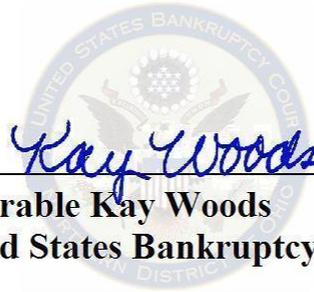


IT IS SO ORDERED.



Dated: June 11, 2009
04:31:17 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

THOMAS C. FOLEY,
Debtor.

* * * * *

THOMAS C. FOLEY,
Plaintiff,

v.

CITIFINANCIAL, INC.,
Defendant.

CASE NUMBER 08-43794

ADVERSARY NUMBER 09-04060

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION
TO DISMISS ADVERSARY PROCEEDING

This cause is before the Court on Defendant's Motion to
Dismiss the Adversary Case Filed on March 4, 2009 with Prejudice

("Motion to Dismiss Adversary") (Doc. # 15)¹ filed by Defendant CitiFinancial, Inc. ("CitiFinancial") on May 6, 2009. Debtor Thomas C. Foley ("Debtor") did not file a response. The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. FACTS

Debtor filed a voluntary chapter 13 petition on December 23, 2008. On Schedule D, Debtor listed CitiFinancial as holding an unsecured second mortgage in the amount of \$15,000.00. (Main Case, Doc. # 1 at 13.) On April 23, 2009, CitiFinancial filed a Proof of Claim (Claim # 8-1) for an unsecured nonpriority claim of \$15,301.09.

On February 27, 2009, Michael A. Gallo, Standing Chapter 13 Trustee ("Trustee") filed Motion to Dismiss (Main Case, Doc. # 20). The Motion to Dismiss (i) asserted that Debtor had failed to make the required plan payments, and (ii) requested dismissal of the case pursuant to 11 U.S.C. § 1307(c). Following a hearing on April 8, 2009, the Court entered Order Dismissing Chapter 13 Case and Notice to Secured Creditors Entitled to Adequate Protection of Right to File Claim (Main Case, Doc. # 24) on May 1, 2009.

Debtor initiated this Adversary Proceeding on March 4, 2009, by filing Complaint to Determine Secured Status of Claim and

¹Unless otherwise specified, all docket numbers refer to the Adversary Proceeding docket, Case No. 09-04060.

to Void Liens to Extent They Secure Claims Which Are Not Allowed Secured Claims ("Complaint") (Doc. # 1). The Complaint asks the Court to void CitiFinancial's mortgage pursuant to 11 U.S.C. § 506.² (Compl. ¶ 10.)

CitiFinancial filed Defendant's Motion for Leave to File Answer Out of Time (Doc. # 11) on April 17, 2009, which was granted by Order for Leave to File Answer Out of Time (Doc. # 13) on May 1, 2009. CitiFinancial then filed Answer (Doc. # 14) on May 4, 2009. Following dismissal of the main case, CitiFinancial filed the Motion to Dismiss Adversary on May 6, 2009. Debtor did not file a response to the Motion to Dismiss Adversary.

II. ANALYSIS

The Motion to Dismiss Adversary does not indicate a statutory basis for the requested dismissal, but the circumstances of the case indicate that this Adversary Proceeding may be dismissed pursuant to FED. R. CIV. PRO. 12(b)(1), made applicable to this proceeding through FED. R. BANKR. PRO. 7012. Rule 12(b)(1) allows a party to assert "lack of subject-matter jurisdiction" as a defense. FED. R. CIV. PRO. 12(b)(1) (West 2009).

The Court will dismiss this Adversary Proceeding for lack of jurisdiction. While dismissal of an underlying bankruptcy case does not automatically strip a bankruptcy court of jurisdiction over

²The Complaint also requests "[t]hat the Trustee be required to set forth whatever interest he may have in the real property used as Debtor's residence or be forever barred from asserting the same." (Compl. ¶ a.) However, Debtor neither listed Trustee as a defendant in the Adversary Proceeding nor served Trustee with the Complaint.

a related adversary proceeding, the decision whether to retain jurisdiction is at the discretion of the bankruptcy court. *Porges v. Gruntal & Co., Inc. (In re Porges)*, 44 F.3d 159, 162 (2nd Cir. 1995). The general rule is that "related proceedings ordinarily should be dismissed following the termination of the underlying bankruptcy case. This general rule favors dismissal because a bankruptcy court's jurisdiction over such related proceedings depends on the proceedings' nexus to the underlying bankruptcy case." *Id. Accord, Smith v. Gepetto's Pizza & Ribs Franchise Sys., Inc. (In re Smith)*, Adv. Proc. No. 05-1183, Doc. # 10 at 1 (Bankr. N.D. Ohio Dec. 29, 2005) (Dismissing an adversary proceeding that fell "within 'the general rule that related proceedings ordinarily should be dismissed following the termination of the underlying bankruptcy case.'") (quoting *In re Porges*, 44 F.3d at 162).

A bankruptcy court "might retain jurisdiction on principles of fairness, efficiency, judicial economy, and degree of difficulty of the related legal issues involved, [but] the court is not required to do so." *Norwood v. Select Portfolio Servicing, Inc. (In re Norwood)*, 2008 Bankr. LEXIS 687, *4 (Bankr. E.D. Tenn. Mar. 10, 2008). "Although bankruptcy courts may retain jurisdiction of some adversary proceedings despite the dismissal of the underlying case, those situations typically involve retention for the purpose of vindicating the court's own authority and to enforce its own orders." *Id.* at *3. Such are not the circumstances in the instant case.

The Complaint requests relief pursuant to 11 U.S.C. § 506(d), which states -

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless-

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d) (West 2008) (emphasis added).

Under 11 U.S.C. § 349(b)(1)(C), dismissal of a bankruptcy case reinstates "any lien voided under section 506(d) of this title[.]"³ 11 U.S.C. § 349(b)(1)(C) (West 2008). Therefore, the Complaint is rendered moot because any lien voided under § 506(d)

³11 U.S.C. § 349(b) reads, in its entirety -

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title --

(1) reinstates-

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349(b) (West 2008). The instant underlying bankruptcy case was dismissed pursuant to 11 U.S.C. § 1307(c).

in the Adversary Proceeding would be reinstated by the dismissal of the underlying bankruptcy case. In light of this, there is no reason for the Court to retain subject-matter jurisdiction over the Adversary Proceeding, so the Court will dismiss the Adversary.

However, CitiFinancial provides no argument to support its request that the Adversary Proceeding be dismissed with prejudice. Based on the documents filed in the Main Case, the parties appear to agree as to the unsecured status of CitiFinancial's lien. Dismissal of a bankruptcy case does not prejudice a debtor with regard to the eventual filing of a subsequent case. 11 U.S.C. § 349(a).⁴ As a consequence, the Court will dismiss the Adversary Proceeding without prejudice.

III. CONCLUSION

The Court grants, in part, and denies, in part, CitiFinancial's Motion to Dismiss Adversary. The Motion to Dismiss Adversary is granted as to the dismissal of the Adversary Proceeding, but denied in that the Adversary Proceeding is dismissed without prejudice.

An appropriate Order will follow.

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⁴§ 349. Effect of dismissal.

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C. § 349(a) (West 2008) (emphasis added).

CitiFinancial, Inc. on May 6, 2009.

For the reasons set forth in this Court's Memorandum Opinion entered this date, The Court grants, in part, and denies, in part, the Motion to Dismiss Adversary. The Motion to Dismiss Adversary is granted as to the dismissal of the Adversary Proceeding, but denied in that the Adversary Proceeding is dismissed without prejudice.

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