

FILED

2005 FEB 14 PM 3:54

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
AKRON

FILED

FEB 14 PM 3:43

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
AKRON

IN RE:	)	CASE NO. 03-56520
	)	
BOUNNA KONGMANICHAHN	)	CHAPTER 7
KONGKANE KONGMANICHANH,	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTOR(S)	)	
	)	<b>ORDER RE: ALLOWANCE OF</b>
	)	<b>PROOFS OF CLAIM FILED BY</b>
	)	<b>AMERICAN TAX FUNDING</b>
	)	
	)	[RELATING TO DOCKET #12, #14,
	)	#15, #16, #17, #21, #25, #29, #30 and
	)	#35]

The matter came on for hearing on August 19, 2004 on the following pleadings: (1) a "Motion to Revoke Confirmation of Chapter 13 Plan" filed by American Tax Funding ("ATF") [docket #14]; (2) the chapter 13 trustee's recommendations regarding the claims of ATF [docket #15, #16 and #17]; (3) the chapter 13 trustee's amended recommendation regarding the claims of ATF [docket #21]; and (4) debtors' objection to the chapter 13 trustee's claim recommendations [docket #25 and #30]. Appearing at the hearing were John Zamoyda, counsel for ATF and Randall Weissfeld, counsel for debtors. During the hearing, counsel indicated to the Court that the underlying facts are not in dispute and that the matter could be resolved by the filing of dispositive motions. Accordingly, the Court entered an Order giving each party the opportunity to brief their respective position and the following pleadings were filed: (1) ATF's brief in support of claim nos. 2-4 [docket #29]; and (2) debtors' supplemental brief in reply to ATF's claims [docket #35]. The Court then took the matter under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the foregoing pleadings and the pleadings in debtors' chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

#### **FINDINGS OF FACT<sup>1</sup>**

1. Debtors are the owners of real property located at 802 May Street in Summit County, Ohio (the "Subject Property").
2. Debtors did not pay all or a portion of the real estate taxes due on the Subject Property for the tax years 1999 and 2001.
3. On October 28, 2000, ATF purchased from the Summit County Treasurer (the "Treasurer") Tax Certificate No. 6832330-00 ("Tax Certificate 00") for a "Certificate Purchase Price" of \$1,553.27. The certificate covered the unpaid real estate taxes for the first half of the tax year 1999. Pursuant to the terms of the sale and the certificate, ATF was entitled to receive simple interest at a rate of 15.75%.
4. On September 28, 2001, ATF purchased from the Treasurer Tax Certificate No. 6832330-01 ("Tax Certificate 01") for a "Certificate Purchase Price" of \$704.28. The certificate covered the unpaid real estate taxes for the second half of the tax year 1999. Pursuant to the terms of the sale and the certificate, ATF was entitled to receive simple interest at a rate of 18%.

---

<sup>1</sup> Findings #1-7 and #11-16 were the subject of stipulations filed by ATF and debtors on November 18, 2004 [docket #34].

5. On September 20, 2002, ATF purchased from the Treasurer Tax Certificate No. 6832330-02 ("Tax Certificate 02") for a "Certificate Purchase Price" of \$157.61. The certificate covered the unpaid real estate taxes during the tax year 2001. Pursuant to the terms of the sale and the certificate, ATF was entitled to receive simple interest at a rate of 18%.

6. On October 15, 2003, the Summit County Prosecutor initiated a foreclosure action against Bounna Kongmanichanh. Said case is captioned *John A. Donofrio v. Bounna Kongmanichanh*, Case No. CV-2003-10-5965, Court of Common Pleas, Summit County Ohio.

7. On December 11, 2003, debtors, through counsel, filed the instant chapter 13 case.

8. Debtors filed their proposed chapter 13 plan with their bankruptcy petition.

As to their delinquent real estate taxes, debtors set forth the following in their plan:

- (3) All claims entitled to priority under 11 U.S.C. §507 shall be paid in full in deferred cash payments unless a holder of a particular claim agrees to a different treatment. In addition to the costs of administration which are to be paid in accordance with the standing procedure of this Court, the following priority claims shall be paid in full prior to the payment of any other claims unless a different treatment is specified herein:

American Tax Funding LLC,  
c/o John A. Donofrio, Summit County Treasurer \$6,506.55

9. The certificate of service attached to debtors' chapter 13 plan sets forth that a copy of the plan was sent to "American Tax Funding LLC, c/o John A. Donofrio, Ohio Building, 3rd Floor, 175 South Main Street, Akron, Ohio 44308-1363."

10. No objections to confirmation of debtors' proposed chapter 13 were filed and an Order confirming that plan was entered on March 29, 2004.

11. On January 30, 2004, ATF timely filed a proof of claim in debtors' bankruptcy for each of the three tax certificates it purchased from the Treasurer.

12. Proof of Claim Number 2 ("Claim 2") was filed by ATF as a secured claim in the amount of \$5,434.66 plus interest at 15.75%. ATF filed Claim 2 based upon Tax Certificate 00.

13. Proof of Claim Number 3 ("Claim 3") was filed by ATF as a secured claim in the amount of \$989.51 plus interest at 18%. ATF filed Claim 3 based upon Tax Certificate 01.

14. Proof of Claim Number 4 ("Claim 4") was filed by ATF as a secured claim in the amount of \$193.07 plus interest at 18%. ATF filed Claim No. 4 based on Tax Certificate 02.

15. On April 29, 2004, the chapter 13 trustee filed a "Recommendation for Treatment" as to Claims 2, 3 and 4. On May 26, 2004, the chapter 13 trustee filed an "Amended Recommendation for Treatment" as to Claim 2. Pursuant to his recommendations, the chapter 13 trustee suggests that ATF's claims be paid as follows:

**Claim 2:** \$1,553.27, plus simple interest at 15.75%, as a secured claim and \$2,774.69 as a secured claim;<sup>2</sup>

**Claim 3:** \$704.28, plus simple interest at 18%, as a secured claim and \$285.23 as a secured claim; and

---

<sup>2</sup> The chapter 13 trustee amended his original recommendation as to Claim 2 to include, as a secured claim, \$2,000.00 in legal fees.

**Claim 4:** \$157.61, plus interest at 18%, as a secured claim and \$35.46 as a secured claim.

16. On June 9, 2004, debtors filed an objection to the chapter 13 trustee's recommendations as to each of ATF's claims.

17. ATF does not object to the chapter 13 trustee's recommendations with respect to Claims 3 and 4 but does object to the recommendation as to Claim 2. ATF contends that Claim 2 should be paid as follows: \$1,553.27, plus simple interest at 15.75%, as a secured claim; \$969.06, plus simple interest at 18%, as a secured claim; and \$2,912.33 as a secured claim.

## DISCUSSION

### A. Revocation of the Order Confirming Debtors' Chapter 13 Plan

On April 28, 2004, ATF filed a pleading that it styled as a "Motion to Revoke Confirmation of Chapter 13 Plan." Through that pleading, ATF sought revocation of the Order confirming debtors' chapter 13 plan contending that it was not properly served with a copy of that plan in time for it to object to confirmation. ATF set forth no statutory basis for its request that this Court revoke the Order confirming debtors' chapter 13 plan. *See* FED. R. BANKR. P. 9024; FED. R. CIV. P. 60(b).

To date, debtors have never responded to ATF's motion seeking revocation of their chapter 13 plan. Therefore, it appears to the Court that they are not contesting ATF's claim that it was not properly served or ATF's request that the order confirming their chapter 13 plan be revoked. Based upon debtors' non-response, the Court finds that the Order

confirming debtors' chapter 13 plan should be revoked *only* to the extent that it fixes treatment of ATF's claims in this bankruptcy proceeding.<sup>3</sup>

**B. Allowance of ATF's Claims**

Once filed, a proof of claim constitutes prima facie evidence of the validity and amount of the claim and such claim is deemed allowed, unless a party in interest objects. 11 U.S.C. § 502(a); FED. R. BANK. P. 3001(f). Once an objection is filed, the objecting party bears the initial burden of producing sufficient evidence to rebut the claimant's prima facie case. *See In re Forte*, 234 B.R. 607, 617 (Bankr. E.D.N.Y. 1999). If the objecting party does so, the burden shifts back to the claimant to then prove its claim by a preponderance of the evidence. *Id.*

Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claims and are not self-contradictory, they prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more.

*In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991), *citing* 3 L. King, *Collier on Bankruptcy* § 502.02, at 502-22 (15th ed. 1991).

---

<sup>3</sup> In evaluating whether a party should be accorded relief from a final order, prejudice to other affected parties should be considered. In this case, debtors have listed no creditors on their Schedule F - Creditors Holding Unsecured Claims and have only listed two creditors on their Schedule D - Creditors Holding Secured Claims and debtors' plan proposes to pay each of those creditors "outside" the plan.. Although ATF did not serve its motion regarding revocation of the chapter 13 confirmation order on any party other than debtors, it does not appear that revocation of the Order confirming the plan as to ATF only will prejudice any other party in interest.

To support its proofs of claim once debtors interposed their objection, ATF cites to multiple Ohio Revised Code provisions that address a county treasurer's right to transfer liens on real property and the rights of the transferee once the transfer is complete. One of the transferee's rights is set forth in Ohio Revised Code § 5721.35(A) which sets forth, in part:

- (A) Upon the sale and delivery of a tax certificate, such tax certificate vests in the certificate holder the first lien previously held by the state and its taxing districts . . . *for the amount of taxes, assessments, interest, and penalty charged against a certificate parcel*, superior to all other liens and encumbrances upon the parcel described in the tax certificate, in the amount of the certificate redemption price . . . .

Ohio Revised Code § 5721.35(A) (emphasis added).

Debtors' objection to ATF's proofs of claim consisted of one paragraph which set forth, in its entirety, the following:

American Tax Funding, the purchaser of property tax owed by the debtors, filed a proof of claim seeking payment of taxes. The Trustee recommends payment of this debt with interest as 15.75% including attorney fees in the collection of this debt. The interest rate and costs of the collection of this debt is [sic] erroneous and should not be paid.

*See Debtors' Obj. to Trustee's Recomm. Trtmnt. Claim [docket #25 and #30].* In their supplemental reply brief (which consists of only 4 paragraphs) debtors state that "[a] review of the charter and of the codified ordinances of Summit County shows no ordinances or charter provisions that deal with the assessment of penalties or interest for the late payment of property tax." *See Debtors' Suppl. Brief at p.1 [docket #35].*

Debtors do not direct this Court to *any* specific Summit County ordinance or charter provision that might be applicable to this case nor do they discuss why the Ohio Revised Code provisions cited by ATF would not entitle ATF to the amount it is seeking through its proofs

of claim. In fact, the *only* legal authority debtors cite to in their brief is a decision from the U.S. District Court for the Southern District of Texas which is inapposite to this case.<sup>4</sup>

This Court is well aware of case law which upholds challenges to claimed interest rates and foreclosure “penalties” based upon equitable considerations and applicable non-bankruptcy law. Although it is possible that such a challenge could have been successfully lodged herein, such is not the case and debtors have not met their burden to rebut the validity of the proofs of claim filed by ATF. This Order should not, however, be construed as a finding that the interest rate and costs of the collection included in ATF’s proofs of claim would be above challenge in other cases filed in this Court.

#### CONCLUSION

Based upon the foregoing, **IT IS HEREBY ORDERED:**

1. That the Order confirming debtors’ chapter 13 plan [docket #12] is hereby revoked as to the extent that it fixes treatment of ATF’s claims in this bankruptcy proceeding.;
2. That ATF’s Claim 2, Claim 3 and Claim 4 are allowed, as filed; and

---

<sup>4</sup> The case of *Galveston Indep. School Dist. v. Heartland Fed. Savings & Loan Ass’n*, 159 B.R. 198 (S.D. Texas 1993) dealt with a chapter 11 proceeding in which the Court was asked to determine whether a claimant was entitled to recover from debtor post-foreclosure sale penalties and costs pursuant to the terms of a *specific* Texas statute.

3. That debtors shall file an amended chapter 13 plan within 30 days of the entry of this Order to address ATF's allowed claims but shall not amend the plan as to any other creditor and/or claim.

  
MARILYN SHEA-STONUM  
U.S. Bankruptcy Judge



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 14<sup>th</sup> day of FEBRUARY 2005, a copy of the foregoing **ORDER RE: ALLOWANCE OF PROOFS OF CLAIM FILED BY AMERICAN TAX FUNDING** was sent via regular U.S. Mail to the following:

**RANDALL WEISSFELD**  
614 E. Market Street  
Akron, OH 44304  
*Counsel for Debtor(s)*

**JOSEPH BISHARA**  
**GLEN SCHWARTZ**  
**JOHN ZAMOYDA**  
Roth, Blair, Roberts, Strasfeld & Lodge  
600 City Centre One  
100 Federal Plaza East  
Youngstown, OH 44503-1893  
*Counsel for ATF*

**JEROME HOLUB**  
159 S. Main Street  
Key Bldg., Suite 930  
Akron, OH 44308  
*Chapter 13 Trustee*

  
CLERK