UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

MICHAEL IBUOS and PAMELA DAVIS IBUOS,

Debtors.
_____/

Case No. 3:03-bk-06237-JAF
Chapter 13

MICHAEL IBUOS and PAMELA DAVIS IBUOS,

Plaintiffs,

vs.

EQUITY ONE, INC. and NATIONAL CAPITAL MANAGEMENT, LLC,

Defendants.
_____/

Adv. Pro. No. 3:07-ap-00264-JAF

ORDER DENYING DEBTORS' MOTION FOR SUMMARY JUDGMENT AND GRANTING NATIONAL CAPITAL MANAGEMENT LLC'S MOTION FOR SUMMARY JUDGMENT

This proceeding came before the Court on the (i) Motion for Summary Judgment as to Liability on Counts I and II of Complaint (Doc. No. 32) filed by Michael Ibuos and Pamela Davis Ibuos, the Plaintiffs and Debtors herein ("Debtors"), requesting summary judgment on their Complaint (Doc. No. 1); (ii) the Motion for Summary Judgment (Doc. No. 33) filed by Defendant National Capital Management, LLC ("National Capital"). Upon a review of the pleadings and the applicable law, the Court finds it appropriate to deny Debtors' Motion for Summary Judgment and grant National Capital's Motion for Summary Judgment. The following facts are undisputed.

Undisputed Facts

Around May 2002, Debtors bought an air conditioning unit and financed the purchase through a loan obtained from Equity One, Inc. ("Equity One"). On May 13, 2002, Equity One recorded a UCC-1 financing statement evidencing Equity One's security interest in the air conditioning unit.

On June 19, 2003, Debtors filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. (Main Case Doc. No. 1). As of the petition date, Debtors owed Equity One approximately $1,521.42 on the air conditioning unit. Equity One filed a secured proof of claim for $1,521.42 on July 2, 2005, which was designated as Claim No. 2. On November 26, 2003, Debtors filed their Amended Chapter 13 Plan (Main Case Doc. No. 27) (the "Plan").[1] On March 23, 2004, the Court entered an Order Confirming Chapter 13 Plan Allowing Claims and Directing Distribution. (Main Case Doc. No. 47).

On November 17, 2004, National Capital acquired Equity One's claim pursuant to an Asset Purchase Agreement dated July 14, 2004 between Equity One and National Capital. On November 17, 2004, National Capital recorded a UCC-3 Assignment Statement and a UCC-3 Continuation Statement (the "Continuation Statement"). On November 6, 2006, Equity One and National Capital filed a Joint Notice of Transfer of Claim pursuant to Federal Rule of Bankruptcy Procedure 3001(E)(2) and Waiver of Opportunity to Object (Main Case Doc. No. 61), which notified Debtors of National Capital's acquisition of Equity One's claim and security interest.

On March 7, 2007, the Court entered a Discharge of Debtor After Completion of Chapter 13 Plan (Main Case Doc. No. 67) (the "Discharge Order"). On October 11, 2007, Debtors initiated

[1] Simultaneously with their filing of the Plan, Debtors filed a Motion to Value Secured Claim No. 2 of Equity One (Main Case Doc. No. 30) (the "Motion to Value Secured Claim"). The Motion to Value Secured Claim sought to value the air conditioning unit at $250.00 and the Plan proposed to pay $250.00 to Equity One in equal monthly installments with interest at the rate of 8% per annum for a period of 42 months. Equity One did not file a response to the Motion to Value Secured Claim. On December 19, 2003, the Court entered an Order Granting Motion to Value Secured Claim No. 2 (Main Case Doc. No. 38), valuing Equity One's claim at $250.00.

this adversary proceeding by filing the Complaint for Automatic Stay and/or Discharge Violation (Doc. No. 1), seeking damages and attorney's fees for alleged violations of the automatic stay and the discharge injunction. However, Debtors inadvertently served the original Complaint on an incorrect defendant. A default judgment was entered and the adversary proceeding was closed on February 29, 2008. Debtors subsequently discovered their error and on May 28, 2008, filed a Motion to Reopen Adversary Case to Correct Harmless Error in Judgment and for Leave to Amend Complaint by Interlineation. (Doc. No. 19).

On June 2, 2008, National Capital recorded a UCC-3 Termination Statement (the "Termination Statement"), terminating National Capital's security interest in Debtors' air conditioning unit. On June 18, 2008, the Court entered an Order Granting Plaintiff's Motion to Reopen Adversary Case to Correct Harmless Error in Judgment and for Leave to Amend Complaint by Interlineation (Doc. No. 21), and deemed the Amended Complaint to be filed as of June 18, 2008. On July 9, 2008, National Capital filed its Answer to the Amended Complaint (Doc. No. 26), denying all material allegations.

On May 22, 2009, Debtors filed their Motion for Summary Judgment as to Liability on Counts I and II of Complaint (Doc. No. 32), requesting summary judgment on their Complaint (Doc. No. 1). On June 5, 2009, National Capital filed its Motion for Summary Judgment (Doc. No. 33).

Summary Judgment Standard

Both Debtors and National Capital seek summary judgment as to National Capital's liability pursuant to Federal Rule of Civil Procedure 56(c). Granting summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2007). The

moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The non-moving party, after a movant makes a properly supported summary judgment motion, must establish specific facts showing the existence of a genuine issue of fact for trial. Fed. R. Civ. P. 56(e). The non-moving party may not rely on the allegations or denials in its pleadings to establish a genuine issue of fact, but must come forward with an affirmative showing of evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A court determining entitlement to summary judgment must view all evidence and make reasonable inferences in favor of the party opposing the motion. Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995).

Application to Instant Case

The two counts set forth in the Amended Complaint respectively allege that: (i) National Capital's filing of the Continuation Statement violated the automatic stay; and (ii) National Capital violated the discharge injunction by not terminating its security interest immediately upon entry of the Discharge Order.

Count I: Alleged Automatic Stay Violation. Debtors argue National Capital's filing of the Continuation Statement violated Bankruptcy Code Section 362(a)(4), which stays "any act to create, perfect, or enforce any lien against property of the estate", and Section 362(a)(5), which stays "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case. . ."

National Capital responds that Section 362(b)(3) provides an exception from the automatic stay for the filing of continuation statements. Specifically, Section 362(b)(3) excludes from the stay "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) [of

the Code]. . .” Section § 546(b) provides, in relevant part, that a trustee’s rights and powers are subject to any generally applicable law that “provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.” 11 U.S.C. § 546(b)(1)(B).

Section 362(b)(3)’s exception permits a creditor to continue a lien against a debtor without violating the automatic stay, if there is a state law providing for (i) maintenance or continuation of perfection of a lien on property (ii) that is effective against a lienholder (iii) who obtains an interest in the property before action is taken to maintain or continue perfection. In re Hayden, 308 B.R. 428, 432 (9th Cir. BAP 2004). In other words, “[§] 362(b)(3) permits filing of the continuation statement [under the UCC], which enables the creditor to assure its continued perfection.” Toranto v. Dzikowski, 380 B.R. 96, 100 (S.D. Fla. 2007) (citing 3 Collier on Bankruptcy ¶ 362.05, at 362-55 (15th Rev. Ed. 2007)).

Debtors argue the reference to “generally applicable law” in Section § 546(b) necessitates an analysis of Fla. Stat. § 679.515, which states that “a filed financing statement is effective for a period of 5 years. . .” and “[a] continuation statement may be filed only within 6 months before the expiration of the 5-year period. . .” Fla. Stat. § 679.515(1),(4). Equity One filed the original financing statement in May, 2002, and National Capital filed the Continuation Statement in November, 2004. National Capital’s filing of the Continuation Statement was not within the “6 months before the expiration of the 5-year period” provided by Fla. Stat. § 679.515(4). Hence, Debtors argue the filing of the Continuation Statement was not effective and thus not protected by Section 362(b)(3)’s exception to the automatic stay.

The Court disagrees with Debtors' argument. It is clear Section 362(b)(3) operates to permit a secured creditor to file a continuation statement despite the automatic stay.[2] The Court has found no persuasive case law, legislative history, or other commentary indicating that the mere untimely filing of a continuation statement renders Section 362(b)(3)'s exception meaningless. Consequently, regardless of whether or not the Continuation Statement was timely-filed, the Court will not impose liability on National Capital for a violation of the automatic stay.

Count II: Alleged Discharge Violation. Debtors argue National Capital's failure to terminate its security interest immediately upon entry of the Discharge Order violated Bankruptcy Code Section 524(a)(2), which "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . ." Debtors do not claim National Capital took any affirmative steps towards enforcing its security interest or collecting any debt. Debtors also do not claim that, upon being requested by Debtors to release its lien, National Capital refused to do so. Debtors simply claim National Capital failed to terminate its security interest immediately upon entry of the Discharge Order.

Bankruptcy courts have held that Section 524 "require[s] some affirmative collection efforts on the part of the creditor in order [to violate the] discharge injunction." In re Dendy, 396 B.R. 171, 179 (Bankr. D.S.C. 2008). "The mere act of refusing to release a lien, even if invalid, does not violate the discharge injunction absent an attempt to enforce the lien, a violation of a court order, or an intent to collect the debt." In re Casarotto, 407 B.R. 369, 377 (Bankr. W.D. Mo. 2009) (citing Dendy, 396 B.R. at 183).

[2] In fact, subsequent revisions to the U.C.C. establish a creditor "must file a timely continuation statement if it wishes to maintain perfection and to preserve the priority position established by its initial financing statement." See G. Ray Warner, Lien on Me: Continuing Perfection During Bankruptcy Under Revised Article 9, Am. Bankr. Institute J., April 2001, at 22.

There may be cases in which a deliberate act of omission may constitute a violation of the stay when a creditor fails to cure a previous violation or otherwise restore the status quo (In re Banks, 253 B.R. 25 (Bankr. E.D.Mich. 2000)), but such cases typically involve a creditor's obligation to take whatever action necessary to stop or reverse ongoing litigation or collection efforts. Count II involves neither the automatic stay nor ongoing litigation or collection efforts. Put plainly, "[t]he failure to release a lien is simply not within the proscription of § 524(a)(2)." In re Weichmann, 2001 WL 1836189, *3 (Bankr. N.D.Ill. 2001). Consequently, the Court will not impose liability on National Capital for the alleged discharge violation.

Conclusion

National Capital has established no genuine issues of material fact exist and National Capital is entitled to judgment as a matter of law. Debtors have not established specific facts showing the existence of a genuine issue of fact for trial. Summary judgment as to National Capital's liability on Counts I and II is due to be granted in favor of the National Capital. Upon the foregoing, it is

ORDERED

1. Debtors' Motion for Summary Judgment is denied.

2. National Capital's Motion for Summary Judgment is denied.

3. The Court will enter a separate judgment consistent with this Order.

DATED this 30 day of September, 2009 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge