FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 10, 2003
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RONALD KEITH FARWELL and JANET RAE FARWELL, Debtors.	BAP No. KS-02-086
RONALD KEITH FARWELL and JANET RAE FARWELL, Appellants, v. HOUSEHOLD FINANCE CORPORATION III and JAN HAMILTON, Trustee, Appellees.	Bankr. No. 01-43347-13 Chapter 13 ORDER AND JUDGMENT*

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

Before CLARK, BOHANON, and CORNISH, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Ronald Keith Farwell (Mr. Farwell) and Janet Rae Farwell, the Chapter 13

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

debtors (Debtors), appeal two Orders of the United States Bankruptcy Court for the District of Kansas. For the reasons set forth below, we AFFIRM.

I. Background

The Debtors are joint owners of their residence located in Topeka, Kansas (Residence). It is undisputed that the value of the Residence is $85,000.00, and that Beneficial Finance holds a first priority lien against the Residence in the amount of $15,413.00.

In 2000, Mr. Farwell borrowed approximately $122,000.00 from Household Finance Corporation (HFC). To secure this loan, both of the Debtors executed a mortgage, granting HFC a second position lien against the Residence. HFC recorded its mortgage.

On December 18, 2001, the Debtors filed their Chapter 13 petition and a proposed Chapter 13 plan.[1] The Notice of Chapter 13 Case served on HFC stated that a hearing to consider the confirmation of the Debtors' proposed plan would be held on February 27, 2002, and that objections to confirmation of the plan should be filed no later than fifteen days prior to the hearing date. The scheduled confirmation hearing was continued by the bankruptcy court until March 27, 2002. At the March 27th confirmation hearing, the bankruptcy court confirmed the Debtors' plan subject to the entry of an order resolving the allowance of an unrelated creditor's secured claim. HFC did not object to the confirmation of the Debtors' plan or appear at the confirmation hearing. An order resolving the unrelated creditor's claim was entered in April 2002, and an order confirming the Debtors' plan was entered in May 2002.

The confirmed plan classifies HFC's claim as a secured claim, but states that HFC will be paid nothing. Under the description of HFC's claim, the plan

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[1] The Court has no record as to whether the Debtors claimed the Residence as exempt.

states: "Lien to be stripped Janet Farwell received no consideration for her mortgage. DEBT OWED BY RONALD FARWELL IS UNSECURED AND WILL BE TREATED AS AN UNSECURED DEBT."[2]

In the meantime, on April 8, 2002, after the confirmation hearing but prior to the entry of the confirmation order, HFC requested relief from the automatic stay to "to pursue such remedies *in rem* as are granted pursuant to Kansas Statues Annotated"[3] (Lift Stay Motion). HFC represented that Mr. Farwell was in default under the loan agreement because he had not made a payment since November 2001. A principal balance of $121,861.61 was owing, and HFC claimed a postpetition arrearage in the amount of $5,927.24. It requested relief under 11 U.S.C. § 362(d)(1) and (2),[4] stating that a lack of adequate protection was "cause" for lifting the stay, and that there was no equity in the Residence. The Debtors objected to HFC's Lift Stay Motion, stating that the confirmed plan stripped HFC's "mortgage claim."[5]

On April 22, 2002, HFC filed an "Objection to Confirmation of Plan, or, in the Alternative, for Modification of Plan" (Modification Motion). HFC requested that any proposed plan not be confirmed; if it had already been confirmed, that the plan be modified to allow payment of its secured claim; or that it be granted relief from stay to pursue its state court remedies *in rem*. In support of this requested relief, HFC argued that under § 1322(b)(2) its lien could not be stripped, and that the Debtors' plan was not proposed in good faith as required under § 1325(b)(2). The Debtors objected to the Modification Motion.

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[2] Chapter 13 Plan, *in* Appellants' Appendix at 9.

[3] Motion to Lift Automatic Stay at 2, *in* Appellants' Appendix at 31.

[4] Unless otherwise stated, all future statutory references are to tile 11 of the United States Code.

[5] Objection to Motion for Relief From Stay Out of Time, *in* Appellant's Appendix at 41.

The bankruptcy court held a joint hearing on the Lift Stay Motion and the Modification Motion (Joint Hearing), and ordered the parties to file supplemental briefs. After supplemental briefs were filed, the court entered an "Order on Motion of Household Finance Corporation III for Order Lifting Stay," granting HFC relief from the automatic stay in the event that the Debtors did not amend their confirmed plan within fifteen days to provide payment on HFC's secured claim (Lift Stay Order). The Debtors requested that the bankruptcy court reconsider its Lift Stay Order, but their motion was summarily denied (Reconsideration Order).

The Debtors timely appealed the final Lift Stay Order and the Reconsideration Order, and the parties have consented to this Court's jurisdiction over this matter because they have not requested that the case be heard by the United States District Court for the District of Kansas.[6]

According to HFC, the Debtors have not amended their confirmed plan as directed by the bankruptcy court in the Lift Stay Order. No stay pending appeal has been obtained.

II. Discussion

The Debtors maintain that the bankruptcy court erred in granting HFC relief from the automatic stay because their confirmed Chapter 13 plan stripped HFC's lien against the Residence. Although not clearly articulated, this argument appears to be premised on principals of *res judicata*. It is impossible for us to review this argument, however, because the Lift Stay Order does not address it, and the Debtors have not provided us with a transcript of the Joint Hearing. Absent a transcript, we cannot determine whether the Debtors raised the issue in the bankruptcy court and, if raised, why it was rejected by the bankruptcy court.

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[6] *See* 28 U.S.C. § 158(a)-(c); Fed. R. Bankr. P. 8002.

In such situations, we must summarily affirm the bankruptcy court.[7]

The only other issue raised by the Debtors on appeal is that the bankruptcy court erred in determining that HFC had a valid, enforceable mortgage on the Residence. Yet, the Debtors admit that they failed to present any evidence on this issue to the bankruptcy court, and again, they have failed to provide us with a transcript of the arguments and oral ruling of the bankruptcy court. Accordingly, for the same reasons cited above, this argument is without merit, and the bankruptcy court must be affirmed. The Debtors are not barred from raising the validity and enforceability of the mortgage in any action commenced by HFC in the state court.

Finally, we note that the Debtors have appealed the Reconsideration Order, but they have neither raised nor argued any points of error related to that Order. Accordingly, any arguments related to the Reconsideration Order have been waived on appeal.[8]

III. Conclusion

For the reasons stated herein, the bankruptcy court's Lift Stay Order and Reconsideration Order are AFFIRMED.

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[7] *See, e.g., McGinnis v. Gustafson*, 978 F.2d 1199, 1200-01 (10th Cir. 1992) (trial transcript is necessary for appellate review and an appellant's failure to provide it is grounds to summarily affirm the trial court); *Trujillo v. Grand Junction Reg'l Ctr.*, 928 F.2d 973, 976 (10th Cir. 1991) (same); *see also Walker v. Mather (In re Walker),* 959 F.2d 894, 896 (10th Cir. 1992) (appellate courts do not consider issues that were not raised or were abandoned below).

[8] *See, e.g., State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (failure to raise an issue in an opening brief waives the issue on appeal); *Phillips v. Calhoun*, 956 F.2d 949, 953-54 (10th Cir. 1992) (issues raised must be supported by argument and legal authority).