

**IN THE UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**IN RE: LEE AND TAMRA HILL, Debtors**

**No. 5:11-bk-74094  
Ch. 13**

**LEE AND TAMRA HILL**

**PLAINTIFFS**

**v.**

**5:15-ap-7015**

**GREEN TREE SERVICING, LLC as transferee for  
BANK OF AMERICA, N.A.**

**DEFENDANT**

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

Before the Court is Green Tree Servicing, LLC's [Green Tree] *Motion For Summary Judgment* filed on May 15, 2015, Green Tree's *Supplement to Motion For Summary Judgment* filed on June 17, 2015, and the *Debtors' Response to Green Tree's Motion For Summary Judgment and Supplement to Motion For Summary Judgment* filed on June 22, 2015. The Court has jurisdiction over these matters under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(K). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. For the reasons stated below, the Court grants Green Tree's motion for summary judgment.

In the debtors' underlying complaint, the debtors are asking the Court to determine the extent of Green Tree's lien on the debtors' residence under Federal Rule of Bankruptcy Procedure 7001(2).<sup>1</sup> In doing so, they argue that because their personal liability on the underlying note was discharged in their previous chapter 7 bankruptcy case, their

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<sup>1</sup> Determining the "extent" of a lien can refer to either a determination of the types of property that may be claimed as collateral and whether a lien exists on all of the property or a determination of to what "extent" a creditor is secured. 10 Collier on Bankruptcy ¶ 7001.03[1], at 7001-11 (16th ed. 2013). It appears that the debtors are referring to the second type of determination.

obligation on the note should be limited to the actual value of the collateral. To reach this result, the debtors are asking the Court first to determine the value of the collateral and next to avoid Green Tree's lien to the extent it exceeds the value of the collateral. In its motion for summary judgment, Green Tree relies on 11 U.S.C. § 1322 and Supreme Court precedent found in *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993), to show why the debtors' proposal is impermissible. In response, the debtors seem to suggest that the Court should consider modifying judicial precedent established by the Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992), by redefining the meaning of "secured claim" as that term is used in § 506(d). The debtors believe that the facts of this case provide the basis for that modification. The Court cannot agree.

Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings. Rule 56 states that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Canal Ins. Co. v. ML & S Trucking, Inc.*, No. 2:10-CV-02041, 2011 WL 2666824, at \*1 (W.D. Ark. July 6, 2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, (1986); *Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir.1999)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing to former Fed. R. Civ. P. 56(c)). The burden then shifts to the non-moving party, who must show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). When ruling on a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party and allow that party the benefit of all reasonable inferences to be drawn from the evidence. *Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1997); *Ferguson v. Cape Girardeau Cty.*, 88 F.3d 647, 650 (8th Cir. 1996).

A review of the case file and the pleadings filed by the parties indicates the following time line related to the debtors and their pending adversary proceeding:

<u>Date</u>	<u>Event or action taken</u>
3/31/2008	The debtors executed a note and mortgage on their residence in favor of Bank of America [BOA]; the documents were filed for record on 4/2/2008.
4/6/2010	The debtors filed a chapter 7 petition and listed BOA as a creditor; the parties did not enter into a reaffirmation agreement for the collateral.
8/25/2010	The debtors received a chapter 7 discharge.
9/7/2011	The debtors filed their current chapter 13 petition; the chapter 13 trustee and the debtors stipulated that the debtors are not eligible to receive a discharge in the current case [doc. 38].
10/18/2011	BOA filed proofs of claims for \$415,273.37 and \$20,820.83.
12/21/2012	The debtors modified their plan to surrender their residence to BOA.
4/24/2013	The debtors' plan was confirmed (after one more amendment not relevant to this matter).
5/15/2013	BOA assigned its rights to Green Tree. Note: The debtors allege that Green Tree, as transferee for BOA, offered a loan modification to the debtors during the pendency of the chapter 13 case and that the debtors completed the loan modification application.
9/12/2013	Green Tree filed a motion for relief from stay [doc. 127] based on the debtors' plan to surrender the collateral. The motion is still pending.
12/23/2014	The debtors filed a modified plan proposing to keep the subject collateral and pay Green Tree \$250,000.00 over 30 years at 4.5% interest as a long term continuing debt. <sup>2</sup>
1/12/2015	Green Tree filed its objection to confirmation [doc. 155] based on an alleged violation of § 1322(b)(2). The objection is still pending.
2/9/2015	The debtors filed their objection to BOA/Green Tree's proofs of claims [doc. 159] based on § 502(b)(1): that the claims are unenforceable against the debtors. The objection is still pending.
2/9/2015	The debtors filed this adversary proceeding to determine the extent of Green Tree's lien. The debtors argue that because their personal

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<sup>2</sup> When the debtors filed their initial schedules on October 18, 2011, they listed the value of the residence at \$400,000.00.

obligation on the note was discharged in their previous chapter 7 case, the extent of the lien securing their obligation should be limited to the value of the property.

3/11/2015 Green Tree filed its answer.

There is no dispute that the debtors are no longer personally liable on the note to Green Tree as a result of their previous bankruptcy. However, as long as the debtors remain in possession of the property, Green Tree is entitled to retain its lien on the property until it has been paid in full. Here is why. In a typical case, § 1322(b)(2) allows for the modification of the rights of a holder of a secured claim. When read in conjunction with § 506(a), this section allows a debtor to bifurcate a creditor's claim into a secured claim and an unsecured claim. Section 1322(b)(2) then allows the debtor to modify the creditor's rights by providing for the treatment of the secured portion of the claim under one part of the debtor's plan while treating the unsecured portion of the claim in another part, along with other unsecured creditors. However, § 1322(b)(2) also contains an exception: the ability to modify the rights of the secured creditor is not allowed when the claim is "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2); *see also Nobleman*, 508 U.S. 324 (1993). In this instance, the parties have not disputed that this claim is secured only by the debtors' principal residence.<sup>3</sup> Because Green Tree's rights cannot be modified, bifurcation of the claim into a secured interest and an unsecured interest is not allowed and the debtors' complaint fails.

Even if bifurcation of Green Tree's claim was allowed and the debtors were allowed to reduce Green Tree's claim to its secured amount, the debtors would have to comply with the statutory requirements of § 1325(a) before the Court could confirm their proposed modified plan. 11 U.S.C. § 1329(b). Under § 1325(a)(5), the debtors are left with three options concerning a secured claim. First, the debtors can surrender the property that

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<sup>3</sup> The mortgage references only the debtors' residential address as reflected on the debtors' petition.

secures the claim to the lienholder, in this case, Green Tree. 11 U.S.C. § 1325(a)(5)(C). This is the posture of the debtors' confirmed plan prior to the proposed modification. Second, the secured creditor could accept the proposed treatment in the debtors' modified plan. 11 U.S.C. § 1325(a)(5)(A). This does not appear likely considering that Green Tree has objected to the debtors' proposed modification. Finally, the plan can provide that the secured creditor retain its lien securing its claim "until the earlier of– (aa) the payment of the underlying debt *determined under nonbankruptcy law*; or (bb) discharge under section 1328 . . . ." 11 U.S.C. § 1325(a)(5)(B) (emphasis added). Because the debtors are not eligible for a discharge in their chapter 13 case,<sup>4</sup> the debtors' plan must provide for Green Tree to retain its lien until payment of the underlying debt as determined under nonbankruptcy law. According to Green Tree's proofs of claims, its underlying debt as of the filing of the debtors' petition is \$415,273.37 and the arrearage is \$20,820.83.<sup>5</sup> Hence, to satisfy the statutory requirements for modification, unless Green Tree accepts the debtors' proposed treatment or the debtors surrender the property, the debtors' plan must provide that Green Tree will retain its lien until the payment of the underlying debt determined under nonbankruptcy law.

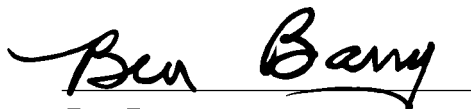
For these reasons, the Court finds that Green Tree is entitled to a judgment as a matter of law, grants Green Tree's motion for summary judgment, and dismisses the debtors' complaint. The Court will set Green Tree's motion for relief from stay [127] and objection to confirmation of the debtors' modified plan [155] and the debtors' objection to Green Tree's claims [159] for hearing on July 15, 2015, beginning at 9:00 a.m. in the United States Bankruptcy Court, Fayetteville, Arkansas.

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<sup>4</sup> The chapter 13 trustee and the debtors entered into a "Stipulation Regarding Debtors' Ineligibility for Discharge." On December 2, 2011, the Court entered its *Order Approving Stipulation That Debtors Are Not Eligible For Discharge*.

<sup>5</sup> The amounts are subject to the debtors' objections to Green Tree's claims, which will be heard on July 15, 2015.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Ben Barry". The signature is written in a cursive style and is positioned above a horizontal line.

Ben Barry

United States Bankruptcy Judge

Dated: 06/29/2015

cc: H. Keith Morrison  
Theresa L. Pockrus