ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA DUBLIN DIVISION

HENRI J. ARSENAULT and SHEILA B. ARSENAULT,	*	
Appellants,	*	CIVIL ACTION NO. CV 311-106
vs.	*	
JP MORGAN CHASE BANK, N.A.,	*	
Appellee.	*	

O R D E R

Appellants Henri and Sheila Arsenault (the "Debtors"), debtors in the underlying Chapter 13 bankruptcy case (Case No. 10-30022), appeal the decision of the United States Bankruptcy Court, Southern District of Georgia, to grant Appellee JP Morgan Chase Bank, N.A.'s (the "Bank") motion to dismiss an adversary proceeding filed by the Debtors. For the following reasons, the Bankruptcy Court's Order of September 19, 2011, dismissing the Debtors' adversary complaint, is **AFFIRMED**.

I. BACKGROUND

The Debtors filed a joint Chapter 13 bankruptcy petition on January 18, 2010. (Compl. ¶ 4.) The Bank filed a proof of claim in that case for $164,657.31, which was secured by real

property located in Florida.[1] (Id. ¶¶ 6-7.) The Debtors' Chapter 13 Plan was confirmed on March 2, 2010. The Plan indicated that the Debtors intended to surrender the Florida property to the Bank "in full satisfaction" of the Bank's claim. (Id. ¶¶ 7-8.)

On March 29, 2011, a year after the Debtors' Chapter 13 Plan was confirmed, the Debtors filed this adversary proceeding in the Bankruptcy Court pursuant to 28 U.S.C. § 157. In their complaint, the Debtors complain that the Bank "has not caused the [Florida] property to be transferred out of Debtors' name." (Id. ¶ 9.) The Debtors claim that the Bank's failure to transfer the property out of their names is (1) "in contempt of the Order of Confirmation" (id. ¶ 10), and (2) a violation of the automatic stay (id. ¶ 11).

The Bank moved to dismiss the adversary complaint, contending that the Debtors had failed to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). On September 19, 2011, the Bankruptcy Court granted the motion to dismiss upon written order. This appeal followed.

II. STANDARD OF REVIEW

In reviewing a Bankruptcy Court's decision, the district

[1] The Debtors do not reside at this property.

court functions as an appellate court. Williams v. EMC Mortgage Corp. (In re Williams), 216 F.3d 1295, 1296 (11th Cir. 2000). Thus, a bankruptcy court's conclusions of law are reviewed *de novo*, accepting as true all well-pled factual allegations.[2] In re Fernandez-Rocha, 451 F.3d 813, 815 n.3 (11th Cir. 2006). Under a *de novo* review, this Court independently examines the law and draws its own conclusions after applying the law to the facts of the case. In re Piper Aircraft Corp., 244 F.3d 1289, 1295 (11th Cir. 2001).

To survive a Rule 12(b)(6) motion, a complaint must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1940 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The plaintiff is required to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although there is no probability requirement at the pleading stage, "something beyond . . . mere possibility . . . must be alleged." Twombly, 550 U.S. at 556-57 (citing Durma Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

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[2] The underlying facts are not in dispute.

III. LEGAL ANALYSIS

At bottom, the Debtors' challenge whether a creditor may fail to take affirmative steps to accept collateral surrendered pursuant to 11 U.S.C. § 1325(a)(5)(C), and whether such failure violates the Chapter 13 confirmation plan or the automatic stay.

Section 1325(a)(5)(C) of the United States Bankruptcy Code provides that a plan be confirmed as it relates to secured claims if, among other options, "the debtor surrenders the property securing such claim to [the claim] holder." The Debtors contend, as they did in the Bankruptcy Court, that this provision, and the term "surrender," requires a creditor to affirmatively accept title to the surrendered property. In a well-reasoned and thorough discussion of the matter, the Bankruptcy Court determined that the Bank was not obligated to transfer title out of the Debtors' names, and therefore, the Debtors had failed to state a claim upon which relief may be granted. (See Order of Sept. 19, 2011.)

Through this appeal, the Debtors assert the same equitable arguments with no applicable legal authority in an attempt to show a plausible claim. The Debtors' arguments, however, do not carry the day for the same reasons set forth in the Order of Dismissal dated September 19, 2011.

Violation of the Order of Confirmation

The Debtors contend that the Bank is "in contempt of the Order of Confirmation" based upon its failure to transfer the Florida property out of the Debtors' names post-confirmation. The Order of Confirmation does not require such action on the part of the Bank. Moreover, the Debtors have cited no authority, particularly in the Bankruptcy Code, that requires the Bank to transfer title. Other courts that have addressed this issue have also determined that "[t]hough the Code provides debtors with a surrender option, it does not force creditors to assume ownership or take possession of collateral." See Order of Sept. 19, 2011 (quoting Canning v. Beneficial Maine, Inc. (In re Canning), 442 B.R. 165, 172 (Bankr. D. Me. 2011)) and other authority cited therein at pages 4 through 6, including Hon. W. Homer Drake, Jr., Hon. Paul W. Bonapfel & Adam M. Goodman, Chapter 13 Practice and Procedure § 9C:9 at 682 (2010-11 ed.) ("Consistently with the general principle that surrender of encumbered property leaves the secured creditor in control of the exercise of its remedies, a plan cannot require a secured creditor to accept a surrender of property or take possession of or title to it through repossession or foreclosure.").

On appeal, the Debtors concede that the Bankruptcy Code does not define "surrender" for purposes of § 1325(a)(5)(C).

Instead, they cite to landlord-tenant law, and they attempt to distinguish between the terms "surrender" and "abandon." The Debtors' arguments in this regard, however, are not relevant and do not diminish the reasoned decisions of the legal authority cited in the Order of September 19, 2011.

The Debtors also point out that they remain liable for post-confirmation obligations of property owners such as taxes, insurance, and utilities. Thus, through the Bank's inaction, the Debtors have not been able to get the "fresh start" envisioned by the Code. Based on this reasoning, the Debtors appear to seek an order requiring the Bankrupcty Court to exercise its equitable powers under 11 U.S.C. § 105(a) to compel the Bank to foreclose on the Florida property. However, as pointed out by the Bankruptcy Court, its equitable powers under § 105(a) are limited to an exercise of such power that is consistent with the provisions of the Bankruptcy Code. See Order of Sept. 19, 2011 (citing United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986)). Because nothing in the Code compels the Bank to foreclose on property surrendered pursuant to a confirmation plan, the Bankrupcty Court properly refused to compel such action. Moreover, as pointed out by the Bankruptcy Court: "[A]lthough the Code provides a discharge of personal liability for debt, it does not discharge the ongoing burdens of owning property." Order of

Sept. 19, 2011 (quoting In re Canning, 442 B.R. at 172).

In short, the Debtors have failed to state a claim for contempt of the Order of Confirmation.

Violation of the Automatic Stay

The Debtors contend that the Bank's failure to foreclose, repossess or otherwise act upon their surrender of the Florida property amounts to a veiled attempt to collect a debt in violation of the automatic stay in 11 U.S.C. § 362(a). In brief, the Debtors specifically cite to § 362(a)(6), which prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case." The Debtors again reference the fact that they remain liable for taxes, insurance, and utilities.

The Bankruptcy Court found that the Bank had not taken any action in violation of the stay, and this Court agrees. The Debtors have alleged no facts that would support a determination that the Bank has attempted to recover a claim that arose before the commencement of the bankruptcy case. Rather, the only attempts to collect against the Debtors as a result of the Bank's failure to transfer title are by unrelated third parties such as the tax authorities. Indeed, the Order of Confirmation has effectively discharged the Debtors from any personal liability on the Bank's claim which arose prior to the bankruptcy case. Thus, the Debtors have

failed to state a claim for a violation of the automatic stay.

IV. CONCLUSION

Upon the foregoing, the Bankruptcy Court's Order of September 19, 2011, is hereby **AFFIRMED**. The Clerk is directed to **CLOSE** this civil action.

ORDER ENTERED at Augusta, Georgia, this 30th day of August, 2012.

UNITED STATES DISTRICT JUDGE