UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ANNETTE BEAMAN Case No. 96-12848 K

Debtor

ORDER REGARDING OLD REPUBLIC INSURANCE FAC

The Court has before it two motions filed by the Debtor. The first, filed on September 10, 1996 and made returnable on September 19, 1996, attempts to utilize 11 U.S.C. § 506(a) and (d) to "strip down" the secured claim of the second mortgagee on her home, from the lien amount of approximately $17,492.82 to a strip down amount of $8,276.00. When that motion came before the Court, there was no appearance in opposition, and it was pointed out to the Court that in fact the second mortgagee - Old Republic Insurance Financial Acceptance Corporation - had filed a secured proof of claim only in the amount of $8,405.07.

The Debtor's counsel asked the Court to approve the Debtor's argument that Old Republic was not entitled to the protection of 11 U.S.C. § 1322(b)(2) because its mortgage lien extended not only to the real estate, but also to "Any money you [the mortgagor] receive if your property is taken by the government, up to the amount of the mortgage." That language was preprinted on the mortgage form. The Debtor cited the case of *Hammond v. Commonwealth Mortgage (In re Hammond)*, 23 F.3d 52 (3d Cir. 1994) for the proposition that this mortgagee had taken a lien on more than just the real estate, and had thus taken itself outside the protection of the "anti-modification provision" contained at 11 U.S.C. § 1322(b)(2). There is much

controversy surrounding the issue presented in *Hammond*,[1] and, in the Court's view, the issue is likely eventually to be resolved either by the United States Supreme Court or by Congress. In light of that fact, and the fact that the Debtor's plan is expected to last five years, the Court thought it to be in the parties' best interest that the issue be resolved, if possible, on the basis of the fact that the creditor had filed a claim in what appeared to be the strip down amount, and that a procedure be used that made it clear that upon payment of the amount set forth in the Proof of Claim, the Debtor would be entitled to a release of the mortgage. Consequently, the Court invited the Debtor's counsel to file a new motion on that basis, and the Court continued the § 506 motion to be heard further at the same time as the new motion.

The Debtor's attorney then filed a motion accordingly. That motion sought to have the mortgagee's claim allowed under 11 U.S.C. § 502 as a secured claim only in the claimed amount of $8,405.07, and sought an order providing that upon the payment of that allowed amount by the Debtor under her plan, the mortgagee would be required to provide the Debtor with proof that the mortgage lien had been satisfied. When that motion ultimately was argued before me on October 23, 1996, Old Republic did not appear. The Chapter 13 Trustee appeared and reported that Old Republic had filed with him an Amended Proof of Claim, asserting a secured claim for the full amount it was owed, and he reported that it informed him that the earlier claim had been filed in error. He reported to the Court that the creditor lodged

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[1] *See, e.g.*, Fleming & McConnell, *The Treatment of Residential Mortgages in Chapter 13 After Nobelman*, 2 Am. Bankr. Inst. L. Rev. 147 (1994).

with him its verbal objection to the treatment proposed by the Debtor. Moreover, the Chapter 13 Trustee objected on his own behalf, in his official capacity, to the Debtor's proposed treatment of the secured creditor's claim.

The question before the Court is whether a creditor may sidestep a proper motion seeking to fix a claim, by ignoring the motion and filing an amended claim instead.

A motion to allow a claim as filed is, in all regards, the functional equivalent of a claims objection under Bankruptcy Rule 3007. This is because a request for an order allowing the claim as filed constitutes a request to disallow it as anything else. Thus, Chapter 7 Trustees in this district are consistently seen to file large numbers of claims "objections" that are really requests to allow the claim as filed. A typical instance would be that of a claim which does not seek any priority status but which contains information that might suggest entitlement to priority status. The purpose of such an "objection" is to assure the Trustee that once the claim is treated as filed, she or he will not be faulted later by the creditor as having "misconstrued" or "misunderstood" what the creditor intended to be a claim of priority status.

Similarly, some Chapter 7 Trustees still file "objections" to claims that were filed as fully secured claims. The intention there is to obtain an order from the Court declaring that the claim is "disallowed" to the extent that it might be viewed (in some manner) as having asserted an unsecured claim that would be entitled to participate in a distribution from unencumbered assets.

Hence, the Court views the Debtor's motion to allow Old Republic's claim as filed as constituting the Debtor's "objection" to the allowance of Old Republic's claim in any

manner inconsistent with the way that it was filed. As such, the Debtor's Notice of Motion was procedurally sufficient, and commenced a "contested matter" (as the Advisory Committee Note to Bankruptcy Rule 3007 explains).

Claim objections are often resolved when the creditor files an amended claim in response to the objection. But that is only true when the amended claim is satisfactory to the objector. Thus, for example, if a Trustee "objects" to a secured claim - which is to say objects to the allowance of any portion thereof as an unsecured claim entitled to share in distribution - and if the secured creditor responds with an amended claim explaining that the collateral had been repossessed and sold and that the creditor has been left with an unsecured deficiency claim in some specified amount, the Trustee will, typically, then withdraw the "objection" and the amended claim will be deemed allowed.

However, let us take the instance of a claim which does not assert entitlement to priority status, but which hints that it might have been entitled to such status if a priority had been asserted. A Trustee would "object" to the claim, arguing that it should be allowed as filed and disallowed to the extent that it hints to entitlement to priority. If the creditor responds with an amended claim that asserts priority but that appends exhibits that demonstrate that the creditor is not entitled to that priority, has the creditor overcome the Trustee's original objection? Is the creditor entitled to a new objection addressing the merits of the amended claim?

Twice this Debtor has sought to place the merits of the § 1322(b)(2) issue before the Court. Is she now required to file another objection, this time to the amended claim?

The Debtor should not be required to box with shadows. Twice Old Republic has

properly been invited to address the merits of the Debtor's position and twice it has abstained. So long as her request is not contrary to law and is not unsupportable under a reasonable interpretation thereof, the creditor should not prevail simply by absenting itself from the proceedings and filing something else for the Debtor to object to.

On the other hand, the filing of the Amended Claim arguably moots the second motion, and in any event that Amended Claim cannot be left "hanging."

The Court hereby deems the Debtor's two motions to constitute an objection to the Amended Claim under Rule 3007. Thus, she will not be required to file yet a third motion.

If Old Republic desires to be heard as to why its Amended Claim should not be stripped down, it shall respond in writing, filed and served no later than November 12, 1996, and if so, it shall appear by its counsel, for oral argument thereon on November 18, 1996 at 2:00 p.m. in Buffalo, at which time the Debtor's counsel also shall appear for further argument unless Old Republic has failed to respond.

The Court expresses no view today regarding the merits of the Debtor's argument, and no view as to whether the Debtor's requested relief will or will not be granted if Old Republic fails to respond. (In some regards, the Debtor's arguments raise a matter of first impression in this Court.)

SO ORDERED.

Dated: Buffalo, New York
October 29, 1996

/s/Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.