UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA

In Re

JUAN F. EVANS Case No. 04-31769

Debtor

JUAN F. EVANS

Plaintiff

vs. Adv. No. 05-03017

CODILIS & STAWIARSKI, P.A.,
WELLS FARGO BANK MINNESOTA, N.A.
as trustee for Option One Mortgage Corporation,
and OPTION ONE MORTGAGE CORPORATION

Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Juan F. Evans, pro se, Plaintiff, Mary Esther, Florida
Joseph J. Circelli, Codilis & Stawiarski, P.A., Attorney for Defendants, Tampa, Florida

This case is before the court on the motion of the plaintiff, Juan Evans, for summary judgment on his complaint against defendants, Codilis & Stawiarski, P.A., Wells Fargo Bank Minnesota, N.A., and Option One Mortgage Corporation. This court has jurisdiction to hear this motion pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the court has authority to enter a final order. For the reasons indicated below, the court is denying the motion for summary judgment.

FACTS

On February 5, 2001, plaintiff, Juan F. Evans, and his wife signed a promissory note for a loan secured by a mortgage on their homestead. The mortgage was originally granted by the Evans to Alternative Funding Corporation in exchange for a loan in the amount of $59,360.00. Alternative Funding subsequently assigned the mortgage to Option One Mortgage Corporation, who thereafter assigned the mortgage to Wells Fargo Bank Minnesota, NA.

Evans stopped making his mortgage payments in mid to late 2003. On February 24, 2004, the law firm of Codilis & Stawiarski, P.A. filed a two-count foreclosure complaint in the Okaloosa County Circuit Court on behalf of Option One and Wells Fargo. Count I of the complaint sought to reestablish the promissory note because it had allegedly been lost or destroyed. Count II sought to foreclose on the mortgage.

On July 13, 2004, Evans filed a petition for bankruptcy under chapter 7 of the Bankruptcy Code. In Schedule D of his bankruptcy schedules, Evans listed the mortgage on his homestead as a secured claim in the amount of $58,160.00. In his Schedule C, Evans claimed his homestead as fully exempt for the current market value of the home, which he listed as worth approximately $88,000.00. No objections to Evans' claimed exemptions were filed.

On August 4, 2004, defendant Codilis & Stawiarski, as counsel for defendant Wells Fargo, the trustee for defendant Option One, filed a motion for relief from stay to proceed with a state court foreclosure action on Evans' home. After a telephonic hearing on the motion, the court granted Wells Fargo's motion for relief. On October 20, 2004, the court entered an order modifying the automatic stay allowing defendant Wells Fargo, as trustee for defendant Option One, to file and complete an action in state court for foreclosure of the mortgage encumbering

Evans' home. The order only allowed Wells Fargo to secure an in rem judgment of foreclosure in state court and not an in personam judgment against Evans. On December 3, 2004, the bankruptcy court entered an order of discharge in Evans' case.

In May 2005 Evans applied for a loan with Ameriquest Mortgage Company. Evans was subsequently denied the loan after Ameriquest learned there was a foreclosure action pending against Evans' home and $75,105.74 was necessary to pay off the mortgage and stop the foreclosure.

On June 17, 2005, Evans filed this complaint against Wells Fargo, Option One, and Codilis & Stawiarski, P.A. The complaint asserts claims against the defendants for violations of the Fair Debt Collection Practices Act, the Florida Consumer Collection Practices Act, the bankruptcy discharge injunction of 11 U.S.C. § 524, and for tortious interference with a business relationship and fraud. The summons was issued on June 20, 2005. Evans served the summons on the defendants by certified mail on June 24, 2005.

The summons stated on its face, in accord with Fed. R. Bankr. P. 7012(a), that the complaint must be answered "within 30 days after the date of issuance of this summons." The last date for defendants to timely file their answer to Evans' complaint was July 20, 2005. The defendants failed to file a timely answer. On July 22, 2005, the defendants' filed a motion to dismiss plaintiff's complaint due to lack of jurisdiction and failure to state a claim upon which relief could be granted. On August 10, 2005, Evans filed a motion for summary judgment on his complaint, alleging that because defendants had failed to timely respond to the complaint, the complaint's assertions were deemed admitted by the defendants and thus there were no genuine issues of material fact.

On September 13, 2005, the court issued an order denying the defendants' motion to dismiss without prejudice, finding that the dismissal motion was untimely filed. That order also stated that any pleadings the defendants wished to file, responsive to plaintiff's motion for summary judgment or otherwise, must be filed by October 31, 2005. The defendants filed their response to plaintiff's summary judgment motion on October 17, 2005. Plaintiff then filed a "verified motion to strike or in the alternative reply" to the defendants' response on November 10, 2005. On November 28, 2005, the court held a telephonic hearing on the motion for summary judgment and took the matter under advisement.

Plaintiff argues that because the defendants failed to file an answer to his complaint within the time permitted by Bankruptcy Rule 7012(a), all allegations contained in the complaint are deemed admitted by the defendants. Therefore, the plaintiff argues, there are no genuine issues of material fact and summary judgment is proper.

Defendants acknowledge that their motion to dismiss was untimely, but they assert that because no motion for default has been filed or any judgment entered, they are not precluded from defending against Evans' motion for summary judgment. Accordingly, the defendants respond that there are genuine issues of material fact in this case, making summary judgment inappropriate.

LAW

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which has been made applicable to bankruptcy proceedings pursuant to Fed.R.Bankr.P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Fed.R.Bankr.P. 7056(c). "When a motion for summary judgment is made and supported as provided by this rule . . . the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed.R.Bankr.P. 7056(e); *see Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 n. 11 (1986). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548(1986).

As stated above, for the plaintiff's summary judgment motion to be successful, he must show that (1) there are no genuine issues of material fact, and (2) that he is entitled to judgment as a matter of law. Fed.R.Bankr.P. 7056(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 250. Of course, the party moving for summary judgment bears the initial burden of meeting these requirements. *See Celotex Corp. v. Catrett*, 477 U.S. at 323. In regards to the first issue, Evans relies on Federal Rule of Civil Procedure 8(d). Under Federal Rule of Civil Procedure 8(d), applicable to adversary proceedings in bankruptcy by Bankruptcy Rule 7008, "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed.R.Civ.P 8(d); Fed.R.Bankr.P.

7008. Because the defendants failed to timely respond to plaintiff's complaint[1], Evans argues there can be no genuine issues of material fact, because all the material facts are deemed admitted. Therefore, Evans argues, his summary judgment motion should prevail. Even if the court was to conclude that there were no genuine issues of material fact (which it has not done), Evans' summary judgment motion must fail because he has failed to meet his burden of showing he is entitled to judgment as a matter of law.

Evans' complaint contains claims for fraud, tortious interference with a business relationship under state law, violation of the discharge injunction, and alleged violations of the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act. All of these alleged violations arise from the defendants' continued assertion that the mortgage claim on Evans' home is still outstanding despite Evans' chapter 7 discharge. Evans insists that the mortgage debt has been discharged. Additionally, Evans argues, that because he listed his home as fully exempt in his bankruptcy schedules, without objection to the exemption, the home is fully protected from creditors by the Florida homestead exemption. Thus, Evans asserts, the defendants are attempting to unlawfully collect or enforce a discharged debt and unlawfully attempting to foreclose on an exempt home. As a matter of law, summary judgment must be denied on all of Evans' claims.

I. The mortgage debt was not discharged

A mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to

[1]The defendants' response was filed two days late. To date, the defendants have not filed a motion to allow their late response or a motion for enlargement of time to file a timely response. Plaintiff has not filed a motion for entry of default judgment either.

foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's in personam liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. *See* 3 R. Powell, The Law of Real Property ¶ 467 (1990). A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 bankruptcy. *See* 11 U.S.C. § 727. "However, such a discharge extinguishes *only* 'the personal liability of the debtor.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 2153 (1991) (emphasis in original) (quoting 11 U.S.C. § 524(a)(1)). Codifying the rule of *Long v. Bullard*, 117 U.S. 617, 6 S.Ct. 917 (1886), the Bankruptcy Code provides that a creditor's right to foreclose on a mortgage survives or passes through the bankruptcy. *Johnson v. Home State Bank*, 501 U.S. at 83; *see* 11 U.S.C. § 522(c)(2); *Owen v. Owen*, 500 U.S. 305, 308-09, 111 S.Ct. 1833, 1835-36 (1991); *Farray v. Sanderfoot*, 500 U.S. 291, 297, 111 S.Ct. 1825, 1829 (1991). Therefore, because Evans has received his Chapter 7 discharge, he is no longer *personally* liable for the mortgage, but the mortgage debt still exists, and is still enforceable against the home and the land on which it sits. *See id.* The defendants may no longer attempt to collect on the mortgage debt from Evans personally, but they may lawfully foreclose on the home post-discharge. *Id.*

II. Florida homestead exemption does not protect a home from a mortgage creditor

Article X, § 4(a) of the Florida Constitution governs the Florida homestead exemption. Article X, § 4(a) provides in relevant part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, *except for* the payment of taxes and assessments thereon, *obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty*, the following property owned by a natural person:

(1) a homestead . . .

Fla. Const. art. X, § 4(a)(1) (emphasis added).

Florida law provides one of the most debtor-friendly homestead exemptions in the country. However, the Florida homestead exemption contains three exceptions, which permit creditors to reach a debtor's homestead: (1) taxes and assessments on the homestead property; (2) mortgages for the purchase, improvement, and repairs of the property; and (3) obligations contracted for the house and for labor performed on the realty. *Quraeshi v. Dzikowski (In re Quraeshi)*, 289 B.R. 240 (Bankr. S.D. Fla. 2002); *In re Aloisi*, 261 B.R. 504 (Bankr. M.D. Fla. 2001). Because the mortgage on Evans' home is one of the exceptions to the homestead exemption, the exemption does not protect the house, even though the homestead exemption was not objected to by the defendants (or any other creditor or the trustee). The mortgage debt survives or passes through the Chapter 7 discharge, and thus the home is still encumbered by the mortgage. Although Evans has had his personal liability on the mortgage debt discharged, the home itself is still encumbered by the mortgage, and the mortgagee can lawfully foreclose on the property and conduct a forced sale of the home to recover on the mortgage debt.

Additionally, Evans argues that the mortgage debt was discharged because he made mortgage payments to Alternative Finance and Option One before receiving notice that the note and mortgage were assigned to Wells Fargo, as trustee for Option One. While it is true that any payments made to the assignor before the debtor has notice of the assignment discharges the debt for the amount of the payments made, *Boulevard National Bank of Miami v. Air Metal Industries, Inc.*, 176 So.2d 94, 98 (Fla. 1965), the debt is not discharged for any unpaid amounts. Thus, the mortgage debt was not fully discharged simply because Evans made some payment to

Alternative Finance or Option One before receiving notice of the assignment to Wells Fargo.

Evans' complaint contains numerous allegations against the defendants. But, all of the allegations concern actions taken by the defendants to foreclose on and collect against the home. These are in rem actions that are not unlawful.[2] In fact, the court's October 20, 2004 order granting relief from the automatic stay specifically allows Wells Fargo, as trustee for Option One, "to secure an in rem judgment of foreclosure in State Court and not an in personam judgment against the Debtors." (emphasis in original).[3] The complaint does not allege that the defendants have taken any in personam actions against Evans. In his brief in support of summary judgment, Evans makes one contention that the defendants are attempting to establish his personal liability on the mortgage debt. However, that allegation is premised on Evans' mistaken belief that the mortgage debt was completely discharged. As discussed above, the mortgage debt against the property was not discharged. Only Evans' personal liability on the debt was erased. There are no other allegations that the defendants have attempted to collect against Evans personally or that the defendants are holding Evans personally accountable for the mortgage debt. Accordingly, Evans' motion for summary judgment will be denied as to all claims, because he has failed to establish that he is entitled to judgment as a matter of law. Even if all of his factual

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[2]Evans also argues that the defendants are unlawfully attempting to foreclose on his home without a validly established note. This court modified the automatic stay to allow the defendants to proceed with their foreclosure action in state court. Any issues Evans has regarding the reestablishment of the note and/or the lawfulness of the foreclosure may be raised by him in that state court foreclosure action. Those issues are not for the bankruptcy court to decide.

[3]Evans' argument that the mortgage was discharged because he received his discharge before there had not been a final judgment in the state court foreclosure action is simply incorrect. Evans' discharge only eliminated his personal liability on the mortgage. The discharge had no effect on the foreclosure action on the property.

allegations are taken as true, his complaint does not establish grounds for relief. *See* Fed.R.Bankr.P 7056(c) (A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law*.") (emphasis added); *see also* Fed.R.Bankr.P 7056(e) ("When a motion for summary judgment is made and supported as provided by this rule . . . the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, *if appropriate*, shall be entered against the adverse party.") (emphasis added).

THEREFORE IT IS ORDERED:

1) The plaintiff's motion for summary judgment is DENIED.

Dated: December 20, 2005

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE