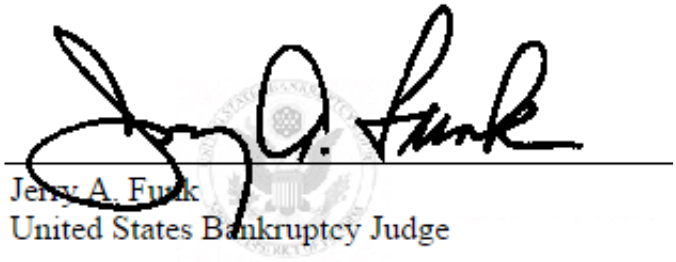
ORDERED.

Dated: February 21, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

DENNIS FOGELL,
A/K/A DENNIS J. FOGELL,

Debtor,
_____/

Case No. 3:14-bk-0436-JAF
Chapter 11

GREEN TREE SERVICING, LLC,
N/K/A DITECH FINANCIAL, LLC

Plaintiff,
v.

BANK OF AMERICA, N.A.,

Defendant.
_____/

Adv. Pro. No. 3:15-ap-0262-JAF

ORDER GRANTING DEBTOR'S AMENDED MOTION FOR NEW TRIAL OR TO ALTER/AMEND JUDGMENT

This proceeding is before the Court on: 1) DENNIS FOGELL's (the "Debtor's") Amended Motion for New Trial or to Alter/Amend Judgment (Doc. 29); 2) Plaintiff GREEN TREE SERVICING, LLC n/k/a DITECH FINANCIAL, LLC's ("Ditech's") Response to Debtor's

motion (Doc. 31); and 3) Debtor's Reply to Ditech's Response in Opposition (Doc. 32). For the reasons stated herein, Debtor's Motion for New Trial or to Alter/Amend Judgment is granted in that the Court reconsiders/clarifies the Consent Judgment, as follows. The Consent Judgment does not impose any equitable lien and has no binding or preclusive effect on Debtor's property rights nor on Debtor's rights to modification under 11 U.S.C. § 1322(b)(2).

Background

On January 30, 2014, Debtor filed a Chapter 13 petition. (Doc. 1 in 3:14-bk-0436). Debtor's Schedule A listed the following two pieces of real property: a) Parcel 234, Debtor's homestead property (the "Homestead Property"), and b) Parcel 235, a vacant lot adjacent to the Homestead Property (the "Vacant Property"). (Doc. 1 at 8, in 3:14-bk-0436). On April 16, 2014, Bank of America filed a proof of claim as to a single mortgage against only the Homestead Property, which secured a revolving credit agreement. (Claim 4-1 at 17). On May 13, 2014, Ditech filed a proof of claim as to a single mortgage against both the Homestead Property and the Vacant Property, which secured a promissory note.[1] (Claim 6-1 at 28). The Bank of America mortgage was recorded in 2005 (the "2005 BOA Mortgage"). The Ditech mortgage was recorded in 2007 (the "Ditech Mortgage").

On March 11, 2015, Debtor filed a motion to value Claim 6. (Doc. 62, in 3:14-bk-0436). Ditech filed an objection and a hearing was held. (Doc. 65, in 3:14-bk-0436). On August 14, 2015, the Court granted the motion (the "Order Valuing Claim 6"). (Doc. 80, in 3:14-bk-0436). The Order Valuing Claim 6 valued the Homestead Property and the Vacant Property, collectively,

[1] The original lender was Paramount Financial, Inc., which later assigned its mortgage rights to GMAC Mortgage, LLC. GMAC Mortgage subsequently assigned all of its right to Green Tree Servicing, LLC, which is now known as Ditech Financial, LLC—i.e., the Plaintiff in this proceeding. While Ditech was not the original lender, the mortgage is referred to as the Ditech Mortgage for simplicity.

at $264,000. (Doc. 80 ¶¶ 2-3, in 3:14-bk-0436). As to the 2005 BOA Mortgage, the Court found: "The total amount of the 1st mortgage on the real property as of the Petition Date was $181,944.57 pursuant to Proof of Claim #4 filed by Bank of America, N.A." (Doc. 80 ¶ 4, in 3:14-bk-0436). As to the Ditech Mortgage, the Court found: "Based on the [Bank of America] prior lien against the collateral, [Ditech] shall have a secured claim of $82,055.43 and an unsecured claim of $167,112.32." (Doc. 80 ¶ 5, in 3:14-bk-0436). The order was "without prejudice to any pending adversary proceeding seeking to determine the extent, validity, and/or priority of any liens on the real property as to [Ditech] and Bank of America." (Doc. 80 ¶ 6, in 3:14-bk-0436).

On August 3, 2015—days before the Order Valuing Claim 6 was entered—Ditech filed this adversary proceeding, naming Bank of America as the sole Defendant. (Doc. 1). The complaint was styled: "Complaint to Determine Extent, Validity, and Priority of Liens." (Doc. 1). Ditech alleged that, in 2007, Ditech's predecessor-in-interest (Paramount Financial, Inc.) loaned Debtor $190,000.00, which was secured by the 2007 Ditech Mortgage against both the Homestead Property and the Vacant Property. (Doc. 1 ¶ 5). In contrast, Bank of America held two individual mortgages against the Homestead Property—that is, a 2004 Bank of America mortgage (the "2004 BOA Mortgage") against the Homestead Property and the 2005 BOA Mortgage also against the Homestead Property. (Doc. 1 ¶ 11). The 2004 and 2005 BOA Mortgages were attached to the complaint as Exhibits G and H.[2] (Doc. 1, Ex. G.-H.).

Ditech further alleged that the intent behind the 2007 Ditech Mortgage was for the loan proceeds to be used to pay off *both* mortgages held by Bank of America, thereby making the Ditech Mortgage first priority. (Doc. 1 ¶¶ 12-13). Apparently, the 2004 BOA Mortgage was paid in full, in the amount of $66,540.39, yet, for some reason, the 2005 BOA Mortgage was never paid in full.

[2] Exhibit G to the instant complaint appears to be the same mortgage attached to Claim 4-1 of the main case.

For this reason, the complaint alleges that, although the 2005 BOA Mortgage is "prior in time" to the 2007 Ditech Mortgage, the Ditech Mortgage is "superior in interest to the 2005 BOA Mortgage in the amount paid to satisfy the 2004 BOA Mortgage under the doctrine of equitable **subrogation**." (Doc. 1 ¶ 24) (emphasis added). The complaint does not cite 11 U.S.C. § 510(c) or mention "equitable subordination." The relief requested by Ditech is couched as "declaratory judgement" relief. The complaint requests a "declaration" that the 2005 BOA Mortgage is "subordinated" to the Ditech Mortgage, in the amount of $66,540.39. (Doc. 1 at 6).

On August 22, 2016, a consent judgement was entered in this proceeding (the "Consent Judgment"). (Doc. 25). Only Ditech and Bank of America were parties to the Consent Judgment. The Consent Judgment provided that "Ditech shall have a first priority equitable lien in the amount of $66,540.39 ([the] 'Equitable Lien'), which is superior to the [2005 BOA Mortgage]." (Doc. 25 ¶ 1). The Consent Judgment also provided that the 2005 BOA Mortgage "shall take a second lien position against the property, after Ditech's Equitable Lien," and the remainder of the 2007 Ditech Mortgage lien "shall take a third position after Ditech's Equitable Lien and the [2005 BOA Mortgage] lien." (Doc. 25 ¶¶ 2-3).

Debtor filed his Motion for New Trial or to Alter/Amend Judgment nine days later, on August 31, 2016. (Doc. 27). Debtor then filed his amended motion, which is the subject of this order. (Doc. 29). Debtor argues "[t]he Consent Judgment modifies the collateral of the Greentree/Ditech lien to include only the [Homestead Property] . . . thereby preventing modification of the lien amount [under § 1322(b)(2)] as if such protection existed prior to the filling of the Chapter 13" petition because the Consent Judgment splits Ditech's mortgage lien into two separate liens—one of which is now a first-priority equitable lien against solely the Homestead

Property. (Doc. 29 at 3 ¶ 6). Debtor claims this denies him procedural due process and frustrates the intent of the Bankruptcy Code in relation to § 1322(b)(2).

Rule 59 standard

Generally, the purpose of a Rule 59 motion "is to present newly discovered evidence or to correct manifest errors of law or fact in the Court's prior order." In re CHC Indus., Inc., 381 B.R. 385, 389 (Bankr. M.D. Fla. 2007); Fed. R. Civ. P. 59(a),(e); Fed. R. Bankr. P. 9023 (making Rule 59 applicable to bankruptcy cases). More specifically, Rule 59 "grants authority to the Court to reconsider orders after entry only upon one of the following grounds: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; (3) to correct a clear error of law; or (4) to prevent manifest injustice." In re Brewer, 500 B.R. 130, 136 (Bankr. M.D. Fla. 2013); 11 Fed. Prac. & Proc. § 2810.1 (3d ed.).

A motion for a new trial is committed to the sound discretion of the trial court. Sec. & Exch. Comm'n v. Radius Capital Corp., 653 F. App'x 744, 753 (11th Cir. 2016). "It is the judge's right, and indeed duty, to order a new trial if it is deemed in the interest of justice to do so." 11 Fed. Prac. & Proc. § 2803 (3d ed.). Most importantly, "[a] motion under Rule 59 is an extraordinary remedy and should not be used 'as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant.'" In re Brewer, 500 B.R. at 136.

Analysis

Procedural "[d]ue process requires notice and an opportunity to be heard." In re Soderstrom, 484 B.R. 874, 878 (M.D. Fla. 2013). "Due process is a flexible concept, tailored to the facts of the case to which it is applied; the denial of procedural due process can be cured by granting an equitable remedy." Regions Bank v. Hyman, 91 F. Supp. 3d 1234, 1244 (M.D. Fla.

2015). "Bankruptcy courts are authorized to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code." In re Soderstrom, 484 B.R. at 878.

Section 1322(b)(2) of the Bankruptcy Code "provides that a Chapter 13 plan cannot modify the rights of holders of secured claims secured only by a security interest in the debtor's principal residence." In re Doyle, No. 3:14-BK-5860-JAF, 2016 WL 6905929, at *1 (Bankr. M.D. Fla. Nov. 23, 2016); 11 U.S.C. § 1322(b)(2). This anti-modification provision "first requires bankruptcy courts to determine the value of the homestead lender's secured claim under section 506(a) and then to protect from modification any claim that is secured by any amount of collateral in the residence." In re Tanner, 217 F.3d 1357, 1360 (11th Cir. 2000).

In opposition to Debtor's motion to reconsider/amend, Ditech relies on In re Thiel, 275 B.R. 633 (Bankr. M.D. Fla. 2001). In Theil, the plaintiff was the debtor's father. The father brought an adversary proceeding against the debtor, seeking an equitable lien against the debtor's homestead. A state court had found the debtor unlawfully converted/liquidated the father's certificates of deposit ("CDs") to pay the mortgage on the homestead. The debtor argued "the imposition of an equitable lien will effectively make non-dischargeable a debt that would otherwise be dischargeable pursuant to Section 1328 of the Bankruptcy Code" and that this "would impermissibly frustrate the purpose of the Bankruptcy Code." Thiel, 275 B.R. at 638. The Theil court rejected the debtor's argument and imposed an equitable lien against the debtor's homestead in favor of the plaintiff-father. Ditech contends the same result should apply here.

Importantly, Thiel was an equitable subrogation proceeding governed by state law, and not an equitable subordination proceeding governed by 11 U.S.C. § 510(c). Applying Florida law, the Theil court stated: "When an equitable lien is sought against homestead real property, some

fraudulent or otherwise egregious act **by the beneficiary of the homestead protection** must be proven." Thiel, 275 B.R. at 638 (emphasis added). The Theil court reasoned that the debtor's conversion of the CDs was "sufficient to establish the predicate fraudulent or egregious act necessary to impose an equitable lien." Id. at 639.

Bank of America did not file a written response here; however, its oral argument discussed equitable *subordination* and contended that Debtor has no due process rights implicated in an equitable subordination proceeding, under 11 U.S.C. § 510(c). Equitable subrogation and equitable subordination are similar, but the key difference is that equitable subrogation can be used to (among other things) impose an equitable property lien where no lien exists, while equitable subordination, under § 510(c), is normally used to alter the priority of existing liens. Compare In re Mahan, 373 B.R. 177, 183 (Bankr. M.D. Fla. 2007) ("In order to equitably subordinate a claim, a court must find that: (1) the claimant engaged in some type of inequitable conduct; (2) the conduct resulted in injury to the creditors or conferred an unfair advantage on the claimant; and (3) subordination of the claim is not inconsistent with the Bankruptcy Code.") with Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018, 1025 (Fla. 2001) ("Equitable subrogation, a sister remedy to the equitable lien, places one party to whom a particular right does not legally belong in the position of the right's legal owner.") (quoting Greta K. Kolcon, *Common Law Equity Defeats Florida's Homestead Exemption*, 68 Fla. B.J., Nov. 1994, at 54-55).[3]

Here, Ditech holds a single mortgage lien (i.e., the 2007 Ditech Mortgage) against two parcels, one of which is the Homestead Property. The Consent Judgment created a lien that did

[3] Equitable subrogation is governed by state law. In re Hamada, 291 F.3d 645, 651 (9th Cir. 2002) ("Equitable subrogation is a doctrine governed by state law."); In re Celotex Corp., 289 B.R. 460, 468 (Bankr. M.D. Fla. 2003) ("It is generally believed state law governs the application of equitable subrogation."). Equitable subordination, in bankruptcy, is governed by § 510(c) and federal case law.

not previously exist by imposing an equitable lien against only the Homestead Property in the amount of $66,540.39. Ditech contends: "Contrary to Debtor's suggestion, Ditech's lien continues to encumber both parcels." (Doc. 31 ¶ 10). Ditech's contention, however, differs with the plain language of paragraph 1 of the Consent Judgment. Moreover, even assuming Ditech and Bank of America intended for the Equitable Lien to exist against both parcels collectively, an amended consent judgment could have put any such ambiguity to rest. This ambiguity, alone, warrants reconsideration/clarification of the Consent Judgment, under these circumstances.

More importantly, however, the anti-modification provision of § 1322(b)(2) would not apply to the 2007 Ditech Mortgage since that mortgage-debt is not "a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). In contrast, the anti-modification provision would apply to the Equitable Lien if the Equitable Lien existed against solely the Homestead Property. In other words, just as he contends, Debtor would be prevented from modifying the debt secured by the Equitable Lien, under § 1322(b)(2). This implicates substantive pre-petition property and due process rights of Debtor, and tends to frustrate the purpose of the Bankruptcy Code insofar as it denies a Title 11 remedy without Debtor having an opportunity to present evidence and argument on the issue.

Finally, Thiel supports Debtor's position even though it was cited in opposition. The pertinent takeaway from Thiel is that it was an action *against the debtor*, wherein the debtor received a full and fair opportunity to be heard. The instant proceeding is, likewise, a subrogation proceeding because a) "subrogation" is the language used in the complaint, b) § 510(c) was not cited in the complaint, c) all argument from Ditech (the Plaintiff) pertains to equitable subrogation even though Defendant Bank of America discussed equitable subordination, d) the result sought by Ditech was the imposition an equitable lien that did not otherwise exist, and e) the actual result

was the imposition of an equitable lien that did not previously exist. Yet, Debtor was never a party to the action. To impose an equitable lien against Debtor's homestead, without Debtor being a party to the action or the agreement, is patently untenable and manifestly unjust under these circumstances—whether viewed as a question of due process or a question of equity.

Ditech and Bank of America may be free to enter a pure subordination agreement if they choose, see 11 U.S.C. § 510(a), but they are not free to alter Debtor's rights by agreement amongst only themselves. Therefore, because Ditech and Bank of America agreed to the terms of the Consent Judgment without involving Debtor, the Consent Judgment shall have no binding or preclusive effect on any of Debtor's rights—including his property rights and his Title 11 rights to modification under 11 U.S.C. § 1322(b)(2). Accordingly, it is ORDERED that Debtor's Amended Motion for New Trial or to Alter/Amend Judgment is GRANTED in that the Consent Judgment is hereby reconsidered and clarified as follows:

1. Paragraph 1 of the Consent Judgment is vacated and void.

2. The Consent Judgment creates no equitable lien against the Homestead Property or any other property owned by Debtor, and no such equitable lien now exists.

3. The Consent Judgment shall have no binding or preclusive effect on Debtor's rights in relation to the Homestead Property or any other property owned by Debtor.

4. The Consent Judgment shall not preclude Debtor from seeking modification of the 2007 Ditech Mortgage, pursuant to 11 U.S.C. § 1322(b)(2) or any other provision of law.

5. The remainder of the terms of the Consent Judgment remain in effect.

6. Debtor's Chapter 13 plan shall operate with respect to the creditor-debtor relationships as those relationships and rights existed at the time Debtor filed his bankruptcy petition.