

May 26, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CARL G. DAVIS,
Debtor.

BAP No. WO-04-057

COUNTRYWIDE HOME LOANS,
Plaintiff – Appellee,

Bankr. No. 00-19757-NLJ
Adv. No. 03-01053-NLJ
Chapter 13

v.

ORDER AND JUDGMENT*

CARL G. DAVIS,
Defendant – Appellant.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, CLARK, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

Carl G. Davis timely appeals the Order on Cross Motions for Summary Judgment of the United States Bankruptcy Court for the Western District of Oklahoma. Finding the action in which the order was entered barred by the doctrine of claim preclusion, we REVERSE and REMAND.

I. Background

On November 30, 1999, Countrywide Home Loans (CHL) and Carl G. Davis (Debtor) entered into a loan transaction. The Debtor executed a promissory

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

note, secured by a mortgage (Mortgage) on his residence. The Debtor defaulted under the terms of the loan.

On December 1, 2002, the Debtor filed his Chapter 13 petition for relief. In the Debtor's Chapter 13 case, four separate bankruptcy court orders culminated in this appeal.

1. Plan Confirmation Order

In his case, the Debtor proposed a Chapter 13 plan that contained the following language relative to the treatment of secured claims: "Countrywide Home Loans is secured by an unperfected mortgage that will be avoided upon plan completion." Chapter 13 Plan at 1, Appellant's Appendix at A-24. The plan proposed to pay nothing on CHL's secured claim and identified CHL's "collateral" as an "unperfected mortgage."

The Plan was served on CHL. CHL did not object to confirmation. However, on February 9, 2001, CHL filed a proof of claim in the Debtor's case, asserting its claim was secured. To the proof of claim, CHL attached a copy of the note and Mortgage. The Mortgage did not bear any notation indicating it was filed of record.

On February 28, 2001, the bankruptcy court entered an Order Confirming Chapter 13 Plan (Confirmation Order). The Confirmation Order does not explicitly address the validity of CHL's lien or its status as a secured or unsecured creditor. CHL did not appeal the Confirmation Order and did not file a motion to have the Confirmation Order revoked within the 180 days allowed by 11 U.S.C. § 1330(a).

2. Orders on Motion for Relief from Automatic Stay

On December 10, 2001, nine months after the Confirmation Order was entered, CHL filed a Motion for Relief from Automatic Stay (Motion for Relief), seeking relief to enforce its Mortgage by foreclosure. At a hearing on the Motion for Relief, CHL abandoned the relief sought, orally requesting equitable relief

from the Confirmation Order or for an order requiring the Debtor to file an adversary proceeding to determine the validity of CHL's lien. CHL argued that Fed. R. Bankr. P. 7001 required an adversary proceeding in such circumstances.

The bankruptcy court denied the oral relief requested and stated:

[T]he Court feels that there must be some finality. Your client did receive notice. And had your client objected within six months – or I should say even six months, there may have been some basis for granting relief.

But at this point I think it's too late. I think the order confirming this plan was over a year ago. And for that reason the Court denies the relief asked by Countrywide.

Transcript at 14, Appellant's Appendix at A-73.

Shortly after the hearing on the Motion for Relief, the bankruptcy judge retired, and a new judge was appointed to the Debtor's Chapter 13 case. On October 10, 2002, the new bankruptcy judge signed an order (First Stay Order) denying the Motion for Relief "for the reasons as stated by this Court on the record." First Stay Order at 1, Appellant's Appendix at A-75.

For unexplained reasons, the bankruptcy court entered another order on December 19, 2002 (Second Stay Order), which denied the Motion for Relief "as orally modified." In the Second Stay Order, the bankruptcy court also ruled: "Upon full consideration thereof, [the court] finds and orders that the motions filed by Movant in this case are denied for reasons as stated by this Court on the record, specifically that Rule 7001 is not applicable and an adversary proceeding is not required in this case." Second Stay Order at 1, Appellant's Appendix at A-76. CHL did not file a motion under either Fed. R. Bankr. P. 9023 or 9024, incorporating Fed. R. Civ. P. 59(e) or 60(b) respectively, and did not appeal the First or Second Stay Order.

3. Order on Summary Judgment

Only two months later, in February 2003, CHL commenced an adversary proceeding against the Debtor seeking a declaration of the validity of its lien and

the claim secured by the Mortgage. To the complaint, CHL attached a copy of the Mortgage showing that it was filed in the Oklahoma land records in December 1999.

On June 3, 2004, the bankruptcy court entered its Order on Cross Motions for Summary Judgment (Summary Judgment Order). The bankruptcy court did not address the Debtor's argument that CHL's adversary proceeding was barred under the principle of res judicata. It held that confirmation of the Chapter 13 plan did not invalidate CHL's lien, and CHL's secured claim was unaffected by the confirmed plan, surviving the bankruptcy case unimpaired. The court ordered CHL to file an amended proof of claim with a copy of the recorded Mortgage attached.

The Debtor timely appealed the Summary Judgment Order. Fed. R. Bankr. P. 8002(a). The parties have consented to this Court's jurisdiction because they have not elected to have this appeal heard by the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

II. Discussion

Both the First and Second Stay Orders adopted the first bankruptcy judge's statements on the record and ruled against CHL based on grounds of finality. In the Second Stay Order, the bankruptcy court also ruled that an adversary proceeding was not required to determine the validity of CHL's lien in this case. Yet, the adversary proceeding requests the very relief the bankruptcy court previously held was barred. Because this Court concludes the Second Stay Order bars the adversary proceeding, the Summary Judgment Order must be reversed and this case remanded for a dismissal of that adversary proceeding.

Claim preclusion (res judicata) “prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or such party’s privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action.” 18 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 131.10[1][a] (3d ed. 1999). Claim preclusion rests on the fundamental policies of finality, judicial economy, and the interest in bringing litigation to an end, and discourages repetitive litigation and forum shopping. *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000) (citing *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1258 (10th Cir. 1997)).

The bankruptcy court erred in refusing to apply the doctrine of claim preclusion to the Second Stay Order. CHL did not appeal or otherwise challenge the Second Stay Order. In that order, the bankruptcy court denied CHL’s motion to modify the Confirmed Chapter 13 Plan and ruled that Fed. R. Bankr. P. 7001 was inapplicable under the facts of the case. The Second Stay Order was final. CHL’s later-commenced adversary proceeding, seeking the same relief that was denied in the Second Stay Order, was a collateral attack on a ruling not to CHL’s liking. Having failed to appeal or otherwise seek relief from the Second Stay Order, CHL is bound by the bankruptcy court’s rejection of CHL’s claims.

The fundamental policy of discouraging forum shopping is implicated in this case. The doctrine of claim preclusion dictates that the adversary proceeding be dismissed.

III. Conclusion

The bankruptcy court’s Summary Judgment Order is REVERSED and the case is REMANDED for the bankruptcy court to dismiss the adversary proceeding.