UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL A. LEMON
LYNN M. LEMON

CASE NO. 99-60083

Chapter 13

Debtors

ASSOCIATES HOME EQUITY SERVICES, INC.

Plaintiff

vs.

ADV. PRO. NO. 99-80268A

MICHAEL A. LEMON
LYNN M. LEMON

Defendants

APPEARANCES:

MARTIN, MARTIN & WOODARD
Attorneys for Plaintiff
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Syracuse, New York 13202

HAROLD GOLDBERG, ESQ.
OF COUNSEL

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Currently before the Court are two motions for summary judgment, stemming from the adversary proceeding commenced by Associates Home Equity Services, Inc. ("Associates") against Michael and Lynn Lemon ("Debtors") on October 12, 1999. In the adversary proceeding,

Associates seeks revocation of the order confirming Debtors' chapter 13 plan pursuant to § 1330 of the Bankruptcy Code, 11 U.S.C. §§101-1330 ("Code"), or Rule 60(b)(3), (b)(5), or (b)(6) of the Federal Rules of Civil Procedure (hereinafter "Fed.R.Civ.P."). Associates' motion was filed on February 18, 2000. Debtors' motion, which apparently seeks dismissal of the adversary proceeding, was filed on February 22, 2000.[1] Both motions were heard on March 21, 2000, in Syracuse, New York, and adjourned to April 18, 2000, when they were submitted for decision by the Court.

JURISDICTION

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§1334, 157(a), 157(b)(1), (b)(2)(A), (L) and (O).

FACTS

The Debtors filed a voluntary petition ("Petition") for relief pursuant to chapter 13 of the Code on January 7, 1999. In the Debtors' schedules, Associates is listed as holding a judgment lien against real property of the Debtors located at 2212 Midland Avenue, Syracuse, New York ("Residence") in the amount of $73,892.35.[2] On January 14, 1999, Associates filed a proof of

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[1] Pursuant to Rule 7001(5) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), a party seeking revocation of an order of confirmation in a chapter 13 case is required to commence an adversary proceeding. Debtors' motion for summary judgment, although not captioned in the adversary proceeding, will be treated as having been made therein.

[2] Debtors' counsel indicates that the judgment lien is pursuant to a foreclosure action commenced by Associates in New York State Supreme Court prepetition.

claim in the amount of $68,282.83, indicating that a judgment had been obtained on November 2, 1998, and that its claim was secured. *See* Attachment to Associates' Motion. The Debtors filed no objection to Associates' claim pursuant to Code § 502. According to the Debtors' Petition, Associates' claim was secured to the extent of $35,000. The balance of its total claim was listed as unsecured. In their plan ("Plan"), filed along with the Debtors' Petition, the Debtors provided for total payments to all creditors of $65,832 over a period of 60 months. The Plan provides for payment of Associates' secured claim of $35,000 with interest of 7% or a total of $41,956.99. In the Plan's section labeled "Miscellaneous Provisions," it states:

> Associates mortgage has been accelerated into a judgement; Debtors will bring 522(f) motion to reduce the lien by $10,000. Upon such reduction the dividend will be significantly increased. The obligation to Associates is treated as a secured lien and is being paid the value of the security! See In re Nepil, 206 BR 72; In re Winogora, 209 BR 632.

See ¶ I of Debtors' Plan.

The Plan, along with a notice of the case filing, the dates for the meeting of creditors and the confirmation hearing was mailed to creditors, including Associates, on January 22, 1999. The confirmation hearing took place on March 9, 1999. Associates does not deny receiving notice of the confirmation hearing and a copy of the Debtors' Plan. Associates filed no objection to confirmation, and the Order confirming the Plan was signed on May 20, 1999 ("Confirmation Order"). Associates commenced this adversary proceeding on October 12, 1999, seeking revocation of the Confirmation Order.

ARGUMENTS

Associates is seeking summary judgment pursuant to its adversary complaint, contending

that the Confirmation Order should be set aside pursuant to either Code §1330 or Fed.R.Civ.P. 60(b)(3), (b)(5), or (b)(6), as incorporated by reference in Fed.R.Bankr.P. 9024. Associates' complaint alleges that the Confirmation Order should be vacated on the basis of extrinsic fraud, arguing that the Plan was vague and misleading.[3] Associates also argues that though the sole basis for revocation under Code §1330 is fraud, Fed.R.Civ.P. 60(b), incorporated by reference in Fed.R.Bankr.P. 9024, allows for revocation on grounds other than fraud.

Associates argues that the Plan does not comply with Code § 1322(b)(2) and takes issue with the fact that the cramdown of Associates' claim was set out in a miscellaneous provision of the Plan. Associates contends that the related language is vague and misleading and thereby failed to provide sufficient notice of the treatment of its claim. It is Associates' position that if a debtor proposes to modify the rights of a holder of a claim secured by a mortgage on the debtor's principal residence in noncompliance with Code § 1322(b)(2) and with the ruling by the Supreme Court in *Nobelman v. American Sav. Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed. 228 (1993), the creditor should be provided with unequivocal notice that that is what is being proposed; otherwise, Associates contends that the plan does not meet with due process requirements. Associates argues that simply stating that the Debtors are going to pay it $35,000 does not put it on sufficient notice.

Notwithstanding the fact that it did not raise an objection prior to confirmation of the Plan, Associates contends that if the Confirmation Order is allowed to stand, it will set a dangerous precedent whereby lawyers will be tempted to formulate bankruptcy plans that do not comport with the Code in the hopes that creditors will fail to object. Associates maintains that

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[3] At the hearing on the summary judgment motions, Associates' attorney stated that he was reluctant to accuse the Debtors or their attorney of actual fraud.

the *res judicata* effect of a confirmed plan must sometimes yield to public policy and ethical considerations.

The Debtors argue that they should be granted summary judgment as Associates failed to timely object to the Plan prior to confirmation and has not provided sufficient grounds to revoke the Confirmation Order. The Debtors maintain that Associates cannot possibly rely on Code §1330 and Fed.R.Civ.P. 60(b)(3) to revoke the Confirmation Order because Associates has made no specific allegations of fraud. Though Associates alleges "extrinsic fraud" in its adversary complaint, it does not provide any support or evidence for this contention. The Debtors point out that Associates' complaint makes no affirmative allegation that the Confirmation Order was procured by fraud. Associates' argument is simply that the Plan was vague and misleading.

The Debtors further point out that Associates received a copy of the Plan and had adequate notice of the confirmation hearing, as required under the Bankruptcy Code. The Debtors assert that their intention to cramdown Associates claim was clearly provided for in the Plan. The Debtors justify the cramdown as permissible under Code §1322(b)(2) based on the fact that Associates had obtained a foreclosure judgment against the Debtors, thereby giving Associates more than simply a security interest in the Debtors' residence. The Debtors contend that if they wrongly interpreted case law in proposing to cramdown Associates' claim, that argument should have been made at the time of the hearing on confirmation of the Debtors' Plan.

DISCUSSION

Standard of Review for Summary Judgment

Summary judgment should be granted when there exists "no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law." *See* Fed.R.Civ.P. 56(c); *Federal Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). The party moving for summary judgment has the burden of demonstrating that no "genuine issue as to any material fact" exists. *See* Fed.R.Civ.P. 56(c).

In this case, it appears that the only issues that must be addressed are questions of law, namely, (1) whether the final order confirming the Debtors' chapter 13 plan can be revoked absent a showing of fraud, and (2) whether Associates was denied due process with respect to the notice afforded to it by the Debtors' Plan.

Revocation of the Confirmation Order

In a lengthy and well-reasoned analysis, the Court of Appeals for the Third Circuit addressed the first issue concerning revocation of a confirmation order when actual fraud is not alleged. *See Branchburg Plaza Associates, L.P. v. Fesq (In re Fesq)*, 153 F.3d 113 (3d Cir. 1998). After considering the plain meaning of Code § 1330, read in conjunction with Fed.R.Bankr.P. 9024, logic, case law,[4] and the policies underlying the Code,[5] the court concluded

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[4] Included in the cases cited by the Third Circuit was that of *In re Walker*, 114 B.R. 847, 851 (Bankr. N.D.N.Y. 1990). *See Fesq*, 153 F.3d at 119.

[5] Citing to *In re Szostek,* 886 F.2d 1405, 1408-13 (3d Cir. 1989), the court in *Fesq* noted that "revoking a confirmation order is a measure that upsets the legitimate expectations of both debtors and creditors [Footnote 10: Congress' reluctance to undermine the finality of Chapter 13 confirmation orders is further evidenced by the fact that Section 1330(a) permits, but does not require, courts to revoke confirmation orders procured by fraud. . . .). Interpreting Section 1330(a) as a limiting provision permits such disruption in only a very narrow category of egregious cases. Branchburg's approach [similar to that of Associates in this case, relying on Fed. R.Civ.P. 60(b)], on the other hand, would open the courtroom doors to a large number of post-confirmation attacks. Those added challenges could seriously undermine the integrity of the Chapter 13 proceedings, as dissatisfied creditors could seek to drag out the litigation by

that "fraud is the only ground for relief available for revocation of a Chapter 13 confirmation order." *Id*. at 120. This Court concurs with that analysis, and there having been no allegations of actual fraud on the part of the Debtors, the Court declines to revoke the Confirmation Order pursuant to Code § 1330.

Binding Effect of the Confirmation Order on Associates

"The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). "'[T]he binding effect of a chapter 13 plan extends to any issue actually litigated by the parties and any issue necessarily determined by the confirmation order, *including whether the plan complies with sections 1322 and 1325 of the Bankruptcy Code*." *In re Walker*, 128 B.R. 465, 467 (Bankr. D.Idaho 1991) (quoting 5 L.King, COLLIER ON BANKRUPTCY ¶ 1327.01[1] (15th ed. 1990) (emphasis added); *In re Pardee*, 193 F.3d 1083, 1086 (9th Cir. 1999) (citations omitted); *In re Sanders*, 243 B.R. 326, 331 (Bankr. N.D. Ohio 2000) (citations omitted); *see also In re Rodgers*, 180 B.R. 504, 505 (Bankr. E.D. Tenn. 1995) (noting that "the confirmed plan is binding on the creditor even if the plan did not meet one of the requirements for confirmation. (citations omitted)."

The binding effect of the Confirmation Order, however, is predicated on Associates having received sufficient notice of the Debtors' intention to modify Associates' secured claim. *See In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993); *In re Friedman*, 184 B.R. 883, 887-88 (Bankr. N.D.N.Y. 1994) (citations omitted), *aff'd* 184 B.R. 890 (N.D.N.Y. 1995); *Rodgers*, 180

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bringing themselves under Rule 60(b)'s broader rubric in an attempt to extract concessions." *Fesq,* 153 F.3d at 120.

B.R. at 505. Due process requires that a creditor receive notice that is "'reasonably calculated' to apprize interested parties of the pendency of an action and to afford them an opportunity to present objections." *In re Hobdy*, 130 B.R. 318, 320 (9th Cir. BAP 1991), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

A number of courts have addressed the issue of notice and/or due process in examining the relationship between the "confirmation process" and the "claims process." *See In re Basham*, 167 B.R. 903, 905 (Bankr. W.D. Mo. 1994) (citations omitted) (discussing three approaches taken by the courts). While courts often take issue with the creditor that chooses to "put its head in the sand" and ignore the "confirmation process," the debtor also has a responsibility to participate in the "claims process" by monitoring the proofs of claim filed in the case, particularly those filed prior to confirmation of the plan.

In this case, Associates filed its proof of claim approximately a week after the Debtors filed their Plan and approximately one week prior to a copy of the Plan being mailed to it. As this Court indicated in *Friedman*, "unless an objection is filed pursuant to Fed.R.Bankr.P. 3007, a plan may not affect the validity or amount of a secured claim in the situation where a proof of claim has been timely filed." *Friedman*, 184 B.R. at 887 (citations omitted). This view rests on the fact that pursuant to Code § 502(a), "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed" unless there is an objection. 11 U.S.C. § 502(a).

Almost two months passed between the filing of the proof of claim and the hearing on confirmation. During that time, the Debtors filed no objection to Associates' secured claim in the amount of $68,282.83. However, it does not appear that the Debtors had any reason to file an objection to Associates' claim insofar as its validity and amount are concerned, those having been acknowledged in their schedules. It is their proposed treatment of that claim that was placed

in issue when, in their Plan, the Debtors proposed to bifurcate the claim based on what they deemed to be the value of the property.

While the Debtors' Plan does not contain language specifically stating that Associates' secured claim is to be modified, it does clearly state that Associates' secured claim of $35,000 is to be paid in full over 53 months at 7% interest. Under the heading of "Miscellaneous Provisions," the Plan provided that "[t]he obligation to Associates is treated as a secured lien and is being paid the value of the security! See In Re: Nepil 206BR72; In RE: Winogora 209BR632." The fact that the Debtors proposed to pay Associates only $35,000 on its secured claim should have alerted Associates to the fact that it was necessary for it to participate in the confirmation process if it was to protect its rights. Whether the Debtors' position, that where a long term mortgage has been reduced to a foreclosure judgment, a debtor may modify the rights of a holder of a secured claim pursuant to Code § 1322(b)(2), was a valid one was an issue that should have been raised by Associates at the confirmation hearing, not some six months later.

In addition to notice of the amount the Debtors proposed to pay on Associates' claim, the Plan also states that the total payments to be made by the Debtors to all creditors over the life of the Plan amount to $65,832. Associates filed a proof of claim in the amount of $68,282.83. It is quite clear that the payments under the Plan were insufficient to pay Associates in full. This information certainly afforded Associates with additional notice that the Debtors intended to modify its claim.

Based on the foregoing, it is hereby

ORDERED that Associates' motion for summary judgment is denied; and it is further

ORDERED that Debtors' motion for summary judgment is granted; and it is finally

ORDERED that the Debtors' attorney submit documentation relating to the request for

additional attorney's fees within30 days, at which point the Court will rule on the matter.[6]

Dated at Utica, New York

this 26th day of October 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[6] In the Debtors' motion for summary judgment, the Debtors also requested the collection of $1,252.50 in attorney's fees as a result of the adversary proceeding. The Debtors' counsel, however, did not submit any documentation as to time spent or related charges.