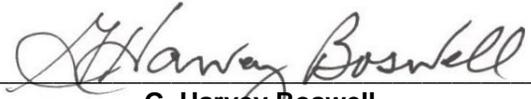


Not intended for publication



Dated: October 25, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

ROY HOLLOWAY and
TERESA HOLLOWAY,

Case No. 01-10960

Debtors.

Chapter 13

ROY HOLLOWAY and
TERESA HOLLOWAY,

Plaintiffs,

v.

Adv. Pro. No. 04-5215

SOUTHERN FINANCIAL,

Defendant.

MEMORANDUM OPINION AND ORDER RE COMPLAINT FOR
TURNOVER OF PROPERTY TO THE ESTATE

The Court conducted a trial on the debtors' complaint for turnover on September 16, 2004. FED . R. BANKR. P. 7001, et seq. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The debtors in this case filed their chapter 13 petition on March 5, 2001. At that time, the debtors listed Southern Financial as the lienholder on their residence with a claim of \$39,000.00. The debtors also listed Southern Financial as the second mortgage holder on the residence with a claim of \$1,600.00. Southern Financial was listed on the debtors' matrix three times with three different addresses.

The plan filed with the debtors' petition proposed to make three payments to Southern Financial. The debtors would pay the ongoing monthly payment on the first mortgage in the amount of \$520.46. Secondly, the debtors proposed paying \$65.00 a month on the \$3,868.00 first mortgage arrearage. Thirdly, the debtors proposed to pay the \$1,600.00 second mortgage at the rate of \$50.00 per month.

The debtors' plan was confirmed on July 23, 2001. According to the terms of the confirmation order, Southern Financial was to receive \$520.46 per month for the ongoing first mortgage payment and \$120.00 a month for the first mortgage arrearage which had increased to \$5,062.09. Southern Financial was also going to be paid \$50.00 per month for the \$1,600.00 second mortgage. The Court entered an Administrative Order Allowing Claims on August 26, 2001. Pursuant to the terms of this order, Southern Financial's ongoing first and second mortgages were allowed as was its first mortgage arrearage in the amount of \$5,062.09.

On July 21, 2004, the debtors filed a "Motion to Substitute W.H. Mullins for Southern Financial." According to the motion, the debtors had mistakenly listed Southern Financial as the second mortgage holder on the petition and in the plan. W.H. Mullins was the correct holder of the second mortgage. Mullins was not listed on the debtors' petition or matrix nor was he included in the debtors' plan. The Court entered an order granting the debtors' motion to substitute W.H. Mullins for Southern Financial on September 15, 2004. As a result of this, W.H. Mullins has received one disbursement under the plan in the amount of \$50.00.

Southern Financial has applied the \$50.00 monthly payment it has been receiving under the plan for the second mortgage to the first mortgage arrearage. By virtue of receiving the monthly payment for the second mortgage under the plan, Southern Financial has received enough money to satisfy the first mortgage arrearage in full plus an additional \$400.00. Southern Financial's attorney has instructed Southern Financial to remit these excess funds to the Chapter 13 Trustee.

On July 22, 2004, the debtors filed this complaint in which they alleged that they were entitled to a turnover of the payments Southern Financial had received under the plan for the second mortgage.¹

¹The debtor's complaint actually stated that it was seeking turnover of monies repossessed by Southern Financial prior to commencement of the case. The debtor used a form complaint and failed to

Southern Financial filed an answer to the complaint on August 12, 2004, in which it alleged that the debtors were barred from recovery under the doctrine of laches and that the complaint failed to state a claim for which relief can be granted.

At the time of the trial in this matter, the debtors' case was \$1,579.00 behind. Roy Holloway is currently incarcerated and is not generating a monthly income. The debtors have filed a motion to reduce the percentage payable to unsecured creditors which is scheduled for a hearing on October 28, 2004. At the present time, the debtors' case is scheduled to pay 100% to unsecured creditors.

II. CONCLUSIONS OF LAW

Section 542(a) of the Bankruptcy Code states:

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). Turnover of property under this section is limited to property of the estate. *Marlow v. Oakland Gin Co. (In re Julien Co.)*, 128 B.R. 987, 993 (Bankr. W.D. Tenn. 1991). In a chapter 7 or 11 case, the property to be turned over must be property which the debtor may exempt under § 522 or that the trustee may use, lease, or sell under § 363. 11 U.S.C. § 542(a). In the context of a chapter 13 case, however, the inquiry is different. Section 1303 states that "the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l)." 11 U.S.C. § 1303. As a result, "in order to apply § 542(a) in a chapter 13 context, the pertinent question is not whether the trustee may use, sell or lease the property but whether the chapter 13 debtor may utilize the property." *Salamina v. Capital One Financial Corp. (In re Sims)*, 278 B.R. 457, 474 (Bankr. E.D. Tenn. 2002); *Transouth Financial Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999).

In the case at bar, the debtor is seeking turnover of the plan payments made to Southern Financial for the second mortgage on the debtors' residence. The order of confirmation in this case provides that:

All property shall remain property of the chapter 13 estate under 541(a) and 1306(a) and shall revert in the debtors only upon discharge pursuant to § 1328(a), dismissal of the case or specific order of the court. The debtors shall remain in possession of and in control of all property of the estate not transferred to the trustee.

change the language to accurately reflect the nature of their complaint. At the trial in this matter, it became apparent that the debtor was actually seeking turnover of plan payments made by the Chapter 13 Trustee to Southern Financial pursuant to terms of the confirmed plan. In the interests of judicial economy, the Court will discuss the complaint as if it were filed with the correct language.

This provision makes clear that the debtors have no right to possess or control property of the estate which has been transferred to the trustee. Clearly the plan payments which the debtors made to the trustee and which the trustee has subsequently disbursed to Southern Financial have been transferred to the trustee within the meaning of the plan. As a result, the debtors have no right to use the plan payments which were made to Southern Financial over the last three years. Additionally, as the court in *In re Lennon*, 65 B.R. 130 (Bankr. N.D. Ga. 1986) recognized,

It is logical to infer that Congress intended that any payments actually made to the trustee pursuant to a confirmed plan would be placed in the trustee's possession and vested in the creditors provided for by such plan. The creditors' right to payment matures at the time each payment is made to the trustee pursuant to the confirmed plan.

Id., 65 B.R. at 136. Obviously when the payments vest in the creditors, the debtor loses the right to use, sell or lease the payments.

Because the debtors have no right to use the plan payments transferred to the trustee and because they cannot claim the funds as exempt, turnover of the funds to the debtors is not appropriate. *Sims*, 278 B.R. at 476. A more proper way for the debtors to have addressed this issue would have been filing a motion to set aside the confirmation order pursuant to FED. R. BANKR. P. 9024; however, the Court finds it important to remind the parties that § 1327(a) of the Bankruptcy Code binds the debtor to the provisions of the confirmed plan. Rule 9024 does grant courts the authority to set aside final orders if a mistake has been made, but motions for relief based on such a reason must be made within one year after the order was entered. Since they waited over three years after confirmation to correct the error they made in the plan they proposed, the debtors might be without any ability to correct their mistake.

III. ORDER

It is therefore **ORDERED** that the debtors' complaint to compel turnover is **DENIED**.

Mailing Information

debtor
Lloyd Utley, attorney for debtors
Steve Hughes, attorney for Southern Financial
Chapter 13 Trustee
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