

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

In re KIM BRONTILDA ELLIOTT,)	Case No. 07-60874-LYN
)	
Debtor.)	
_____)	
KIM BRONTILDA ELLIOTT,)	Adversary No. 07-06064
)	
Plaintiff,)	
)	
v.)	
)	
CITIFINANCIAL, INC. ,)	
)	
Defendant,)	
_____)	

MEMORANDUM

This matter comes before the court on a motion for summary judgment based on a complaint filed by Kim Brontilda Elliott (“the Debtor”) to avoid a consensual lien of Citifinancial, Inc.

This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(A)&(K). This Court may enter a final order. This memorandum shall constitute the Court’s findings of fact and conclusions of law as

required by Fed. R. Civ. P. 52, which is made applicable in this proceeding by Fed. R. Bankr. P. 7052.

Facts

On September 15, 2007, the Debtor's parents conveyed to the Debtor real property "in fee simple, with GENERAL WARRANTY AND ENGLISH COVENANTS OF TITLE". A legal description of the real property is provided on the Deed of Gift.¹

On August 23, 2000, the Debtor borrowed \$9,808.67 from Citifinancial, Inc. The loan was evidenced by a Disclosure Statement, Note and Security Agreement. The loan was secured by real property the legal description of which is the same as that on the Deed of Gift. The common name of the property is given as 12734 Red House Rd, Brookneal, Virginia. This property is referred to hereinafter as "the Red House Property".

On May 18, 2007, the Debtor filed a petition initiating the above-styled chapter 13 case. The Debtor scheduled a "remainder interest subject to life estate of parents" in real property described as "12734 Red House Road" as property of the estate. She scheduled the value of her interest in the Red House Property at \$51,000.00. She did not schedule an exemption in the property.

On her Schedule D, she scheduled three secured claims. The first was that of Citifinancial, Inc., in the approximate amount of \$10,000.00 secured by a deed of trust on the Red House Property. The second was that of Countryside Home Loans in the amount of \$47,000.00 also secured by a deed of trust on the Red House Property. The third was that of Green Tree Financial Corp in the amount of \$40,452.00 secured by a "Purchase Money

¹ Exhibit A to the Plaintiff's Complaint.

Security” interest in a “Mobile Home”. The Mobile Home is not scheduled as property of the estate.

On July 19, 2007, the Debtor filed the above-styled adversary complaint seeking to avoid the lien of Citifinancial, Inc., on the Red House Property.

Discussion.

This is a motion for default judgment in a complaint seeking to avoid a consensual lien of Citifinancial, Inc. Neither the complaint nor the motion for default judgment provides any statutory or other legal basis for the relief requested in the complaint. Accordingly, the Court is left to divine the legal basis on which the complaint is based.

The lien is consensual so it is not an attempt to avoid a judgment lien under 11 U.S.C. § 522(f)(1). The property to which the lien attaches is not included in the list property in 11 U.S.C. § 522(f)(2), so the complaint is not brought under that paragraph. The lien attached more than six years pre-petition, so the complaint cannot be brought as an action to recover a preference under 11 U.S.C. § 547.

The Court concludes that the complaint is brought under 11 U.S.C. §§ 506(a) and 1322(b)(2) which permit a chapter 13 debtor to modify the rights of holders of claims secured by the debtor’s principal residence only if all other senior liens on the property are greater than the value of the residence. See, e.g., Wright v. Commercial Credit Corp., 178 B.R. 703 (E.D.Va. 1995) and In re Zimmer, 313 F.3d 1220 (9th Cir. 2002).

The Court accepts well-pleaded facts as true, but those facts must give rise under the law to the relief requested.

. . . “[A] defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered.

[Footnote omitted] As the Supreme Court stated in the “venerable but still definitive case”[Footnote omitted] of Thomson v. Wooster: a default judgment may be lawfully entered only “according to what is proper to be decreed upon the statements of the bill, assumed to be true,” and not “as of course according to the prayer of the bill.” 114 U.S. at 113, 5 S.Ct. at 792, 29 L.Ed. at 108. The defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. In short, despite occasional statements to the contrary, [Footnote omitted] a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff’s right to recover. Thomson v. Wooster; Ohio Central Railroad Company v. Central Trust Company of New York;

Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank, 515 F.2d 1200 (5th Cir 1975).

In this case, the relevant facts are as follows. The Debtor owns the Red House Property in fee simple. The fair market value of the Red House Property is \$102,000.00. The Red House Property is her principal residence. Two liens attach to that property, a first priority lien in favor of Countrywide Home Loans in the approximate amount of \$47,000.00, and a second lien in favor of Citifinancial, Inc., in the approximate amount of \$10,000.00.

On these facts, the Court must conclude that the claim of Citifinancial, Inc., is fully secured. Accordingly, the Debtor cannot modify the claim of Citifinancial, Inc., by avoiding its lien on the Red House Property.

The Debtor asserts in her complaint and in her schedules that her parents own a life estate in the Red House Property and that she only owns a remainder interest in the Red House Property. There are a number of problems with the assertion and with any conclusion that may be made from it.

First, other documents filed by the Debtor contradict her assertion in the complaint that her parents own a life interest in the Red House Property. Her Exhibit A to the complaint, a Deed of Gift transferring the Red House Property to the Debtor, indicates that the Debtor is the fee simple owner of the Red House Property. Exhibit A does not provide for the retention of a

life estate in the property by the Debtor's parents.

The assertions in the complaint are also contradicted by the Disclosure Statement, Note and Security Agreement that was signed by the Debtor. On page two, the "borrower [the Debtor] represent[ed] that the [Red House] Property is owned by the Borrower. . ." The legal description on the Deed of Trust supporting the Disclosure Statement, Note and Security Agreement is the same as that on the Deed of Gift. In the Deed of Trust, the Debtor "covenants that [she] is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered , except for encumbrances of record." These prior statements by the Debtor are strong evidence that the Debtor's parents do not own a life estate in the Red House Property.

Second, the Debtor's assertion in her complaint that the value of her remainder interest in the Red House Property is \$31,473.12 and that the value of her parents life interest is \$70,526.88. is inconsistent with the Debtor's scheduled value of the remainder interest, \$51,000.00. Ambiguities in the schedules must be construed against the Debtor. See In re Mohring, 142 B.R. 389, 394, n.14 (Bankr. E.D.Cal. 1992). One seeking benefits under the Bankruptcy Code must satisfy the duty to schedule, for the benefit of creditors, all one's interests and property rights. See Oneida Motor Freight, Inc., 848 F.2d 414, 416 (3rd Cir.1988). While the Court accepts well-pleaded facts as true, facts that are contradicted by the Debtor's sworn valuations in her schedules are not well-pleaded and may not be accepted as true.

If the debtor's alleged remainder interest is valued at \$51,000.00, then the amount of the first lien on the property (if it is applied only to the remainder) is greater than the value of the property and the Debtor is not entitled to avoid the lien.

Finally, there is no evidence, or even an assertion, that the Debtor's parents recorded any conveyance to them by the Debtor of a life estate in the Red House Property. Consequently, even if the Court were to accept the assertions that the Debtor conveyed a life interest in the Red House Property to her parents and the assertion that the value of the Debtor's interest in the Red House Property is \$31,473.12, the Debtor has presented no legal argument supporting the unstated premise that the Lien of Countrywide Home Loans should be offset against the Debtor's remainder interest before being offset against her parent's life interest.²

Conclusion

The Debtor owns the Red House Property in fee simple. Her interest is not subject to a life estate owned by her Parents. The value of that property is greater than both liens on the property and the lien of Citifinancial, Inc., may not be avoided.

If it were determined that her parents have a life estate in the Red House Property, her interest must be valued at the amount on her schedules, \$51,000.00. This amount that is greater than the amount of Countrywide Home Loans' first priority lien. Accordingly, the lien may not be avoided.

If it were found that the Debtor's valuations are correct, the Debtor has provided no legal basis for the argument that the first lien should be offset against the Debtor's remainder interest before her parent's life interest.

ORDER

The Debtor's motion for default judgment is denied, without prejudice.

² While it is not the duty of this Court to raise defenses that Citifinancial, Inc., might have raised had it appeared in this adversary proceeding, these issues are naturally raised by the aforementioned contradictions in documents filed by the Debtor.

Upon entry of this Memorandum the Clerk shall forward a copy to Stephen Dunn, Esq., counsel for the Debtor, and Herbert L. Beskin, Esq., chapter 13 trustee.

Entered on this 30th day of October, 2007.

