UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

HERBERT LEE TANNER, Case No. 92-32261-X

Debtor. Chapter 7

GEORGE W. STEVENSON, Bankruptcy Trustee of the Chapter 7 estate of Herbert Lee Tanner, the above-named debtor,

Plaintiff,

v. Adversary Proc. No. 96-0439

WILLIAM B. TANNER,

Defendant.

MEMORANDUM AND ORDER RE PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

This action is before the court on a motion filed by the plaintiff, George W. Stevenson, bankruptcy trustee of the chapter 7 estate of the above-named debtor, Herbert Lee Tanner, seeking a judgment on the pleadings pursuant to FED. R. BANKR. P. 7012(c) or alternatively for summary judgment pursuant to FED. R. BANKR. P. 7056.

By virtue of 28 U.S.C. § 157(b)(2)(I) this is a core proceeding. The court has jurisdiction of this action under 28 U.S.C. §§ 1334 and 157(a) and Miscellaneous District Court Order No. 84-30 entered on July 11, 1984. The following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The relevant background facts are not in dispute and may be briefly summarized as follows. On November 9, 1992, the above-named debtor, Herbert Lee Tanner ("Debtor"), filed an original chapter 11 petition. On November 4, 1993, the debtor voluntarily converted the chapter 11 case to a case under the liquidating provisions of chapter 7 of the Bankruptcy Code. Subsequently, the plaintiff, George W. Stevenson, in his capacity as bankruptcy trustee ("Trustee"), filed the above-captioned adversary proceeding seeking ultimately to determine the validity of a second mortgage on certain property of the estate. The instant motion of the trustee seeks a judgment on the pleadings or in the alternative for summary judgment in favor of the trustee who contends, inter alia, that the defendant, William B. Tanner ("Mr. Tanner"), does not hold an allowable secured claim; that Mr. Tanner's second mortgage on the debtor's home is void under 11 U.S.C. § 506(d); and that the second lien is otherwise unenforceable under applicable state law (discussed more fully, infra). Mr. Tanner and the debtor are brothers.

The debtor's Schedules A and D reflect a secured claim owing to Mr. Tanner, who holds a promissory note and a second deed of trust executed on September 1, 1978, securing the debtor's home located at 2624 Heatherbrook Lane, Germantown, Tennessee. The trustee states under applicable Tennessee law that since no statutory extension of the deed of trust was effectuated and no suit was brought by Mr. Tanner within 10 years of September 1, 1978, seeking to enforce the second deed of trust and promissory note, the statute of limitations set forth in TENN. CODE ANN. §§ 28-3-109[1] and 28-2-111[2] expired on August 31, 1988.

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[1] TENN. CODE ANN. § 28-3-109 provides:

28-3-109. Rent - Official Misconduct - Contracts not otherwise covered - Title Insurance - Demand notes.

(c) The cause of action on demand notes shall be commenced within ten (10) years after the cause of action accrued.

[2] TENN. CODE ANN. § 28-2-111 provides:

28-2-111. Period of validity of liens - Extension. (a) Liens on realty, . . . deeds of trust . . . shall be barred, and the liens discharged, unless suits to

Consequently, the trustee asserts that Mr. Tanner does not hold an allowable and enforceable

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> enforce the same be brought within ten (10) years from the maturity of the debt.
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> (c) . . . deeds of trust . . . may be extended without their priority or legal effectiveness be in any way impaired for any period of time agreed upon and beyond the ten (10) year period from the maturity of the obligation or debt, as provided for in subsection (a); such extension shall be evidenced by a written instrument, which shall, prior to or within ten (10) years from the maturity of the obligation or debt, be duly executed and acknowledged and be filed or recorded with the register of the county in which the realty affected is located and be there recorded . . . .

secured claim. Moreover, the trustee specifically asserts that Mr. Tanner's second lien is void under section 506(d) of the Bankruptcy Code and unenforceable under applicable Tennessee law.[3]

[3] 11 U.S.C. § 506(d) provides:

> To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of claim under section 501 of this title.

Mr. Tanner concedes that the promissory note and deed of trust are subject to the ten year statute of limitations set forth in TENN. CODE ANN. §§ 28-3-109(c) and 28-2-111(a); that the promissory note and the second deed of trust were executed by the debtor in favor of Mr. Tanner on September 1, 1978; and that the ten year statute of limitations under applicable Tennessee law began to run on September 1, 1978. Mr. Tanner contends, however, that the statute of limitations was revived when the debtor subsequently orally acknowledged that he was liable for the note and expressed a willingness to pay it during and after the first ten years of the date of the execution of the note. Mr. Tanner further contends that the court should invoke its equitable powers under the circumstances to recognize the validity of and to enforce the second deed of trust covering the debtor's home - even though the statutory statute of limitations has expired.[4]

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[4] Bankruptcy courts are courts of equity and can provide a remedy where there is a substantive right. U.S. v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (6th Cir. 1990). The bankruptcy court's equitable powers may only be exercised within the confines of the Bankruptcy Code; a bankruptcy court does not have unfettered equity powers. Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988). Moreover, the bankruptcy court's broad power under 11 U.S.C. § 105(a) is not a limitless authorization to do whatever seems equitable. The bankruptcy court may not use section 105 to expand substantive rights. Johnson v. First National Bank of Montevideo, 719 F.2d 270, 274 (8th Cir. 1983), cert. denied 465

There are no genuine issues of material fact which are in dispute here and the issues are ripe for disposition by summary judgment pursuant to FED. R. BANK. P. 7056 and FED. R. CIV. P. 56. See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 514, 106 S. Ct. (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986).

The Tennessee Supreme Court has held that an acknowledgment of the debt "coupled with an expression of a willingness to pay" will toll the statute of limitations and revive the debt for the statutory period from the date of the acknowledgment of the debt and willingness to pay. Graves v. Sawyer, 588 S.W.2d 542 (Tenn. 1979); Hall v. Skidmore, 180 Tenn. 23, 171 S.W.2d 274 (1943). See also C.A. Hobbs, Jr. Inc. v. Brainard, 919 S.W.2d 337 (Tenn. Ct. App. 1995); Spearman v. Stucki, No. 85-344-II, 1986 WL 6315 (Tenn. Ct. App. June 6, 1996).

The court in Hall, supra, stated that "[s]uch an expression might be implied from words or acts of the debtor, but, in whatever form it is to be found, it must amount to the recognition of a continuing obligation." Hall, 171 S.W.2d at 275. Additionally, only the maker of the note can remove an already existing note from the statute of limitations by acknowledging and expressing a willingness to pay without the execution of a new note. Brainard, 919 S.W.2d at 339; see also Spearman, 1996 WL 6315 at *2; Farmers & Merchants Bank v. Templeton, 646 S.W.2d 920, 923 (Tenn. Ct. App. 1982).

Debtor, the maker of the note in question, has stated the following in his affidavit:

> On many occasions since the execution of the said Note, and certainly on many occasions within the preceding ten (10) years, I

U.S. 1012 (1984).

> have stated to the holder of that Note, William B. Tanner, that I acknowledged my indebtedness to Mr. Tanner and that I would pay it willingly as soon as I had the financial capability of doing so. It was, in fact, my intention to pay that Note when I had the financial capability of doing so. I was and still am willing to pay that Note if I had the financial capacity. I have and do acknowledge my liability on said Note and my willingness to pay it.

The affidavit of the debtor clearly indicates an acknowledgment of the debt coupled with an expression of a willingness to pay the note. This court, therefore, finds that the statute of limitations regarding the promissory note itself (i.e., Mr. Tanner's in personam claim against the debtor) is renewed for ten years from the date of the acknowledgment of and willingness to pay the note.

Notwithstanding the fact that the in personam claim of Mr. Tanner against the debtor may be revived by such an acknowledgment and willingness to pay, TENN. CODE ANN. § 28-2-111,[5] however, prohibits Mr. Tanner's enforcement of his in rem claim against the debtor's property (i.e., the secured claim) from being renewed unless a written instrument is prepared and actually filed with the county register within the ten year period. Runnells v. Jacobs, 100 Tenn. 397, 45 S.W. 980 (1898); Alexander v. Muse, 112 Tenn. 233, 79 S.W. 117 (1903); Johnson v. Robinson, 7 Tenn. App. 457 (1928). Section 28-2-111(c) of the TENN. CODE ANN. in essence prevents a renewal of a deed of trust (i.e., the in rem action) by an unregistered instrument. Shanks v. Phillips, 165 Tenn. 401, 55 S.W.2d 258 (1932). Here, no such written instrument extending the duration of Mr. Tanner's second deed of trust under applicable Tennessee law was ever filed with the Register of Shelby County, Tennessee. For this reason, the court finds that the ten year

[5] See note 2, supra.

statute of limitations regarding Mr. Tanner's second deed of trust on the debtor's home expired on August 31, 1988, and is not revived or tolled by the debtor's oral expressions and communications as set forth in his affidavit. Assuming arguendo that equitable principles may be considered here, no compelling reasons have been articulated that would warrant the triggering of such principles. The mere status of brotherhood between Mr. Tanner and the debtor does not, ipso facto, warrant a different result. It is noted that bankruptcy courts are no more entitled to ignore plain statutory law than are other courts. That is, a fundamental principle of equity jurisprudence is that "equity follows the law." Hedges v. Dixon County, 150 U.S. 183, 192 (1893).

Accordingly, this court finds, considering a totality of the particular facts and circumstances and applicable law, that Mr. Tanner does not hold an allowable and enforceable secured claim; therefore, the second deed of trust which secures the debt (i.e., the in rem claim) between him and the debtor is void under section 506(d) of the Bankruptcy Code and is otherwise unenforceable under applicable Tennessee law. Since Mr. Tanner's second mortgage covering the debtor's home is subject to a successful attack by the trustee, the trustee is entitled to have the second lien preserved under section 551 of the Bankruptcy Code for the benefit of the section 541(a) estate. Mr. Tanner indeed does hold an unsecured claim against the estate, which may be subject to distribution under section 726 as an unsecured creditor.[6] That is, Mr. Tanner's secured claim is hereby relegated to the status of an unsecured, nonpriority claim for distribution purposes set forth in the bankruptcy statutory scheme under section 726.

Based on the foregoing and the case and proceeding records as a whole,

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[6] See, e.g, FED. R. BANKR. P. 3002(c)(3).

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that the motion for summary judgment filed by the plaintiff, George W. Stevenson, Chapter 7 trustee, is hereby granted consistent with the foregoing.[7]

BY THE COURT

David S. Kennedy
Chief United States Bankruptcy Judge

Dated: February 24, 1997

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[7] The court greatly appreciates the preparedness and outstanding advocacy of the parties' attorneys in this proceeding.

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