WRITTEN DECISION - NOT FOR PUBLICATION

ENTERED Oct 3, 2011
FILED
OCT 3 2011
CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re OLIVER ZAMMIT and ALENE ZAMMIT, Debtors.	Case No. 10-12043-PB7 Adv. No. 11-90180 ORDER ON MOTION TO INTERVENE
LESLIE T. GLADSTONE, Chapter 7 Trustee, Plaintiff, v. BANK OF AMERICA, N.A., Respondent.	

In the underlying Chapter 7, debtors disclosed they had made three payments to Bank of America shortly before filing which totalled $12,655.10. The payments were made within 90 days before the filing.

After examining debtors' Schedules, which listed Bank of America in first priority on debtors' real property as

undersecured the Chapter 7 trustee made demand on Bank of America to return the payments. When the Bank did not respond, the trustee sued the Bank to recover the allegedly preferential payments. Thereafter, the Bank acknowledged the merits of the trustee's complaint, and the parties stipulated to the return to the trustee of the full amount of the payments. The trustee noticed for hearing the proposed settlement, which prompted the debtors to oppose the settlement, and to seek to intervene in this preference adversary proceeding.

In opposition to the trustee's motion to approve the settlement with Bank of America, the debtors submitted the declaration of Mr. Zammit. In paragraph 10 of the declaration, he states:

> 10. The payments were made on the advice of the lawyer who was assisting us in the proceeding through the loan modification process with BOA. We had fallen behind on our payments, but our lawyer, the Chance Gordon Law Firm, told us to try to bring the payments current in order to increase our chances of being approved for a loan modification. That is what caused us to pay the $12,655.10. We did get approved for a loan modification shortly after the payments were made.

Curiously, in paragraph 12 of the same declaration, Mr. Zammit asserted in conclusory form:

> 12. The payments were made in the ordinary course of our dealings with BOA. Second, the payments were made for value, namely the acquisition of a loan modification. Third, BOA was fully secured at the time the payments were made.

Of course, the first assertion is fully impeached by paragraph 10 -- the payments were not "ordinary course" but were overdue payments made in the hope of influencing a decision on the loan modification application. Second, while Mr. Zammit asserts the payments were made for value, there is no competent evidence provided that the bank based any part of its decision to grant the loan modification because of the payments. Moreover, that information, if it exists, would be in the possession of the bank and could be a defense under 11 U.S.C. § 547(c)(1)(A). However, the bank has not raised it. To the contrary, the bank has stipulated to return the full amount of the payments to the trustee in exchange for an unsecured claim in the same amount, and a release.

Perhaps most troubling is Mr. Zammit's third assertion, that "BOA was fully secured at the time the payments were made." In paragraph 14 of the same declaration he stated:

> 14. I believe that our home was worth more than the debt owed to BOA. Attached hereto as Exhibit A is a letter we obtained in preparing to file this bankruptcy case from real estate broker Frank Macri. Mr. Macri's opinion was that our house had a fair market value between $675,000 to $690,000. BOA was owed approximately $649,000 when it received the $12,655.10. BOA was fully secured when our Chapter 7 case was filed.

Debtor filed this case on July 8, 2010. They filed their Schedules at the same time. On their Schedule A they listed their residence as valued at $648,000 and the amount of secured debt on it at $693,434. On Schedule D they listed the same value

and explained that BAC Home Loans was owed $649,983, while a junior lienholder was owed $43,451. Debtors' Schedules were signed under penalty of perjury on July 8, 2010.

Mr. Zammit attempted to explain in paragraph 15 of his declaration:

> 15. In our bankruptcy schedules, we estimated our house value at $648,000 and provided to the trustee a printout of a page from the Zillow home value website. We cited the Zillow because we were told that bankruptcy trustees typically accept this as an estimate of value.

Then, for unknown reason, Mr. Zammit added a last sentence without any apparent competence to assert it: "In this adversary proceeding, the court typically would hear expert testimony as to value and would make a decision, unfettered by what the schedules estimate."

The Congress intended to level the field for creditors by providing a trustee the power to recover for the benefit of the bankruptcy estate transfers of a debtor's interest in property made within a certain period of time before filing. The avowed purpose is to prevent debtors from preferring certain creditors over others in distribution of assets that would otherwise become property of the estate upon filing the bankruptcy petition. Section 547(b) of the Bankruptcy Code provides:

> (b) Except as provided in subsection (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
>
> (1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

As noted above, subpart (c) provides some exceptions to the trustee's power to avoid a prepetition transfer on a preference. One exception is where the transfer is made in a contemporaneous exchange for new value for the debtor. Another is where the transfer is made in the ordinary course of dealings between the debtor and creditor.

What this motion to intervene boils down to is that debtors are afraid of the effect payment of the funds by Bank of America to the trustee <u>might</u> have on their prepetition loan modification. That modification reduced their monthly payments from $4,218.49 to $2,412.12 for the first 60 months of the loan term. The Court has not been apprised of the terms thereafter, nor whether any

prepetition arrears were rolled over to the end of the loan, increasing the total of the debt to Bank of America.

The Court agrees that the debtors have an interest in their home, and in the current terms of their modified home loan. It is not clear whether there are any viable defenses to the trustee's complaint against the bank regarding the allegedly preferential payments. It may be that the bank determined that fighting the litigation was not cost-effective, even if it saw possible defenses.

Accordingly, and while recognizing concerns the Court has already noted about debtors' assertions, the Court finds and concludes that debtors should be allowed to intervene in this adversary proceeding. Among the issues to be addressed are whether there is a viable contemporaneous new value defense, and whether the trustee is entitled to recover all three payments made to the bank totalling over $12,000, when the most the bank could have gained was either $1,983 over the value of the home, or $1,483 if the Zillow value is used.

IT IS SO ORDERED.

DATED: OCT - 3 2011

PETER W. BOWIE, Chief Judge
United States Bankruptcy Court