UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:

TOMMIE JAMES CLARK,

Debtor.

BK #94-30194-WHB
Chapter 13

TOMMIE JAMES CLARK,

Plaintiff,

v.

LOUIS RONZA, JR., individually and d/b/a RONZA REALTY CO., d/b/a RONZA REALTY & INVESTMENT CO.,

Defendants.

Adversary Proceeding
No. 95-0330

MEMORANDUM OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a core proceeding[1] before the Court on a motion for summary judgment filed by the defendant in response to the plaintiff's "Complaint Objecting To Claim Of Ronza Realty And Seeking Other Relief" filed March 22, 1995, and "Revised Second Amended Complaint To Rescind Mortgages At Issue And For Recoupment" filed August 10, 1995. At issue is whether, as a matter of law, the debtor is precluded from obtaining the relief sought on the grounds of estoppel or judicial estoppel, *res judicata* or claim preclusion, and/or laches. The following constitutes findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052 and 7056(C).

[1] 28 U.S.C. §157(b)(2)(B), (C), (O).

The controversy between these parties arises from two non-purchase money loans, and their documentation or lack thereof, made by the defendant to the debtor and secured by the debtor's residence. The loan agreements were executed on May 13, 1986 and May 1, 1987 in the respective amounts of $3,250 and $19,200. Ex. 1.

The apparent gravamen of the debtor's complaint is that the amount of the repayment currently asserted by the defendant is excessive[2] and if the amounts are correct based on calculations from the loan documents then the language of those documents violate state and federal truth in lending, consumer protection and usury laws. The debtor now seeks to rescind the loan agreements.

The relief requested in the debtor's original complaint, objecting to the claim of Ronza Realty, is as follows:

> 1. That the Court allow the debtor to rescind the two mortgages on his home and make restitution as required through his wage earner plan.
>
> 2. That the Court examine the Truth In Lending Disclosure documents for violations and assess damages in the form of recoupment against the claim.
>
> 3. That the Court examine the notes, deeds of trusts [sic], and other documents for usury as contemplated in Matter of Coxson, 43 F. 3d 189 (5th Cir. 1995) and assess damages in the form of recoupment against the claim.
>
> 4. That appropriate attorney fees be awarded.
>
> 5. That Louis Ronza, Jr., be added to the complaint should the Court deem him [sic] necessary party.
>
> 6. That Plaintiff be awarded such other and further relief to which he may be entitled.

[2] It should be noted that modification of the claim under the bankruptcy laws, for example, by strip down to the value of the collateral, is not permitted under Bankruptcy Code §1322(b)(2) because this claim is secured solely by the debtor's residence. See, Nobelman v. American Savings Bank, 113 S. Ct. 2106 (1993).

This requested relief is incorporated into the debtor's "Revised Second Amended Complaint To Rescind Mortgages And For Recoupment" where the following additional relief is requested:

> 1. That strict liability be applied with respect to the Federal Truth In Lending violations and compensatory damages and statutory damages be allowed as recoupment, thereby reducing the amount financed with respect to each loan.
>
> 2. That attorney fees be allowed plaintiff based on Defendants [sic] violation of Truth In Lending Act.
>
> 3. That the Court deny Defendants interest and commissions pursuant to T.C.A. §47-14-117(c) and allow recovery to plaintiff as allowed by statute.
> (Note: The statute of limitations T.C.A. 47-14-118 has not run, but if the Court determines it has run, that the Court allow recoupment of these sums.)
>
> 4. If #3 prayer is not granted, that the contracts be reformed to lower interest to the formula rate in each contract and a fair and reasonable commission. (T.C.A. §47-14-115(b) allows pauper's oath).
>
> 5. That attorney fees be allowed plaintiff for reformation of contract under T.C.A. §47-14-115(c) as to usury and excess charges.
>
> 6. That the Court eliminate any loan charges for services not actually rendered or any sum the Court deems excessive, or relating to recordation of invalid Deeds of Trust, and given credit for sums not actually expended by Defendant to record the two Deeds of Trust.
>
> 7. That the Court declare the 1987 Deed of Trust and its recordation to be void as it does not bear the signature of Louis Ronza, Jr., as notary public.
>
> 8. That the Court allow Plaintiff to rescind the two mortgages on his home and remit to Defendant as necessary through his wage earner plan.
>
> 9. That the Court allow as recoupment or counter-claim as part of his objection to defendant's claim damages, treble damages, and attorney fee for violation of Tennessee Consumer Protection Act.
>
> 10. That the Court grant Plaintiff credit for all payments on the loan by Plaintiff.
>
> 11. That the Court allow Plaintiff damages and attorney fees as allowed by T.C.A. 66-25-102 for failure of Defendant to release the 1986 Deed of Trust upon Plaintiff [sic] written requests to release.
>
> 12. That the Court declare the Broker Contract void.

> 13. That any expenses and costs incident to Defendant failing to disclose the Broker Contract by [sic] assessed against the Defendant.
>
> 14. That the Court grant Plaintiff such other and further relief to which he may be entitled.
>
> 15. That the Court grant Plaintiff appropriate civil remedies should the Court determine that unlawful debt defined by 18 U.S.C. § 1961(6) has been created by Defendant and collection of same by Defendant violated 18 U.S.C. § 1962.

As noted above, the defendant responded to this complaint with a motion for summary judgment and to dismiss the complaints, which is supported by the affidavit and exhibit thereto of Mr. Louis Ronza, Jr., the defendant. According to the defendant, summary judgment is appropriate here because in three prior chapter 13 cases and one voluntarily nonsuited Shelby County Chancery Court action commenced by Mr. Clark, the debtor could have questioned the validity or legality of the defendant's claim but has not done so. Although the debtor filed an objection in his 1993 chapter 13 case to the amount of the defendant's arrearage claim, he failed to prosecute the said objection and the case itself was dismissed for nonpayment in 1994. Thus, the defendant contends that the plaintiff is barred from prosecuting this complaint by the doctrines of *res judicata* or claim preclusion, estoppel or judicial estoppel, or laches.

The debtor concedes that there are no disputed facts regarding the filing and dismissals of his prior chapter 13 cases and Chancery Court complaint. However, the debtor denies that the current complaint is barred because he was not provided with copies of the loan documents until after commencement of this proceeding and was unaware of the availability of these causes of action. Further, the debtor asserts that some of his causes of action are not time barred and did not mature until recently. Thus, the issue becomes whether the debtor can pursue the requested relief over the summary judgment motion raised by the defendant.

Summary judgment may be awarded only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a mater of law. FED. R. BANKR. P. 7056(c). The substantive law of the case will determine what factual issues are material and the proper inquiry is the same

as that used on federal directed verdict motions, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." Street v. J. C. Bradford & Co., 886 F. 2d 1472, 1480 (6th Cir. 1989).

RES JUDICATA

The Court shall first address the defendant's contention that, in light of the debtor's prior chapter 13 cases and Chancery Court lawsuit, the complaint here is barred by *res judicata* or claim preclusion as a matter of law. Under the doctrine of claim preclusion or *res judicata*, "a final judgment on the merits [from a court of competent jurisdiction] of an action precludes the parties or their privies from relitigating issues that were or could have been raised int that action." Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 n. 6 (1982). See also, Federal Mortgage Management, Inc. v. Weeks (In re Weeks), 133 B.R. 201, 204 (Bankr. W.D. Tenn. 1991). The initial inquiry for determining whether *res judicata* is applicable to this situation is whether a final judgment on the merits of the claims between these parties has been issued.

Turning first to the state court litigation, the record reflects that on June 5, 1992, the debtor commenced an action against this defendant in the Chancery Court of Shelby County, Tennessee with a "Complaint To Enjoin Foreclosure And In The Alternative To Set Aside Foreclosure And For Accounting." Ex. 1. In comparison to the relief requested in this adversary proceeding, the debtor there requested that the Chancery Court enjoin a foreclosure sale of the subject property that was scheduled by Mr. Ronza for June 12, 1995, and require that the defendant provide the debtor with an accounting

> for all charges that . . . he claims is [sic] due by the Plaintiff for this loan, including but not limited to a copy of the original Promissory Note, a copy of the Amortization Schedule made at the time the loan was made, a copy of the Federally required Disclosure Statement and provide dates upon which [the defendant] received any money from the Plaintiff, Tommie Clark.
>
> 4. That this Court determine how much is owed by the Plaintiff to [the defendant], if any, that the Court determine a pay back schedule therefore.

Ex. 1, "Complaint To Enjoin Foreclosure . . . " filed in the Chancery Court of Shelby County, Tennessee on June 5, 1992.

On June 9, 1992, Chancellor Neal Small issued an order styled "Order Denying Application For Temporary Injunction" wherein he ordered:

> that the application for a temporary injunction by plaintiff be and the same is hereby denied [. . .and Mr. Ronza was permitted to proceed with a foreclosure sale, and]
>
> that Louis Ronza, Jr., acting on behalf of Louis Ronza Realty Company, shall furnish to plaintiff an accounting . . . .

Ex. 1.

Subsequently, on June 12, 1992, the defendant filed an answer to the Chancery Court complaint wherein the defendant denied that the debtor was entitled to the relief requested. Additionally, the defendant denied that the debtor had not been provided with copies of the pertinent loan documents at the respective loan closings. Indeed, cumulative exhibit one (1) submitted to this Court in reference to this summary judgment motion contains copies of the loan documents, excluding a purported letter to Associates Financial Services Company of Tennessee, Inc. regarding the defendant's asserted payoff of a loan made to the debtor by Associates, which appear to have been exhibits to the Chancery Court answer and filed contemporaneously therewith. Mr. Clark's attorney in the Chancery Court action has filed an affidavit stating that he did not receive the answer or its attached documents until this litigation began. The record reflects no further activity in the Chancery Court lawsuit until January 13, 1995, when the Clerk and Master of the Chancery Court issued a show cause motion to require the parties to show why the proceedings should not be dismissed.[3] As a result, counsel for the debtor caused an Order of Voluntary Nonsuit to be entered on February 3, 1995, without consulting with Mr. Clark. See Affidavit of Felix Bean.

In Tennessee, a voluntary nonsuit is not considered a judgment on the merits and no *res judicata* effect attaches thereto as long as the plaintiff has not previously taken two voluntary nonsuits. TENN. R. CIV. PROC. 41.01(1) and (2). Accordingly, no *res judicata* effect attaches to the disposition of the debtor's

[3] Between June 11, 1992 and January 13, 1995, the date of the Chancellor's show cause, the debtor filed three voluntary chapter 13 petitions, two of which were dismissed for nonpayment.

Chancery Court action and summary judgment is not available in this proceeding on this basis. Having reached this determination, the issue becomes whether the orders confirming the debtor's prior Chapter 13 plans, without a determination on an objection to the defendant's claim, are entitled to *res judicata* effect so as to preclude this adversary proceeding.

It would initially appear that the confirmation orders should enjoy preclusive effect, as §1327(a) provides:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

However, other chapter 13 considerations ameliorate that outcome. Section 1307 gives the debtor an absolute right to dismiss the case and provides for dismissal by the court. Section 349 generally provides that a case dismissal restores the prebankruptcy conditions. A chapter 13 confirmation's preclusive effect is significantly restricted by the fact that postconfirmation dismissal relieves the creditor of the effects of that confirmation. Lundin, Chapter 13 Bankruptcy 2d ed. §6-9 (1994). Moreover, *res judicata* may be restricted by due process concerns. See, e.g., In re Linkous, 990 F. 2d 160 (4th Cir. 1993).

It is true that Mr. Clark's attorney filed an objection to the amount of the Ronza claim in case number 93-29938, and claim preclusion may attach to grounds for recovery that were not but could have been litigated in an earlier proceeding. Similarly, in prior case 87-25883 the debtor filed a motion to add postpetition mortgage arrearages, and in that case a consent order was entered providing for relief from the automatic stay if the debtor became more than 30 days delinquent. It would appear that the debtor had an opportunity to litigate the allowance of the Ronza claim in all three prior chapter 13 cases. However, the orders of confirmation in those cases did not address the validity of the Ronza claims. More importantly, those orders and the cases themselves did not address the fluid nature of the Ronza claims.

It is obvious that the Ronza claims have increased in amount since the first chapter 13 was filed, when the arrearage claim was $5,595.41. In case number 92-26274, the Ronza proof of claim for an arrearage was

$11,315.890. In case number 93-29938, the arrearage had increased on the proof of claim to $20,851.95. Now the claim is asserted to be in excess of $41,000. Thus, there appears to be an issue of material fact as to the amount of the Ronza claims. Even if those amounts could have been determined in prior cases, the allowable amount of interest and other charges now have continued to increase so that the claims in the present case may not be the same claims as in the prior chapter 13 cases.

As one District Court has stated, a chapter 13 confirmation does not necessarily confirm the validity of an underlying debt; rather, the confirmed plan generally provides for a manner of payment. And, that Court agreed that dismissal of the chapter 13 case vacated the confirmation order. Elliott v. ITT Corp. (In re Elliott), 150 B.R. 36 (N.D. Ill. 1992).

Moreover, some of the grounds for relief in the present amended complaint allege that the debtor did not have matured causes of action or did not know that he had grounds for relief until after this chapter 13 case was filed. For example, the debtor alleges recoupment as a defense to the claims. Recoupment may not be time barred and may not be a compulsory counter claim. See, e.g., In re Woolaghan, 140 B.R. 377 (Bankr. W.D. Pa. 1992). At the very least there are factual issues about what the debtor knew and when he knew it that prevent the granting of summary judgment at this time. It may be appropriate for the Court to bifurcate some factual issues for trial and for the parties to renew summary judgment motions, and that possible procedure will be discussed with counsel at a status conference to be set by the Court. However, at this time the Court will deny the defendant's summary judgment motion on *res judicata* grounds.

ESTOPPEL OR JUDICIAL ESTOPPEL

The plaintiff next contends that the instant proceeding is barred by equitable estoppel or judicial estoppel and/or laches.

It is well settled that equitable estoppel is available as a defense when a party has, with knowledge of the facts, engaged in misleading conduct with the expectation that such conduct would be acted upon by another party and that party justifiably relies on the conduct to its detriment. Edmondson v. Mandrell (In re

Mandrell), 39 B.R. 455, 458 (Bankr. M.D. Tenn. 1984). Judicial estoppel precludes a party from asserting a legal position contrary to that asserted to that party's benefit in a prior judicial proceeding. Peoples Bank of Dickson v. Duke (In re Duke), 172 B.R. 575, 579 (Bankr. M.D. Tenn. 1994). The primary purpose of judicial estoppel is to protect the integrity of the courts. It binds a party to sworn statements made during judicial proceedings which were accepted by the Court and on which the party prevailed. Haymaker v. Green Tree Consumer Discount Co., 166 B.R. 601, 605 (Bankr. W.D. Pa. 1994).

In the instant proceeding, the debtor and his state court counsel claim that they had no access to the documents which memorialized the loans at issue until this proceeding. Affidavit of Louis Ronza filed Sept. 20, 1995; affidavit of Felix H. Bean filed Oct. 23, 1995. At the same time, the copy of the answer filed by the defendant to the debtor's Chancery Court action on June 12, 1992, and submitted as an exhibit in this proceeding, has copies of the pertinent documents referenced and attached as exhibits. The answer further contains a certificate of service signed by former counsel for the defendant, which declares that the answer was served on debtor's former counsel on June 13, 1992 and the debtor's 1993 chapter 13 contains an objection to this defendant's claims. For estoppel purposes, there is at a minimum a genuine issue of material fact regarding whether the debtor had prior knowledge of the facts which he asserts to support his current complaints. Further, as stated earlier, the record reflects that the amounts of the claims asserted by the debtor in the prior chapter 13 cases were much less than the current accelerated claim.

Similarly, there are genuine issues of material fact regarding the applicability of judicial estoppel to this proceeding because there is evidence that the debtor did not intentionally omit his allegations that the terms of the loans at issue violate consumer protection and usury laws. Mr. Clark states that he was unaware at the time of his prior chapter 13 cases that these allegations constituted a "position" for purposes of judicial estoppel. See Elliott v. ITT Corporation (In re Elliott), 150 B.R. 36, 40 (N.D. Ill. 1992).

The Court will deny the defendant's motion for summary judgment on estoppel or judicial estoppel grounds, again without prejudice to its renewal after proof on the issues of what the debtor knew and when he knew it.

LACHES

Finally, the Court will address whether summary judgment may be granted in this proceeding under the doctrine of laches. Laches is an equitable doctrine founded on the maxim that equity aids the vigilant and not those who slumber on their rights. As an equitable remedy, its application is a question addressed to the sound discretion of the trial court and considered in light of the facts of each case. Bott v. Four Star Corp., 807 F. 2d 1567, 1576 (6th Cir. 1986).

Laches is an inexcusable, unreasonable delay in asserting a claim, after knowledge of the facts giving rise to the claim, that prejudices another party. Mere delay is insufficient for the laches defense; there must be prejudice to another party. Wells v. U.S. Steel & Carnegie Pension Fund, Inc., 950 F. 2d 1244, 1250 (6th Cir. 1991); Patton v. Bearden, 8 F. 3d 343, 347 (6th Cir. 1993). Moreover, it should be noted that "courts are reluctant to sustain the defense of laches and in a case where the delay in filing the suit can be reasonably explained or justified, such a defense will not be heard." Whitehaven Utility District of Shelby County v. Ramsey, 387 S.W. 2d 351, 353 (Tenn. 1964).

As discussed above, the debtor in this proceeding contends that he had no knowledge of the potential for the claims asserted here. Both he and his current attorney have filed affidavits in support of this contention. As also noted above, the defendant disputes this contention and relies upon the copies of the debtor's prior chapter 13 case records and Chancery Court record submitted as exhibits here in support thereof. Given these circumstances, the Court cannot conclude that no genuine issues of material fact exist with respect to the laches defense.

Given the above discussion, it is evident that the defense of estoppel and/or laches may preclude the debtor from pursuing the relief sought in this proceeding. However, the applicability of these defenses depends upon what the debtor and when he knew it regarding the terms of the notes at issue and potential for objection thereto. The evidence and pleadings submitted thus far on both sides of that issue preclude the grant of summary judgment as they raise genuine issues of material fact. As such, the defendant' s motion for

summary judgment must be denied at this time. A separate order reflecting this disposition shall be entered simultaneously with this memorandum.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

Date: January 10, 1996

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