

STATE OF MICHIGAN
COURT OF APPEALS

RONNIE A. HERMIZ and KHALIDA HERMIZ,

Plaintiffs-Appellees,

V

SABAH KAMMA,

Defendant-Appellant.

UNPUBLISHED

October 27, 2005

No. 263501

Oakland Circuit Court

LC No. 2005-063773-CH

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a trial court order granting plaintiffs summary disposition with respect to certain counts of their complaint and granting defendant summary disposition with respect to one count. We reverse and remand for entry of summary disposition in favor of defendant on each of plaintiffs' claims. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs granted defendant a mortgage in residential property in Farmington Hills on August 7, 2000, securing a note with a principal amount of \$25,000. In September 2002, plaintiffs filed a petition for bankruptcy under Chapter 7, 11 USC 701 *et seq.* In the bankruptcy proceedings, plaintiffs listed defendant on Schedule D, as one of their creditors with a secured claim. That schedule listed the value of the residential property at \$288,000, and indicated that two other creditors held more senior mortgage interests in the property. The total of the claims of the two senior creditors exceeded the listed value of the property by \$13,150.48. The bankruptcy court granted plaintiffs a discharge of their debt to defendant in an order dated January 14, 2003.

Defendant later initiated proceedings to foreclose on his mortgage interest against plaintiffs' residential property. Plaintiffs subsequently filed the present action. Plaintiffs' complaint included four counts, all of which were essentially premised on their position that, in light of the bankruptcy discharge, defendant's mortgage lien against the property was invalid. In Count I, plaintiffs brought a claim for slander of title, alleging that the bankruptcy discharge extinguished any lien or security interest that defendant possessed with regard to the property. In Count II, plaintiffs alleged that defendant violated MCL 565.41 and MCL 565.44, because he was required to file a discharge of the mortgage within seventy-five days of the discharge, but failed to do so and instead initiated foreclosure proceedings. In Count III, plaintiffs brought a claim for abuse of process, alleging that defendant was not entitled to initiate foreclosure

proceedings because he did not have an interest in the property. In Count IV, plaintiffs asserted that they were entitled to an order adjudging defendant's mortgage interest extinguished because defendant did not have a secured interest in the property and was required to file a discharge of the mortgage, but refused to do so.

The parties filed cross-motions for summary disposition. Defendant argued that a valid pre-petition lien passes through bankruptcy proceedings unaffected. Plaintiffs, relying on 11 USC 506(a) and (d), contended that defendant's claim "was deemed unsecured" in the bankruptcy proceedings and, therefore, was void.

The trial court granted plaintiffs' motion for summary disposition with regard to Counts I, II, and IV and ordered defendant to immediately file a discharge of the mortgage. The trial court determined that "once the Bankruptcy Court discharged the debt owed by Plaintiffs to Defendant, Defendant's lien became satisfied and Defendant was required to file a discharge of the mortgage." However, the court held that plaintiffs "failed to satisfy the elements necessary to sustain the Slander of Title claim and therefore Defendant is entitled to dismissal of Count III." The court ordered that defendant's motion for summary disposition be granted in part pursuant to MCR 2.116(C)(8) with respect to Count III.¹

Defendant argues that the trial court erred in determining that plaintiffs' bankruptcy discharge operated to discharge the mortgage lien that defendant held on plaintiffs' residence. This Court reviews a trial court's grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-121; 597 NW2d 817 (1999). The effect of a bankruptcy discharge is a question of law. Questions of law are subject to de novo review. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Contrary to the trial court's ruling, discharge of a debtor's personal liability by way of bankruptcy does not automatically extinguish or satisfy a lien against real property. As recognized by the United States Supreme Court, ordinarily liens on real property and other secured interests survive Chapter 7 bankruptcy. *Dewsnup v Timm*, 502 US 410, 417-419; 112 S Ct 773; 116 L Ed 2d 903 (1992). *Johnson v Home State Bank*, 501 US 78, 82-83; 111 S Ct 2150; 115 L Ed 2d 66 (1991) explains this point in more detail:

To put this question^[2] in context, we must first say more about the nature of the mortgage interest that survives a Chapter 7 liquidation. A mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his

¹ The court apparently mistyped and intended to refer to Count I rather than Count III. Count I asserted the claim for slander of title, whereas Count III asserted the claim for abuse of process.

² The issue at bar was whether a mortgage interest that survived a Chapter 7 bankruptcy may be included in a subsequent reorganization plan pursuant to Chapter 13 of the Bankruptcy Code.

obligation; rather, the creditor may in addition sue to establish the debtor's *in personam* liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. However, such a discharge extinguishes *only* "the personal liability of the debtor." Codifying the rule of *Long v Bullard*, 117 US 617; 6 S Ct 917; 29 L Ed 1004 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. [Citations omitted & emphasis in original.]

The Court in *Johnson* further explained:

The Court of Appeals thus erred in concluding that the discharge of petitioner's *personal liability* on his promissory notes constituted the complete termination of the Bank's *claim* against petitioner. Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*. [*Johnson, supra*, p 84 (emphasis in original).]

This Court has recognized this principle in the course of evaluating the effect of a bankruptcy discharge on a vendor's lien on property sold on a land contract. See *Tidwell v Dasher*, 152 Mich App 379, 384; 393 NW2d 644 (1986) ("the law seems quite clear that a discharge in bankruptcy does not affect a lien of a mortgage, as a discharge is no bar to a subsequent foreclosure but only relieves the discharged bankrupt from personal liability on the obligation.")

Plaintiffs here further argue, however, that defendant's mortgage lien is void pursuant to the interplay of 11 USC 506(a) and (d), because the value of their residential property was less than the amount of the more senior mortgages. The interpretation advanced by plaintiffs is that defendant's interest is not a "secured claim" pursuant to 11 USC 506(a) because the lien was valueless in light of the senior mortgage interests. Then, relying on 11 USC 506(d), plaintiffs argue that the lien is void because it is not an "allowed secured claim." However, the Sixth Circuit Court of Appeals rejected the approach advocated by plaintiffs in *In re Talbert*, 344 F3d 555, 561-562 (CA 6, 2003).

Although *In re Talbert* is not binding on this Court, the decision indicates that had plaintiffs presented their challenge to defendant's lien in bankruptcy court, the court would have rejected it. We reject plaintiffs' attempt to now obtain relief in state court premised on an interpretation of the impact of a bankruptcy discharge that is wholly inconsistent with the interpretation that is controlling in the bankruptcy court. Because each count of plaintiffs' complaint is premised on their claim of entitlement to a discharge of defendant's mortgage lien as a result of the bankruptcy discharge, and *In re Talbert* shows that plaintiffs were not entitled to a discharge of the lien, we reverse the trial court's order granting partial summary disposition

to plaintiffs and direct the trial court to enter summary disposition in favor of defendant for failure to state a claim. MCR 2.116(C)(8).

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray