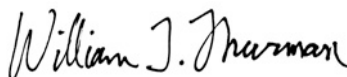


The below described is **SIGNED**.

Dated: January 21, 2005



WILLIAM T. THURMAN
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

Calvin K. Jones,

Debtor.

Calvin K. Jones and Jolene C. Jones,

Plaintiffs,

v.

**Homecomings Financial Network
and
Residential Funding Corporation,**

Defendants.

Bankruptcy Case Number

02-30630

[Chapter 13]

Adversary Proceeding Number

04-02636

Judge William T. Thurman

**MEMORANDUM DECISION GRANTING DEFENDANTS' MOTION TO DISMISS
COUNTS 3 THROUGH 12 AND COUNT 14 OF PLAINTIFFS' COMPLAINT**

A hearing on the Defendants' Motion to Dismiss Counts 3 through 12 and Count 14 of Plaintiffs' Complaint or Alternatively for More Definitive Statement was conducted on November 23, 2004 before the Honorable William T. Thurman in room 376, United States Courthouse, 350 South

Main Street, Salt Lake City, Utah. Present at the hearing were Jay Woodall, local counsel for the Defendants, and Alan Smith, counsel for the Plaintiffs. Representations were made and arguments were had thereupon. Based upon the same, the pleadings, and other court papers on file and good cause appearing, the Court hereby enters this Memorandum Decision, which will constitute its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.¹

BACKGROUND

Defendants seek an order dismissing Counts 3-12 and 14 in the Plaintiff's Complaint for failure to state a claim upon which relief can be granted because, Defendants argue, the applicable statutes of limitation create a complete bar to Plaintiffs' recovery on those claims. In the alternative, Defendants argue that even if § 108 applies to Debtors,² the statute of limitations still has run on Counts 3, 4, 5, 8, 9, and 10. Furthermore, Defendants argue that the Wrongful Foreclosure claim (Count 7) is not ripe because Defendants have not conducted a foreclosure sale, and that the Objection to the Proof of Claim (Count 14) is not ripe because Defendants have not filed a proof of claim in this case.

Plaintiffs respond that the statute of limitations does not bar any Counts in the Complaint because 11 U.S.C. § 108(a) extends the applicable statute of limitations up to two years past entry of the order for relief. Plaintiffs filed the Complaint in June 2004, within two years after filing their Petition for Relief. Therefore, Plaintiffs argue, all Counts were filed within the statute of limitations. Plaintiffs

¹ Incorporated into the Bankruptcy Code via Bankruptcy Rule 7052.

² Which extends the deadlines for filing a Complaint by up to two years. See discussion under Analysis section, *supra*.

further argue that Count 10 (regarding Truth in Lending Violations) is not time-barred because 15 U.S.C. § 1640(e) provides that the statute of limitations do not apply to situations where damage is caused by recoupment or setoff. Here, Plaintiffs seek recoupment or setoff from the Defendants, who requested relief from stay to foreclose on the property. Finally, Plaintiffs argue that Count 14 is ripe because: (1) pursuant to §101(5), a claim exists without a formal Proof of Claim being filed; (2) Defendants filed an informal Proof of Claim by seeking relief from stay; and (3) the Court could grant leave for Debtor to file a Proof of Claim on behalf of the Defendants and "ripen" Count 14.

JURISDICTION

The Court has jurisdiction over the parties and subject matter of this adversary proceeding under 28 U.S.C. § 1334. The Court notes, however, that § 108(a) affects only debtors. Because Jolene C. Jones is not a debtor, the Court finds that she is not eligible to be afforded the benefits of § 108(a). As such, the Court's analysis applies solely to Calvin K. Jones.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

FACTS

1. The Debtor, Calvin K. Jones, filed a Chapter 13 bankruptcy case on June 28, 2002. Debtor's wife, Jolene C. Jones, did not file as a co-debtor in this case.
2. This adversary proceeding was initiated by the Plaintiffs on June 14, 2004.

3. The alleged actions, as stated in the Complaint, occurred between April 1999 and October 2000.
4. Plaintiffs allege the following in their Complaint: Count 1: Breach of Contract; Count 2: Bad Faith, Wrongful Debt Collection; Count 3: Invasion of Privacy; Count 4: Defamation; Count 5: Intentional Infliction of Emotional Distress; Count 6: Fraud; Count 7: Wrongful Foreclosure; Count 8: Violations of Fair Debt Collection Practices Act 15 U.S.C. § 1692 et seq.; Count 9: Violations of Real Estate Settlement Procedures Act 12 U.S.C. §2601 et seq.; Count 10: Violations of the Truth in Lending Act 15 U.S.C. § 1639 et seq.; Count 11: Violations of the Fair Billing Act 15 U.S.C.; Count 12: Violations of the Utah Consumer Sales Practices Act: Utah Code, Title 13, Chapter 11; Count 13: Accounting (Plaintiffs are entitled to an accounting of their actual debt);³ Count 14: Objection to Proof of Claim.

LEGAL STANDARD

Section 108(a) states that:

If applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, *the trustee* may commence such action only before the later of (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief.⁴

³ This is the only claim not at issue in the current matter before the Court.

⁴ 11 U.S.C.A. § 108 (2004) (emphasis added).

ANALYSIS

Plain Meaning of the Statute

Congress “says in a statute what it means and means in a statute what it says there.”⁵ When “the statute's language is plain, ‘the sole function of the courts’—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”⁶ Section 108 provides for an additional two years in which the Trustee may file a Complaint after a bankruptcy is filed. Legislative history provides insight into the reasoning behind enactment of the statute. “Subsections (a) and (b) [of § 108] . . . permit the trustee, when he steps into the shoes of the Debtor, an extension of time for filing an action or doing some other act that is required to preserve the debtor’s rights.”⁷ Thus the statute was meant to allow the Trustee, who begins the case unfamiliar to its facts and circumstances, an extra two years from the time he becomes fiduciary of the estate to file a complaint in order to obtain a benefit for the estate.

The Defendants refer to the case of Hartford Underwriters Insurance Company v. Union Planters Bank, 520 U.S. 1 (2000) for the argument that only a Trustee may pursue certain rights and remedies. In that case, the Supreme Court looked at the language of § 506(c) to determine whether its benefits were solely for the Trustee, or for the Debtor also. Section 506(c) provides:

⁵ Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, *6, 120 S.Ct. 1942, **1947 (U.S. 2000) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed. 2d 290 (1989)).

⁶ Id.

⁷ House Report No. 95-595, 95th Cong., 1st Sess., 318 (1977).

“The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.”⁸ The Supreme Court stated that “the statute appears quite plain in specifying who may use § 506(c)—‘[t]he trustee.’ It is true, however, as petitioner notes, that all this actually ‘says’ is that the trustee may seek recovery under the section, not that others may not. The question thus becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision. We have little difficulty answering yes.”⁹

The language of §§ 506(c) and 108(a) are similar, in that they provide for a benefit to the trustee without explicitly denying the same benefit to the debtor. In footnote 3 of Hartford Underwriters, the Supreme Court acknowledged that “Debtors-in-possession may also use [§ 506(c)], as they are expressly given the rights and powers of a trustee by 11 U.S.C. § 1107.” Similarly, debtors in possession would also be permitted to use § 108 as a result of the grant of powers from § 1107. Notably, however, the Supreme Court mentions only debtors in possession and not Chapter 13 debtors in this footnote. This is likely because there is no corresponding carte blanche allotment of trustee’s rights and powers for a Chapter 13 debtor in the Bankruptcy Code. Accordingly, the benefit granted in § 108 applies solely to the trustee and debtors in possession, but not to Chapter 13 debtors.¹⁰

⁸ 11 U.S.C. § 506(c) (2004).

⁹ Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 1947 (2000).

¹⁰ The Court is well aware that § 1306(b) requires the debtor to “remain in possession of all property of the estate,” and that choses in action meet the definition of property. Nevertheless, § 1306

Equitable Considerations

Plaintiffs point to the case of In re Gaskins to support their contention that Chapter 13 debtors should be allowed to use § 108(a) to extend the time allowed to file a complaint. In Gaskins, the Chapter 13 debtor filed a complaint to void a home improvement contract and mortgage on grounds of fraud. In its analysis, the court noted that “Section 108(a) specifically extends the time for the bankruptcy trustee, *not for the debtor* who is in bankruptcy.”¹¹ The court even acknowledged that in a prior Chapter 7 case, the court had found that the debtors were not entitled to the benefit of § 108(a) because there were no assets to be distributed and thus any recovery by the debtors could not benefit the estate.¹² The Gaskins court went on to conclude, however, that because the complaint filed by Ms. Gaskins would benefit the estate, § 108(a) extended the time for the debtor to bring the suit.¹³

This Court is reticent to agree completely with the reasoning in In re Gaskins. Nevertheless, the Court notes that the Debtor’s Plan¹⁴ proposes to return 100% to unsecured creditors, plus 6% in interest. As such, any return to the Debtors in this case would not benefit the creditors as they are already being paid in full plus interest. Accordingly, it appears that the Debtors in this case do not meet

does not confer all rights of the trustee onto the Chapter 13 debtor as § 1107 does for the debtor in possession.

¹¹ In re Gaskins, 98 B.R. 328, 330 (1989) (emphasis added).

¹² Id.

¹³ Id. at 331.

¹⁴ Confirmed March 26, 2003.

the sole standard espoused by the court in In re Gaskins: in order for the debtor to be allowed to utilize § 108(a), any recovery gained from the complaint must benefit of creditors.

In addition, the Court notes that while the alleged improper conduct occurred between April 1999 and October 2000, nowhere in the Debtor's Schedules or Statement of Financial Affairs¹⁵ does the Debtor mention this cause of action.¹⁶ No evidence was presented that the Debtor ever discussed the causes of action in this adversary proceeding with the Trustee. Indeed, the action is not mentioned in the Chapter 13 Plan or the Order Confirming the Plan. Two of the factors used by the Tenth Circuit Court of Appeals to determine whether good faith has been shown when confirming a plan is: 1) the accuracy of the statements and schedules; and 2) the motivation of the debtor in seeking Chapter 13 relief.¹⁷ The Court is concerned about the motivation of the Debtor in failing to inform creditors of this potential claim, then filing a Complaint after the Plan was confirmed where the apparent sole benefit would run to him and his wife. Section 108(a) is meant to give a trustee extra time to file suit in a case in which he is unfamiliar. Section 108(a) is not meant to give a negligent or forgetful debtor extra time to decide the best route to take.

¹⁵ Filed on July 15, 2002. The Court takes judicial notice of these filings pursuant to Federal Rule of Evidence Rule 201. See St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1175 (10th Cir.1979).

¹⁶ In the response section for number 20 on Schedule B, which asks the debtor to list all "[o]ther contingent and unliquidated claims of any nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims," the Debtor answered "NONE."

¹⁷ See Flygare v. Boulden, 709 F.2d 1344, 1347-48 (10th Cir. 1983).

By this ruling, the Court is not limiting other avoidance actions that are typically instituted by Chapter 13 debtors, even though the code sections may refer specifically to the trustee; e.g., §§ 544, 547, 548 et. seq. The Court sees a difference in the present case where the extension of time would not have some benefit to creditors and when other code sections can be more practically applied by debtors.

Count 10: Truth in Lending Violations

The Court believes that the Debtor's argument regarding the application of 15 U.S.C. §§ 1635 and 1640 to Count 10 are misplaced. The title of § 1635 is the "Right of rescission as to certain transactions." Specifically, § 1635(g) states that "In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind."¹⁸ The plain reading of the statute shows that, in order for § 1640¹⁹ to become applicable, the Court must first determine that the creditor violated § 1635. The Court has not done so. Furthermore, even if the Court found that § 1640 was applicable, which it does not, the Debtor's argument still fails.

Section 1640(e) states:

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a

¹⁸ 15 U.S.C. § 1635(g) (2004).

¹⁹ Which discusses civil liability.

violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation *as a matter of defense* by recoupment or set-off in such action, except as otherwise provided by State law.²⁰

Clearly, the statute allows for an extension of the statute of limitations only if the violation is used as a matter of defense. Here, the Debtor alleged the violation in a Complaint, not as a defense. As such, the Debtor would be ineligible to utilize the extension of time provided by § 1640(e), were it applicable in this case.

Count 14: Objection to Proof of Claim

This Count requires very little discussion. Because neither of the Defendants have filed proofs of claims in this case, the claim is not ripe. The Court therefore denies it without prejudice.

CONCLUSION

The Court is unpersuaded by Plaintiffs' arguments. First, Jolene C. Jones cannot utilize § 108(a) because she is not a debtor in this bankruptcy case. Second, Calvin K. Jones cannot utilize § 108(a) himself as a debtor; that section was meant to benefit solely trustees or debtors in possession. Third, the debtor is not afforded the benefits of § 1640(e) because it is inapplicable to this case. Finally, the Debtor's objection to proof of claim is not ripe because neither Defendant has filed a proof of claim in this case. Accordingly, the Defendants' Motion to Dismiss Counts 3 through 12 and Count 14

²⁰ 15 U.S.C. § 1640(e) (2004) (emphasis added).

of Plaintiffs' Complaint should be granted. A separate order will follow.

END OF DOCUMENT

ORDER SIGNED

_____0000000_____

SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION GRANTING DEFENDANTS' MOTION TO DISMISS COUNTS 3 THROUGH 12 AND COUNT 14 OF PLAINTIFFS' COMPLAINT** will be effected through the Bankruptcy Noticing Center to each party listed below.

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ORDER SCHEDULED