

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **10-00489-hb**

Adversary Proceeding Number: **10-80038-hb**

ORDER ON MOTION TO DISMISS ADVERSARY PROCEEDING

The relief set forth on the following pages, for a total of 8 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
09/22/2010**



Entered: 09/23/2010

US Bankruptcy Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In Re:)	Case No. 10-00489-hb
)	
Charles Atlas Hill, Sr.,)	Adv. Pro. No. 10-80038-hb
Debtor.)	
_____)	Chapter 13
)	
Charles Atlas Hill, Sr.,)	
Plaintiff,)	ORDER GRANTING IN PART
)	AND DENYING IN PART
vs.)	DEFENDANT'S MOTION FOR
)	SUMMARY JUDGMENT OR FOR
EMC Mortgage Corporation,)	PERMISSIVE ABSTENTION
Defendant.)	
)	
_____)	

This matter comes before the court upon a motion for summary judgment or for permissive abstention filed by the defendant, EMC Mortgage Corporation. Based upon the content of the defendant's motion, its memorandum in support, and the arguments and evidence presented by the debtor, Charles Atlas Hill, Sr., and his counsel during the hearing for the motion, the court grants the defendant's motion for permissive abstention but denies the motion for summary judgment. Accordingly, for the reasons detailed below, the court dismisses this adversary proceeding.

FINDINGS OF FACT

1. The debtor owns real property with a street address of 2 Hitching Post Lane. This real property is debtor's primary residence.

2. The public record indicates that debtor's residence is encumbered by one mortgage loan agreement held by the defendant and another mortgage loan agreement held by BB&T.

3. On October 14, 2005, the defendant filed a foreclosure action in the Court of Common Pleas for Greenville County, South Carolina (state court) because the debtor failed to make timely payments owed under the mortgage loan agreement held by the defendant. On December 6, 2005, the debtor filed an answer and certain counterclaims, which he later amended multiple times with the final amended answer and counterclaims filed on May 22, 2006.

4. On December 3, 2009, the defendant filed a motion for summary judgment in state court to dismiss the debtor's counterclaims in the foreclosure action.

5. On January 26, 2010, the debtor filed a voluntary chapter 13 bankruptcy petition, bankruptcy schedules, and a statement of financial affairs in the court.

6. On February 9, 2010, the debtor filed a chapter 13 plan of reorganization and other related motions. Thereafter, he filed his first amended plan on April 15, 2010, and then he filed his second amended plan on April 19, 2010.

7. In the second amended plan, the debtor disclosed that he intended to challenge the amount of the defendant's prepetition arrearage claim in its proof of claim through this adversary proceeding.

8. Nevertheless, under the second amended plan, the debtor also promised to pay regularly scheduled post-petition loan payments directly to the defendant and BB&T beginning on March 2010.

9. The debtor's second amended plan expressly states that "[a]ny creditor holding a claim secured by property that is removed from the protection of the automatic stay by order, surrender, or through operation of the plan will receive no further distribution from the chapter 13 trustee on account of any secured claim."

10. The debtor failed to make any post-petition payments to the defendant and BB&T under the terms of his proposed second amended plan or his respective loan agreements with either defendant or BB&T.

11. Because the debtor failed to make his required post-petition mortgage payments, BB&T filed a motion for relief from stay on July 12, 2010. The defendant filed a motion for relief from stay on August 4, 2010.

12. The debtor did not object to BB&T's motion for relief from stay or defendant's motion.

13. The court entered an order granting BB&T's motion for relief from stay on August 6, 2010, and it entered an order granting defendant's motion on August 26, 2010.

14. Because the defendant and BB&T obtained relief from the automatic stay, the chapter 13 trustee will not remit any payments to the defendant for its secured claim through the plan. Furthermore, the defendant and BB&T are authorized to enforce their security interests in the plaintiff's residence outside of this bankruptcy before the state court.

CONCLUSIONS OF LAW

The defendant filed a motion for summary judgment and a motion for permissive abstention. Because the court is inclined to dismiss this case based on defendant's motion for permissive abstention, the court denies the defendant's motion for summary judgment. Accordingly, the court grants defendant's motion for permissive abstention and dismisses this adversary proceeding for the following reasons detailed below:

The debtor filed his chapter 13 bankruptcy to avoid foreclosure of his home through defendant's pending prepetition foreclosure action in state court. Because the issues in this adversary proceeding are so substantively intertwined with the defendant's pending foreclosure

action, the court abstains from considering the issues and theories of liability raised in debtor's adversary proceeding complaint. Since the defendant has relief from the automatic stay and can continue the prosecution of its state court foreclosure action, abstention under 28 U.S.C. § 1332(c)(1) is appropriate. Under 28 U.S.C. § 1334(c)(1), this court may decide, in its discretion, to abstain from hearing a matter should it determine that the interest of justice or the interest of comity with state court or respect for state law justifies abstention. *See American Investors Life Ins. Co., Inc. v. Salinas (In re Salinas)*, Chp. 7 No. 06-01150-jw, Adv. Pro. No. 06-80087-jw, slip op. at 4 (Bankr. D.S.C. July 21, 2006).

When considering the issue of permissive abstention, the following factors are considered:

1. The effect or lack thereof on the efficient administration of the estate if a Court recommends abstention;
2. The extent to which state law issues predominate over bankruptcy issues;
3. The difficulty or unsettled nature of the applicable state law;
4. The presence of a related proceeding commenced in state court or other nonbankruptcy court;
5. The jurisdictional basis, if any, other than 28 U.S.C. §1334;
6. The degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
7. The substance rather than form of an asserted "core" proceeding;
8. The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
9. The burden of the bankruptcy court's docket;
10. The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
11. The existence of a right to a jury trial; and

12. The presence in the proceeding of nondebtor parties.

See id. at 4-5. Under the circumstances of this case, these factors weigh in favor of abstention:

1. As stated previously, the defendant has obtained relief from the automatic stay and can no longer be paid distributions from the debtor's chapter 13 plan for its secured claim. To that end, the defendant must seek recourse and protection of its secured interests in the debtor's residence through a prepetition foreclosure action pending in state court. Since the reorganization of the defendant's secured claim can no longer be done through the debtor's chapter 13 plan, administration of the debtor's plan for all other purposes will not be materially affected by abstaining.

2. The viability of any challenge to the defendant's claim against the debtor are entirely dependent upon the merits of his state law based counterclaims, which are asserted in the defendant's foreclosure action, and the contractual rights of the parties under the Loan Agreement. Accordingly, state law matters that are more appropriate for the state court's consideration predominate here.

3. Although the state law issues are not particularly difficult or unsettled, the fact that the defendant obtained relief from stay to resume its foreclosure action, which has been pending since late 2005, favors abstention.

4. The defendant's pending foreclosure action and its right to continue prosecution of it after receiving relief from the automatic stay supports abstention of this adversary proceeding since the issues in this adversary proceeding can be fully and appropriately resolved through the pending foreclosure action in state court instead of this adversary proceeding.

5. The debtor has not identified any grounds for federal jurisdiction outside of 28 U.S.C. §1334. Because the defendant filed the foreclosure action in state court and there is

nothing in the record indicating any federal cause of action or claim outside of debtor's bankruptcy, there does not appear to be any independent basis for federal jurisdiction other than 28 U.S.C. §1334. To this end, abstention is appropriate under this factor.

6. Since the defendant has obtained relief from the automatic stay, the impact of this adversary proceeding on the debtor's bankruptcy is remote now that the defendant can enforce its secured interests through its pending state-court, foreclosure action. The debtor's chapter 13 plan acknowledges this by precluding the defendant from being paid for its secured claim after receiving relief from the stay. Thus, the lack of significant relationship between this adversary proceeding and the debtor's chapter 13 bankruptcy favors abstention.

7. The core bankruptcy matters involved in this adversary proceeding have fallen away. Initially, the debtor's adversary proceeding and his challenge to the defendant's secured claim were an integral part of the debtor's chapter 13 reorganization. But the defendant received relief from the automatic stay and is now authorized to enforce its secured claim outside of the debtor's bankruptcy. Moreover, the debtor failed to perform under his proposed plan by failing to pay regularly scheduled post-petition payments to the defendant. Therefore, this adversary proceeding is now exclusively predicated on assessing liability on the defendant for money damages under state law rather than furthering a reorganization of the defendant's secured claim through a chapter 13 plan. Here, the pending state law theories of liability can easily be severed from any underlying core bankruptcy matters that previously existed. This is another factor favoring abstention.

8. Unable to prevent the defendant from foreclosing its security interests in state court, the debtor filed bankruptcy and this adversary proceeding and defendant's foreclosure

proceeding was stayed. Therefore, the debtor selected this forum over the state court forum to challenge defendant's claim. This is another factor favoring abstention.

On balance, the above relevant factors overwhelmingly weigh in favor of abstention given the defendant's ability to prosecute its pending foreclosure action in the state court. Accordingly, in the interests of comity with state courts, respect for state law, and in the interests of justice, the court grants the defendant's motion for permissive abstention and dismisses this adversary proceeding.

AND IT IS SO ORDERED.