United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
JOHN O. MARABLE, JR.	§	
Appellant,	§	
	§	
	§	CASE NO: 4:15-cv-00788
v.	§	Judge Mazzant
	§	
THE BANK OF NEW YORK MELLON	§	
As Trustee For the Certificatesholders	§	
Of CWMBS, Inc., CHL Mortgage Pass-	§	
Through Trust 2007-11 Mortgage Pass-	§	
Through Certificates, Series 2007-11,	§	
Its Successors and Assigns	§	
Appellee	§	

MEMORANDUM OPINION AND ORDER AFFIRMING
APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION
(CASE NUMBER 11-43002-BTR-13)

Pending before the Court is John O. Marable, Jr.'s ("Marable" or "Debtor") appeal from the bankruptcy court's November 4, 2015 Order Granting Motion for Relief from Automatic Stay and Co-Debtor Stay filed by The Bank of New York Mellon FKA The Bank of New York, As Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-11 Mortgage Pass-Through Certificates, Series 2007-11, Its Successors and Assigns (Dkt. #1). Having reviewed the bankruptcy court's order, the record, and the parties' submissions, the Court finds that the bankruptcy court's order should be affirmed.

BACKGROUND

On April 30, 2007, Marable and Nicey V. Marable (the "Marables") executed a Promissory Note (the "Note") in the original principal amount of $748,000.00 payable to the order of First Mortgage Home Lending L.L.C., D/B/A Victory Mortgage ("Victory Mortgage") (Case No. 11-43002-BTR-13, Docket No. ("Btr. Dkt. #") 62). Concurrently with the execution of the Note, the Marables executed a Deed of Trust granting a lien to Victory Mortgage on 4516 Mahogany Lane, Copper Canyon, Texas, 75077-8547 ("the Property") (Btr. Dkt. #62). On May 24, 2011, the Deed of Trust was assigned to The Bank of New York Mellon FKA The Bank of New York ("BONY"), as trustee For the Certificatesholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-11 Mortgage Pass-Through Certificates, Series 2007-11 (Btr. Dkt. #62).

On October 1, 2011, Marable filed his voluntary Chapter 13 bankruptcy petition in the bankruptcy court (Btr. Dkt. #1). Nicey V. Marable was not a debtor in the bankruptcy proceeding but was protected by the co-debtor stay of 11 U.S.C. Section 1301 (Btr. Dkt. #1). On July 12, 2012, the bankruptcy court entered an order confirming Marable's Chapter 13 Plan (Btr. Dkt. #43).

On August 5, 2015, BONY filed a Motion for Relief from Automatic Stay and Co-Debtor Stay as to the Property (the "Motion for Relief") (Btr. Dkt. #69). In the Motion for Relief, BONY alleged that the Marables had not made post-petition mortgage payments and the unpaid principal balance due and owing on the Note was $713,141.45 (Btr. Dkt. #69 at p. 3). BONY requested that the bankruptcy court enter an order granting relief from the automatic stay to allow BONY to exercise its right to foreclosure and disposition of the Property and payment of costs, expenses, and reasonable attorneys' fees (Btr. Dkt. #69 at p. 4).

On August 12, 2015, Marable filed an Answer to the Motion for Relief (Btr. Dkt. #70). On October 7, 2015, Marable filed a Motion for Withdrawal of Counsel and requested permission to proceed pro se (Btr. Dkt. #72). Richard Kinkade, Marable's attorney of record at the time, filed a Motion for Withdrawal of Counsel on October 12, 2015 (Btr. Dkt. #73).

On November 2, 2015, the bankruptcy court held a final hearing on the Motion for Relief (the "Final Hearing") and found that there was cause to lift the stay because Marable had not made any post-petition mortgage payments (Dkt. #4 at p. 6). On November 4, 2015, the bankruptcy court entered an order granting BONY's Motion for Relief (Btr. Dkt. #75). The bankruptcy court granted the Motion for Withdrawal of Counsel on November 10, 2015 (Btr. Dkt. #77). On November 12, 2015, Marable filed his Notice of Appeal regarding the bankruptcy court's order (Dkt. #1).

After filing his notice of appeal, Marable designated the following issues to be decided on appeal:

1. Did the Court abused [sic] its discretion by denying Debtor's right to a fair hearing by requiring the Debtor to preceed [sic] at The Hearing without Debtor's Attorney of Record present at The Hearing. Whereas, The Court had not issued an Order to grant Debtor permission to act Pro Se?

2. Was it a denial of due process, or otherwise reversible error to provide Debtor with this type of hearing on the relevant relief from stay issues, whereas, The BONY did not have to present its evidence in admissible form, such as, by sworn testimony by persons with personal knowledge and to not allow Debtor to contest the truth of said evidence by cross examination controverting evidence of its own?

3. Did the Court err by only considering Debtor's failure to make all post petition payments, instead of also considering whether The BONY was adequately protected in the property, particularly given the fact that this is what Debtor alleged in Debtor's response to the MFRFS?

4. What evidence is necessary to prove Constitutional Standing and Prudential Standing in the context of a Motion for Relief from Stay in Bankruptcy Court on

residential real estate? Other ways of framing this issue is contained in the following sub-questions:

a. Did the Court err in failing to require BONY to present evidence that it paid true value of its own for ownership of the Loan, and that even if it had, that it had not sold the Loan to another non-party?

b. Did the Court err in failing to require BONY to present evidence that it had a security interest in the Property, meaning that it was still possessed of the DOT rights?

c. Was it error to rely on statement of BONY's Attorney as to the fact that the appearance of the documents attached to its motion constituted a true and complete representation of the actual facts of the case, particularly, since there is a good and reasonably [sic] cause to allege that the facts that would be revealed at trial would be that the apparent picture created by these documents would be dispelled in cross-examination and controverting evidence of the BONY's fraudulent submission to this Court?

5. What effect should the established lack of credibility on the part of financial institutions related to residential mortgage loan servicing and foreclosure processing have upon residential mortgage stay relief procedures, in cases of pertinent mortgage loan debt. Particularly when such motions are challenged by the homeowner? This is within the context that, admittedly, in prior years such motions had been routine, such that when a Debtor had not made the monthly mortgage payments, stay relief was proper, absent a plan for Debtor to cure the arrearage. Because of the unsafe, unsound and fraudulent practices related to residential mortgage loan servicing and foreclosure processing for mortgages, primarily dated after 2006. This lack of credibility has been established, because it has been made part of the official public record, and because of the astonishing and overwhelming findings made through official investigations, private legal and expert inquiries and investigative journalism. There have been serious questions raised concerning the execution of documents by Bank of America, a previous owner of the Note and DOT, by what are being referred to as "robosigners" to the point that, a couple of years ago, The State of Texas suspended all foreclosures by Bank of America. And 48 other States similarly banned Bank of America foreclosures.

6. Whether the Bankruptcy Court erred in not requiring the BONY to complete the evaluation of the Debtor's eligibility under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, before granting the Order to lift the automatic stay.

(Dkt. #3 at pp. 3 – 6).

LEGAL STANDARD

A district court has jurisdiction to hear appeals from "final judgments, orders, and decrees" of a bankruptcy court. 28 U.S.C. § 158(a)(1) (2012). A bankruptcy court's "findings of fact are reviewed for clear error and conclusions of law are reviewed de novo." *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 346 (5th Cir. 2008); *see also In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007); *Ferrell v. Countryman*, 398 B.R. 857, 862 (E.D. Tex. 2009). In a bankruptcy appeal, "a district court cannot consider issues that were not initially presented to the bankruptcy court." *Ferrell*, 398 B.R. at 863 (citations omitted). A district court "will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory." *Ferrell*, 398 B.R. at 863 (citing *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996)).

Under Section 362(a) of the Bankruptcy Code, the filing of a bankruptcy petition "operates as an automatic stay of several categories of judicial and administrative proceedings that affect the property in the debtor's bankruptcy estate." *Prince v. CMS Wireless LLC*, No. 4:11-CV-438, 2012 WL 1015001, at *3 (E.D. Tex. Mar. 22, 2012) (citing 11 U.S.C. § 362(a)(1) (2012)). "The purposes of the stay are to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse." *Prince*, 2012 WL 1015001, at *3 (citing *Reliant Energy Servs., Inc. v. Enron Can. Corp.*, 349 F.3d 816, 825 (5th Cir. 2003)). However, a creditor may obtain relief from the stay "for cause." *Prince*, 2012 WL 1015001, at *3 (citing 11 U.S.C. § 362(d)(1)).

Section 362(d)(1) of the Bankruptcy Code states, "on request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . by terminating, annulling, modifying, or conditioning such stay . . . (1) for cause, including the lack of adequate protection

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