

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:) Chapter 13 Case
) Number 90-11183
LOYD KENT)
CLYDE KENT)
)
Debtors)
_____)
)
LOYD KENT) FILED
CLYDE KENT) at 5 O'clock & 26 min. P.M.
) Date: 3-27-91
vs.)
)
BANK OF THOMSON)

MEMORANDUM AND ORDER

The Bank of Thomson (hereinafter "the Bank") objects to confirmation questioning feasibility of the debtors' Chapter 13 plan, and whether the plan is proposed in good faith. Debtors object to the secured proof of claim filed by the Bank.

The Bank filed a secured proof of claim in the amount of Nine Thousand Nine Hundred Twenty Four and 62/100 (\$9,924.62) Dollars and claimed a security interest in debtor's 1988 GMC pickup truck and 1979 mobile home. Debtors object to the Bank's claim of a security interest in the mobile home. Debtors seek to avoid the Bank's security interest in the mobile home as unperfected and value

the Bank's claim as secured to the extent of the value of the truck and unsecured as to the balance. The debtors do not object to the Bank's claimed security interest in the truck, but the truck's value is disputed.

Debtor by objection to the Bank's proof of claim is seeking to avoid the

creditor's security interest. Procedurally, an action to recover property or to determine the validity, priority, or extent of lien must proceed by adversary proceeding. Bankruptcy Rule 7001(1)(2). An action to avoid a transfer or obligation of the debtor under 11 U.S.C. §544(a) is such an action. The adversary proceeding requirements of Part VII of the Bankruptcy Rules may not be circumvented by designating an action to avoid a lien under §544(a) as an objection to claim. However, in this case the creditor opposed a continuance of confirmation and the matter was tried on the merits. See In re: Cox, 68 B.R. 788, 803 (Bankr. D. Ore. 1987).

Debtors obtained three loans from the Bank which make up its claim of Nine Thousand Nine Hundred Twenty Four and 62/100 (\$9,924.62) Dollars. The collateral used as security for one of the loans was debtors' 1979 Capella II mobile home. The Bank filed a UCC-1 financing statement with the Clerk of Superior Court of McDuffie County, Georgia. The Bank did not procure, nor did it attempt to procure a perfected security interest in debtors' mobile home by noticing their security interest on the mobile home

certificate of title. One loan was secured by the debtor's truck. The remaining loan was listed as unsecured on-its face. The Bank's claim as filed asserts that it is a secured claim.

The debtors have been living in their mobile home since purchase in 1979 and have removed the wheels and axles. The Bank's expert witness testified that the cost and labor to install axles and wheels and move the mobile home is minimal. The Bank introduced evidence as to the value of debtors' mobile home as being Six Thousand and No/100 (\$6,000.00) Dollars. In assessing value, the Bank's expert witness used the NADA mobile home value guide. The debtor did not rebut this evidence of value.

As to the truck, eight months ago the debtor as a willing buyer purchased it from a used car dealer, a willing seller, in an arms length transaction

for Five Thousand Two Hundred and No/100 (\$5,200.00) Dollars. The debtor values the truck today at Three Thousand Five Hundred and No/100 (\$3,500.00) Dollars. The Bank values the truck today at Six Thousand Three Hundred Twenty Five and No/100 (\$6,325.00) Dollars. The only evidence introduced effecting value from the date of purchase is the passage of eight months time, an additional 9,000 miles of use, and normal wear and tear. The fair market value of the vehicle as of the effective date of the debtors' plan is Five Thousand and No/100 (\$5,000.00) Dollars.

CONCLUSIONS OF LAW

Once a claim is filed it is presumed valid and is prima facie evidence of validity of both the claim and amount., See, In Re: The Securities Groups, 116 B.R. 839, 845 (Bankr. M.D. Fla. 1990). "A claim or interest, proof of which is filed under section 501 of this title [11], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. §502(a). Normally in a hearing on a properly filed objection to claim, the burden is initially on the objecting party to put forth sufficient evidence to overcome the prima facie correctness of the claim. See In Re: The Securities Groups supra. Once the objecting party comes forth with sufficient evidence to place the claim's allowability as filed at issue the burden of going forward with evidence to sustain the claim shifts to the claimant. See, In re: Cherry, 116 B.R. 315, 316 (Bankr. M.D. Ga. 1990). The ultimate burden of persuasion rests with the claimant. See id. The debtors' action, though designated an objection to claim, is an action to determine the extent of the Bank's lien and is governed by the burden of proof requirement for such an adversary proceeding. The plaintiff, party bringing the complaint to determine the validity of a lien and avoid same, bears the burden of proof by a preponderance of the evidence. See generally In re: Commercial Western Finance Corp., 761 F.2d 1329 (9th Cir. 1985); L. King, 3 Colliers on Bankruptcy ¶502.02 (15th ed. 1990). The

debtors bear the burden of proof on the avoidance of the

Bank's security interest.

"[U]nder Georgia law, a mobile home is initially considered a vehicle which must be given a certificate of title. Georgia Code [O.C.G.A.] §40-3-20 (1982)." In re: Washington, 837 F.2d 455, 456 (11th Cir. 1988). If permanently affixed to the land a mobile home may be considered a fixture. See id. Unrebutted testimony on behalf of the Bank established value using the NADA mobile home value guide. Furthermore, the cost to install wheels and move the mobile home is minimal. The evidence clearly established that the mobile home remains just that, a mobile home. "In order to perfect a security interest in a vehicle the lienor's interest must be noted on the title. Georgia Code Annotated [O.C.G.A.] §40-3-50(b) (1982)." See id. The Bank has failed to validly perfect its security interest in debtors' mobile home by failing to acknowledge their security interest on the mobile home's certificate of title.

"An unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected . . . [and such a] lien creditor would include the trustee in bankruptcy." See In re: Diamond Manufacturing Company, Inc., Chapter 7 Case No. 85-40555 (Bankr. S.D. Ga. Sav. Div., Dalis, J. March 19, 1990). Bankruptcy Code (title 11 United States Code) section 544(a) provides:

(a) The trustee shall have, as of the commencement of the case, and without regard to

any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any - transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial

lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists.

A creditor's failure to take prompt action to list its lien on the certificate of title of its security as required by state law before the filing of the bankruptcy petition renders the creditor's unperfected security interest subject to the trustee's interest under §544(a)(1). First National Bank of Denver v. Turley, 705 F.2d 1024 (8th Cir., 1983). It is undisputed that a Chapter 13 trustee may use his "strong-arm" powers for lien avoidance. Through 11 U.S.C. §103(a) all provisions of Chapter 5, including §544 are applicable and operative in a Chapter 13 case. See e.g. In re: Freeman, 72 B.R. 850 (Bankr. E.D. Va. 1987); In re: Weaver, 69 B.R.

554 (Bankr. W.D. Ky. 1987); In re: Hall, 26 B.R. 10 (Bankr. M.D. Fla. 1982). Accord, In re: Bland, 760 F.2d 1252 (11th Cir. 1985); In re: Ware, 99 B.R. 103 (Bankr. M.D. Fla. 1989).

The Bank's contention that the powers of a trustee available to a Chapter 13 debtor are limited to those set forth in 11 U.S.C. §1303 is incorrect. Section 1303 provides:

Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under section 363(b), 363(d), 363(e), 363(f), and 363(1), of this title.

Congress has delineated certain express powers that the Chapter 13 debtor may exercise exclusive of the trustee. Freeman supra; 11 U.S.C. §1303. Legislative history has indicated that these powers are exclusive, however not exhaustive.

"The section [11 U.S.C.

§1303] does not imply that the debtor does not also possess other

powers concurrently with the trustee . . . " 124 Cong. Rec. H. 11,106 (Sept. 28, 1978); S. 17,423 (Oct. 6, 1978). "Where the trustee has taken no action, it seems only reasonable to assume that the trustee's avoidance powers should be among those which Congress has referred to as concurrently possessed by the Chapter 13 debtor." Freeman supra at 855. The debtor's actual knowledge and prepetition grant of the unperfected security interest is irrelevant under §544. See generally, In re: Sandy Ridge Oil Co. Inc., 807 F.2d 1332 (7th Cir., 1986). Concurrent with the Chapter 13 trustee, the debtor possesses and may invoke the "strong-arm" powers of §544(a) and

thereby avoid a creditor's unperfected security interest.

The Bank objects to confirmation. The Bank contends that debtors' plan is not feasible and not proposed in good faith. In determining good faith, this court must consider the following nonexclusive list of factors:

1. the amount of the debtor's income from all sources;
2. the living expenses of the debtor and his dependents;
3. the amount of attorneys fees;
4. the probable or expected duration of the debtor's Chapter 13 plan;
5. the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. the debtor's degree of effort;
7. the debtor's ability to earn and the likelihood of fluctuation in his earnings;
8. special circumstances such as inordinate medical expenses;
9. the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack or same, in dealing with his creditors;
11. the burden which the plan's administration would place upon the trustee;
12. the substantiality of repayments; and
13. the potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Company, 702 F.2d 885

(11th Cir. 1983).

Applying these factors to this case requires a determination of good faith.

Additionally, the plan appears feasible. The debtors have proposed a reasonable living expense budget and payments of One Hundred Sixty-Five and No/100 (\$165.00)

Dollars per month for a period of sixty (60) months. As of the date of confirmation hearing the debtors were current in plan payments to the trustee.

Furthermore, I find debtors' testimony creditable regarding their good faith and sincerity in efforts to fund their plan. The debtors jointly owned mobile home is their homeplace and necessary for the success of their plan. The value of the mobile home is within the exemption limitations of Georgia law [O.C.G.A. §44-13-100(a)(1)] available to these debtors. Under the plan, the debtors are devoting all disposable income to plan payments for sixty- (60) months and the holders of unsecured claims will receive more under the plan than through a Chapter 7 liquidation. 11 U.S.C. §1325(a)(4) & (b)(1)(B). The debtor bears the burden of establishing that the plan meets the confirmation criteria of 11 U.S.C. §1325 which includes good faith and feasibility. See, In re: Girdaukas, 92 B.R. 373 (Bankr. E.D. Wis. 1988). These debtors have met that burden.

It is therefore ORDERED that Bank of Thomson's objection to confirmation is denied;

further ORDERED debtors' objection to proof of claim is sustained;

further ORDERED that upon completion of the debtors' plan and issuance of discharge the lien of the Bank of Thomson on debtors' 1979 mobile home is avoided and cancelled;

further ORDERED that the claim of the Bank of Thomson is secured to the extent of the value of the truck, Five Thousand and No/100 (\$5,000.00) Dollars and unsecured as to the balance, Four

Thousand Nine Hundred Twenty Four and 62/100 (\$4,924.62) Dollars; and an order of confirmation shall issue in accordance with this memorandum.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of March, 1991.