Rules provide in pertinent part as follows:

The trustee or any creditor may file objections to the list of property claimed as exempt within thirty (30) days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

FRBP 4003(b) (emphasis added). Bankers First did not file its objection within the 30 day period immediately following the conclusion of the meeting of creditors. Under 11 U.S.C. §522(1) and FRBP 4003(b), Bankers First's failure to timely object to the exemption claimed for debtor's residence bars it from challenging the exemption now, even if there is no colorable statutory basis for the exemption. Taylor v. Freeland & Kronz, ___ U.S. ___, 112 S.Ct. 1644, 118 L.E.2d 280 (1992). As no party in interest timely objected to the exemption, the exemption is valid under 11 U.S.C. §522(1).

⁶See Federal Rule of Bankruptcy Procedure (FRBP) 9006(a). The meeting of creditors was concluded on March 22, 1993. Bankers First filed its objection to debtor's claimed exemption of his residence on April 22, 1993.

Nevertheless, Bankers First contends that allowing the debtor's claimed exemption of his residence to stand would be an abuse of process because there appears to be no colorable legal

basis for the exemption. Bankers First urges the court to exercise its equitable powers under 11 U.S.C. §105(a) to except it from the requirements of §522(1) and FRBP 4003(b).⁷ Bankers First notes that in Taylor, supra, the Supreme Court expressly declined to address the trustee's argument in that case that the bankruptcy court can consider the validity of a late filed objection to a claimed exemption under 11 U.S.C. §105(a). Bankers First cites various cases, none of which are binding on this court, in support of its §105(a) argument. As I disagree with Bankers First's interpretation of §105(a) and, to the extent they support Banker First's position, I decline to follow the cases cited Bankers First.

Section 105(a) authorizes me to "issue any order . . . that is necessary or appropriate to carry out the provisions of [title 11]." 11 U.S.C. §105(a) (emphasis added). By its terms §105(a) grants bankruptcy courts broad power to see to it that the Bankruptcy Code is "carr[ied] out," but not to read exceptions into it, or into the provisions of the Federal Rules of Bankruptcy Procedure. Bankruptcy courts are courts of equity, Bank of Marin v.

⁷11 U.S.C. §105(a) provides:

The court may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title [11]. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

England 385 U.S. 99, 103, 87 S.Ct 274, 277, 17 L.Ed.2d 197 (1966); however, "the fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be." Matter of Chicago. Milwaukee St. Paul Pac. R. Co., 791 F.2d 524, 528 (7th Cir. 1986). "[T]he powers granted by [§105(a)] may be exercised only in a manner consistent with the provisions of the Bankruptcy Code. That statute does not authorize bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." U.S. v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986) (footnotes omitted). Cf. Matter of Levens, 563 F.2d 1223, 1224 (5th Cir. 1977), In re: Woodhaven, Ltd., 139 B.R. 745, 749 (Bankr. N.D. Ala. 1992). Section 105(a) does not authorize this court to create an exception to §522(1) and FRBP 4003(b) for Bankers First.

Bankers First also argues that its alleged oral notice to debtor at the meeting of creditors complied with the purpose of FRBP 4003(b). This argument is unpersuasive as FRBP 4003(b) contemplates a written objection. ("The trustee or any creditor may file objections Copies of the objection shall be delivered or mailed. . . . FRBP 4003(b)). If Congress intended oral notice to the debtor of an objection to a claimed exemption to extend the period for filing objections, it would have said so. See generally In re:

Georgia Scale Co., 134 B.R. 69, 71 (Bankr. S.D. Ga. 1991).

Section 522(1) renders exempt any property claimed exempt by the debtor unless a party in interest objects. Time to object, however, is not unlimited. Parties in interest are given, 30 days following the conclusion of the meeting of creditors to file any objection. Once the 30 day period expires, the bankruptcy court is prohibited from enlarging the time for filing an objection, unless prior to the expiration of the 30 day period a party in interest seeks additional time to

object. See FRBP 9006(b)(1) and (b)(3) in conjunction with FRBP 4003(b). Bankers First did not request within the 30 day period additional time to file an objection and filed its objection after the 30 day period expired. Thus, under §522(1) and FRBP 4003(b) (and the Supreme Court's application of these provisions in Taylor, supra), Bankers First can no longer challenge the validity of the exemption.

Bankers First does not dispute that debtor may utilize 11 U.S.C. §548 avoidance powers to the extent debtor seeks to recover exempt property. See 11 U.S.C. §522(h).⁸ Having determined all of debtor's interest in the subject property is exempt, Bankers First's argument in support of its motion for dismissal in the adversary

proceeding is moot. The debtor has standing to prosecute his complaint under 11 U.S.C. §522(h).

It is therefore ORDERED that the objection to the claim of exemptions filed by Bankers First in Ch. 13 case No. 93-10136 is overruled;

further ORDERED that the motion to dismiss filed by Bankers First in adversary proceeding No. 93-1007 is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 20th day of July, 1993.

⁸A debtor's standing to avoid a transfer under §522(h) depends on his or her ability to exempt the subject property under §522(g) assuming "the trustee had avoided such transfer." See 11 U.S.C. §522(h). Subsection 522(g) allows the debtor to exempt property recovered by the trustee to the extent the property would be exempt had it not been transferred, if the transfer was involuntary and the debtor did not conceal the property.