

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

In re:

AURORA PEREZ GOMEZ,

Case No. 6:09-bk-13656-ABB

Chapter 13

Debtor.

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ORDER

This matter came before the Court on the Motions to Value and Amended Motion to Avoid Junior Lien (Doc. Nos. 38, 39, and 48) filed by the Debtor Aurora Perez Gomez relating to the secured claims filed by Litton Loan Servicing, L.P. (“Litton”), Bank of America, N.A. (“Bank of America”), and OneWest Bank, F.S.B. (“OneWest”). Litton filed a Preliminary Response (Doc. No. 42). No other responses have been filed.

An evidentiary hearing was held on August 31, 2010 on the Motion to Value Litton’s claim at which the Debtor, counsel for the Debtor, counsel for the Chapter 13 Trustee, and counsel for Litton appeared. The Court directed the parties to submit post-hearing briefs regarding the homestead classification issue within fourteen days. Neither party filed a post-hearing brief.

This case was dismissed on November 5, 2010 for the Debtor’s failure to make Plan payments. Her motion to reopen the case was granted by the Order entered on December 6, 2010 (Doc. No. 65).

Tilly Byrd Road Property

The Debtor filed this Chapter 13 case on September 15, 2009. She filed a joint Chapter 7 bankruptcy case captioned *In re Efrain Gomez and Aurora Gomez*, Case No. 6:08-bk-00040-ABB, on January 4, 2008 and received discharge on April 25, 2008

pursuant to 11 U.S.C. Section 727(a). The Chapter 7 case was closed as a no asset case on April 25, 2008.

The Debtor owns real property located at 1490 Tilly Byrd Road (a/k/a Tilly Bird Road), Seville, Florida 32190-7948 (“Tilly Byrd”) which is encumbered by a first-priority mortgage held by Litton and a second-priority mortgage held by Bank of America, f/k/a LaSalle Bank, N.A. Litton filed Claim No. 4-1 asserting a secured claim of \$242,972.72 and Bank of America filed Claim No. 1-1 asserting a secured claim of \$59,681.25.

Litton Claim: The Debtor, as to the Litton mortgage, seeks to, pursuant to 11 U.S.C. Sections 506(a) and 1322(b)(2): (i) cram down Claim No. 4-1 to \$180,000.00 and reamortize the loan for thirty years, with interest at the rate of 7.80% or 8.0%, whichever is less; and (ii) pay Litton \$0.00 on the unsecured portion of its claim on the basis the underlying debt was fully discharged in the Debtor’s previous bankruptcy case pursuant to 11 U.S.C. Section 727. The Debtor filed an Amended Chapter 13 Plan reflecting this intended treatment of Litton’s claim (Doc. No. 49). Litton objects to such treatment.

A proposed Order was presented to the Court by the Debtor post-hearing regarding the valuation of Litton’s claim. An Order was entered on September 13, 2010 (Doc. No. 52) valuing the secured portion of Claim No. 4-1 at \$180,000.00 and the unsecured portion at \$0.00. The September 13, 2010 Order was entered in error and was vacated on October 20, 2010 (Doc. No. 56).

Bank of America Claim: The Debtor, as to Bank of America’s claim, seeks to: (i) strip off the mortgage lien as wholly unsecured pursuant to 11 U.S.C. Section 506(a);

and (ii) pay Bank of America \$0.00 on its resulting unsecured claim based upon the Debtor's discharge she received pursuant to 11 U.S.C. Section 727(a).

An Order was entered on June 23, 2010 (Doc. No. 45) granting the Debtor's Amended Motion to Avoid Bank of America's lien. The Order was entered in error and is due to be vacated for the reasons set forth below.

Woodland Boulevard

The Debtor owns real property located at 2650 North Woodland Boulevard, Deland, Florida 32720 ("Woodland Boulevard") which is encumbered by a first-priority mortgage held by OneWest. OneWest filed Claim No. 3-1 asserting a secured claim of \$178,419.06.

The Debtor seeks to, citing 11 U.S.C. Sections 727(a) and 524(a)(2): (i) value Claim No. 3-1 at \$0.00; (ii) avoid the lien; and (iii) pay OneWest \$0.00 on the unsecured portion of its claim on the basis the underlying debt was fully discharged in the Debtor's previous bankruptcy case pursuant to 11 U.S.C. Section 727.

An Order was entered on October 20, 2010 (Doc. No. 55) granting the Debtor's Motion to Value OneWest's secured claim. The Order was entered in error and is due to be vacated for the reasons set forth below.

Analysis

The Debtor's Motions are governed by Section 1328(f)(1) of the Bankruptcy Code, as enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Section 1328(f)(1) provides:

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter

11 U.S.C. § 1328(f)(1). The filing of a petition constitutes an “order for relief” pursuant to 11 U.S.C. Section 301(b). The four-year look-back period of Section 1328(f)(1) runs from the date of filing of the debtor’s prior bankruptcy case and ends upon the filing of the Chapter 13 petition. Carroll v. Sanders (In re Sanders), 551 F.3d 397, 399-400 (6th Cir. 2008); Branigan v. Bateman (In re Bateman), 515 F.3d 272, 277-78 (4th Cir. 2008) (addressing Section 1328(f)(2)). The “four-year embargo begins on the date of filing, not the date of discharge.” In re Sanders, 551 F.3d at 400.

The Debtor filed her Chapter 7 case on January 4, 2008. She filed this Chapter 13 case on September 15, 2009, which is within four years of the petition date of her Chapter 7 case. The Debtor is precluded from receiving a discharge in the pending case pursuant to 11 U.S.C. Section 1328(f)(1).

The Debtor requires a discharge in this case to permanently modify the claims of Litton, Bank of America, and OneWest. In re Jarvis, 390 B.R. 600, 606 (Bankr. C.D. Ill. 2008). Where a debtor is ineligible to receive a discharge in a Chapter 13, any modifications to the creditors’ rights are not permanent and have no binding effect once the plan ends. In re Lilly, 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007).

Because the Debtor is precluded from receiving a discharge in her Chapter 13 case, her Motions to cram down and avoid the claims of Litton, Bank One, and OneWest are due to be denied. The Orders entered regarding the Bank One and OneWest claims (Doc. Nos. 45, 55) are due to be vacated pursuant to 11 U.S.C. Section 1328(f)(1).

The Debtor, based upon her ineligibility to receive a discharge pursuant to Section 1328(f)(1), may decide to not further pursue this bankruptcy case. She shall be granted an opportunity to inform the Court as to her intentions regarding this case.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor Aurora Perez Gomez is not eligible for a discharge in the above-captioned case pursuant to 11 U.S.C. Section 1328(f)(1); and it is further

ORDERED, ADJUDGED and DECREED that the Debtor shall, within fourteen (14) days of the entry of this Order, file with the Court and serve on the Chapter 13 Trustee a Notice setting forth her intentions regarding this Chapter 13 case.

Dated this 7th day of December, 2010.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge