



ENTERED

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Signed July 29, 2008

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:

VANCE COLE CHESNUT,

Debtor.

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Case No. 03-41050-DML-13

MEMORANDUM OPINION

Before the court is the Motion to Enforce Confirmed Plan and Order Confirming Plan (the "Motion") filed by Vance Cole Chesnut ("Debtor"), the Joinder of Jacqueline Chesnut in Debtor's Motion to Enforce Confirmed Plan and Order Confirming Plan filed by Jacqueline Chesnut ("Mrs. Chesnut") and the response to the Motion (the "Response") filed by Templeton Mortgage Corporation ("TMC") through its owner Mark T. Brown ("Brown"). The court heard argument respecting the Motion on May 12, 2008. Thereafter Debtor and TMC filed briefs in

support of their respective positions. The court will consider the entire record of Debtor's case in resolving the Motion.¹

This matter is subject to the court's core jurisdiction. See 28 U.S.C. §§ 1334 and 157(b)(2)(L) and (O). This memorandum opinion embodies the court's findings of fact and conclusions of law. See Fed. R. Bankr. P. 9014 and 7052.

I. Background

A. Prior Adversary Proceeding.

The instant matter is related to an adversary proceeding in which this court held that TMC violated the automatic stay by foreclosing on certain property located at 400 I-20 East, Ranger, Texas (the "Property").² In the prior adversary proceeding, the sole issue before the court was whether TMC willfully violated the automatic stay of section 362 of the Bankruptcy Code (the "Code")³ by foreclosing on the Property after receiving notice that Debtor claimed the Property as community property and so as part of his bankruptcy estate. At that time, it was not the "chore of the court to determine whether the Property was a community asset or separately owned by Mrs. Chesnut." See *In re Chesnut*, 300 B.R. 880, 886 (Bankr. N.D. Tex. 2003). Nor did the adversary proceeding directly present that issue. Instead, the court needed only to decide whether Debtor had an interest in the Property which was protected by the automatic stay. *Id.*

¹ In contested matters, it is appropriate for the court to consider the entire record in the underlying bankruptcy case. See, e.g., *Nantucket Investors II v. Cal. Fed. Bank (In re Indian Palms Assocs. Ltd.)*, 61 F.3d 197, 203 (3rd Cir. 1995); *In re Mirant Corp.*, 354 B.R. 113, 120 (Bankr. N.D. Tex. 2006).

² *In re Chesnut*, 300 B.R. 880 (Bankr. N.D. Tex. 2003). The decision of this court was appealed by TMC to the District Court which reversed on July 1, 2004. See *Brown v. Chesnut (In re Chesnut)*, 311 B.R. 446, 450 (N.D. Tex. 2004). Debtor appealed the decision of the District Court to the Court of Appeals which reversed the District Court's decision and affirmed this court's decision. See *In re Chesnut*, 422 F.3d 298, 306 (5th Cir. 2005).

³ 11 U.S.C. §§ 101 et seq.

The court held that, in fact, TMC willfully violated the automatic stay and assessed sanctions in the form of attorney fees and damages as well as directing that TMC deed back the Property.

B. Debtor's Chapter 13 Case.

While the prior adversary proceeding was being litigated to its conclusion, Debtor's chapter 13 case progressed to confirmation of a plan. Debtor's initial plan, filed on March 10, 2003, showed the Property as subject to a lien held by TMC (the "Lien"), and reflected TMC's claim in the amount of \$22,000 and the value of the Property as \$15,110. Debtor listed TMC as an unsecured creditor for the difference. On July 18, 2003, Debtor filed an amended plan providing TMC with the same treatment. On July 17, 2003, Debtor filed a proof of claim on behalf of TMC (*see* Fed. R. Bankr. P. 3004) in the amount of \$22,000.

TMC received notice both of the plan and the claim. However, TMC neither acted with respect to the claim nor objected to confirmation of either the initial or the amended plan or otherwise raised the issue of whether the Property was Mrs. Chesnut's separate or community property. Rather, on August 28, 2003, Brown⁴ filed a motion seeking relief from the co-debtor stay of Code § 1301. In this motion Brown alleged (at ¶ 5(a)) that Debtor's plan proposed to treat the claim of TMC as unsecured to the extent of \$6,890.⁵ Thus, Brown wished to pursue Mrs. Chesnut for this balance.

⁴ The note signed by Mrs. Chesnut was assigned to TMC or Brown by the original payee, and the court is unable to determine whether Brown or TMC is the proper claimant. As Brown apparently is the sole owner or proprietor of TMC, and there is no dispute over ownership of the claim, the court need not here determine the correct claimant.

⁵ Though the Property was claimed by Debtor as his homestead (though the record does not reflect that he ever resided there), no question was ever raised whether TMC's claim was not subject to bifurcation by reason of Code § 1322(a)(2).

On September 22, 2003, however, Brown withdrew his motion, and on October 15, 2003, Debtor filed another amended plan which continued to list TMC's secured claim as \$15,110. However, Debtor's final plan (the "Plan"), filed on March 3, 2004, provided for treatment of TMC as a secured creditor to the full extent of \$22,000. The Plan was confirmed by order entered on December 8, 2004 (the "Confirmation Order").

Neither Brown nor TMC objected to confirmation of the Plan (or any of the prior versions). The decision of the District Court in the prior adversary proceeding was issued almost four months after the filing of the Plan but before the entry of the Confirmation Order.

When the Court of Appeals reversed the District Court in 2005, its initial mandate directed remand of the case. As this mandate was inconsistent with the opinion of the Court,⁶ a corrected mandate was issued which eliminated the remand provision.⁷

Following the decision of the Court of Appeals, neither Debtor nor TMC or Brown raised in this court the question of ownership of the Property. TMC and Brown did not ask that the Confirmation Order be revisited. Although TMC now argues that the debt to it was in fact, greater than \$22,000, it made no mention of that when seeking relief from the co-debtor stay or at any other time until the hearing on the Motion. Thus, Debtor continued to perform the Plan, and, some time prior to filing the Motion, Debtor completed all payments under the Plan, including those to TMC, which TMC apparently accepted. The Plan included a provision requiring secured creditors (including TMC) to release their liens upon payment of their secured

⁶ In its post-hearing brief, TMC states that the Court of Appeals changed its opinion. It did not. Rather the clerk of that Court issued a revised mandate which, unlike the original, conformed to the ruling by the Court of Appeals.

⁷ Counsel for TMC advised the court during the May 12 hearing that he did not receive the revised mandate. The court accepts counsel's statement as true and so need not consider implications of counsel's conduct as an officer of the court.

claims.⁸ When TMC refused to release the Lien after its full payment, Debtor filed the Motion. TMC now contends it need not release the Lien because it is still owed for the Property by Mrs. Chestnut and because Debtor never sought a determination that the Property belonged to the community. Response at 1-2.

II. Discussion

At the outset, it is important to recognize that TMC (and Brown) did not take advantage of Debtor's filing of a claim on behalf of TMC⁹ or the confirmation process to raise the question of whether the Property was separately held or subject to community ownership. Despite this court's clear statement that the prior adversary proceeding did not require a determination of ownership (*In re Chesnut*, 300 B.R. at 886), despite Debtor's filing of four plans and a claim which were premised on Debtor's contention that the Property belonged to the community, at no time did TMC so much as contest this assumption. Indeed, Brown's motion seeking relief from the co-debtor stay appeared to suggest that Brown and TMC acquiesced in Debtor's ownership claim.

Even after the District Court's decision, TMC and Brown did not contest the terms of the Plan for dealing with the Property.¹⁰ Even assuming that the decision of the District Court, as

⁸ Section L(2) of the Plan provides:

Each secured creditor's lien (including tax liens) shall be released after the amount of the creditor's allowed secured claim is paid. All secured creditors shall execute documentation necessary to release their liens upon payment of their allowed secured claim [sic].

⁹ Clearly, TMC could have questioned the claim. See *In re Kolstad*, 978 F.2d 171 (5th Cir. 1991).

¹⁰ On August 31, 2004, Brown did file a motion seeking release of funds assessed as fees and sanctions that were being held in the court's registry and seeking return of the deed executed and delivered to Mrs. Chesnut in accordance with this court's orders. However, TMC and Brown, between issuance of the District Court's opinion and final disposition of the adversary proceeding by the Court of Appeals, did nothing to question confirmation or Debtor's performance of his Plan.

law of the case,¹¹ excused TMC and Brown from challenging the Plan (and it must be remembered that the District Court decision issued almost 15 months after the initial plan was filed – and never in that 15 months were any of the plans filed by Debtor objected to by TMC or Brown), once the Court of Appeals rendered its decision, Brown and TMC surely should have recognized the need to raise the propriety of Debtor’s treatment of the Property in the Plan.¹²

The conduct of TMC and Brown very likely estops either from now arguing that the Plan was not binding with respect to the Property and release of the Lien. TMC and Brown accepted the benefits of the Plan without ever contesting its terms. Even if the community ownership of the Property were not – as discussed below – *res judicata*, TMC and Brown’s conduct arguably constitutes waiver of their right to argue to the contrary.

However, the court need not explore the applicability of doctrines of waiver or estoppel. Rather, the court concludes that TMC and Brown are barred by the doctrine of *res judicata* and by reason of the Plan’s binding effect from contending that the Lien should not be released because the Property belonged to Mrs. Chesnut as her separate property.

A. Res Judicata Effect.

Because the ownership of the Property was an issue that could have been raised prior to or at the time of confirmation of the Plan and because the issue was not otherwise posed to the

¹¹ See, e.g., *Avitia v. Metropolitan Club of Chicago, Inc.*, 43 F.3d 1219, 1227 (7th Cir. 1995) as to the limits of law of the case. Because the District Court spoke to ownership of the Property *in dicta* (and not at all in its final judgment), it is doubtful that that Court’s determination would have relieved Brown and TMC of their obligation to object to the Plan even had the Court of Appeals not reversed. Certainly after and probably prior to the District Court’s decision TMC and Brown had an obligation to act in some fashion to preserve their position that the Plan could not deal with the Property. Even in the motion seeking release of funds (see n. 10 above), there was no suggestion the Plan should not be confirmed.

¹² In its post-hearing brief, TMC argues that Debtor should have, following the decision of the Court of Appeals, amended the Plan to make clear that it dealt with the Property and the Lien. Exactly how the Plan could have been made clearer in those respects eludes the court.

court, the res judicata effect¹³ of confirmation prevents TMC from raising this issue now (*see, e.g.*, 8 Collier on Bankruptcy ¶ 1327.02 (15th ed. rev. 2006); *Cromwell v. County of Sac*, 94 U.S. 351, 358 (1876) (holding that res judicata applies not only to the points “upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1054 (5th Cir. 1987) (opining that a bankruptcy court’s order confirming the plan bars subsequent actions that were raised or could have been raised in connection with confirmation); *In re Howe*, 913 F.2d 1138, 1143 (5th Cir. 1990) (noting that the “law in this circuit is well settled that a plan is binding upon all parties once it is confirmed and all questions that could have been raised pertaining to such plan are res judicata”). Although *Shoaf* and *Howe* were chapter 11 cases, as this court has had occasion to note recently, the same rule applies in chapter 13. *See In re Braune*, 385 B.R. 167, 172 (Bankr. N.D. Tex. 2008); *In re Rosetti*, No. 06-43810, 2007 WL 2669265, at *3 (Bankr. N.D. Tex. Sept. 6, 2007) (holding that by failing to raise ineligibility for chapter 13 pre-confirmation, the creditor was precluded from raising this issue post-confirmation).

Preclusion of the ownership issue also results from the binding effect of section 1327 of the Code.¹⁴ Once the Plan was confirmed, TMC, Brown and Debtor were bound by the terms of

¹³ The requirements of res judicata are identity of the parties, a prior judgment by a court of competent jurisdiction, that the judgment is final on the merits and that the cause of action is the same. Clearly, both Debtor on the one hand and TMC and Brown on the other were parties to the Confirmation Order and that Order is both a final judgment and was entered by a court of competent jurisdiction. As to the identity of the cause of action, the Plan and Confirmation Order clearly deal with the Property, the Lien and Brown and TMC’s claim.

¹⁴ Section 1327 of the Code provides:

the Plan. The Plan provided for a \$22,000 claim secured by the Property, and once all payments under the Plan were made, TMC was required to release the Lien. Because TMC did not object to its treatment under the Plan, TMC acquiesced in the terms of the Plan and is bound by those terms. Once the court entered the Confirmation Order, all issues that could have been raised, including whether the Property was property of the estate and could be dealt with in Debtor's Plan, whether the Plan could require the release of the Lien and what amount had to be paid prior to release of the Lien, were res judicata.

In essence, section 1327(a) closes the door to actions or objections that were raised or could have been raised prior to or at confirmation of a plan. Thus the binding effect of section 1327(a) operates consistently with the general doctrine of res judicata. The Court of Appeals for the Second Circuit recognized this correlation and noted how the binding effect of section 1327(a) brought with it finality. *See Layo v. First Nat'l Bank of N.N.Y. (In re Layo)*, 460 F.3d 289, 293 (2d Cir. 2006). The Court opined that finality was needed in a confirmation order so “that all parties may rely upon it without concern that actions that they may later take could be upset because of a later change or revocation of the order.” *Id.*; *see also In re Gellington*, 363 B.R. 497, 502 (Bankr. N.D. Tex. 2007) (quoting *In re Sanders*, 243 B.R. 326, 331 (Bankr. N.D. Ohio 2000)) (noting that the objective of the confirmation process is to achieve finality, because “[c]onfirmation is the bright line in the life of a Chapter 13 case at which all important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with reference to the plan”).

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- (a) The provisions of a confirmed plan binds the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to , has accepted, or has rejected the plan.
 - (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
 - (c) Except as otherwise provided in the plan or the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

What Brown and TMC now seek to do is precisely what the *Layo* and *Gellington* courts stated a confirmation order was meant to prevent. Brown and TMC, only after Debtor has fulfilled his obligations under the Plan, wish to reconsider the bargain the Plan represents. Having failed to raise questions about Debtor's entitlement to make provision for the Property and release of the Lien in the Plan, TMC and Brown have lost whatever rights they might have had to contest the Plan's terms.

B. Absence of Adversary Proceeding Has No Effect.

The absence of an adversary proceeding to determine whether or not the Property belonged just to Mrs. Chestnut or to the community does not preclude the release of the Lien on the Property, therefore having no impact on the instant matter. Since TMC had ample opportunity to resolve the ownership issue prior to the entry of the Confirmation Order, TMC is barred from raising this issue now. The Court of Appeals for the Fifth Circuit addressed the issue of barring litigation post-confirmation of questions that could have been raised pre-confirmation in *Shoaf*. In *Shoaf*, the debtor included a release in his plan for a third-party guarantor. The creditor failed to object to the release and the plan was confirmed. After confirmation, the creditor sought to sue the guarantor for payment of the debt. The Court of Appeals held that the order confirming the plan barred this action by the creditor even though approving the release was beyond the authority of the bankruptcy court. *See Shoaf*, 815 F.2d at 1050. Although approving the release was beyond the authority of the bankruptcy court, the Court of Appeals noted that the "interest in finality surpassed any threat that courts will engage in drastic overreaching." *See Shoaf*, 815 F.2d at 1054 n.9. In the case at bar, given the result of the prior adversary proceeding, there was not even the sort of overreaching arguably present in *Shoaf*.

C. Release of Lien is Proper and does not Affect Mrs. Chestnut

The Plan called for the release of each secured creditor's lien after payment of that creditor's claim under the Plan. Release of the Lien on the Property does not affect Mrs. Chesnut's obligation to TMC or Brown. On the contrary, TMC or Brown is free to use and pursue any and all remedies which may still be available under the law to recoup from Mrs. Chesnut any deficit that is owed.¹⁵ Further, the provisions of the Plan did not "void" the Lien on the Property; rather, pursuant to the Plan, the debt secured by the Lien was paid.¹⁶ Because the provisions of the Plan provided for the Property and for release of the Lien, TMC must release the Lien on the Property.

In a similar context, this court directed release of a lien on a vehicle in accordance with the terms of a confirmed chapter 13 plan. *In re Gray*, 285 B.R. 379 (Bankr. N.D. Tex. 2002). Indeed, courts that have reached a different result than *Gray* on the lien-release issue often did so on the basis that the debtor had not completed all payments (as opposed to just those to the lien creditor) under the debtor's plan, focusing on the "super" discharge of chapter 13. *See, e.g., In re Thompson*, 224 B.R. 360 (Bankr. N.D. Tex. 1998). In the case at bar, Debtor has fully performed under the Plan. Thus, even under *Thompson*, he is entitled to release of the Lien.

¹⁵ Whether TMC and Brown have forfeited their rights against Mrs. Chestnut through their conduct in this case is a matter to be determined in a different forum.

¹⁶ This is the principal distinction between the case at bar and *Simmons v. Savell (In re Simmons)*, 765 F.2d 547 (5th Cir. 1985) on which Brown and TMC rely: here no claim objection was purportedly effected through the Plan. Rather, as contemplated in *Simmons* (765 F.2d at 553), the Plan provided for valuation of TMC's secured claim and payment of that claim over time as provided by Code § 1325(a)(5)(B). *Simmons* is additionally distinguishable by reason of the many actions taken by the creditor (filing a claim, noting his objection to unsecured treatment, not cashing distribution checks, for example) to protect his rights – a course of conduct in marked contrast to the lay-behind-the-log tactics adopted by TMC and Brown.

III. Conclusion

For the foregoing reasons, the court concludes that the absence of an adversary proceeding to determine the ownership of the Property does not preclude the Plan's requirement that the Lien be released. The Motion must be granted and TMC is, accordingly, directed to release the Lien. Debtor's counsel is granted leave at his option to seek such costs and fees from TMC and Brown as may be allowable under the law.

IT IS SO ORDERED.

END OF MEMORANDUM OPINION