NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

- -X

In re: Cora Jackson-Bostic

Chapter 13
Case No. 02-52127 (RTL)

Debtor.

- -X

OPINION

APPEARANCES:

LOMBARDI & LOMBARDI, P.A.
Neil A. Malvone, Esq.
(Attorneys for Cora Jackson-Bostic)

PARKER MCCAY, P.A.
Oren Klein, Esq.
(Attorneys for Beneficial New Jersey, Inc.)

RAYMOND T. LYONS, U.S.B.J.

Following the completion of her payments to the Trustee, this motion was brought by the Debtor to enforce her chapter 13 plan and cram-down provision effecting the second mortgagee, Beneficial New Jersey, Inc, ("Beneficial"). Beneficial objects to the motion to enforce, claiming the Debtor's plan and the cram-down provision were procedurally defective and in violation of its due process rights based on an allegation of improper notice. Beneficial also argues that the plan was modified by a settlement agreement. Debtor's motion to enforce is granted because Beneficial never objected to the plan before confirmation despite adequate notice of the plan and the cram-down provision. The settlement has not modified the plan.

JURISDICTION

This court has jurisdiction of this motion under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and the Standing Order of Reference by the United States District Court for the District of New Jersey dated July 23, 1984, referring all proceedings arising under Title 11 of the United States Code to the bankruptcy court. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(L) relating to confirmation of a plan.

FACTS AND PROCEDURAL HISTORY

The Debtor filed a voluntary petition under chapter 13 of the Bankruptcy Code on February 25, 2002. Along with her petition, the Debtor filed schedules showing her residential real estate and one secured creditor with a mortgage on the residence. Schedule D also listed "Beneficial Credit Services" as a secured creditor in the amount of $39,614.31, but stated the market value of property subject to lien as $0.00. Beneficial Credit Services' address was listed as a post office box in Maryland. D.N.J. LBR 1007-2 requires a matrix to be filed showing the name and address of each creditor. On the matrix, the Debtor listed "Beneficial" with the same post office box in Maryland.

The service bureau used by the clerk certified that Beneficial was served with notice of commencement of this chapter 13 case (the "First Notice") by electronic transmission on February 25, 2002. (The same day the petition was filed). The next day, February 26, 2002, a representative of Beneficial New Jersey, Inc. D/B/A Beneficial Mortgage Co. signed a Proof of Claim for $48,290.54, secured by real estate, referencing the same account number that the Debtor put on her Schedule D as Beneficial Credit Services' account number. That Proof of

Claim was docketed on April 4, 2002, as Claim #3. It showed the creditor's address at a post office box in Illinois and attached a copy of a mortgage dated October 12, 2001, in the amount of $141,888.62.

Also filed with the petition and schedules on February 25, 2002, was a chapter 13 plan and summary thereof. The plan provided:

> Beneficial NJ - 2nd Mtge on Residence. Cram down this creditor's claim to zero (-0-), creditor to release Mtge and lien upon completion of plan.

Using the information in the summary, the Clerk prepared a second notice of Hearing on Confirmation of Plan (the "Second Notice") giving the date of hearing as July 16, 2002, and advising:

> An objection to confirmation of the plan shall be filed and served seven days prior to the confirmation date set forth above. Filing a proof of claim rejecting the plan or a motion for relief from the automatic stay will not be considered an objection to the confirmation.

The Clerk included a summary of the plan in his notice and used the exact language from the plan regarding the cram-down of Beneficial NJ. This second notice was mailed on March 6, 2002 to "Beneficial" at the post office address in Maryland.

The same person that signed Claim #3 signed another Proof of Claim on behalf of Beneficial New Jersey, Inc. on March 6, 2002, reflecting a claim of $48,408.40 secured by real estate. That Proof of Claim was docketed on March 20, 2002, as Claim #4. The address for the creditor was the same post office box in Illinois and a copy of a mortgage dated October 8, 2001, in the amount of $161,890.64 was attached to the Proof of Claim.

Beneficial failed to object to confirmation and the court confirmed the plan on September

20, 2002. Beneficial has received no payments on its secured claims under the Plan nor outside the Plan from the Debtor. Beneficial took no action during the Bankruptcy case to assert its rights.

Adversary Proceeding

The Debtor filed a complaint on September 2, 2002, against Beneficial, alleging a mishandling of a refinancing of her first mortgage and violations of various state and federal consumer protection laws. She alleged that Beneficial never advanced any money to her, but recorded two mortgages against her home: one for $141,888.62 and the other for $161,890.64. She sought relief, declaring the mortgages void, disallowing any claim to Beneficial, and awarding her damages. After a somewhat tortured procedural history, Beneficial filed an answer on July 13, 2005. Counsel for the Debtor and counsel for Beneficial negotiated a settlement of the adversary proceeding on October 28, 2005. The Debtor, however, refused to sign the settlement stipulation. After a hearing, the court accepted the testimony of the Debtor's lawyer that he had negotiated a settlement with the Debtor's full knowledge and rejected the Debtor's testimony that she had not authorized her lawyer to settle the matter.[1]

The settlement provided that the mortgage, in the amount of $161,890.54, recorded on October 11, 2001, in Book 8588, page 295, etc., would be discharged. The other mortgage, in the amount of $141,888.62, recorded on December 14, 2001, in Book 8754, page 228, would be modified to reduce the principal to $24,263.93. The settlement provides:

> 4) Plaintiff acknowledges that Defendant Beneficial holds a duly perfected second mortgage lien against the Subject Property as

[1]The Debtor, *pro se*, has appealed the order granting Beneficial's motion to enforce settlement.

> evidenced by the October 12, 2001 loan.
>
> 5) Plaintiff acknowledges, agrees, and understands that as to the October 12, 2001 loan, Defendant Beneficial holds a secured claim against the Subject Property in the amount of $27,250.93 as of November 9, 2005.
>
> 6) Plaintiff acknowledges, agrees, and understands that the October 12, 2001 Loan is valid. The terms of the October 12, 2001 Loan shall be modified pursuant to a Loan Modification Agreement which is attached hereto and incorporated herein as **EXHIBIT A**. The general terms of the Loan Modification include but are not limited to the following:
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>> a) The October 12, 2001 Loan is reduced from $141,888.62 to $27,250.93 which includes the principal, origination points, and miscellaneous loan closing fees and costs ("New Loan Amount").
>>
>> b) The Contractual Rate of Interest is hereby reduced from 10.89% to 8.00% ("New Rate of Interest")
>
> 7) Commencing with the initial post-petition mortgage payment that becomes due subsequent to the Effective Date of this Agreement, Plaintiff shall tender to Defendant Beneficial said post-petition mortgage payment when same come [sic] due.

During the hearing on Beneficial's motion to enforce the settlement, the Debtor mentioned that her chapter 13 plan crammed down Beneficial to zero. The court questioned Beneficial's counsel about that and asked if his client wished to proceed with settlement in light of the possible cram-down if the Debtor completed her plan. Counsel requested an opportunity to see if his client had proper notice. The matter was continued and Beneficial filed a letter brief asserting that it had not been properly served with the plan, was not bound by the cram-down, and wished to enforce the settlement.

Two weeks later, the hearing continued. The court granted Beneficial's motion to enforce the settlement, but specifically left open the issue of whether the plan had effectively crammed down their mortgage to zero.

The Debtor has since completed her payments to the Trustee and now moves to enforce the provision of the plan reducing Beneficial's mortgage to zero.

DISCUSSION

An underlying tenet of bankruptcy law is the interest of finality. The policy of finality in the bankruptcy context allows the debtor and third parties to participate in proceedings knowing their actions will not be subject to later changes. Confirmation of a chapter 13 plan furthers the interest of finality. Section 1327 provides that, in the absence of fraud, a confirmed plan is binding on debtors and creditors.[2] Further, "a confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation." *In re Szostek*, 886 F.2d 1405, 1413 (3d Cir.1989). This is true, unless it would result in a denial of due process, such as insufficient notice. *In re Fili*, 257 B.R. 370, 372 (1st Cir. B.A.P.2001). The need for the binding effect of a confirmed plan has previously been stated by the Third Circuit:

> that creditors would not participate in reorganization if they could

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[2]In its entirety, § 1327 reads:

> (a) 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.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
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> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

> not feel that the plan was final, and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constitute the basis of its earlier acceptance.

In re Szostek, 886 F.2d at 1409, *quoting In re Penn Central Transp. Co.*, 771 F.2d 762 (3d Cir.1985) (where a creditor received notice of railroad reorganization, failure to participate in the proceedings barred litigation of an antitrust claim). Thus, a creditor who ignores bankruptcy proceedings does so at his own peril. *In re Szostek*, 886 F.2d at 1410, *citing Matter of Gregory*, 705 F.2d 1118, 1123 (9th Cir.1983).

Notice

Bankruptcy Code § 1321 directs the debtor to file a plan and § 1322 describes what a plan must or may provide. A plan may modify the rights of holders of secured claims (§ 1322(b)(2)) and the court shall confirm a plan with respect to a secured claim if the holder has accepted the plan. There is no procedural mechanism to solicit acceptance of a chapter 13 plan as there is in a chapter 11. The Third Circuit has stated that failure by a creditor to object, after notice, may be deemed acceptance: "[t]he general rule is that the acceptance of a plan by a secured creditor can be inferred by the absence of an objection." *In re Szostek,* 886 F.2d at 1413.

Bankruptcy Rule 3015(b) allows the debtor to file a plan with the petition, as was done in this case. Rule 3015(d) requires that the plan, or a summary thereof, be included with the notice of the hearing on confirmation, mailed pursuant to Rule 2002. Docket entry 6 (Second Notice) on the Clerk's records shows that the notice of the date, time, and place of the hearing on confirmation, together with a summary of the chapter 13 plan, were sent by mail to all creditors on March 6, 2002. This Second Notice was mailed to Beneficial at its post office box in Maryland.

Rule 3015(f) requires filing of an objection to confirmation of a plan before confirmation. D.N.J. LBR 3015-(6)(a) specifies that an objection must be filed seven days prior to the hearing. The Second Notice informed creditors of the due date for objections. Beneficial failed to object to confirmation and the court confirmed the plan by order entered September 20, 2002.

Beneficial claims the "Debtor's Plan containing a 'cram-down' motion was procedurally defective because: (1) Beneficial was not listed as a creditor; and (2) Debtor failed to serve notice of her Plan and motion on [Beneficial] pursuant to Federal Rules of Bankruptcy Procedure."

Schedule D lists Beneficial Credit Services ("BCS"). Beneficial's counsel states, without competent evidence, that "[Beneficial] is not one and the same as BCS and said companies are wholly unrelated. The address of [Beneficial]'s headquarters for purposes of notice and service of motion is. . .Illinois." Counsel also cites the mortgage document that requires notices be sent certified mail to Beneficial's local address in New Jersey. Identifying the creditor as BCS on Schedule D and failing to use its correct legal name, Beneficial New Jersey, Inc. D/B/A Beneficial Mortgage Company, is of no moment. Beneficial obviously had notice of the bankruptcy case - it filed two proofs of claim within a short time after the petition was filed, and well before the bar date. Its protestation that it was not properly listed as a creditor will not relieve Beneficial of the binding effect of a confirmed plan if it received adequate and timely notice.

A review of the docket revealed that the notice of commencement of this chapter 13 case (First Notice) was served electronically on Beneficial on February 25, 2002. (Docket entry #2). An inquiry to the Clerk has disclosed that Beneficial New Jersey, Inc. (the named mortgagee), Beneficial Mortgage Co. (its trade name) and Beneficial are all affiliated with Household International, Inc. The parent company entered into an Electronic Bankruptcy Noticing Trading Partner Agreement ("Noticing Agreement") on May 4, 2001, with the Clerk of this court, agreeing to receive electronic notices as authorized by Bankruptcy Rule 9036.[3] The Noticing Agreement provides "[Household] will submit a list with this Agreement. . .of the common synonyms for [Household's] name and the specific electronic and postal service addresses in accordance with Rule 2002(g), Fed. R. Bank. P, to which notices are to be directed in accordance with this Agreement." Household attached to the Noticing Agreement a list of several hundred names, including Beneficial, Beneficial New Jersey, Inc., and Beneficial Mortgage Co. Also attached was a list of hundreds of addresses, including the post office box in Maryland to which the Second Notice was mailed in this case. The Second Notice complied with Rules 3015 and 2002.

Beneficial complains that the Second Notice sent to the Maryland post office box was procedurally defective because notices must be sent to the address listed on a filed proof of claim. Beneficial's proofs of claim both designate an address in Illinois. Rule 2002(g)(1)(A) provides that a filed proof of claim constitutes a request to mail notices to the address designated in the proof of claim. The rule requires notices to be addressed to the last address requested by

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[3]The Advisory Committee Note to this rule states:

> [t]his rule is added to provide flexibility for banks, credit card companies, taxing authorities, and other entities that ordinarily receive notices by mail in a large volume of bankruptcy cases, to arrange to receive by electronic transmission all or part of the information required to be contained in such notices. The use of electronic technology instead of mail to send information to creditors and interested parties will be more convenient and less costly for the sender and receiver.

the creditor. If a creditor has not requested an address, the notice shall be mailed to the address shown on the list of creditors. Rule 2002(g)(2). At the time the Second Notice was mailed on March 6, 2002, Beneficial had not yet filed a proof of claim, therefore, mailing notice to the Maryland post office box shown on the list of creditors and the Noticing Agreement was adequate.

Beneficial mistakenly asserts that Debtor did not provide sufficient notice of the cram-down as required by Fed. R. Bank.P. 9014 and 2002. Rule 9014(a) provides :"[i]n a contested matter not otherwise governed by these rules, relief shall be requested in a motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." Rule 9014(b) then provides the means by which service is to be effectuated.[4] Beneficial argues the service required by Rule 9014(b), and by incorporation Rule 7004(b)(3), was not provided, and therefore confirmation of the plan cannot have binding effect. This argument is misplaced as the service requirements of Rule 9014(b) did not apply since notice of a plan, even where the proposal is for a cram-down, is not a "contested matter," and no further motion was needed. Plan confirmation was the proper means to modify Beneficial's claim: "a debtor may modify a secured claim and cancel its lien to the extent permitted under Code section 506(a) and 1325 by so providing in a chapter 13 plan without an adversary proceeding, objection to claim or motion under Bankruptcy Rule 3012." *In re Wolf*, 162 B.R. 108-09 (Bankr.D.N.J.1993).

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[4]In pertinent part, Rule 9014(b) provides: "[t]he motion shall be served in the manner provided for service of a summons and compliant by Rule 7004." Rule 7004(b)(3) directs that service upon a domestic corporation is to be made "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process."

Beneficial's claim was completely unsecured in this case because Schedule D listed the market value of the property subject to lien as $0.00, and, as to Beneficial's second mortgage, the Plan provided: "[c]ram down this creditor's claim to zero (-0-)." Without any objection from Beneficial, the court confirmed the plan, accepting the Debtor's valuation of the property and of Beneficial's secured claim. Since Beneficial's claim was completely unsecured in that there was no value on the property securing its interest as second mortgagee, the plan could modify the amount of the claim without violating the requirements of § 1322(b)(2).[5] *McDonald v. Master Fin., Inc.* (*In re McDonald*), 205 F.3d 606, 611-12 (3d Cir.2000).

The court in *In re Wolf*, in a case with notably similar facts and issues as the case at hand, previously stated that "[a]n adversary proceeding is not required to modify a secured creditor's rights in a chapter 13. . . Nor is a separate motion under Bankruptcy Rule 3012 necessary to modify a secured creditor's rights in chapter 13." *In re Wolf.* 162 B.R. at 106. Additionally, "no separate objection to the allowance of a secured claim is required to modify a secured creditor's rights in a chapter 13 plan." *Id.* at 107. The *Wolf* court stated:

> Permitting a debtor to void a creditor's lien through a provision in a plan without filing an adversary proceeding or other motion does not violate the creditor's due process rights. A summary of the plan's terms in the notice to creditors puts the creditor on notice that its rights will be modified by the chapter 13 plan. That creditor has the opportunity to object or otherwise assert its rights at the confirmation hearing. This notice and opportunity to be heard at the confirmation hearing is sufficient to satisfy the requirements of due process.

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[5]Section 1322(b)(2) provides, in pertinent part: "the plan may– modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."

Id. at 108. This court is similarly satisfied that the provisions of Rule 9014 did not apply and the notice of the plan provisions was sufficient for due process purposes. The requirements of Rule 3015(d) and service requirements of Rule 2002 were satisfied. Beneficial had ample opportunity to object to the plan. Having failed to object, Beneficial is deemed to have accepted the plan.[6]

Beneficial has neither alleged nor presented any evidence that it did not have actual notice of the plan summary. To the contrary, the fact that Beneficial filed a second proof of claim (#4) shortly after the Second Notice was given suggests that Beneficial received the Second Notice prompting a second proof of claim. The court will infer from the sequence of events, the coincidence from the Second Notice followed closely by the second proof of claim, and the absence of denial of receipt by Beneficial, that Beneficial had actual notice of the plan summary. Furthermore, the plan summary was crystal clear in informing Beneficial that the Debtor proposed to modify Beneficial's rights and reduce its secured claim to zero. The confirmed plan is binding on Beneficial and upon completion of her payments, which she has recently done, the Debtor is entitled to have her home released from Beneficial's liens, unless precluded by the settlement agreement.

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[6]A proof of claim for an amount different than that provided by the plan is not equivalent to objecting to a plan: "[i]f...a plan does propose to modify a secured claim, by paying the secured creditor less than the creditor believes is due, the secured creditor who objects to such treatment must file a timely proof of claim **and** objection to confirmation or it will be bound by the plan under Code section 1327(a)." *In re Dennis*, 230 B.R. 244, 252 (Bankr.D.N.J.1999) (emphasis added), *citing In re Szostek*, 886 F.2d 1405, and *In re Wolf*, 162 B.R. 98. This court's local rules were amended on August 1, 2005, to treat a proof of claim as an objection to confirmation. D.N.J. LBR. 3015-6(b). That recent amendment does not apply in this case.

Effect of Settlement

Having found that due process rights were not violated and therefore do not change the binding effect of the confirmation plan as to Beneficial, the court must now consider whether the settlement agreement between the parties can avoid the effects of the cram-down.

The adversary proceeding originally commenced by the Debtor against Beneficial on September 2, 2002, did not concern the cram-down of Beneficial's claim. Rather, the adversary proceeding was commenced to void the two mortgages and collect damages pursuant to consumer protection laws, specifically for violations of the Federal Truth in Lending Act, the New Jersey Licensed Lenders Act, and the New Jersey Consumer Fraud Act.

If the Debtor was to prevail in the adversary action against Beneficial, the two mortgages would be void, and, consequently, there would be no need for a cram-down of those mortgages. If, however, the Debtor were to lose the adversary proceeding, the mortgages would remain valid and a provision in the plan would be necessary to reduce the amount of the claim secured by the mortgages. Furthermore, the debtor would have to complete her plan to cram down the mortgage whereas a judgment in her favor would void the mortgage whether or not she completed her plan. The adversary action resulted in a settlement between counsel for both parties in which it was agreed that Beneficial held a secured claim in the amount of $27,250.93 as of November 9, 2005. Although the Debtor later refused to sign the settlement agreement, this court previously ruled that Debtor's counsel was authorized by the Debtor to enter into the settlement. During the hearing to enforce the settlement, the Debtor inquired as to the effect of the cram-down. That inquiry clearly caught both Beneficial's attorney and the

Debtor's attorney off-guard.[7] This court questioned Beneficial as to whether it wished to proceeded with the settlement in light of the possible cram-down if Debtor successfully completed her plan. The court adjourned the hearing to permit Beneficial an opportunity to consider the implications of the plan. Beneficial filed a letter brief arguing that it was not bound by the confirmed plans and wished to proceed with its motion to enforce settlement. Beneficial stated it wished to proceed, not because the settlement encompassed the cram-down issue, but because they believed the cram-down would be of no moment based on the argument that the plan violated their due process rights for insufficient notice. It follows that if Beneficial lost their due process challenge, the cram-down would stand.

Beneficial did not previously pursue the argument that the settlement took into account the cram-down. It could have made that argument in connection with its motion to enforce settlement, but it did not. To the contrary, it appears that Beneficial failed to consider the cram-down plan at all in negotiating the settlement.[8] Nor did the Debtor's new counsel appear to have

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[7]Debtor's current attorney substituted late in this case and had not drafted the plan nor participated in confirmation.

[8]The court is mindful of the language in the settlement that purports to encompass all disputes, those in existence and those that may arise, between the Debtor and Beneficial. In addition to the provisions quoted on page 5 above, the language in the settlement agreement reads as follows:

> Plaintiff shall be deemed to release, acquit, and forever discharge Defendant Beneficial and its respective agents, employees, representatives, officers, attorneys, shareholders, directors, parent and/or subsidiary corporations, affiliates, assigns, and successors-in-interest from any and all claims, causes of action, liabilities, obligations or suits that the Plaintiff now has, or ever will have, against Defendant Beneficial, in connection with any and all claims, known or unknown, including but not limited to any matter or circumstance arising out of the October 8, 2001 loan and October 12, 2001 loan, the recording of the mortgages relating to

been aware of the cram-down plan while he negotiated the settlement. Beneficial has not succeeded in its due process challenge to the cram-down in the reorganization plan. Furthermore, to modify a plan after confirmation the requirements of section 1329, including notice and a hearing, would have to be followed. That was not done in this case.

CONCLUSION

Beneficial received adequate notice of debtor's plan and is bound by the confirmation order. The settlement of debtor's adversary complaint against Beneficial did not modify debtor's plan. Having now completed the payments under her plan, debtor is entitled to enforce its provision reducing Beneficial's secured claim to zero and releasing the mortgage lien.

Dated: June 14, 2006

/S/ ***Raymond T. Lyons***
United States Bankruptcy Judge

> the aforesaid loans in the Office of the Clerk of Union, the servicing of the aforesaid loans, and this bankruptcy adversary proceeding as well as the associated main bankruptcy case, and Plaintiff does hereby acknowledge the validity and enforceability of the aforesaid loans and all documents executed in connection therewith and as modified pursuant to the terms of this Agreement and Stipulation.

This court does not believe that language precludes modification of a claim as part of the Debtor's plan of reorganization. Treatment of Beneficial's secured claim in a reorganization plan does not contradict Debtor's promise to "release, acquit, and forever discharge Defendant Beneficial...from any and all claims, causes of action, liabilities, obligations or suits that the Plaintiff now has, or ever will have, against Defendant Beneficial." The plan provisions that change Beneficial's status from secured to unsecured and thereby cram-down their claim to $0 is based on a valuation of the collateral, not a dispute over the validity of the claim. This valuation effects all creditors, not just Beneficial.