FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
April 9, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE LUCINDA ANN RAMSEY, Debtor.	BAP No. KS-07-050
WILLIAM GRIFFIN, Trustee, Plaintiff – Appellee, v. NOVASTAR MORTGAGE INC., Defendant – Appellant, and LUCINDA ANN RAMSEY, Defendant – Appellee.	Bankr. No. 04-23220 Adv. No. 05-06154 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, McNIFF, and BOULDEN[1], Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

NovaStar Mortgage, Inc. ("NovaStar"), holder of an unperfected consensual mortgage lien against debtor Lucinda Ramsey's ("Debtor") home as of the petition date, appeals the bankruptcy court's Memorandum Opinion denying its

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Judith A. Boulden, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

joint Motion to Approve Settlement and Compromise ("Memorandum Opinion") with the Chapter 13 trustee ("Trustee"). NovaStar also appeals the bankruptcy court's subsequent ruling avoiding its lien on the home and allowing it a general unsecured claim to be satisfied from payments the Debtor was to make to the Chapter 13 estate totaling 35% of the claim within one year, *inter alia* ("Lien Ruling"), alleging error in both the bankruptcy court's avoidance of the lien and application of the best-interests-of-creditors test in 11 U.S.C. § 1325(a)(4).[2] For the reasons stated below, we DISMISS the appeal of the Memorandum Opinion as moot, REVERSE the Lien Ruling, and REMAND the matter with instructions to dismiss the associated adversary proceeding.[3]

I. FACTUAL BACKGROUND

The material facts in this case are intricate but undisputed. Prepetition, the Debtor's ex-husband executed a note in NovaStar's favor with a principal sum of $133,650, although the Debtor did not. To secure the Note, both the Debtor and her ex-husband executed and delivered a mortgage to NovaStar granting a lien on their home ("Mortgage"). The Debtor's ex-husband conveyed his ownership interest in the home to the Debtor in 2003, leaving the Debtor as the sole owner of the home, albeit with no personal liability on the debt. NovaStar failed to perfect its lien prepetition by recording the Mortgage in accordance with Kansas

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[2] This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") became effective. Thus, all statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101-1330 (2004) unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004) unless otherwise specified.

[3] The Debtor alleged in her brief that the bankruptcy court erred in refusing to find that the terms of her confirmed Chapter 13 plan were res judicata as to particular treatment of NovaStar's claim. But she did not cross-appeal any of the bankruptcy court's rulings and, in any event, abandoned the issue at oral argument. Accordingly, this Court has not considered the Debtor's res judicata argument. *See In re Country World Casinos, Inc.*, 181 F.3d 1146, 1150 (10th Cir. 1999); *In re MiniScribe Corp.*, 309 F.3d 1234, 1244 (10th Cir. 2002).

law.

The Debtor filed a Chapter 13 petition on August 2, 2004, along with a Schedule C listing the current value of the home as $130,000 and claiming an exemption of $135,000 pursuant to Kan. Stat. Ann. § 60-2301, which permits an unlimited homestead exemption in certain circumstances. No objection to the Debtor's claimed homestead exemption was ever filed.[4]

Despite receiving adequate notice, NovaStar failed to object to the Debtor's proposed Chapter 13 plan, which was confirmed on October 1, 2004, and which provided for an estimated 35% return to general unsecured creditors. NovaStar then filed an untimely secured proof of claim that was disallowed after NovaStar failed to appear at the claim objection hearing.

In May 2005, NovaStar filed a Motion for Relief from Stay based on the Debtor's failure to make mortgage and other payments on the home. The bankruptcy court denied the Motion for Relief from Stay "to allow the Trustee time to decide whether he would seek to avoid the mortgage under § 544 through an appropriate adversary proceeding."[5] On September 27, 2005, the Trustee commenced an adversary proceeding under § 544 against the Debtor and NovaStar to avoid NovaStar's lien. The next day the Trustee and NovaStar filed a joint Motion to Approve Settlement and Compromise ("Settlement Motion"), proposing that (1) NovaStar's lien would be avoided and preserved for the benefit of the estate; (2) NovaStar would pay $4,000 to the Trustee for his interests in the avoided lien and the payment would then be used to pay unsecured claims an increased return of approximately 60%; (3) NovaStar would waive any claim against the estate based on its avoided lien; (4) the Trustee would waive any

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[4] This is a pre-BAPCPA case, so the homestead exemption cap in the current § 522(p)(1) of the Bankruptcy Code does not apply.

[5] *Griffin v. NovaStar Mortgage, Inc. (In re Ramsey)*, 356 B.R. 217, 222 (Bankr. D. Kan. 2006).

claim against the Debtor for mortgage payments that were neither made to NovaStar nor paid into the plan; and (5) NovaStar would be granted stay relief to seek foreclosure of the Mortgage in state court. The Settlement Motion was taken under advisement on November 8, 2005. Two days later, the Debtor filed a Motion to Grant Modified Equitable Mortgage ("Modification Motion") requesting that the bankruptcy court fashion some kind of equitable remedy by creating a new, reasonable mortgage agreement between the parties. About three months later the court also took the Modification Motion under advisement.

With no ruling yet from the bankruptcy court on the pending motions, NovaStar filed its second Motion for Relief from Stay in August 2006, again alleging the Debtor's failure to make mortgage and other payments since August 2004. Around the time that the second Motion for Relief from Stay was filed, without the Debtor's knowledge or Court approval, and while the Settlement Motion and Modification Motion were still under advisement, NovaStar transferred approximately $7,500 to the Trustee to allow for an additional payment increase to 100% of all the allowed claims in the Debtor's confirmed plan. The Trustee distributed the $7,500 to creditors and filed a Notice of Plan Completion in the main case on September 5, 2006, to which no objection was filed. The Memorandum Opinion that is the subject of this appeal denying both the Settlement Motion and the Modification Motion was issued on December 13, 2006. The bankruptcy court ruled, in part, that the Trustee's attempted sale of the Trustee's avoided lien rights was improper since a Chapter 13 trustee has no power to sell property of the estate under § 363(b) of the Bankruptcy Code. The bankruptcy court issued an Order Discharging Debtor nine days later.

The bankruptcy court then issued a Supplemental Scheduling Order on January 9, 2007, requiring briefing on the issue of whether NovaStar had the ability to file a proof of claim once its lien was avoided given the prior proceedings in the bankruptcy case. The bankruptcy court ultimately issued the

Lien Ruling that is the second appeal before us on April 5, 2007 (1) avoiding NovaStar's lien; (2) allowing NovaStar to file a general unsecured proof of claim as to the avoided lien; (3) requiring that the Debtor pay 35% of NovaStar's claim within one year through payments the Debtor was to make to the estate; (4) authorizing the Debtor to obtain secured financing for this purpose if the claim was to be paid by refinancing the home; and (5) indicating that the automatic stay would remain in effect during this time. Shortly after the bankruptcy court's issuance of the Lien Ruling, the Trustee filed documents attempting to withdraw his Final Report and the Order Discharging Debtor. The motions he ultimately filed seeking vacatur of the Order approving his Final Report and the Order Discharging Debtor were taken under advisement on May 22, 2007.[6] The appeal of the Memorandum Opinion denying approval of the Settlement Motion and the Lien Ruling followed.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.[7] Neither party elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have therefore consented to appellate review by this Court.[8]

A decision is considered final "if it 'ends the litigation on the merits and

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[6] Of course, the Tenth Circuit discussed both the procedural and substantive distinctions between vacatur of a Chapter 13 discharge order and revocation of a discharge in *In re Midkiff*, 342 F.3d 1194 (10th Cir. 2003).

[7] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1(a) and (d).

[8] Although the Trustee is nominally listed as an Appellee in the case caption, he has not participated in this appeal.

leaves nothing for the court to do but execute the judgment.'"[9] The Memorandum Opinion denying the Settlement Motion was interlocutory, and the Lien Ruling fully resolved the adversary proceeding such that nothing remained for the bankruptcy court's consideration. Thus, the Lien Ruling is final and appeal of the Memorandum Opinion denying the Settlement Motion is timely for purposes of review.[10]

III. DISCUSSION

A. Denial of the Settlement Motion

But "[i]n addition to determining whether an order is 'final' as required under 28 U.S.C. § 158(a)(1), we have an obligation to determine the jurisdictional issue of whether the appeals are moot, including whether they are moot in the constitutional sense, *i.e.*, that there is no case or controversy."[11] First and foremost, the parties to this appeal are actually arguing about the propriety and effect of a subsequent singular event in the underlying bankruptcy case — *i.e.*, NovaStar's unilateral payoff of the plan — and not the Memorandum Opinion denying the multifaceted settlement proposed in the Settlement Motion which is the matter properly before the Court. The parties are effectively raising a new controversy regarding the bankruptcy court's approval of the Trustee's Final Report and issuance of the discharge order following NovaStar's payoff rather than arguing the controversy actually on appeal.

Moreover, affirming the Memorandum Opinion denying the Settlement Motion would do nothing because the plan was subsequently paid off in full, a

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[9] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. U.S.*, 324 U.S. 229, 233 (1945)).

[10] *See, e.g., Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 726 (11th Cir. 1995) (order approving settlement is final but order disapproving settlement is not).

[11] *In re Long Shot Drilling, Inc.*, 224 B.R. 473, 477 (10th Cir. BAP 1998); *see also In re Inv. Co. of the Sw., Inc.*, 341 B.R. 298, 306 (10th Cir. BAP 2006).

discharge order was issued, and the discharge has not been revoked pursuant to § 1328(e) of the Bankruptcy Code. For the same reasons, reversing the Memorandum Opinion denying the Settlement Motion would also do nothing except effectively require creditors' disgorgement of the difference between full payoff and the approximately 60% return proposed in the Settlement Motion. In light of this procedural posture, it is "impossible for the [C]ourt to grant any effectual relief whatever" such that the appeal of the Memorandum Opinion is constitutionally moot.[12]

Although highly unusual in the Chapter 13 context, the difficulty with the appeal of the Memorandum Opinion denying the Settlement Motion can also be framed in terms of equitable mootness.

> Equitable mootness deals with parties' reliance upon a substantially consummated plan of reorganization and the point at which modification of that plan would unduly impact innocent third parties.
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> An appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.[13]

Factors applicable to an equitable mootness inquiry include the following: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated;[14] (3) whether the relief requested would affect the rights of parties not before the Court; (4) whether the relief requested would affect the success of the confirmed plan; and (5) the public policy of affording finality to bankruptcy

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[12] *In re Milk Palace Dairy, LLC*, 327 B.R. 462, 467 (10th Cir. BAP 2005) (internal quotation marks omitted).

[13] *Id.* at 467-68 (internal quotation marks omitted).

[14] "Substantial consummation" is obviously a term of art specific to Chapter 11 cases, and there is no need in this case to try grafting its nuances into Chapter 13 because the Debtor's plan was paid off in full.

court judgments.[15]

In this case, no stay has been obtained, the plan has been paid off in full for approximately 19 months, creditors would have to disgorge payments received by the Trustee if the Settlement Motion providing an approximately 60% return were approved, an order of discharge was entered, and the discharge has not been revoked pursuant to § 1328(e) of the Bankruptcy Code. And although NovaStar's unilateral payoff of the Debtor's plan and the Trustee's distribution of those funds are certainly questionable, the resulting orders approving the Final Report and discharging the Debtor are not properly before the Court and do not outweigh the other facts in this case in any event. Under these unique circumstances, the Memorandum Opinion appeal is equitably moot.

B. Lien Ruling

As stated above, in its Lien Ruling the bankruptcy court (1) avoided NovaStar's unperfected lien on the Debtor's home; (2) allowed NovaStar to file a general unsecured proof of claim as to the avoided lien; (3) required that the Debtor pay 35% of NovaStar's claim within one year through payments the Debtor was to make to the Chapter 13 estate; (4) authorized the Debtor to obtain secured financing for this purpose if the claim was to be paid by refinancing the home; and (5) indicated that the automatic stay would remain in effect during this time. NovaStar first alleges that the bankruptcy court acted outside of its jurisdiction or otherwise erred when it issued the Lien Ruling given the prior events in both the main case and the adversary proceeding.[16]

Although this Court is not prepared to say that the bankruptcy court lacked

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[15] *Milk Palace Dairy* at 468.

[16] Alternatively, NovaStar alleges error in the substantive aspects of the Lien Ruling. Given our disposition of NovaStar's initial argument, we need not determine any other particular substantive errors with the Lien Ruling at this time.

subject matter jurisdiction over the adversary proceeding at the time of the Lien Ruling, the Lien Ruling was nevertheless erroneous because further consideration of the Trustee's lien avoidance action was moot after the plan had been paid off in full and the discharge issued. Creditors had already been paid 100% and preserving the avoided lien under §551 for the benefit of the estate would serve no purpose, thus rendering the proceeding moot.

> [A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."[17]

Section 551 of the Bankruptcy Code provides for the automatic preservation of liens avoided under § 544 "for the benefit of the estate." And although the legislative history to § 551 allows that "preservation may not benefit the estate in every instance" and that "[a] preserved lien may be abandoned by the trustee . . . if the preservation does not benefit the estate,"[18] such post-avoidance considerations cannot transform a moot action into a live controversy with legally cognizable stakes in its outcome. In this case, the Debtor's plan was paid off in full and the unrevoked discharge order was issued and became final long before issuance of the Lien Ruling. As such, there were no creditors who could have possibly benefited from avoidance of NovaStar's lien and therefore no basis existed for continuation of the Trustee's § 544 action.

We understand that the bankruptcy court tried to reach an equitable result between the parties in the face of a Gordian procedural history, but at the time of

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[17] *Fehribach v. City of Troy*, 412 F. Supp. 2d 639, 642 (E.D. Mich. 2006) (quoting *In re Parsons Inv. Co.*, 466 F.2d 869, 871 (6th Cir. 1972)); *see also Yellow Cab Coop. Ass'n v. Metro Taxi, Inc. (In re Yellow Cab Coop. Ass'n)*, 132 F.3d 591, 594-95 (10th Cir. 1997).

[18] S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5877; H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6332.

the Lien Ruling the bankruptcy court was at best left with a "pretended controversy" in the form of a two-party dispute over the method of satisfying NovaStar's unperfected lien interest. And at the very least, the Lien Ruling could not "have any practical legal effect upon a then existing controversy."[19] The adversary proceeding was accordingly moot, and issuance of the Lien Ruling in light of that posture was reversible error.

IV. CONCLUSION

For the reasons stated above, the appeal of the Memorandum Opinion denying the Settlement Motion is DISMISSED as moot, the Lien Ruling is REVERSED, and the matter is REMANDED with instructions to dismiss the associated adversary proceeding.

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[19] *Fehribach* at 642 (quoting *Parsons* at 871).