

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

IN RE: NORMA C. Z. WITHROW, Debtor

**No. 5:06-bk-72616
Ch. 13**

MEMORANDUM OPINION AND ORDER

Before the Court are a Motion to Alter or Amend Judgment and an Objection to Confirmation to Modification of Chapter 13 Plan, both filed on September 21, 2007, by creditor Bank of America, N.A. After a series of continuances requested by the parties, the Court heard the matters on May 14, 2008. At the conclusion of the hearing, the Court took both matters under advisement. For the reasons stated below, the Court grants Bank of America's Motion to Alter or Amend Judgment and sustains its Objection to Confirmation to Modification of Chapter 13 Plan.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (L). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

History of the Case

On November 13, 2006, the debtor filed her chapter 13 bankruptcy petition. The subsequent relevant events that occurred are presented in bulleted format and are based on exhibits presented at trial on May 14, 2008. The non-bulleted text is based on the Court's review of the case file.¹

¹ A court may take judicial notice of its own orders and records in a case before the court. Fed. R. Evid. 201.

- On December 1, 2006, Bank of America filed its Proof of Claim, which indicated an arrearage amount of \$12,781.97 owed to Bank of America. (Bank of Am. Ex. 1.)
- On December 4, 2006, the debtor filed her Chapter 13 Plan, which indicated an arrearage amount of \$6000.00 owed to Bank of America, and proposed a monthly arrearage payment of \$100.00 per month under the plan. (Bank of Am. Ex. 2.) The proposed plan was signed by the debtor and her attorney, Stanley V. Bond.
- On January 2, 2007, Bank of America filed its Objection to Confirmation of the debtor's proposed plan, specifically objecting to the amount of the arrearage listed in the debtor's petition and the proposed monthly arrearage payment. (Bank of Am. Ex. 3.) The objection to confirmation was signed by attorney W. Carson Tucker, Wilson & Associates, P.L.L.C., on behalf of Bank of America.
- On February 8, 2007, the debtor filed her Objection to Claim of Bank of America (Claim 1), alleging that Bank of America's claim is fraudulent. (Bank of Am. Ex. 4.)

On April 10, 2007, the Court called the case for hearing on Bank of America's objection to confirmation and the debtor's objection to Bank of America's claim. Stanley Bond and Carson Tucker both appeared and announced to the Court that the debtor's objection to claim would be withdrawn, and that Bank of America's objection to confirmation would be sustained with 30 days for the debtor to amend her proposed plan.

- On April 12, 2007, the Court entered its Order reflecting the settlement announced on April 10 in relation to Bank of America's objection to confirmation. Specifically, the order stated, "Debtor shall modify her plan within thirty (30) days to provide for arrearages in the sum of \$12,781.97 to be cured at \$213.03 per month through the Trustee's office." (Bank of Am. Ex. 5.)

The docket reflects that the debtor's plan has never been amended to reflect the agreed arrearage amount or monthly arrearage payment.

- On May 1, 2007, the Court entered its Order to Submit Proposed Order relating to the debtor's objection to claim as announced at the April 10, 2007, hearing. (Bank of Am. Ex. 6.)
- On May 17, 2007, the trustee filed her Motion . . . Allowing Claims, and the Court entered its Order Allowing Claims (both on the same pleading). (Bank of Am. Ex. 7.) Bank of America's mortgage arrearage claim in the amount of \$12,781.97 was listed on the motion allowing claims. The order allowing claims included the following language:

[T]hat the Debtor be given 30 days from the date of this

order within which to examine the proofs of claim and to file a written objection to any claim which may be improper. The absence of a timely written objection will be deemed an approval by the Debtor of the claims as recited above and the claim shall be allowed for the purpose of distribution pursuant to the confirmed plan and other orders of this Court.

The docket reflects that the debtor has never filed a written objection to the allowance of Bank of America's arrearage claim in the amount of \$12,781.97, as reflected on the Motion and Order Allowing Claims.

- On June 22, 2007, the Clerk of the Court mailed a hearing notice resetting the debtor's initial objection to claim that was filed on February 8, 2007, for hearing on July 24, 2007. (Bank of Am. Ex. 8.)

The BNC-generated Certificate of Service, which is a part of the case docket, indicates that the hearing notice was mailed to the debtor, Stanley Bond, and W. Carson Tucker. The hearing was subsequently continued to August 14, 2007. According to the BNC-generated Certificate of Service, the continuation notice was mailed to the debtor, Stanley Bond, Carson Tucker, and Bank of America, N.A. Only Stanley Bond appeared at the hearing.

- On September 12, 2007, the Court entered its Order Partially Disallowing Claim of Bank of America (Claim 1). The order sustained the debtor's objection to claim filed on February 8, 2007, in part, and stated that the allowed amount of the arrearage claim was \$6000.00. (Bank of Am. Ex. 9.)
- On September 14, 2007, the debtor filed her [amended] Chapter 13 Plan, which, again, indicated an arrearage amount of \$6000.00 owed to Bank of America, and proposed a monthly arrearage payment of \$110.00 per month under the plan. (Bank of Am. Ex. 10.)
- On September 21, 2007, Bank of America timely filed its Motion to Alter or Amend Judgment relating to the Court's September 12 order (Bank of Am. Ex. 11), and its Objection to Confirmation to Modification of Chapter 13 Plan relating to the debtor's September 14 amended plan (Bank of Am. Ex. 12).

Motion to Alter or Amend Judgment

In its Motion to Alter or Amend Judgment, Bank of America references three events that are supported by the record. First, that on April 10, 2007, the debtor's attorney

announced that the debtor's objection to Bank of America's claim was withdrawn and Bank of America's objection to the debtor's plan was sustained with 30 days to amend the plan to allow for Bank of America's arrearage claim of \$12,781.97. Second, that on April 12, 2007, the Court entered its order sustaining Bank of America's objection and requiring the debtor to amend her plan to provide for Bank of America's arrearage in the amount of \$12,781.97. And third, that on May 17, 2007, the Court entered its order allowing the arrearage claim of Bank of America in the amount of \$12,781.97, to which the debtor did not file a written objection within the time allowed. It is in this light that Bank of America presents its Motion to Alter or Amend Judgment with respect to this Court's order dated September 12, 2007, which sustained the debtor's objection to the arrearage claim of Bank of America and allowed the claim in the amount of \$6000.00.

Bank of America's motion to alter or amend the judgment entered September 12, 2007, was timely brought under Federal Rule of Bankruptcy Procedure 9023, which incorporates Federal Rule of Civil Procedure 59. However, Bank of America's requested relief was presented as relief from a judgment or order based on Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60. Under Rule 9024, the Court may relieve a party from a final order or judgment if the judgment is void, or for any other reason that justifies relief. Fed. R. Civ. P. 60(b)(4), (6). In this instance, the Court is presented with two conflicting orders entered by the Court: (1) the order dated May 17, 2007, which allows Bank of America's arrearage claim in the amount of \$12,781.97, and (2) the order dated September 12, 2007, which allows Bank of America's arrearage claim in the amount of \$6000.00.

In this case, when the Court called the debtor's objection to Bank of America's claim and Bank of America's objection to confirmation for hearing on April 10, 2007, the attorneys representing both parties announced to the Court a settlement of each objection: the debtor's objection to Bank of America's claim was withdrawn, and Bank of America's objection to confirmation was sustained. As a result of that announcement, the Court entered an order sustaining Bank of America's objection to plan with a directive for the

debtor to modify her plan within 30 days to provide for arrearages in the amount of \$12,781.97. That modification never took place; nor was a precedent ever provided by the debtor's attorney withdrawing the debtor's objection to Bank of America's claim, as previously announced to the Court.

On May 17, 2007, the Court entered its Motion and Order Allowing Claims, which clearly stated Bank of America's arrearage claim in the amount of \$12,781.97. The debtor did not object to the allowance of this claim within the 30 day objection period reflected on the Court's order. Had the debtor objected, an evidentiary hearing on the amount of the claim would have been scheduled.

Finally, because an order was never entered reflecting the parties' settlement of the debtor's objection to Bank of America's claim, the Court reset the objection for hearing. On August 14, 2007, the debtor's attorney appeared at the hearing and announced to the Court that he had not heard from Bank of America's attorney, nor had the attorney provided him with some requested documents.² Even though the parties had previously announced that the debtor's objection was withdrawn, based on the debtor's attorney's representation the Court sustained the debtor's objection to Bank of America's arrearage claim. This order, which was entered September 12, 2007, is the order to which Bank of America takes exception because of the previously entered order allowing the arrearage claim in the amount of \$12,781.97.

² A review of the Court's recording from the hearing held August 14, 2007, indicates that at the hearing, Mr. Bond informed the Court that he had not heard from Mr. Tucker prior to the hearing, and that Mr. Tucker had not provided Mr. Bond with some requested documents. Based on that information, Mr. Bond stated to the Court: "I think I win." With the information before it, the Court agreed. However, the Court was not advised that the objection to claim currently before the Court was earlier announced "withdrawn" by agreement of the attorneys on April 10, 2007; nor was it pointed out to the Court that on May 17, 2007, the Court had previously entered its order allowing the arrearage claim at issue in the amount of \$12,781.97.

The debtor testified at the May 14, 2008, hearing that she had filed a previous chapter 13 case and believed an arrearage payment to Bank of America was included in the previous chapter 13 plan. She also testified that Bank of America began foreclosure proceedings at the conclusion of her previous bankruptcy case, causing her to file the pending case. It appears that the purpose of her testimony was to show the Court that the arrearage amount included in the September 12, 2007, order was not accurate. However, reconsideration of Bank of America's claim is not before the Court. The debtor did not object to, or appeal from, the order entered by the Court on May 17, 2007. Therefore, it is a final order and the Court will enforce that order. Because the order dated September 12, 2007, conflicts with the terms of the May 17 order, the Court will not enforce the September 12 order and, accordingly, grants Bank of America's Motion to Alter or Amend Judgment, and sets aside its Order Partially Disallowing Claim of Bank of America (Claim 1) entered on September 12, 2007.

Objection To Confirmation To Modification of Chapter 13 Plan

The second pleading before the Court is Bank of America's objection to the debtor's modified plan. Bank of America's initial objection to confirmation of the debtor's plan was sustained and the debtor given 30 days to amend her plan to show an arrearage amount payable to Bank of America of \$12,781.97. As stated above, the debtor never amended her plan in accordance with the Court's April 12, 2007, order. Instead, on September 14, 2007, the debtor filed an "amended" plan. The amended plan reflects the same arrearage amount as the first plan--\$6000.00; the debtor has simply increased the proposed monthly arrearage payment from \$100.00 to \$110.00.

Bank of America, as the objecting party, has the burden of proof regarding its objection to confirmation. *In re Coleman*, 373 B.R. 907, 911 (Bankr. W.D. Mo. 2007); *In re Gatlin*, 357 B.R. 519, 521-22 (Bankr. W.D. Ark. 2006). The debtor then has the burden of coming forward with evidence to rebut Bank of America's evidence. *Gatlin*, 357 B.R. at 522. In this case, Bank of America introduced this Court's April 12, 2007, order requiring the debtor to amend her plan to include Bank of America's arrearage claim of

\$12,781.97. The debtor provided no evidence in rebuttal, and has failed or refused to amend her plan to conform with this Court's April 12, 2007, order. Accordingly, and based on the debtor's failure to follow what was represented to the Court to be an agreed order, Bank of America's objection to the amended plan is sustained. The debtor shall have 20 days from the entry of this order to file an amended plan reflecting Bank of America's arrearage in the amount of \$12,781.97. Failure to do so shall result in the dismissal of the debtor's case.

IT IS SO ORDERED.

June 6, 2008

DATE



BEN T. BARRY

UNITED STATES BANKRUPTCY JUDGE

cc: Stanley V. Bond, attorney for the debtor
Kimberly D. Burnette, attorney for Bank of America, N.A.
Joyce B. Babin, chapter 13 trustee