UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:

Marvin Eugene Cox, **No. 13-29708-PJD**

Debtor.

ORDER SUSTAINING DEBTOR'S OBJECTION TO CLAIM

This matter came before the court on the Debtor's Objection to Proof of Claim No. 20, which was filed by Regions Bank ("Regions"). Regions filed a Response in Opposition, and a hearing was held on the Objection and Response, after which the court

took the matter under advisement. The following represents the court's findings of facts and conclusions of law.

This Chapter 13 case was filed on September 11, 2013. On November 19, 2013, Regions filed a Proof of Claim for an unsecured amount of $46,080.03, representing a deficiency after foreclosure. Attached to the Proof of Claim is a document titled "Regions Bank Infopoint Recovery Management Calculated Payoff" showing an interest rate of 8.75%. The Debtor's Objection to Regions' claim asserted that the claim is barred by the Tennessee statute of limitations, T.C.A. § 28-3-109, as an uncollectable debt, and thus not subject to allowance by virtue of 11 U.S.C. § 502(b)(1).

Section 502(b)(1) of the Bankruptcy Code provides that:

> (b) ...if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that---
> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

The Tennessee statute of limitations, codified in Tenn.Code Ann. § 28-3-109(a)(3), provides that actions "...shall be commenced within six (6) years after the cause of action accrued," including " actions on contracts not otherwise expressly provided for."

Regions' Response asserts that its claim was based on a debt that represented "a deficiency balance following the debtor's default and subsequent foreclosure of real property." Regions' Response also contends that the Note evidencing the debt was executed in 2002 with a maturity date in 2017, and that Regions last received a

"payment" on the account (via set off from the Debtor's checking account at Regions) on August 29, 2013—a date within the six year limitations period.

At the hearing, however, both parties agreed that the Debtor made his last *voluntary* installment payment on this debt in July, 2007, and that Regions sent a default letter to Debtor in October, 2007. Based on this stipulated date of default, Regions could have properly brought an action to collect its debt anytime within six years of October 2007, *i.e.*, between October 2007 and October 2013, yet Regions essentially sat on its contractual rights.

The parties agreed and the evidence showed that the Debtor executed a Quit Claim Deed to Regions in March 2009, thereby surrendering the collateral, and that Regions subsequently set off Debtor's checking account in August, 2013. If one or both of these acts could be viewed as promises that revived the debt, they would be deemed to bring Regions' claim within the six-year limitations period. When Regions filed the Proof of Claim in November, 2013, however, there is no question that such attempt to collect the debt, standing alone, occurred after the six-year limitations period had expired.

The issue for the court is whether the execution of the Quit Claim Deed in connection with the foreclosure of the property, or the subsequent set off by Regions of Debtor's checking account, either estopped the Debtor from asserting the six-year statute of limitations, tolled the statute, or somehow revived the debt.

When a debtor induces a creditor to refrain from filing a collection suit during the limitations period, or makes representations that he will not assert the statute of

limitations defense, the debtor may be estopped from asserting the defense. However, even if a debtor induces a creditor to refrain from filing suit, the creditor still has an obligation to take action to collect the debt within a reasonable period of time, when the debtor fails to make good on the promise. *See Wilson v. Harris*, 304 S.W.3d 824, 828 (Tenn. Ct. App. 2009, *appeal denied* 2010)("Persons who successfully establish the estoppel exception [to the statute of limitations] . . . must file suit within a reasonable time after becoming aware that the debtor will not pay the debt.").

Even if the Debtor's execution of the Quit Claim Deed is viewed as conduct by the Debtor intended to induce Regions to refrain from filing suit, more than a reasonable period of time passed from the execution of the Quit Claim Deed in March, 2009 to Regions' next collection attempt - the set off in August, 2013. Thus, Debtor may not be estopped from asserting the statute of limitations defense because of his execution of the Quit Claim Deed. After receiving the Quit Claim Deed, Regions had no payment activity on the Debtor's account for over four years, yet took no action during that time to collect the debt.

Although the original agreement between Debtor and Regions provided for set off rights, such action can hardly be viewed as the kind of conduct that is contemplated under estoppel case law. What is contemplated under estoppel case law is that Debtor's voluntary statements or conduct, after default, induced the creditor to believe that the debtor would not assert the defense, or that the dispute would be settled without litigation. *Id*. at 828-829. The involuntary set off in this case cannot be viewed as conduct by a

debtor to induce the creditor to do or refrain from doing anything. It is simply the creditor acting in accord with rights given well in advance of default. The fact that Debtor agreed to set off rights in the original contract does not approach the level of voluntary representations or conduct contemplated by an estoppel exception to the statute of limitations.

In some cases, promises made by a debtor after default may toll the statute of limitations. However, "[u]nder Tennessee law, 'performing what was already promised in the original contract is not consideration to support a second contract.'" *E.I. DuPont De Nemours & Co. v. Am. Nonwovens Corp.*, 2009 WL 1065164, No. 3:07-00949 (M.D. Tenn. April 20, 2009) (*citations omitted).* So the statute of limitations is not tolled by the set off in this case, which was provided for in the Note, nor is it tolled by the Quit Claim Deed, which was executed in connection with the foreclosure of the property.

In order to revive the debt and thus "restart" the running of the statute, the limitations period must have already expired when the debtor makes a renewed promise to pay and acknowledges the debt. *Wilson,* 304 S.W.3d at 828. There is no conduct in this case that occurred after the expiration of the limitations period, except Regions' filing of the Proof of Claim, to which Debtor promptly filed an objection.

The court finds that the debt has not been revived, the limitations period has not been tolled and Debtor is not estopped from asserting the statute of limitations defense because of the Quit Claim Deed or the set off of Debtor's checking account.

After having considered the pleadings filed in this matter, statements of counsel, a

totality of the circumstances of this case, the relevant case law, and the case record as a whole, this court finds that Regions' Claim No. 20 is time-barred, and thus unenforceable pursuant to 11 U.S.C. § 502(b)(1). The court accordingly sustains the Debtor's Objection and disallows Region's Claim No. 20.

IT IS SO ORDERED