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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*
	*
MARY JO SHUSTER,	*
	*
	CASE NUMBER 05-45399
	*
Debtor.	*
	*

	*
MARY JO SHUSTER,	*
	*
Plaintiff,	ADVERSARY NUMBER 08-4014
	*
vs.	*
	*
JP MORGAN CHASE BANK, N.A.	*
successor by merger to BANK N.A.*	*
c/o CHASE HOME FINANCE, LLC,	*
	HONORABLE KAY WOODS
Defendant.	*
	*

ORDER DISMISSING (i) ADVERSARY PROCEEDING,
AND (ii) BANKRUPTCY CASE

Debtor Mary Jo Schuster ("Debtor"), by and through her attorney David Engler, Esq., filed a voluntary chapter 7 petition on September 8, 2005. Subsequent to the issuance of Order of Discharge on December 7, 2005, Debtor's case was closed and Final Decree issued on December 29, 2005.

On December 21, 2007, Debtor, *pro se*, filed Motion to Reopen Chapter 7 Case. Debtor's case was reopened. Thereafter, Debtor filed Complaint to Determine Dischargeability of Unsecured Creditor Pursuant to Rule 4007(b) Fed. R. Bankr. Proc. [sic]; and

11 U.S.C. 523 [sic] ("Complaint") on January 25, 2008.

Defendant in this case was served with the Summons and Complaint on January 28, 2008, via certified mail (Doc. # 6), but did not file an Answer or other responsive pleading. Debtor filed Motion for Default Judgment on February 26, 2008. The Court held a hearing on the Motion for Default Judgment on March 27, 2008.

Despite Defendant's failure to file a responsive pleading, the Complaint was so deficient that the Court could not, in equity, grant the Motion for Default Judgment. As a consequence, the Court granted Debtor one week to amend the Complaint. Failure to amend the Complaint so that it pled a cognizable claim for relief would result in dismissal of the Adversary Proceeding. (Order Denying Motion for Default, Doc. # 14.)

Debtor timely filed Amended Complaint (Doc. # 17), which continues to be substantively deficient. As a consequence, on April 14, 2008, the Court issued Order for Mary Jo Shuster to Appear and Show Cause (Doc. # 19), which required Debtor to appear at a hearing on April 24, 2008 ("Hearing"), and show cause why this Adversary Proceeding should not be dismissed.

Debtor appeared at the Hearing and, in response to questioning from the Court, conceded that the purpose of the Adversary Proceeding was to stop the foreclosure action initiated by JP Morgan Chase Bank ("Chase") in Mahoning County Court of

Common Pleas. Debtor acknowledged that Chase was not seeking to collect a debt from her, but only to foreclose on the mortgage lien held by Chase.

The Amended Complaint purports to seek to have Chase's "mortgage debt" discharged. This debt, which was originally scheduled in Debtor's bankruptcy case, has been discharged. Discharge means that Debtor no longer has personal liability for the debt, but it does not mean that the lien held by Chase no longer has any validity. As Debtor acknowledges, Chase concedes that Debtor's personal liability for this debt has been discharged. (Comp. ¶ 10.) As a consequence, no purpose is served by this Adversary Proceeding, which purports to seek the "discharge" of the "mortgage debt," which has previously been discharged.

Despite Debtor's assertion that Chase merely holds an unsecured equity line of credit, the Open-End Mortgage Debtor attached to her Amended Complaint as Exhibit B and the Complaint in Foreclosure attached as Exhibit H belie this assertion. Exhibit B is an Open-End Mortgage given by Debtor to Bank One N.A. ("Bank One"). Chase alleges that it is the successor by merger to Bank One. Moreover, Debtor's Schedule D sets forth the Chase debt of \$45,916.00, as secured.

The Court informed Debtor at the hearing on the Motion for Default Judgment that attaching "amended schedules" to the Complaint as exhibits did not suffice to actually amend Debtor's

schedules. Notwithstanding that instruction, Debtor has not taken any steps to file amended schedules and pay the requisite fee. Furthermore, even if Debtor amended her schedules to list Chase as an unsecured creditor, to the extent Chase holds a valid lien, such amendment would not in any way affect such lien. Chase's position as either the first or second mortgage holder does not impact its right to foreclose on Debtor's residence, although it may likely affect the amount of money, if any, Chase will receive from foreclosure.

As Debtor admitted, the sole purpose of this adversary proceeding is to stop the foreclosure action. As a consequence, despite the stated prayer for relief that the debt be "discharged," in reality, Debtor is attempting to have this Court "strip off" the mortgage lien held by Chase. The Court cannot provide this relief even if the value of the property securing the loan results in the lienholder being partially or wholly unsecured.

Section 506 of the Bankruptcy Code governs lien avoidance, and provides that:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1) (West 2007). Moreover, "to the extent that

a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" 11 U.S.C. § 506(d) (West 2007).

Although these subsections may appear, when read in conjunction with each other, to permit Debtor to avoid a lien that is more than the value of the property, this is not the case. The Supreme Court has held, "Ordinarily, liens and other secured interests survive bankruptcy." *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991). "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 v. Home State Bank*, 501 U.S. 78, 84 (1991). As a consequence, "even after [a] debtor's personal obligations have been extinguished, the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." *Id.* The Supreme Court expressly rejected the argument Debtor attempts to make in this Adversary Proceeding, *i.e.*, that subsections (a) and (d) of section 506, when read together, eliminate a lienholder's right to foreclose on real property post-discharge. *See Dewsnap v. Timm*, 502 U.S. 410 (1992).

Although *Dewsnap* applies to a "strip down" of a partially secured lien, the Sixth Circuit Court of Appeals rejected the same argument with respect to a debtor's attempt to "strip off" a junior

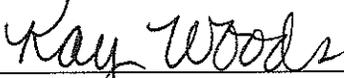
creditor's lien. In *Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555 (6th Cir. 2003), the junior lien was wholly unsecured because the senior lien exceeded the fair market value of the real property that secured both liens. The Sixth Circuit held:

The Supreme Court's reasoning for not permitting "strip downs" in the Chapter 7 context applies with equal validity to a debtor's attempt to effectuate a chapter 7 "strip off." . . . [T]o permit a "strip off" would mark a departure from the . . . rule that real property liens emerge from bankruptcy unaffected, [and] would rob the mortgagee of the bargain it struck with the mortgagor. . . . "[T]he fresh start' policy cannot justify an impairment of [creditors'] property rights, for the fresh start does not extend to an *in rem* claim against property but is limited to a discharge of personal liability."

Id. at 560-61 (citations omitted).

Whether construed as an action to discharge a debt or strip-off a mortgage, Debtor's Amended Complaint fails to state a cause of action upon which relief can be granted. Accordingly, the Court dismisses Debtor's Amended Complaint, with prejudice. This Adversary Proceeding is hereby dismissed. The Court hereby directs the clerk's office to re-close the underlying bankruptcy case, Case No. 05-45399.

IT IS SO ORDERED.



HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE