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IN THE UNITED STATES BANKRUPTCY COURT DISTRICT OF UTAH 350 South Main Street, Salt Lake City, Utah 84101	
IN RE: [PARTY NAME REDACTED] Debtor(s)	Case No. Xx-xxxxx (Dismissed) Judge Glen E. Clark Chapter 13 FILED ELECTRONICALLY
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF [PARTY NAME REDACTED] TO SET ASIDE DISMISSAL AND ENFORCE SALE TO PURCHASER	

[PARTY NAME REDACTED], by and through her counsel of record, David W.M. Snow, hereby submits this memorandum of points and authorities in opposition to the Motion of [PARTY NAME REDACTED] to Set Aside Dismissal and Enforce Sale to Purchaser.

I. INTRODUCTION

Through his motion, [PARTY NAME REDACTED] seeks to set aside the voluntary dismissal of this chapter 13 case, and enforce what he claims was an order of the court directing the debtor to sell the real property previously used as the debtor's residence and located at [PROPERTY ADDRESS REDACTED] to [PARTY NAME REDACTED]. The motion makes

defamatory allegations which [PARTY NAME REDACTED] apparently believes constitute cause to set aside the voluntary dismissal, but fails to cite any authority under which a voluntary dismissal of a previously unconverted chapter 13 case can be denied or set aside, or under which this court could void a real estate transaction entered into by the debtor and a non-debtor joint tenant following that voluntary dismissal.

II. FACTS

The relevant facts and basic outline of events in the case are as follows:

1. The debtor, together with her housemate [PARTY NAME REDACTED], owned the real property in question as joint tenants. The debtor and [PARTY NAME REDACTED] had struggled with the mortgage payments for several years and through a number of attempts to cure the payment arrears through chapter 13 bankruptcy.

2. The beneficiary under the deed of trust secured by the real property was HSBC Mortgage. In the present case, HSBC filed a Proof of Claim No. 6, indicating a total balance due of \$336,398.46, of which \$51,296.89 was for pre-petition arrears.

3. The debtor indicated that the total fair market value of the property was approximately \$280,000.00 at the time of filing, based on a comparable sales valuation obtained through a free online service. During the course of the debtor's attempts to negotiate a short sale, the property was determined to be worth substantially less than \$280,000.00 because of significant necessary repairs.

4. The bankruptcy case was filed on November 11, 2006, with the original confirmation hearing set for January 16, 2007. The case was originally filed under chapter 13 and has not been converted to or from another chapter.

5. The confirmation hearing was continued three times because of preconfirmation plan modifications.

6. At the hearing held on July 3, 2007, the debtor was ordered to cure her plan payment delinquency prior to the continued confirmation hearing to be held on July 30, or the case would be dismissed. The debtor was not able to make those payments.

7. On May 15, 2007, HSBC Mortgage Services, Inc. filed a motion for relief from the automatic stay in relation to the real property identified above, citing a post-petition payment delinquency as cause for relief.

8. The debtor was unable to oppose this motion or cure the post-petition delinquency, and the order terminating stay was entered on June 5, 2007.

9. In her last proposed amended plan, the debtor modified her plan to provide for HSBC's anticipated mortgage deficiency as an unsecured claim, and proposed to reduce her plan payment.

10. In the meantime, the debtor and the joint tenant became increasingly concerned about the appearance of a foreclosure on their credit, and began working with an organization called Foreclosure Advocates to negotiate short sale terms with HSBC. Those negotiations resulted in the rescheduling of two foreclosure sale dates in July, with the final sale date set for July 30, 2007.

11. Foreclosure Advocates provided debtor's counsel with the terms of its preliminary agreement with HSBC, and those terms were incorporated into the Debtor's Motion to Sell Property, which came before the court on July 25, 2007.

12. Concurrently with her motion to sell, the debtor filed an Application to employ Realtor Ross Patterson. The Court approved that application and issued the Order authorizing employment on July 19, 2007.

13. Minutes before the July 25 hearing, debtor's counsel received a fax from Foreclosure Advocates indicating HSBC's final payoff terms, which were different from those outlined in the debtor's motion. Instead of the \$160,000.00 payoff contemplated in the motion, HSBC would only agree to accept a payoff of \$198,543.00, which they agreed to accept as the net balance remaining with an overall sale price of \$210,000.00 less the realtor commissions approved by the Court and other transaction costs.

14. The debtor's motion to sell was initially set by Court as an uncontested matter, because no written objections had been filed. (Although the hearing was set of reduced notice and the prior two days had been Court holidays.)

15. As debtor's counsel indicated to the Court at the time, he did not mention the changed terms of the short sale when the case was initially called on the uncontested matters calendar because he had not actually seen the Foreclosure Advocates fax and because the changed terms of the transactions resulted in a net benefit to creditors by reducing the amount of HSBC's unsecured claim. (Debtor's counsel was only able to view the fax after stepping outside

the court during a brief recess and logging into his office computer from his laptop through the Court's wireless internet system.)

16. When the debtor's motion to sell was called, [PARTY NAME REDACTED] stood and announced that he was a California attorney representing a third party who wanted to make a higher offer on the property. At this point, debtor's counsel approached the court and asked for a brief recess while he discussed the offer with [PARTY NAME REDACTED].

17. At the time of the hearing, it was unknown to debtor's counsel that [PARTY NAME REDACTED] was neither a member of the Utah Bar or the Bar for the U.S. District Court for the District of Utah, even though [PARTY NAME REDACTED] clearly stated that he was appearing in a representative capacity. A copy of the Utah Bar Membership Search results and the California Bar Membership search results are attached hereto as Exhibit "A."

18. Following the recess, and after some discussion, the court made an oral ruling authorizing the sale of the property for \$198,543.00. The minute entry for the hearing, appearing as a PACER docket entry only states that the "House may be sold for \$198,543.00." No other orders or directives, including any identification of a specific purchaser or who was to prepare any written order were made, or appear in the docket entry. A copy of the PACER docket entry is attached hereto as Exhibit "B."

19. Following the hearing, and after discussing the matter with counsel, the debtor determined to voluntarily dismiss her bankruptcy case pursuant to Section 1307 of the bankruptcy code, and filed a motion and notice to that effect on July 26, 2007.

20. The Court signed the order of dismissal on July 27, 2007.

21. The debtor and Ms. [PARTY NAME REDACTED] completed a closing on the property on July 27 and the transaction closed and funded that day, with the property being sold to [PARTY NAME REDACTED] according to the terms negotiated by Foreclosure Advocates with HSBC.

22. According to phone records, [PARTY NAME REDACTED] attempted to contact debtor's counsel once on Thursday, July 26th and twice by phone and once by fax on Monday, July 30. Debtor's counsel notified [PARTY NAME REDACTED] of the dismissal by fax on July 30, not August 1, as claimed in Mr. [PARTY NAME REDACTED]'s pleadings. In addition to preparing the voluntary dismissal requested by the debtor, debtor's counsel was preparing for and in a 2 hour hearing in another court on Thursday, July 26 and was simply unable to return [PARTY NAME REDACTED]'s call. Regardless, [PARTY NAME REDACTED] only attempted to contact debtor's counsel once prior to the dismissal of the case and the sale to Mr. [PARTY NAME REDACTED]. Copy of debtor's counsel's phone log and the July 30th faxes are attached hereto as Exhibit "C."

23. On August 7, 2007, [PARTY NAME REDACTED] filed his Motion to Set Aside Dismissal and Enforce Sale to Purchaser, to which the debtor has filed this objection. [PARTY NAME REDACTED]'s attorney has not scheduled a hearing on the matter.

24. Also on August 7, 2007, [PARTY NAME REDACTED] filed a Notice of Depositions, seeking to depose the debtor and her attorney. The debtor has filed a Motion to Quash in response. The basis of the Motion to Quash is that the case is dismissed, and that even

if the case were pending, the notice fails to comply with any required procedure for conducting an examination or deposition of the debtor or any other interested party.

III. ARGUMENT

The Motion to Set Aside the Dismissal contains a number of factual inaccuracies, which inaccuracies could have been easily determined from a review of the record available in this case. First, the Court simply did not order the debtor to sell the property to [PARTY NAME REDACTED] or anyone else at the hearing on July 25. Mr. [PARTY NAME REDACTED] indicated to the court that he was representing a third party, and in that capacity, the court had it ordered a specific purchaser at all, would have ordered the sale either to the party who had contracted with the debtor, or with [PARTY NAME REDACTED]'s client. Regardless, the court's order as evidenced by the minute entry available on PACER and by a review of the hearing recording, indicates that the court merely issued an order allowing the sale at a particular price and not directing a sale to any particular party. There was also no directive as to who should prepare a written order. Debtor's counsel did prepare and file a proposed order prior to the July 25 hearing, but that order would have been inappropriate given the change in sale price.

Probably the most glaring inaccuracy is the claim that the debtor was ordered to sell the property to [PARTY NAME REDACTED] himself. A sale to [PARTY NAME REDACTED] himself was never requested. In court on July 25, in subsequent phone messages, and in the fax [PARTY NAME REDACTED] sent to debtor's counsel on July 30, Mr. [PARTY NAME

REDACTED] indicated that he represented a third party. The fact that [PARTY NAME REDACTED] now claims to be the purchaser himself is at best a disingenuous attempt to cover the fact that he appeared in a representative capacity in this court without taking even the most basic steps needed to ensure that his appearance was proper. The requirements for admission to the bar of this Court are readily available on the website of the U.S. District Court for the District of Utah. As quoted there, Local Rule DUCivR 831-1.1 requires an attorney to be a member of the Utah State Bar to become a member of the District Court Bar. According to the Utah State Bar online membership search, neither Mr. [PARTY NAME REDACTED] nor any member of his firm are members of the Utah Bar. [PARTY NAME REDACTED] also made no attempt to file an application to appear pro hac vice. Admittedly, such an application might have been difficult given that the court was closed on the two days immediately preceding the July 25 hearing, but at a minimum a disclosure to the court would have been appropriate. If nothing else, [PARTY NAME REDACTED] indicated that he had spent two days in Salt Lake City with nothing to do. (Despite that fact that his California bar record shows that he has an address in Heber City, Utah.) Debtor's counsel and many of his colleagues did not follow the court's lead in taking July 23 and 24 off. [PARTY NAME REDACTED] could have used his free time on those days to find a local attorney to prepare and submit a pro hac vice application when the Court opened on July 25. [PARTY NAME REDACTED]'s California Bar record indicates that he has been an attorney for 37 years. Surely, with that kind of experience, it is not unreasonable to ask that [PARTY NAME REDACTED] comply with the rules, nor is it unreasonable to require that pleadings be brought in the name of a real party in interest. It is simply improper,

and too late, to now claim that his appearance was essentially that of a pro se participant. At a minimum, the Motion to Set Aside the Dismissal should be denied because [PARTY NAME REDACTED] is not the real party in interest in this matter.

The other inaccuracies in the motion relate to [PARTY NAME REDACTED]'s attempts to contact debtor's counsel and the date of counsel's fax to [PARTY NAME REDACTED], as well as the remaining defamatory allegations, made without any basis in fact, as to fraud and collusion in the debtor's voluntary dismissal of her bankruptcy case. [PARTY NAME REDACTED] attempted to contact debtor's counsel only once prior to the dismissal, not multiple times as alleged.

In the motion, [PARTY NAME REDACTED] outlines the events of the case, as he sees them, then alleges that the debtor, her attorney, and Mr. [PARTY NAME REDACTED] have acted fraudulently. Allegations of fraud and collusion are serious, and when made should have some foundation. There is no specific event or act outlined in the motion that could objectively be construed as fraudulent or collusive. Whatever those allegations may actually be, the debtor and her attorney deny them, and given the record as exists in this case, believes the allegations and [PARTY NAME REDACTED]'s motion itself to be frivolous.

Even if specific allegations were identifiable and true, they would not constitute cause to set aside the voluntary dismissal of this chapter 13 case. Under bankruptcy law, there is no cause for setting aside, delaying or denying the debtor's request for a voluntary dismissal of an unconverted chapter 13 case. 11 U.S.C. § 1307(b) states:

“On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.” (emphasis added)

The right of the debtor to a voluntary dismissal at any time in an unconverted chapter 13 case is absolute, based on the plain language of the statute. The debtor is entitled to the dismissal as a matter of right at any time. According to *Collier on Bankruptcy*, the dismissal cannot even be delayed by the court, “even where other parties oppose the dismissal or seek to have the court convert the case to another chapter, since to do so would force a debtor to remain in chapter 13 involuntarily.” (*Collier on Bankruptcy*, 1307-8). The 10th Circuit Bankruptcy Appellate Panel has followed this interpretation of the statute as well, stating that “[p]ursuant to Section 1307(b), if Chapter 13 case has not been converted previously, a debtor has a right to dismiss the case.” (*In re Gilchrist* BAP No. WO-03-095 2004.) [PARTY NAME REDACTED] simply fails in his attempt to argue that the debtor has somehow acted wrongfully or defrauded him by exercising her legal right to dismiss her case.

The dismissal order signed by the Court and Section 1307(b) make the dismissal effective as of the date and time the debtor’s motion to dismiss was filed, which was July 26, 2007 at 11:47 a.m. Upon dismissal, property of the estate becomes property of the debtor. At the time the debtor’s sale to [PARTY NAME REDACTED] was concluded, the real property in question was clearly hers to dispose of as she saw fit. Further, the debtor was a joint tenant in the property. At the time of the sale, the joint tenant and her undivided half interest in the property were not subject to the bankruptcy court’s jurisdiction. [PARTY NAME REDACTED] presents

no explanation or theory as to how, as a matter of law, the Court could order the non-debtor joint tenant to sell the property to any particular individual. If [PARTY NAME REDACTED]'s motion is granted, the best outcome he could hope for would be that he (or his unknown client) would own an undivided half interest in the property.

IV. CONCLUSION

[PARTY NAME REDACTED]'s Motion to Set Aside Dismissal and Enforce Sale to Purchaser should be denied in its entirety, with prejudice. The motion is based on a misinterpretation of the Court's oral ruling of July 25, and of the debtor's rights under bankruptcy law, and the motion is not brought in the name of a real party in interest. The allegations of wrongful behavior are without foundation.

The motion fails to state any claim or legal basis upon which the relief requested may be granted. The bankruptcy code provides the debtor with an absolute right to a voluntary dismissal of her unconverted chapter 13 bankruptcy case at any time, and the motion utterly fails to outline any argument, theory, or basis upon which that right should be infringed or otherwise limited by this Court. Likewise, the Court should not act with regard to [PARTY NAME REDACTED], his status as a bona fide purchaser, or to reverse the sale of the property or any other actions of the debtor or third parties that occurred after the filing of the debtor's motion for voluntary dismissal of the bankruptcy case.

DATED: August 20, 2007

DAVID W.M. SNOW, P.C.

/S/ - David W.M. Snow

Attorney for Debtor