

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:) **CASE NO. 00-51946**
)
GEORGE M. BROWN) **CHAPTER 13**

U.S. BANK, N.A., successor by)
merger to FIRSTAR BANK)
MIDWEST, N.A.)
)
v.) **ADV. PROC. NO. 03-05375**
)
GEORGE M. BROWN, et al)
)

OPINION

The matter before the court is the Motion for Summary Judgment filed by the Plaintiff in this adversary proceeding, U.S. Bank., N.A., successor by merger to Firststar Bank Midwest, N.A., as well as the response and Cross-Motion for Summary Judgment filed by the debtor- defendant, George M. Brown. Having considered the matter, the court concludes that the Motion for Summary Judgment by U.S. Bank, N.A. should be denied and the Cross-Motion by George M. Brown should be denied.

I. FACTUAL BACKGROUND¹

1. George M. Brown filed a petition for relief under Chapter 13 of Title 11 of the United States Code on May 9, 2000. The debtor listed Firststar Mercantile of Kansas (“Firststar”) as a

¹ The factual recitation is taken from the court file as well as pleadings and supporting documentation filed by the parties.

secured creditor in his schedules listing a first mortgage for \$12,452.00 and a second mortgage of \$25,031.00. The debtor listed the Mercantile Bank of Kansas as an unsecured creditor on a credit line in the amount of \$146,702.68.²

2. Firststar filed a proof of claim on July 25, 2000, in the amount of \$368,458.33 secured by real estate. The proof of claim lists the value of the collateral as \$165,000.00. An amended claim was filed on August 31, 2000, reducing the total amount of the claim to \$257,420.62.³

3. Firststar filed an objection to confirmation on August 3, 2000, indicating it was secured by liens against real property and claiming that the total amount due from the debtor at the time of filing was \$368,458.33. Firststar stated that the debtor listed the value of the collateral as \$165,000.00 and claimed the debtor has no equity in the property. The debtor filed a response denying the allegations and entitlement to relief. Interestingly, an order was entered April 20, 2001 dismissing the objection to confirmation due to the failure of the parties to contact the court in accordance with a court minute entry that required the parties to resolve the matter or contact the court to schedule a hearing by a specified date.

4. The debtor subsequently filed a motion allowing him to sell the real estate held as

² In an affidavit dated August 14, 2005, the debtor, Brown indicated that the debt was owed on a guaranty agreement signed November 13, 1987 guaranteeing the debt of Theodore Lawrence, Inc., and indicated that this debt, being the “subject matter of this litigation was not listed” in his schedules. Therefore, it is somewhat unclear whether the debt listed as unsecured was the debt that is the subject of the matter before the court.

³ An attachment indicated that the claim consisted of \$12,931.34 on a mortgage loan secured by a first deed of trust, \$28,198.46 on a commercial loan to Theodore Lawrence, Inc., George Brown and Mary Brown on a second deed of trust, and \$216,290.82 on a guaranty of credit line secured by a second deed of trust. The guaranty debt is the matter before the court that guarantees the debt of Theodore Lawrence, Inc. The debtor was the majority shareholder and president of the corporation.

collateral by Firststar that resulted in an order approving the sale of real estate entered March 29, 2001. The property was sold to Angelon T. and Marcella F. Jones for \$160,000.00 free and clear of liens and encumbrances, with the lien of Firststar attaching to the sales proceeds. The order stated that Firststar's liens were to attach to the proceeds in accordance with its filed and allowed secured claim and that its objection to the sale was overruled. An amended order approving sale of real estate was entered April 27, 2001 changing the closing date of the sale. A second amended order was entered May 23, 2001 indicating that the funds were to be held in the trustee's non-interest bearing holding account.

5. Firststar filed a motion for authority to disburse certain sales proceeds held by the Chapter 13 trustee. The bank moved for authority for the Chapter 13 trustee to distribute sales proceeds to Firststar, less tax claims and closings costs. The motion stated that the claims of Firststar are valid, secured claims that have not been objected to and are deemed allowed in accordance with the sale orders and that Firststar should receive distribution of the balance of the sales proceeds. The trustee objected to the motion indicating that all entities who had a lien should be notified.

6. After dismissal of the motion for failure to comply with a court minute entry, Firststar filed a "second amended motion" for authority to disburse sales proceeds, specifying amounts held by the trustee and also claiming priority over a federal tax lien. The debtor filed a response indicating that there was a question as to the validity of the creditor's lien and that the motion should be denied until its lien is properly validated. Subsequently, Firststar filed a similar motion styled "second motion" for authority to disburse sales proceeds. The IRS responded denying Firststar's entitlement to relief.

7. In September of 2002, a third motion for authority to disburse sales proceeds held by the trustee was filed by Firststar. The motion acknowledged the dispute with the IRS and indicated other creditors with liens on the property and also indicated the parties had reached an agreement authorizing partial distribution to Firststar.

8. An agreed order was entered on October 30, 2002, authorizing partial distribution to Firststar. The order indicated that the trustee was to pay Firststar the total amount of \$17,635.66 being comprised of principal due under the first Deed of Trust of \$12,451.08, interest of \$5,184.58, plus interest with specific acknowledgment by all parties therein that Firststar did not thereby waive any rights for payment of all actual attorney fees and expenses sought in connection with the adversary filed and/or the application to be filed. The order indicated the trustee shall hold remaining proceeds and same shall remain impressed with the lien of Firststar and all creditors as their interests may appear until ordered paid and distributed. An order was also entered in June 2003 withdrawing the IRS's objection to the Firststar's third motion for authority to disburse.

9. A complaint was filed by U.S. Bank, N.A., successor by merger to Firststar Bank Midwest, N.A. on August 26, 2003, against the debtor, the IRS, GoldBank f/k/a First Business Bank and the Missouri Department of Revenue, to determine the extent, validity and priority of liens. The plaintiff seeks that a determination be made by the court finding and restating the validity and priority of its lien in the remaining sales proceeds held by the Chapter 13 trustee and ordering disbursement to the plaintiff.

10. On March 8, 2004, an order was entered confirming the debtor's plan. The plan provided for mortgage payments to Firststar and included 10% to unsecured claims totaling

approximately \$257,318.0.

11. Subsequently, the debtor filed an objection to the proof of claim of Firststar on March 29, 2004. The objection stated that the creditor relies on a personal guaranty executed by the debtor on May 7, 1986 and on November 3, 1987, and that the terms of the guaranty provided that a creditor would have five years from the date of default of the borrower to commence a civil action against the guarantor to enforce its claim. The debtor asserted that the loan has been in default almost since its inception and that no action was taken within said five year period rendering the personal guaranty unenforceable. Firststar responded that the indebtedness was restructured and new security agreements, notes and existing continuing personal guaranties were executed and that issues related to the guaranty claims have been extended. An order was subsequently entered holding the debtor's objection to the proof of claim of Firststar in abeyance until the pending adversary action is concluded.

12. In the adversary complaint, U.S. Bank, as successor by merger to Firststar Bank Midwest, N.A., indicates that the balance of sales proceeds totaling approximately \$116,000.00 are still being held in an escrow account maintained by the Chapter 13 trustee. The Bank further indicates that the only remaining creditors which have asserted liens in the remaining proceeds are First Business Bank, the IRS, the Missouri Department of Revenue and a judgment lien. U.S. Bank asserted that it has a senior lien. The bank further asserted that the IRS had withdrawn its objection related to distribution of proceeds, and that none of the creditors filed affirmative pleadings in response to the motions to disburse and the only apparent remaining objection was the debtor's assertion that the plaintiff's lien is invalid. The debtor filed its answer to the complaint agreeing that the plaintiff had a valid secured claim based upon a deed of trust which

has not been paid and indicating that the plaintiff's additional claim is based upon a disputed debt which the debtor claims is invalid and not collectible and should not be considered a valid claim. The debtor further asserted that the debtor's spouse, a non-filing co-owner of the home was entitled to half of the proceeds. The bank subsequently filed an amended complaint adding Mary Kay Brown, the debtor's wife, and the State of Missouri Child Support Division as defendants in the action.

13. A motion for summary judgment was subsequently filed by U.S. Bank representing that there remain no genuine issues as to any material fact in dispute and that the bank is entitled to summary judgment as a matter of law. The bank filed its statement of undisputed facts which indicated that the IRS had disclaimed any interest in the subject funds, and that the defendants Gold Bank, Missouri Department of Revenue , Mary Kay Brown and the State of Missouri Child Support Division have failed to answer or otherwise appear or plead.

14. The debtor filed his response and Cross-Motion for Summary Judgment claiming entitlement to summary judgment on all claims asserted against him by the Plaintiff U.S. Bank and on all issues and claims asserted by the defendant in his answer to the complaint.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. §157. The court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §1334 and §157.

U.S. Bank, N.A. has requested summary judgment pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and the debtor has filed his cross-motion for summary judgment.

"Summary judgment is proper when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 529 (5th Cir.2005). The

initial burden to demonstrate that no genuine issue of material fact exists is on the movant. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Upon showing there is an absence of evidence to support an essential element of the non-movant's case, the burden shifts to the party opponent to establish that there is a genuine issue of material fact in dispute. *Id.* at 322, 106 S.Ct. 2548.

Condrey v. SunTrust Bank of Georgia 431 F.3d 191, 197 (5th Cir. 2005). *See also, In re Ramba, Inc.* 416 F.3d 394 (5th Cir. 2005)(summary judgment is appropriate where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.

U.S. Bank claims that it is entitled to payment of all funds now held by the Chapter 13 trustee and that other liens that attached may be extinguished as the lienholders have not appeared to assert any claim, except the county taxing authority that has been paid. The bank urges that the second amended order approving the sale of real estate validates the liens that U.S. Bank held against the property and provides that it held an allowed, secured claim. U. S. Bank claims that the debtor, the only objector, is attempting to collaterally attack the terms of the order approving the sale that was consented to and that is now over one year old. The bank further claims the debtor should be estopped from objecting to the bank's proof of claim this late in the proceedings, arguing that although Rule 3007 does not provide any time limits for filing an objection, courts have held that confirmation of a plan may result in the loss of right of object to a claim. The bank argues that the debtor should be collaterally and judicially estopped from taking positions inconsistent with prior positions and orders. The bank further claims entitlement to a reasonable attorney's fee and out of pocket expenses on the over-secured portion of its claim based on the first lien mortgage.

The debtor claims entitlement to summary judgment on all issues and claims asserted by the debtor in his answer to the complaint. The debtor acknowledges the plaintiff's entitlement to reasonable attorney's fees on its oversecured claim but stated that the amount should not exceed \$500.00. The debtor argues that the basis of the bank's claim is a guaranty agreement signed by the debtor in 1987, the terms of which indicated that the bank had only five years to bring an action to enforce any obligation under the agreement after default of the party for whom the guaranty was made, being Theodore Lawrence, Inc. The debtor's affidavit indicates that default was in 1992 or 1993, and that the five year period expired prior to the filing of the Chapter 13 and that the agreement was no longer enforceable.⁴ The debtor indicates that the proof of claim shows the principal due under the agreement to be \$112,882.91 and interest of \$103,407.91. The debtor indicates that the Chapter 13 plan was approved on March 4, 2004 and did not include any provision for payment under the guaranty agreement.⁵ Although the bank argues that the confirmed plan forecloses the debtor's objection to the claim, the debtor argues that it made an informal objection to the claim prior to confirmation in its answer to the adversary complaint. The debtor cites *In re Nikoloutsos*, 199 F. 3d 233 (5th Cir. 2000) and argues that the adversary answer meets the criteria for an informal proof of claim. The debtor argues that the plan

⁴ The bank argues that the guaranty agreement provides that it is not necessary for the guarantor to agree to any extensions of time for payment and that the borrower was, in fact, granted extensions.

⁵ The plan provides for payment to Firststar on the first mortgage payments and provides for a 10% distribution on unsecured claims in the amount of \$257,318. The unsecured debt amount listed in the debtor's schedules included \$146,702.68 owed to the Mercantile Bank of Kansas on a credit line. Although the debtor indicates the subject debt is not scheduled, it is not altogether clear whether the unsecured debt scheduled by the debtor is the debt that is the subject of this dispute or is a separate debt.

provided no payment under the guaranty agreement and that no objection was made by the creditor.⁶ The debtor further argues that the orders approving the sale and authorizing partial distribution to Firststar acknowledge a dispute rather than recognize specific lien values.

Upon review of the court file, the pleadings, supporting documentation and briefs of the parties, the court concludes that although several issues are raised by the parties, resolution of the issue regarding enforceability of the guaranty debt may moot other arguments. The debtor claims that the guaranty debt is unenforceable because suit to enforce the debt was not filed within 5 years of default. Although the debtor indicates default occurred in 1992 or 1993, approximately 7 years prior to the filing of the Chapter 13, the bank indicates that there was a renewal of the guaranty note in 1995. If there was a renewal or extension, the debtor's underlying argument would be invalid and it would be unnecessary to make determinations on most remaining issues. Because the documentation provided by the parties does not clearly set out the dates regarding default on the note and any renewals or extensions of time for payment on the note, the court must conclude that there is a genuine issue of material fact and that summary judgment is not appropriate at this time. Other issues, such as whether or not the debtor's answer to the complaint qualified as an informal objection to the claim prior to confirmation⁷, or whether the orders authorizing the sale actually adjudicated the validity or allowability of the disputed debt,

⁶ Firststar did file an objection to confirmation in August of 2000 setting out the total amount claimed due at the time of filing and objecting to the proposed plan's treatment of its debt. The objection was subsequently dismissed due to failure of the parties to comply with a minute entry, as noted above.

⁷ Rule 3007, which governs objections to claims, provides little guidance as to the form the objection must take other than specifying that it be in writing and filed with the court." *Southland Corp. v. Kilgore (In re Southland Corp.)*, 19 F. 3d 1084, 1087 (5th Cir.1994).

and whether the confirmation order precluded such issues,⁸ would be premature for the court at this time. The motion for summary filed by U.S. Bank should be denied. Additionally, the cross-motion by George M. Brown should be denied.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 31st day of March, 2006.

/s/ Edward R. Gaines

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UNITED STATES BANKRUPTCY JUDGE

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⁸ The court notes that in *Internal Revenue Service v. Taylor (In re Taylor)*, 132 F. 3d 256, 260 (5th Cir. 1998), the Fifth Circuit stated that, “The *Howard* court found that the secured creditor was entitled to the protection of the proof-of-claim process and that his claim could not be compromised by the confirmed plan unless an objection was filed to put him on notice that his claim was at risk.”