



ENTERED

TAWANA C. MARSHALL, CLERK
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The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 17, 2006

Barbara J. Houser
United States Bankruptcy Judge

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

IN RE:

PEDRO ARTURO RODRIGUEZ and
ANA MARIA RODRIGUEZ

Debtors.

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CASE NO. 03-30081-BJH-13

MEMORANDUM OPINION AND ORDER

Before the Court is the Second Amended Objection to the Claim of Charles Bessire (“Bessire”) filed by Debtors Pedro Arturo Rodriguez and Ana Maria Rodriguez (the “Debtors”). The Court has core jurisdiction over the claim objection pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B). This Memorandum Opinion and Order contains the Court’s findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

I. Factual Background

On August 31, 1990, the Debtors purchased certain real property and signed a Real Estate Lien Note (the “Note”) with a stated principal amount of \$86,500.00 payable to M. Paul Smith and Priscilla J. Smith (the “Smiths”). The Debtors’ obligation to pay the Note was secured by a lien on the real property being purchased (now the Debtors’ homestead), which was created by the Debtors’ execution of a Deed of Trust dated August 31, 1990 (the “Deed of Trust”). At closing, the Smiths assigned their interest in the Note and the Deed of Trust to Charles Bessire (“Bessire”) through the execution of a Transfer of Lien (the “Transfer of Lien”). Bessire is the holder of the Note and is entitled to enforce the Deed of Trust.

The Note is an installment note payable in monthly installments of principal and interest in the amount of \$892.88 beginning on September 30, 1999 and continuing until principal and interest is paid in full. The Note also calls for four (4) additional payments to be made as follows: (i) \$3,063.48 on or before January 31, 1991, (ii) \$3,072.40 on or before September 30, 1991, (iii) \$2,932.07 on or before January 31, 1992, and (iv) \$2,952.77 on or before September 30, 1992 (the “Additional Payments”). Each payment on the Note is to be applied first to accrued interest due on the unpaid principal balance and the remainder to the reduction of principal.

On January 2, 2003 (the “Petition Date”), the Debtors filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code, thereby commencing this bankruptcy case (the “Bankruptcy Case”). And, on or about June 4, 2003, Bessire filed a proof of claim in the Bankruptcy Case asserting a secured claim in the amount of \$132,880.16 (the “Bessire Claim”). Copies of the Note, the Deed of Trust, and the Transfer of Lien are attached to the Bessire Claim.

On March 17, 2006, the Debtors filed an objection to the Bessire Claim, as amended on April

11, 2006 and as further amended on May 17, 2006 (together, as amended, the “Claim Objection”). In the Claim Objection, the Debtors contend that the Bessire Claim is overstated for two (2) reasons: (i) the original principal amount of the Note was \$86,500.00, not \$98,520.72 as reflected in the Bessire Claim, and (ii) Bessire is unable to collect the Additional Payments from the Debtors because those installments under the Note are barred by the statute of limitations. The Claim Objection also contained several other affirmative defenses to Bessire’s recovery on the Note – *i.e.*, laches, waiver, and usury.

On April 5, 2006, Bessire filed his response to the Claim Objection (the “Response”). In the Response, Bessire contends that he has correctly calculated the amount owing on the Note. Moreover, Bessire denies that the original principal amount of the Note was \$86,500.00. Finally, Bessire denies that any installment payments on the Note are barred by limitations.

A hearing was held on the Claim Objection on July 5, 2006 (the “Hearing”). During the Hearing, the parties stipulated to the following facts: (1) the Note, the Deed of Trust, the Closing Statement, and other associated closing documents contained in Debtors’ Exhibit No. 1 are true and correct copies of the originals of those documents; (2) Bessire did not make a written demand for payment, or accelerate the Note, prior to the Petition Date; (3) the Debtors failed to make the Additional Payments; (4) the final installment due on the Note was not due prior to the Petition Date; and (5) Bessire is the current holder of the Note. The parties also narrowed the issues for the Court’s determination to the following: (1) what was the original principal amount of the Note; and (2) does the applicable statute of limitations bar recovery of the Additional Payments? Audiotape: Hearing conducted 7/5/06 at 9:40:16 a.m. - 9:40:52 a.m. (on file with Court). Accordingly, this Memorandum

Opinion and Order is limited to these two issues.¹

II. Legal Analysis

A. What was the Original Principal Amount of the Note?

As noted previously, the Debtors contend that the original principal amount of the Note was \$86,500.00 – the amount stated on the Note, the Deed of Trust, and in the Closing Statement. On the other hand, Bessire contends that the original principal amount of the Note was \$86,500.00 *plus* the total amount of the Additional Payments. Bessire argues that the Additional Payments must be added to the stated principal amount of the Note in order to determine the total amount owing under the Note. Neither party offered any evidence in support of his contention, other than the stipulations recited previously and the documents contained in Debtors' Exhibit No. 1 (the Note, the Deed of Trust, the Closing Statement, and other closing documents).

In deciding this question, the Court must start with the terms of the Note itself. The Note is clear and unambiguous. It expressly states that its principal amount is \$86,500.00. Moreover, each of the other potentially relevant documents – *i.e.*, the Deed of Trust and the Closing Statement, confirms that the original principal amount of the Note was \$86,500.00. The Closing Statement makes it clear that the Smiths provided \$86,500.00 of seller financing to facilitate the Debtors' purchase of the real property. And, the Deed of Trust also references the principal amount of the Note as being \$86,500.00.

In support of his contention, Bessire points to the following provision of the Note:

¹While other issues could impact upon the amount of Bessire's allowed secured claim in the Bankruptcy Case – *i.e.*, the value of the real property securing the Note, the parties indicated a belief that they could resolve these other issues without the Court's guidance. Accordingly, no evidence was offered concerning those issues and the Court is unable to address them here.

Principal and interest shall be due and payable in monthly installments of \$892.88 each, payable on or before the last day of each and every calendar month, beginning September 30, 1990, and continuing regularly thereafter until this note, both principal and interest has been duly paid; *provided, however, an additional payment* of \$3,063.48 shall be due and payable on or before January 31, 1991, an *additional payment* of \$3,072.40 shall be due and payable on or before September 30, 1991, an *additional payment* of \$2,932.07 shall be due and payable on or before January 31, 1992, and an *additional payment* of \$2,952.77 shall be due and payable on or before September 30, 1992. Each payment made shall be applied first to the payment of accrued interest due on the unpaid principal balance and the remainder to the reduction of principal. Maker reserves the right to prepay this note in any amount at any time prior to maturity without penalty.

Note, Debtors' Exhibit No. 1 (emphasis added). Bessire misconstrues this provision. The Additional Payments do not increase the principal amount of the Note. Rather, the Additional Payments are simply "additional payments" on the Note, which will cause the Note to be paid more quickly than the monthly payments would otherwise provide.

There is nothing in the documents to support Bessire's contention that the Additional Payments were intended by the parties to be an additional amount of indebtedness. And, as noted previously, Bessire did not provide any evidence to support his contention. Accordingly, the Court rejects Bessire's contention that the Additional Payments must be added to the stated principal amount of the Note in order to determine the total amount owing under the Note. The original principal amount of the Note was \$86,500.00.

B. Does Limitations Bar Recovery of the Additional Payments?

The Debtors contend that the statute of limitations contained in § 3.118 of the Tex. Bus. &

Comm. Code applies to bar recovery of the Additional Payments.² Section 3.118 provides that “[a]n action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.” Tex. Bus. & Comm. Code § 3.118(a) (2005).³ Because the Additional Payments were more than six years past due at the Petition Date, the Debtors contend that Bessire is barred by limitations from attempting to collect those sums from them (or their bankruptcy estate).

On the other hand, Bessire contends that the statute of limitations contained in § 3.118(a) is inapplicable here because the Note is secured by the Deed of Trust. Specifically, Bessire points out that § 3.118(h) of the Tex. Bus. & Comm. Code provides that § 3.118(a) does not apply to an action involving a real property lien covered by § 16.035 of the Tex. Civ. Prac. Rem. Code. In turn, § 16.035(a) of the Tex. Civ. Prac. Rem. Code provides that “[a] person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues.” Tex. Civ. Prac. Rem. Code § 16.035(a) (2005). Moreover, § 16.035(e) provides that “[i]f a series of notes or obligations or a note or obligation

²The Debtors may also be contending that certain other monthly installments due under the Note are barred by limitations. While that was not the focus of the hearing on the Claim Objection, for the reasons stated hereinafter, the Court agrees that Bessire is precluded from attempting to recover from the Debtors any installment payment that was due and owing on the Note more than six years prior to the Petition Date.

³Texas courts and courts applying Texas law have held that when recovery is sought on a note or other obligation payable in installments, the statute of limitations runs against each installment from the time it becomes due. *Whittle v. McCorp Properties*, 17 S.W.3d 718, 720 (Tex. App. - Amarillo 2000) (specifically interpreting § 3.118 and finding that eleven out of twenty-four installment payments were barred by the statute of limitations); *Stille v. Colborn*, 740 S.W.2d 42, 44 (Tex. App. - San Antonio 1987, writ denied) (“[a] cause of action accrues when an installment is due and unpaid”); *Hondo Oil & Gas Co. v. Texas Crude Operator*, 970 F.2d 1433, 1440 (5th Cir. 1992) (interpreting Texas law and holding that where a contract provides for monthly payments, a cause of action accrues when any given monthly payment is due) (citing *Gabriel v. Alhabbal*, 618 S.W.2d 894, 897 (Tex. App. - Houston 1981)).

payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment.” *Id.* at § 16.035(e); *see also Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Finally, § 16.035(f) provides that the limitations period under § 16.035(a) is not affected by Tex. Bus. & Comm. Code § 3.118(a). So, according to Bessire, no payments under the Note are barred because the four-year limitations period set forth in § 16.035(e) does not begin to run until the maturity date of the last installment; and, as the parties stipulated, the last installment on the Note was not due prior to the Petition Date.

Obviously, the first issue the Court must decide is which statute of limitations applies here, as the parties are relying on different statutes in support of their competing contentions. In order to determine which statute of limitations is applicable, the Court must decide what is being sought through a contested claim allowance proceeding in a bankruptcy case. In the words of the arguably relevant statutes – is this “[a]n action to enforce the obligation of a party to pay a note” or is it a “suit for the recovery of real property under a real property lien or the foreclosure of a real property lien?” For the reasons explained more fully below, the Court concludes that a contested claim allowance proceeding in a bankruptcy case is “[a]n action to enforce the obligation of a party to pay a note” within the meaning of § 3.118 of the Tex. Bus. & Comm. Code, and the recovery of the Additional Payments from the Debtors (or their bankruptcy estate) is barred by limitations.

A very brief review of the nature of debts and the liens given to secure their payment will be helpful to understanding the Court’s analysis. A note is a written promise to pay a sum certain. A note creates a contractual debt, and the maker of a note is personally liable to pay that debt. A lien, however, is an interest in property and is given to secure payment of a debt – *i.e.*, it gives the lienor

the right to look to the collateral should the maker of the note default in his promise to pay. *Black's Law Dictionary* 941(8th ed.); 11.U.S.C. § 101(37) (“‘lien’ means charge against or interest in property to secure payment of a debt or performance of an obligation”). Therefore, a creditor with both a note and a lien has two distinct remedies: (i) to collect on the note as a personal, contractual liability of the maker, and/or (ii) to recover against, or foreclose upon, specific collateral *in rem*.

Texas state law recognizes both remedies. And, the Texas legislature has provided two statutes of limitations – one applicable to each of the remedies. For example, in *Aguero v. Ramirez*, 70 S.W.2d 372 (Tex. App. - Corpus Christi 2002), the court held that Tex. Bus. & Com. Code § 3.118 applied to an action to enforce the obligation of a party to pay a note payable at a definite time, while Tex. Civ. Prac. & Rem. Code § 16.035 applied to a suit for the recovery of real property. *Id.* at 375. Specifically, the *Aguero* court held that because the creditor was not seeking to recover against the real property, but was seeking to enforce the note, the six-year statute of limitations provided by Tex. Bus. & Com. Code § 3.118 applied to his suit. *Id.* However, the *Aguero* court noted that if the creditor had been suing to enforce the lien, the deed of trust, or to foreclose on the real property collateral, the four-year statute of limitations provided by Tex. Civ. Prac. & Rem. Code § 16.035 would have applied. *Id.*

The filing of a petition in bankruptcy does not alter this basic scheme. Once bankruptcy intervenes, however, the parties' relative rights and obligations are subject to the provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Bankruptcy Code does not require a secured creditor – *i.e.*, a creditor with a lien – to file a proof of claim in a bankruptcy case. *See* 11 U.S.C. § 501 (a creditor “may” file a proof of claim); Fed. R. Bankr. P. 3002(a) (“an *unsecured* . . . creditor must file a proof of claim . . . for the claim . . . to be allowed). The law is well

established that ordinarily, liens pass through bankruptcy unaffected, *In re Orr*, 180 F.3d 656, 660 (5th Cir. 1999), and a secured creditor can ignore the bankruptcy case and look solely to his collateral in satisfaction of the debt (although he will be stayed from doing so during the pendency of the case). *In re Kinion*, 207 F.3d 751 (5th Cir. 2000).

However, should the creditor elect to seek payment of the debt as a personal obligation of the debtor, the creditor must file a proof of claim in order to be entitled to payment of the obligation from the debtor and the bankruptcy estate. The filing of a proof of claim, therefore, is the means through which a creditor elects to be paid as a personal liability of the debtor – *i.e.*, from the estate’s funds under a plan in a chapter 13 case. *In re Macias*, 195 B.R. 659, 663 (Bankr. W.D. Tex. 1996) (secured creditor, while entitled to ignore the bankruptcy proceedings and look solely to its collateral, must file a claim in order to receive a distribution from the estate). Accordingly, the filing of a proof of claim is akin to an action on the underlying note.

The filing of a proof of claim is *not*, however, the means through which a creditor can foreclose on collateral – *i.e.*, to enforce the debtor’s obligation *in rem*. A creditor seeking to look to his collateral must seek, and receive, relief from the automatic stay in order to do so. 11 U.S.C. § 362(a)(4) (a bankruptcy petition “operates as a stay . . . of . . . any act to create, perfect, or enforce any lien against property of the estate”).

By filing the Bessire Claim, Bessire seeks to be paid as a personal liability of the Debtors under the Debtors’ chapter 13 plan. To date, Bessire has not sought relief from stay so that he may recover against, or foreclose upon, the real property securing the Note. Accordingly, the six-year statute of limitations set forth in § 3.118 of the Tex. Bus. & Com. Code is applicable. Because each of the Additional Payments was due and owing more than six years prior to the Petition Date, Bessire

is barred from attempting to collect the Additional Payments as a personal liability of the Debtors.⁴

III. Conclusion

The Court concludes that the original principal amount of the Note was \$86,500.00. The Court further concludes that Bessire is barred by limitations from attempting to collect the Additional Payments as a personal liability of the Debtors and the bankruptcy estate. It is therefore

ORDERED that the parties calculate the amount of the Bessire Claim in a manner consistent with this Memorandum Opinion and Order. It is further

ORDERED that if the parties are unable to agree upon the amount of the Bessire Claim, they shall promptly schedule a status conference with the Court so that the remaining disagreements can be scheduled for further hearing or otherwise disposed of.

End of Order

⁴However, this may not be the end of the story. Presumably, Bessire will now seek relief from stay so that he may attempt to enforce his rights against the real property securing the Note. As noted previously, such an action against the real property would not be barred by limitations, as the four-year limitations period set forth in § 16.035(e) of the Tex. Civ. Prac. & Rem. Code does not begin to run until the last installment payment on the Note is due. And, as the parties stipulated, the last installment payment on the Note was not due prior to the Petition Date.