

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE:

GARY D. BARBEE

CASE NO. 09-53591

DEBTOR

CHAPTER 13

GARY D. BARBEE

V.

ADV. NO. 10-05054

U.S. BANK NATIONAL ASSOCIATION
AS TRUSTEE FOR THE TRUMAN FHA
TRUST 2008-1, BY AND THROUGH ITS
MORTGAGE SERVICING AGENT BAC
HOME LOAN SERVICING

ORDER

This matter having come before the Court on cross-motions for summary judgment by the Plaintiff Barbee [Doc. 7] and the Defendant U.S. Bank [Doc. 6], the matter having been heard on September 13, 2010 [Doc. 18], and the parties having agreed that there are no genuine issues of material fact and that disposition of the cross-motions for summary judgment will fully adjudicate all claims [Doc. 21], the Court hereby issues this order.

This matter is submitted to the Court on the issue of whether the Defendant US Bank's interest in the Plaintiff's manufactured home is avoidable pursuant to 11 U.S.C. § 544.

Facts.

The undisputed facts are as follows. On or about November 15, 1999, the Plaintiff and Rebecca Ruth Gaunce borrowed the sum of \$75,558.93 from Countrywide Home Loans, Inc. [hereinafter "Countrywide"]. Repayment of the Note was secured by the grant of a

mortgage lien to Countrywide. The mortgage is dated November 15, 1999, and was recorded in the office of the Bourbon County Clerk on December 1, 1999. The mortgage encumbered the real property and all improvements and fixtures located at 106 Vimont Street, Millersburg, Kentucky. The Note and Mortgage were assigned to the Defendant U.S. Bank by Assignment dated October 22, 2009.

The Plaintiff and Ms. Gaunce used the proceeds of the loan to acquire the real property from the Estate of Joseph F. O'Nan. Located on the property is the Plaintiff and Ms. Gaunce's home. Attached to the home is a metal plate that states "As evidenced by this label No. NTA 213282 the manufacturer certifies to the best of the manufacturer's knowledge and belief that this manufactured home has been inspected in accordance with the requirements of the Department of House and Urban Development and is constructed in conformance with the federal manufactured home construction and safety standards in effect at the date of manufacture."

Ms. Gaunce filed for Chapter 13 bankruptcy on November 11, 2009 [Eastern District of Kentucky Case No. 09-53592]. Ms. Gaunce's Chapter 13 plan was filed the same day and included within it the mortgage to Countrywide. The plan proposed that the mortgage to Countrywide, estimated in value as \$79,000, be valued as \$7,500 according to 11 U.S.C. § 506(a) [Doc. 2]. The plan was confirmed without objection on March 22, 2010 [Doc. 34].

The Plaintiff filed this adversarial proceeding seeking to avoid the Defendant U.S. Bank's interest in the manufactured home situated on the property. The Plaintiff's position is that the Plaintiff, as hypothetical lien creditor, has superior title to the manufactured home on the real property located at 106 Vimont Street, Millersburg,

Kentucky, and any interest that the Defendant U.S. Bank has in the home is avoidable pursuant to 11 U.S.C. § 544. More specifically, the Plaintiff contends that the Court's March 22, 2010 Order confirming Ms. Gaunce's Chapter 13 plan in Case No. 09-53592 has res judicata effect as to the non-existence of a lien on the home. Further, the Plaintiff contends that the Defendant U.S. Bank has failed to perfect the lien on the manufactured home pursuant to Kentucky law.

The Defendant U.S. Bank's position is that (1) the Plaintiff Debtor has no standing and (2) the Plaintiff never acquired title to the home pursuant to K.R.S. § 186A.215 and Potts v. Draper, 864 S.W.2d 896 (Ky. 1993). According to U.S. Bank, the Plaintiff acquired no interest in the home apart from its status as an improvement to real property or fixture and thus the home does not constitute an asset of the estate and is subject to U.S. Bank's mortgage lien as improvement to real property. Finally, the Defendant U.S. Bank maintains that the Plaintiff's claims are barred by 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5) in that the Plaintiff may not modify U.S. Bank's rights as the holder of a mortgage secured solely by his residence.¹

Analysis.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. 157(b)(2).

First, the Plaintiff has derivative standing as a debtor to pursue lien avoidance under 11 U.S.C. § 544. See Countrywide Home

¹The Defendant U.S. Bank also argues that there are no allegations to support the Plaintiff Debtor's claim under 11 U.S.C. § 547. Although the Plaintiff cited this provision in its jurisdictional averments of its Complaint [Doc. 1], the Court finds based on the pleadings and filings in the record that the Plaintiff's primary basis for this proceeding is 11 U.S.C. § 544.

Loans d/b/a America's Wholesale Lender v. Dickson (In re Dickson), 427 B.R. 399, 404 (B.A.P. 6th Cir. 2010).

Second, the confirmation of Ms. Gaunce's Chapter 13 plan is not res judicata as to the issue of whether the Defendant U.S. Bank's lien is avoidable. Res judicata requires: (1) a final decision on the merits of the first action by a court of competent jurisdiction; (2) the same parties, or their privies in the first; (3) an issue actually litigated or which should have been litigated in the first action; and (4) an identity of claims. Century Indemn. Co. v. Special Metals Corp. (In re Special Metals Corp.), 317 B.R. 326, 331 (Bankr. E.D. Ky. 2004) (citing Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 480 (6th Cir. 1992)). The Plaintiff has not shown, and the Court has not located, any evidence that the issue of whether U.S. Bank's lien is avoidable was litigated in Ms. Gaunce's Chapter 13 bankruptcy. Further, the Plaintiff has not given any reason that the issue should have been litigated in Ms. Gaunce's Chapter 13 bankruptcy such to justify the application of res judicata. Thus, the elements of res judicata have not been met.

Third, in Kentucky there are two ways to perfect title to a manufactured home. First, a creditor may perfect a lien on a manufactured home by notation on the certificate of title pursuant to K.R.S. § 186A.190. Second, a creditor may perfect a lien on a manufactured home if the owner has filed an affidavit of affixment and surrendered the Kentucky certificate of title pursuant to K.R.S. § 186A.297 and the creditor has properly recorded a mortgage on the real property where the manufactured home, now part of the real estate, sits. See PHH Mortgage Services v. Higgason, 345 B.R. 584 (Bankr. E.D. Ky. 2006). The Defendant U.S. Bank has produced no evidence that

it has perfected its title on the manufactured home at issue under either scenario.

Further, the Defendant U.S. Bank's argument that the home is not property of the estate because the Plaintiff has failed to produce title to the home is not persuasive. Property of the estate is defined broadly under the Code to include "all legal and equitable interests of the debtor." Rutledge v. Toyota Motor Credit (In re Rutledge), 115 B.R. 344 (Bankr. N.D. Ala. 1990). The Plaintiff clearly has an interest in the property that would fall under the definition as set forth in 11 U.S.C. § 541.

Finally, "property interests are created and defined by state law." Butner v. United States, 99 S.Ct. 914, 918 (1979). In Kentucky, mobile homes are personal property unless the owner takes affirmative steps to convert the home to real property. The record reflects that none of these steps were taken in this case. This Court has previously ruled that application of the 11 U.S.C. § 1322(b)(2) anti-modification provision requires an interest secured only by real property that is the debtor's residence. See In re Gearheart, Eastern District of Kentucky, Pikeville Division, Case. No 07-70232 [Doc. 36]. As there is no evidence in the record that the owner of the manufactured home filed an affidavit of affixment or surrendered the Kentucky certificate of title pursuant to K.R.S. § 186A.297, the manufactured home remains personal property under Kentucky law and 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5) are not applicable.

For the reasons stated herein, it is hereby ordered that the Plaintiff's Motion for Summary Judgment [Doc. 7] is GRANTED. The debtor is entitled to pay the value of the lot through the Chapter 13

plan to the Defendant U.S. Bank and pay an amount to the unsecured creditors to meet liquidation of the manufactured home. The Defendant U.S. Bank's Motion for Summary Judgment [Doc. 6] is OVERRULED.

Copies to:

John Simms, Esq.
John Brice, Esq.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Friday, September 17, 2010**  
**(jms)**