UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

John Gausewitz, Debtor
Bankruptcy Case No. 01-34926-13

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

February 22, 2002

Joel Bruce Winnig, Madison, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

John Gausewitz set out in 2000 to borrow enough money to keep his ballroom operating. Unable to obtain credit from more conventional lenders, Mr. Gausewitz turned to Action Mortgage and its manager, Robert Call, for a loan. Seeking to borrow just $30,000 for his ballroom, Mr. Gausewitz ended up as the confused owner and mortgagor of a house he had never offered to purchase. His obligation to Action Mortgage was thus increased from the $33,000 he received in cash to include the purchase price of the house. Payouts at the closing included one to Action Mortgage in satisfaction of the prior mortgage on the house. This mortgage was given by the prior owner of the house, Steven Teela, a business associate of Robert Call. At the closing it was disclosed that Mr. Gausewitz owed Action Mortgage $163,000 at an A.P.R. of approximately 53%. In addition to the mortgage, Mr. Gausewitz gave Action a security interest in some construction equipment and vehicles which he owned.

The strange transaction unraveled. Mr.Gausewitz apparently could not maintain payments on the mortgage, so he quitclaimed the house to Robert Call (presumably for the benefit of Action Mortgage). Mr. Call took possession of the house and collected rents from lessees who occupied it, but to date has apparently not credited any amount to Mr. Gausewitz's obligation to Action. Mr. Gausewitz believed that his conveyance to Mr. Call extinguished his obligation to Action Mortgage (at least as to the mortgage and the purchase price of the house). Mr. Gausewitz has since filed for chapter 13 relief and objected to the validity of Action Mortgage's claim against him alleging the claim was obtained by fraud. He further objects to the amount of Action Mortgage's claim arguing that the quitclaim terminated all or a significant portion of his debt.

Mr. Call disagrees with Mr. Gausewitz's contention. He testified that the quitclaim did nothing to alter the original terms of the loan, when he came to this Court as Action Mortgage's representative to prove its claim. Action Mortgage now alleges that their claim against Mr. Gausewitz has risen to $193,000 including accrued interest. Action Mortgage has filed a proof of claim with this Court in that amount. Prior to Mr. Gausewitz's bankruptcy filing, Action Mortgage obtained a default judgment in state court for replevin of specified equipment against Mr. Gausewitz[1] and now seeks relief from the automatic stay to enforce its judgment.

Mr. Gausewitz's objection to Action Mortgage's claim must be sustained, at least as to amount. A filed proof of claim is prima facie evidence of that claim's validity. If the debtor wishes to object to the claim, he must carry the burden of going forward by producing evidence equal in probative force to the proof of claim. When Mr. Gausewitz testified in support of his objection on the grounds of fraud, he carried this burden because the loan transaction itself had some indicia of deception, trick, cunning, or dissembling.[2] Moreover, when Mr. Gausewitz claimed to have at least paid off the debt for the house after he quitclaimed it to Mr. Call, he legitimately called into question the amount of Action Mortgage's claim. The final burden of persuasion rested upon Action Mortgage to prove its claim. Action Mortgage did not present evidence sufficient to carry this burden.

Action Mortgage's motion for relief from stay must be denied. Action Mortgage has not carried its burden to warrant relief from stay. First, Action Mortgage has failed to offer proper evidence of its perfected interest in the property subject to the stay. Second, even if Action Mortgage were deemed to have a secured claim in certain automobiles based on debtor's admissions, it has not demonstrated a decline or a threat of decline in the value of the collateral as is required by one asserting lack of adequate protection.

Carlson v. U.S. (In the Matter of Carlson), 126 F.3d 915 (7th Cir. 1997), articulated the proper procedure to resolve a claim dispute. Even though Carlson involved the potentially distinguishable circumstance of a tax claim,[3] Judge Evans set forth the general procedure that

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[1] There is no evidence as to whether this judgment was executed by the sheriff.

[2] See McClellan v. Cantrell, 217 F.3d 890 (7th Cir. 2000) (The phrase "actual fraud" as required by 11 U.S.C. §523(a)(2)(A) is not limited to misrepresentation. "Actual fraud" could encompass "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.").

[3] Disputes over tax claims involve the peculiar situation in which the IRS cannot typically carry a burden of persuasion to prove such a claim because the taxpayer is normally the party with all the information pertaining to the claim or lack thereof. Thus, outside of bankruptcy, the taxpayer bears the burden when disputing tax liabilities with the IRS. See Helvering v. Taylor, 293 U.S. 507, 515, 55 S.Ct. 287, 290-91, 79 L.Ed. 623 (1935). However, because the ultimate burden of proof lies on the claimant in bankruptcy to prove a claim, a split has developed in the circuits over whether the IRS or the taxpayer has the ultimate burden of proof when a debtor objects in bankruptcy to a tax claim. See IRS v. Levy (In re Landbank Equity Corp.), 973 F.2d 265, 269-71 (4th Cir. 1992)

would apply in any claim dispute. He did so in his parenthetical citation to Placid Oil Co. v. IRS (In re Placid Oil), 988 F.2d 554, 557 (5th Cir. 1993):

> pursuant to 11 U.S.C. § 502 and Fed. R. Bankr.P. 3001(f), proof of claim is prima facie evidence of validity and amount; burden of going forward then shifts to objecting party, who must bring forth evidence equal in probative force; only then does burden revert to claimant to prove validity of claim by preponderance of the evidence.

Carlson at 921 (citing Placid Oil Co.; In re Allegheny Int'l, Inc., 954 F.2d 167, 173-74 (3rd Cir. 1992) ("the burden of persuasion is always on the claimant"); Fullmer v. United States (In re Fullmer), 962 F.2d 1463 (10th Cir. 1992)). We can consult Black's Law Dictionary for the definitions of the foregoing procedural terms referenced in Carlson's parenthetical. Black's first defines "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary 579 (7th ed. 1999). To find the definition of the "burden of going forward with evidence" Black's directs one to the definition of the "burden of production." Id. at 190. It defines the latter as "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." Id. Black's defines the "burden of persuasion" as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party."[4] Id.

In our case, Action Mortgage filed a proof of claim establishing prima facie evidence of the claim's validity and amount. See Carlson at 921. Mr. Gausewitz objected to this claim asserting that it resulted from a fraudulent transaction. This objection without more would not carry the debtor's burden of going forward. See In re Holm, 931 F.2d 620, 623 (9th Cir. 1991). But because Mr. Gausewitz's attorney pointed out that Action Mortgage's managing member, Mr.Call, had participated in an allegedly collusive transaction with his cohort, Mr. Teela, in order to place the house in Mr. Gausewitz's hands, an issue was raised as to the initial debt's validity. Moreover, even though Mr. Gausewitz admitted on the stand to owing a debt to Action Mortgage, he did not admit to the amount that Action Mortgage's proof of claim asserts ($193,000) or anything close to it. In fact, Mr. Gausewitz testified that he believed the debt was repaid because Mr. Call accepted his deed in lieu of the foreclosure when Mr. Gausewitz quitclaimed the property to Mr. Call.[5] As a result, the "[d]ebtor has rebutted the presumed amount of the claim." In re Kham, 97 B.R. 420 (Bankr. N.D. Ill. 1989) (Coar, J.) (allowing a debtor's allegations as to lack of documentation to determine accuracy

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(taxpayer's burden); Placid Oil (IRS's burden). Judge Evans avoided determining the Seventh Circuit's rule regarding this split by relying on the general procedural rules to claim objections to decide Carlson.

[4] Black's also notes that "[t]he burden of proof includes both the burden of persuasion and the burden of production." Black's Law Dictionary 190 (7th ed. 1999).

[5] As noted above, Mr. Call never filed this quitclaim deed.

and composition of the creditor's claim as well as the failure of the creditor to account for debtor's post-petition payments on such claim to carry debtor's burden of going forward, thus placing the ultimate burden of persuasion to prove claim onto creditor). Having lost the effect of the presumption of validity accorded to a filed claim, Action Mortgage had to convince this Court, as the fact-finder, of the amount owed by Mr. Gausewitz. Action Mortgage did not carry this burden of persuasion; it did not put on any evidence as to the amount owed. In fact, the only amount this Court might infer is owed is $33,000 as a result of Mr. Gausewitz's own testimony; but there is inadequate proof of even that to be deemed a preponderance of the evidence.

Action Mortgage also requests relief from stay to allow the Writ of Execution for Replevin in Dane County Case 01-CV-1502 to proceed against Mr. Gausewitz's personal property specified in the Writ. Action Mortgage alleged "lack of adequate protection in an interest in property" and lack of equity in the property, but proved neither.

Action Mortgage has failed to attach proper evidence of a security interest to its proof of claim. When claiming a secured interest, Bankruptcy Rule 3001(d) requires evidence of the perfection of the security interest to accompany the proof of claim. Action offered only a Default Judgment dated August 6, 2001 and a Writ of Execution issued on August 13, 2001, but no evidence of having levied. Clearly the Default Judgment is inadequate to prove perfection. <u>See</u> <u>Wisconsin (Dep't of Revenue) v. Bar Coat Blacktop, Inc.</u>, 640 F. Supp. 407, 416 (W.D. Wis. 1986) ("Final judgments create a perfected lien upon real property, but not upon personal property. Wis. Stat. § 806.15"). Since there is no proof of levy, the judgment of replevin creates no rights in specific property, unless the property specified in the judgment was found by the court issuing the replevin to be subject to an enforceable security interest or lien. Since no findings of the state court are in evidence there is no basis on which this Court can infer the pre-replevin interest of the plaintiff. Even if an inference of an enforceable lien could be supported by a replevin judgment without a specific fact finding, because the judgment is entered on default it has no preclusive effect in this subsequent inquiry by the bankruptcy court.

In any event, it is unnecessary to determine if an unlevied Writ of Execution perfects Action Mortgage's interest as Mr. Gausewitz's bankruptcy petition was filed August 27, 2001. If the judicial lien had been perfected it was done so within 90 days of the petition, and is thus avoidable as a preference by the trustee under §547. Action might still have had non-avoidable, perfected, security interests in named property, but Bankruptcy Rule 3001(d) obligated it to produce evidence to that effect in its proof of claim.

Action's only evidence of a perfected security interest is Mr. Call's testimony that liens have been entered on the titles of the two motor vehicles listed in the Writ of Execution. It offered no documentary evidence on the matter. It made no claim such documents were lost or in the exclusive possession of Mr. Gausewitz, nor any explanation whatsoever for the lack of evidence. Thus, Action has not satisfied Federal Rule of Evidence 1002, requiring production of an original of writing to prove its contents, nor any of the rules that allow

exception to such requirement. See Fed. R. Evid. 1002, 1003, 1004.

Section 362(g)(1) explicitly states movant has the burden of proof on the issue of debtor's equity (or lack thereof) in the motor vehicles. Action offered no evidence whatsoever on the value of the vehicles. If Mr. Call's estimate of the claim of $70,000 is assumed, arguendo, accurate, Action would still not have met its burden of production on the issue of lack of debtor equity in the vehicles. Even in its adequate protection claim, Action has the burden to establish its prima facie case (i.e., demonstrating a decline or a threat of decline in the value of the collateral.) See In re Elmira Litho, Inc., 174 B.R. 892, 902 (Bankr. S.D.N.Y 1994). Once again, Action has failed to introduce any evidence on this point.