

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:12-bk-1502-PMG

Peggy Kelly Del Vecchio,

\_\_\_\_\_  
Debtor.

Chapter 7

Peggy Kelly Del Vecchio,

Plaintiff,

vs.

Adv. No. 3: 12-ap-452-PMG

BancorpSouth Bank,

\_\_\_\_\_  
Defendant.

**ORDER ON DEFENDANT’S MOTION TO DISMISS**

**THIS CASE** came before the Court for hearing to consider the Motion of the Defendant, BancorpSouth Bank, to dismiss this adversary proceeding. (Doc. 5).

The Debtor, Peggy Kelly Del Vecchio, commenced this proceeding by filing a Complaint for a determination that the Defendant’s mortgage on her homestead real property is void because the mortgage document was not signed by her spouse.

Under 28 U.S.C. §1334(c)(1), the Court has broad discretion to abstain from hearing a proceeding “in the interest of justice, or in the interest of comity with State courts or respect for State law.” In this

case, the Debtor's homestead property is not property of the bankruptcy estate, the mortgage issue raised by the Debtor involves a developing area of state law, and the mortgage is the subject of a pending state court action. Accordingly, the Court will abstain from hearing this proceeding pursuant to §1334(c)(1).

### **Background**

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on March 7, 2012. On her schedule of assets filed with the petition, the Debtor stated that she is the "sole owner" of certain real property located at 15681 S.W. 16<sup>th</sup> Terrace, Ocala, Florida (the Property). On her Schedule C, she claimed the Property as exempt pursuant to "Fla. Const. art. X, § 4(a)(1); Fla. Stat. Ann. §§ 222.01 & 222.02."

On her schedule of liabilities, the Debtor listed the Defendant as an unsecured creditor holding a "disputed mortgage on homestead."

On her Statement of Financial Affairs, the Debtor disclosed that she was a party to a foreclosure action pending in the Circuit Court for Marion County, Florida styled Bancorpsouth Bank v. Peggy K. Delvecchio, et al., Case # 2012-CA-471-P.

The §341 meeting of creditors in the Debtor's bankruptcy case was held and concluded on April 17, 2012. No objections to the Debtor's claim of exemptions were filed, and the Chapter 7 Trustee filed a Report of No Distribution in the case on April 18, 2012. The Debtor received her discharge on July 3, 2012.

In the Complaint presently before the Court, the Debtor alleges that she owns the Property in Ocala, and that the Property is her homestead. She also alleges that the "Defendant holds a mortgage

dated August 8, 2006 which was recorded August 21, 2006 in the public records of Marion County, Florida.” (Doc. 3, ¶ 5). Finally, the Debtor alleges that her spouse did not sign the mortgage or otherwise agree to encumber the Property, even though she and her spouse were married on the date that she executed the mortgage and have remained married since that time. (Doc. 3, ¶¶ 6, 8).

According to the Debtor, the mortgage is invalid because the mortgage document does not contain her spouse’s signature, and the Defendant therefore “failed to comply with the provisions of Fla. Const. Art. X, § 4(c)(2011).” (Doc. 8, p. 3). Consequently, the Debtor asserts that the “lien of the Mortgage should be deemed void an[d] extinguished automatically, without further court order, upon entry of a discharge to Plaintiff, as provided by §506(d) of the Bankruptcy Code.” (Doc. 3, ¶ 11).

In response, the Defendant filed a Motion to dismiss the Debtor’s Complaint for two primary reasons. (Doc. 5). First, the Defendant asserts that this Court lacks jurisdiction to consider the Complaint, because the Property has been claimed as exempt and is no longer property of the bankruptcy estate. Second, the Defendant asserts that the Complaint should be dismissed because it fails to state a claim which would entitle the Debtor to relief. Alternatively, the Defendant asks that the Court abstain from this proceeding, and allow the State Court to adjudicate the validity of its lien on the Property. (Doc. 5, ¶ 18).

### **Discussion**

Section 1334(c)(1) of title 28 provides:

#### **28 USC § 1334. Bankruptcy cases and proceedings**

...

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with

State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

11 U.S.C. §1334(c)(1)(Emphasis supplied). The section “grants a bankruptcy court broad discretion to permissively abstain from exercising jurisdiction.” In re Annicott Excellence, LLC, 264 B.R. 756, 758 (Bankr. M.D. Fla. 2001).

In exercising its discretion, courts generally consider a number of factors, including (1) the effect on the administration of the bankruptcy estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of state law; (4) the presence of related proceedings in State Court; (5) the substance rather than the form of an allegedly core proceeding; and (6) the existence of a right to a jury trial. FCCA Commercial Insurance Company v. Armour, 2012 WL 4208056, at 3 (M.D. Fla.).

“Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative.” In re Best, 417 B.R. 259, 274 (Bankr. E.D. Pa. 2009)(quoting In re Chicago, Milwaukee, St. Paul & Pacific R. Co., 6 F.3d 1184, 1189 (7<sup>th</sup> Cir. 1993)). In considering the factors, courts must ultimately balance whether justice would be better served if the proceeding were decided by the bankruptcy court or another court. In re Gilliam, 2009 WL 4051074, at 4 (D.S.C.).

In this case, the Court finds that the relevant factors weigh in favor of permissive abstention, and that abstention under §1334(c)(1) is appropriate because (1) the Property is not property of the bankruptcy estate; (2) the mortgage issue raised by the Debtor involves a developing area of state law; and (3) the mortgage is the subject of a pending state court action.

First, the Property is not property of the bankruptcy estate. In the Complaint, the Debtor seeks to invalidate a mortgage on the Property. The Property was claimed as exempt homestead on her bankruptcy schedules, no objections were filed, and the exemption has been allowed. “The plain language of the bankruptcy code and precedent from this court are clear that exempt property is no longer part of the bankruptcy estate, and is available for the debtor’s use.” In re Gamble, 168 F.3d 442, 444-45 (11<sup>th</sup> Cir. 1999)(citations omitted).

Consequently, the outcome of this proceeding will not have any effect on the administration of the Debtor’s Chapter 7 estate. The Chapter 7 Trustee has filed a Report of No Distribution in which he stated that “there is no property available for distribution from the estate over and above that exempted by law,” and the Debtor’s bankruptcy estate “has been fully administered.” Avoidance of the mortgage on the Debtor’s exempt homestead Property will not produce any benefit for the Chapter 7 estate or the Debtor’s creditors.

Second, the mortgage issue raised by the Debtor involves a developing area of state law. The Debtor contends that the mortgage should be invalidated because the mortgage document was not signed by her non-owner spouse, and therefore does not comply with article X, §4(c) of the Florida Constitution. Her challenge to the mortgage is purely a matter of state law. In re Annicott Excellence, LLC, 264 B.R. at 759(“The validity, priority and extent of a security interest in real property in Florida are solely a matter of Florida law.”).

On December 19, 2012, while the Defendant’s motion to dismiss or abstain was under consideration by this Court, the District Court of Appeal of Florida, Fourth District, entered an Order involving virtually the same issue that the Debtor presented in her Complaint. In Spikes v. OneWest

Bank, FSB, 2012 WL 6601217 (Fla. 4<sup>th</sup> DCA), a husband had signed a note and mortgage in favor of the bank, and certain real property was conveyed to him as a married man. His wife did not sign the mortgage. Following a default, the bank commenced a foreclosure action against both spouses. The trial court awarded the bank an equitable subrogation lien in an amount equal to prior mortgages that had been satisfied with the proceeds of the bank's loan, and entered a judgment foreclosing the equitable lien.

The issue on appeal was whether the bank's lien was enforceable in view of the wife's marital interest in the homestead property. In addressing the issue, the appellate court considered at least two fairly recent decisions dealing with a creditor's rights where only one spouse was named on the relevant documents. See Coy v. Mango Bay Prop. & Invs., Inc., 963 So.2d 873 (Fla. 4<sup>th</sup> DCA 2007)(Whether a husband "had a homestead protection from forced sale even though the title to the home was in wife's name alone."), and Countrywide Home Loans, Inc. v. Kim, 898 So.2d 250 (Fla. 4<sup>th</sup> DCA 2005)(The inadvertent failure to obtain a wife's signature on a mortgage, when she knew about the loan, does not preclude foreclosure of the mortgage upon default.).

In Spikes, the District Court of Appeal ultimately determined that the bank was entitled not only to an equitable subrogation lien, as held by the trial court, but also an equitable vendor's lien for the full amount of the loan. Further, the Court held that "a non-owner spouse cannot claim homestead exemption against an equitable lien imposed for a purchase money mortgage, regardless of whether the lien was imposed for fraud."

It is not clear in this case whether the Defendant's mortgage on the Debtor's Property was a purchase money mortgage, or whether the proceeds were used to satisfy any existing mortgages on the

Property. Nevertheless, the Debtor contends that the mortgage is void because the mortgage document was not signed by her spouse. Based on recent state court decisions regarding a lender's rights when only one spouse executes the loan documents, it appears that the Debtor's challenge to the mortgage involves a developing area of state law, and that this Court should abstain in the interest of comity with State courts. See In re Hospitality Ventures/Lavista, 314 B.R. 843, 850 (Bankr. N.D. Ga. 2004)(citing Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940)(State court is the appropriate court to hear "unsettled questions of state property law.")).

Finally, the enforceability of the Defendant's mortgage is the subject of an action that was already pending in state court at the time that the bankruptcy petition was filed. Based on the Debtor's default under the note and mortgage, the Defendant had filed a foreclosure action against both the Debtor and her spouse in the Circuit Court in Marion County. The Debtor acknowledged the foreclosure action as a pending suit on her Statement of Financial Affairs, and the Defendant identified the action in its Motion to Dismiss. (Doc. 5, ¶ 7). Further, it appears that the issue of the spouse's non-joinder in the mortgage had been raised by the Defendant before the foreclosure action was filed. (Doc. 5, Exhibit D). The existence of a pending state court action is a factor that weighs in favor of permissive abstention under §1334(c)(1). FCCA Commercial Insurance Company v. Armour, 2012 WL 4208056, at 3.

### **Conclusion**

The Debtor has filed a Complaint against the Defendant for a determination that the Defendant's mortgage on her homestead real property is void because the mortgage document was not signed by her non-owner spouse.

Under 28 U.S.C. §1334(c)(1), the Court has broad discretion to abstain from hearing a proceeding “in the interest of justice, or in the interest of comity with State courts or respect for State law.” 28 U.S.C. §1334(c)(1). In this case, the Property that is the subject of the Complaint is not property of the Debtor’s bankruptcy estate, the mortgage issue raised by the Debtor involves a developing area of state law, and the mortgage is the subject of a pending state court action. For these reasons, the Court will abstain from hearing this proceeding pursuant to 28 U.S.C. §1334(c)(1).

Accordingly:

**IT IS ORDERED** that:

1. The Motion of the Defendant, BancorpSouth Bank, to Dismiss the Complaint of the Debtor, Peggy Kelly Del Vecchio, is granted as set forth in this Order.
2. The Court abstains from hearing this proceeding pursuant to 28 U.S.C. §1334(c)(1).

**DATED** this 9 day of January, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
United States Bankruptcy Judge