

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

CASE NO.: 00-32269-BKC-SHF
CHAPTER 13

Israel D. Burgos,
DEBTOR.

ORDER GRANTING MOTION TO VACATE ORDER INsofar AS IT DISALLOWS
CLAIM NUMBER 5 AND VOIDS THE LIEN ASSOCIATED WITH CLAIM NUMBER 5

THIS MATTER came before the Court for an evidentiary hearing on March 18, 2004, upon Security National Funding Trust's ("Security" or "Claimant") Motion to Quash Service and To Vacate Order on Claims and Voiding Liens (the "Motion"). Israel D. Burgos (the "Debtor") filed a Response to Motion to Quash Service and To Vacate Order on Claims and Voiding Lien (the "Response") on February 24, 2004. At the conclusion of the hearing the Court directed the parties to submit memoranda of law and a joint stipulation of facts. Pursuant thereto, the Debtor filed its Memorandum of Law on March 30, 2004, and Security filed its Memorandum of Law in Support of Motion to Quash Service and to Vacate Order On Claims and Voiding Lien on March 29, 2004. Also pursuant thereto, Option One Mortgage ("Option One") filed a Memorandum of Law in Opposition to Security National's Motion to Vacate the Court's Prior Order Voiding Lien and, in the Alternative, to Make a Finding As to the Priority of Option One's Mortgage on April 8, 2004.

FINDINGS OF FACT

The facts of this matter are undisputed.

1) The law firm of Echevarria & Associates, P.A. ("Echevarria") filed a proof of claim on behalf of Conti Mortgage Corporation ("Conti") on June 16, 2000 showing an arrearage in the amount of \$3,797.56 and a secured claim in the amount of \$28,347.45 ("Claim #5"). The address for notices on the proof of claim is Conti Mortgage Corporation, P.O. Box 900, Suite 32, Hatboro, PA 19040.

2) On June 21, 2000, Echevarria filed a Request For Notice and Request To Be Added To Creditor's Matrix ("Notice of Appearance") on behalf of Conti. The Notice of Appearance stated that all required notices should be sent to Echevarria. The Notice Of Appearance did not contain a certificate of service. Debtor's counsel asserts she was not served with the Notice of Appearance.

3) On June 16, 2003, a Notice of Transfer of Claim ("Notice of Transfer") was filed for Claim # 5. The Notice of Transfer states that "the proof of claim filed by Conti Mortgage Corp., has been unconditionally transferred to Security National". The Notice of Transfer lists the transferor as Manufacturers & Trade Trust c/o Conti Mortgage Corp., P.O. Box 900, #32, Hatboro, PA 19040.

4) The Notice of Transfer was docketed as entry #35. Docket entry #35 states, "Filing of Evidence of Transfer of Claim Re number 5 From: Manufacturers Trade Trust To: Security National

Funding Trust in the Amount of \$ 28347.45". Docket entry #35 does not reflect Conti as the transferor.

5) The Notice of Transfer states that all future notices should be sent to SN Servicing Corporation ("SN Servicing") ATTN: Bankruptcy Dept, 232 5th Street, P.O. Box 35, Eureka, CA 95502-0035.

6) The Notice of Transfer was not served on Debtor's counsel.

7) Debtor's Third Amended Plan was confirmed August 29, 2000.

8) The Third Amended Plan called for a full payoff of arrearages, but did not call for a full payoff of Claimant's secured lien.

9) No objections to Claim #5 were filed prior to confirmation.

10) On July 25, 2003, the Debtor filed an objection to eight claims including Claim #5 (the "Objection"). Debtor's Objection lists the claimant for Claim #5 as "Conti Mortgage Corp. (2nd mortgage)" in the amount of \$28,347.45. The stated basis for objection to Claim #5 is "substantially paid or reduced in the context of the plan". The Objection "[r]ecommend[s] claim be stricken or reduced." Echevarria, counsel for Claimant, was neither listed on the creditor's matrix attached to the Objection nor served with Debtor's Objection.

11) SN Servicing was not served with Debtor's Objection.

12) On September 5, 2003, Debtor's counsel filed a Certificate of No Response and Request for Entry of an Order which stated that

Conti had neither objected to, nor requested a hearing on Debtor's Objection to Claim.

13) On September 8, 2003, pursuant to the Certificate of No Response, the Court entered an *Order On Claims and Voiding Liens* (the "Order") which had been drafted by, and provided to the Court by Debtor's counsel. The Order stated in relevant part, "Claim #5 by Conti Mortgage Corp. is disallowed and its lien is deemed voided". Echevarria was not served with a copy of the Order.

14) On November 14, 2003, the Debtor gave a mortgage on the subject property in exchange for payment of \$201,600.00 from Option One.

CONCLUSIONS OF LAW

Security's Motion seeks to vacate the Order to the extent of its ruling on Claim # 5. In support of its Motion, Claimant argues that Debtor's Objection to Claim # 5 was not properly served upon the Claimant or upon Echevarria, the Claimant's attorney. Claimant further argues that Debtor's Objection is untimely because it was filed nearly three years after confirmation of the Third Amended Plan, that the Order Confirming the Third Amended Plan is *res judicata*, and that the subsequent mortgage holder's lien is subordinate to Security's lien. ¹

¹ As discussed below the Court finds that service of the Debtor's Objection to Claim was deficient, therefore it is not necessary to address Claimant's additional arguments.

Debtor's counsel argues in opposition that Echevarria's Notice Of Appearance and Security's Notice of Transfer are deficient because the notices were not served on Debtor's counsel. Debtor's counsel also argues that the equities of this matter lie with the Debtor because reinstating the lien would cause more harm to the Debtor and to Option One, an allegedly good faith third party substitute mortgagee, than it would cause to Security.

Option One argues in opposition to the Motion that they are a good faith lender who refinanced the property in reliance on the Court's Order voiding the lien that supported Claim #5. Option One asks the Court to find that Option One's mortgage has priority over Security's mortgage based upon the doctrine of equitable subrogation, in the event that the Court vacates the Order.

The only issue before the Court is whether the Order should be vacated insofar as it disallows Claim # 5 and voids the lien associated with Claim # 5. Bankruptcy Rule 3008 permits a party in interest to move for reconsideration of any order allowing or disallowing a claim against the estate. The rule directs the Court to enter an appropriate order after a hearing on notice. As discussed below, the Court finds that cause exists to reconsider and to vacate the Order as it relates to Claim # 5.

A. ***Notice and Federal Rule of Bankruptcy Procedure 3001(e)(2)***

The Notice of Transfer of Conti's claim was filed on June 16,

2003 pursuant to Bankruptcy Rule 3001(e)(2). The Notice of Transfer lists the transferor as Manufacturers & Trade Trust c/o Conti Mortgage Corp. and the transferee as Security National Funding Trust. In addition, the Notice of Transfer states that all future notices should be sent to SN Servicing Corporation, ATTN: Bankruptcy Dept, 232 5th Street, P.O. Box 35, Eureka, CA 95502-0035.

Federal Rule of Bankruptcy Procedure 3001(e)(2) does not require the transferor or transferee to notify or serve any parties to the bankruptcy with the notice of transfer. The rule requires the clerk to notify the transferor of the notice and allow them 20 days to object.² Rule 3001 (e)(2) does not require the clerk to serve the notice of transfer on the debtor, the debtor's attorney, or the trustee.³ The Local Rules similarly do not require service of a notice of transfer upon the debtor, the debtor's attorney or

² Local Rule 3001-1(C)(3) dispenses with the need for notice by the clerk to the transferor if evidence of the transfer contains signatures of both the transferee and the transferor.

³ The Advisory Committee Notes for Bankruptcy Rule 3001 explains that "subdivision (e) [wa]s amended to limit the court's role to the adjudication of disputes regarding transfers of claims." Advisory Committee Note (1991). "The 1991 amendment to Rule 3001(e) . . . expressly intended to curtail judicial oversight of the claim assignment process itself by eliminating notice to third parties and limiting the court's role to determining disputes between assignee and assignor, the only party entitled to notice of the purported transfer. Under the current version of Rule 3001(e)(2), if the assignor does not timely object to the proposed transfer as unenforceable under nonbankruptcy law, the assignment becomes effective without court approval." *In re Lynn*, 285 B.R. 858, 861 (Bankr.S.D.N.Y. 2002) (holding debtor did not have standing to object to claim assignment but would have standing to object to improper use of assigned claim). In this case Debtor's memorandum of law questions the validity of the assignment between Conti and Security, however Debtor does not have standing to object to the validity of the assignment.

the trustee. Security was thus not required to serve the Debtor or the Debtor's attorney with the Notice of Transfer to make the notice effective.

Although the Notice of Transfer was not served on either Debtor nor Debtor's counsel, the Court notes that docket entry #35 for the Notice of Transfer lists both the claim number, "number 5", and the amount of claim, "\$28,347.45". These two items of information match Conti's claim. The Debtor's Objection to Claim was docketed as entry #37. Thus the Objection is only two docket entries removed from the Notice of Transfer. On September 5, 2003, Debtor's counsel filed a Certificate of No Response representing that counsel reviewed the docket as of September 2, 2003. A review of the docket should have revealed the transfer of Claim # 5. Although the docket entry did not list Conti as the transferor of Claim #5, the Court finds that there was sufficient information contained in the docket entries (as shown on PACER) to put Debtor's counsel on inquiry notice that the claim the Debtor was objecting to had been transferred. At that point it was incumbent upon Debtor's counsel to look beyond the face of the docket entry.

B. *Notice Requirements for Objections to Claims*

"It is fundamental that due process of law requires 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections.'" *United States v. Levoy* (*In re Levoy*), 182 B.R. 827,833 (9th Cir. BAP 1995) (quoting *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306,314 (1950)). Objections to claims are subject to the due process requirements embodied in Bankruptcy Rule 3007. The rule states:

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding. Fed. R. Bankr. P. 3007

In the Southern District of Florida objections to claims must also comply with Local Rule 3007-1 which states in pertinent part:

(A) Service

A party filing an objection to claim shall serve a copy of the objection on (1) the claimant at the claimant's address of record, or if the claim has been transferred, at the transferee's address of record, and on (2) any attorney of record for the claim holder.

In this case the Debtor's Objection to Claim #5 was served on Conti Mortgage, not on Security, the transferee pursuant to the Notice of Transfer. Therefore Debtor's Objection was not served on the transferee at the transferee's address of record as required by Local Rule 3007-1(A).

Local Rule 3007-1(A) also requires a party filing an objection to claim to serve a copy of the objection on any attorney of record for the claim holder. Echevarria served the Debtor and Debtor's

counsel with proof of Conti's claim on June 16, 2000. Echevarria also filed a Notice of Appearance as attorney for Conti on June 21, 2000 pursuant to Local Rule 9010-1.⁴ Even if Debtor was unaware that Claim #5 had been transferred, the attorney for the putative claimant was still not served with Debtor's Objection to Claim as required by the Local Rules. Ironically, Echevarria represented not only Conti in this bankruptcy proceeding, Echevarria also represented Security the transferee of Conti's claim. The Court finds that the information contained in the docket entries on PACER⁵ and in the proof of claim was sufficient to put Debtor's attorney on notice that Echevarria was representing the holder of Claim #5.

"A judgment is . . . void when it is found that there has been defective service of process that is inconsistent with due process of law." *Levoy*, 182 B.R. at 833 (citations omitted). The procedure for objecting to claims contemplates specific notice to the claim holder such that due process is not offended. In this case, the Court finds that service of the Objection was defective because it failed to provide specific notice to the Claimant that Claim #5 was

⁴ Echevarria did not serve Debtor's counsel with the Notice of Appearance. Although Local Rule 9010-1 does not require an attorney filing a Notice of Appearance to serve any parties therewith, in the Court's view the better practice is to serve such notice on the debtor, debtor's counsel, and the trustee.

⁵ Docket Entry #8 for the Notice of Appearance states, "Notice of Appearance And Request For Service Of Notice By Shamila Subramaniam for Creditor Conti Mortgage Corporation". Shamila Subramaniam was an associate at the Echevarria law firm.

contested. Furthermore, claimant's attorney (putative or otherwise) was not properly served with the Debtor's Objection as required under the Local Rules. To the extent that the Order sustained the Objection to Claim #5 and voided the lien supporting that claim, the Order was improperly entered and must be vacated.

C . ***The Order Granted Relief Not Sought In The Objection***

The Order granted more relief than the Objection sought. The Objection stated that Claim # 5 was substantially paid or reduced in the context of the plan and requested only that the claim be stricken. However the Order submitted by Debtor's counsel and subsequently entered by the Court, voided the Claimant's lien in addition to striking the claim. Since the Order granted relief that was not sought in the Objection, additional grounds exist to vacate the Order as it relates to Claim #5.

D. ***Equities of the Case***

Bankruptcy Rule 3008 permitting the Court to reconsider claims, implements 11 U.S.C. §502(j) which states in pertinent part:

A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. . .

11 U.S.C. §502(j)

Section 502(j) permits a reconsidered claim to be allowed or disallowed according to the equities of the case. The Debtor argues

that the equities in this case lie with the Debtor. Security argues that it has suffered harm as an innocent party who was never aware of the Objection to its claim. The parties' equitable arguments have some degree of merit. However, the failure of notice to the Claimant violates the fundamental requirement of due process and constitutes cause to vacate the Order.

Option One requests that the Court make a finding that its lien has priority over Security's lien based upon the doctrine of equitable subrogation. The Court finds there has been no evidence presented to show that Option One satisfied Security's claim as required for equitable subrogation under 11 U.S.C. §509(a). Accordingly, Option One's request for a finding that its lien has priority over Security's lien must be denied.

CONCLUSION

For the reasons stated above, the Court finds sufficient cause to vacate the Order insofar as it strikes Claim #5 and voids the lien supporting Claim #5. Option One's request for a finding that its lien has priority over Security's lien is denied.

ORDER

The Court, having heard the arguments of counsel, having reviewed the file, the submissions of the parties, the applicable law, and being otherwise fully advised in the premises, hereby

ORDERS AND ADJUDGES that:

1. The *Order On Claims and Voiding Liens* entered on September 8, 2003 is vacated insofar as it disallows Claim #5 and voids the lien supporting Claim #5.
2. Option One's Motion for a Finding As to the Priority of Its Lien on the basis of equitable subrogation is DENIED WITHOUT PREJUDICE because there has been no evidence presented that Option One satisfied Security's claim.

ORDERED in the Southern District of Florida on the 15th day of April, 2004.

PAUL G. HYMAN, JR.
United States Bankruptcy Judge