

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 05-12177)
)
FORT WAYNE TELSAT, INC.)
)
Debtor)
)
)
R. DAVID BOYER)
)
Plaintiff)
)
vs.) PROC. NO. 07-1286
)
JAMES A. SIMON, et al)
)
Defendants)

DECISION AND ORDER
ON MOTIONS FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on February 12, 2009.

This matter is before the court on the motions for partial summary judgment filed by JAS Partners and James Simon and by Thomas Shoaff and William Millett. JAS and Simon seek summary judgment as to Shoaff and Millett's claim against them which seeks to establish a lien upon or an interest in FCC licenses (or their proceeds) that belong to JAS and Simon. Shoaff and Millett seek summary judgment as to Simon and JAS's claim against them concerning the enforceability of what the parties call the "Scheumann Agreement" and as to Simon and JAS's objections to their proofs of claim.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Bankr. P. Rule 7056(c); Fed. R. Civ. P.

Rule 56(c). Thus, summary judgment is essentially an inquiry as to “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

Rule 56 requires the moving party to inform the court of the basis of the motion and to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once it does so, the non-moving party must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct 1348, 1356 (1986). The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). In ruling on a summary judgment motion, the court accepts as true the non-moving party’s evidence, draws all inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

As for Simon and JAS’s motion concerning Shoaff and Millett’s efforts to establish a lien upon or interest in FCC licenses that belong to Simon and JAS, the decision and order of February 6, 2009 dismissed that claim due to a lack of subject matter jurisdiction and so the court need consider it no further.

As for Shoaff and Millett’s motion concerning the enforceability of the Scheumann Agreement, the court finds that there are genuine issues of material fact and so the motion is

DENIED.

As for Shoaff and Millett's motion concerning Simon and JAS's objection to their proofs of claim, that motion is GRANTED for the reasons which follow.

Claims are deemed allowed unless objected to. 11 U.S.C. § 502(a). Furthermore, the proof of claim is itself evidence of the debt. Fed. R. Bankr. P. Rule 3001(f) ("A proof of claim . . . constitute[s] prima facie evidence of the validity and the amount of the claim.").

The party objecting to the claim bears the initial burden of presenting sufficient evidence to overcome the presumed validity and amount of the claim. . . . Although that burden is easily satisfied, affirmative proof must be offered to overcome the presumed validity of the claim. In re Smith, 249 B.R. 328 (Bankr. S.D. Ga. 2000)(citations omitted). See also, In re Figard, 382 B.R. 695, 711-12 (Bankr. W.D. Pa. 2008); In re Chalakee, 385 B.R. 771, 777 (Bankr. N.D. Okla. 2008).

In the context of a motion for summary judgment, this means that the party objecting to a proof of claim has the burden of coming forward with evidence that will undermine the claim's presumed validity and if it fails to do so summary judgment should be entered against it, overruling the objection. See, Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552 ("the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Simon and JAS have failed to meet their burden to come forward with evidence that might undermine the presumed validity of Shoaff and Millett's claims or to create any issues of fact with regard thereto. Indeed, they have not even attempted to do so. To the contrary, instead of trying to support a challenge to those claims they disclaim any attempt to do so. They contend Shoaff and Millett are mistaken in their belief that Simon and JAS have objected to their claims. Instead of a claim objection under § 502(b) – a proceeding that would put the existence and amount of a debt in

issue – Simon and JAS contend all they are seeking by their cross-claim is a determination of secured status – determining the value of a creditor’s interest in property of the estate under § 506(a) and Rule 3012. See, Matter of Taylor, 289 B.R. 379, 383-4, 386 (Bankr. N.D. Ind. 2003); In re Fareed, 262 B.R. 761, 764-66 (Bankr. N.D. Ill. 2001). Yet, this bit of deflection is of no help to Simon and JAS in defeating Shoaff and Millett’s motion for summary judgment. It exposes their request to a host of other deficiencies, substantive, procedural, and Constitutional, which all lead the court to the conclusion that granting the motion for summary judgment is the appropriate thing to do.

The first substantive/procedural deficiency in Simon and JAS’s position arises out of the fact that even though they are the ones who have asked the court to determine the secured status of Shoaff and Millett’s claims, in response to the motion for summary judgment, they failed to come forward with any evidence of what the liens they want the court to value might be worth. Celotex teaches that when, in response to a motion for summary judgment, a party who bears the burden of proof on an issue fails to come forward with evidence that, if believed, would be sufficient to carry that burden, summary judgment should be entered against them. Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552. So, if Simon and JAS bear the burden of producing evidence concerning the value of Shoaff and Millett’s liens, they should lose.

Little, if anything, has been written concerning who, in the abstract, bears the burden of proof concerning the determination of secured status under § 506(a) or Bankruptcy Rule 3012. The statute says that the issue “shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such

disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a).¹ These instructions, that the issue is to be determined in light of the collateral's proposed disposition and use and in connection with any hearing on that disposition and use, explain why there are no abstract discussions of the burden of proof. The question is always subsumed in the larger question concerning the disposition of the property and who has the burden of proof on that issue. So, when the issue is confirmation of a proposed plan and the proper treatment of particular secured claims, whether under § 1129(b)(2)(A)(i)(II), § 1225(a)(5)(B)(ii), or § 1325(a)(5)(B)(ii), the debtor (or plan proponent) bears the burden of proving that the secured claims have been properly valued. See e.g., 4 Collier on Bankruptcy ¶ 506.03[9]. See also, In re Young, 390 B.R. 480, 486-87 (Bankr. D. Me. 2008); In re El Charro, Inc., 2007 WL 2174911, 2007 Bankr. LEXIS 2550 (Bankr. D. Kan. 2007). If the issue is whether particular property should be abandoned, under § 554(b), the movant bears the burden of proving the value of the property and the amounts due on account of the liens against it. See e.g., In re Yates, 332 B.R. 1, 5-6 (10th Cir. BAP 2005); Smoker v. Hill & Assocs., Inc., 204 B.R. 966, 975 (D. N.D. Ind. 1997); In re Siegel, 204 B.R. 6, 8 (Bankr. W.D. N.Y. 1996); In re Siciliano, 167 B.R. 999, 1011 (Bankr. E.D. Pa. 1994). See also, 11 U.S.C. § 362(g)(1). Similarly, if the issue is whether a Chapter 7 debtor can redeem property from a lien, using § 722, the debtor bears the burden of proving the value of the creditor's lien. See e.g., In re Ard, 280 B.R. 910, 913 (Bankr. S.D. Ala. 2002).

In these examples of different disputes where the value of liens can be put in issue, the party who creates the need for the valuation determination bears the burden of proving what the

¹Rule 3012 says the determination is to be made on a motion from "any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct." Fed. R. Bankr. P. Rule 3012.

appropriate value is. This is consistent with the traditional approach to the burden of proof which holds that “the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim.” Auburndale State Bank v. Dairy Farm Leasing Corp., 890 F.2d 888, 893 (7th Cir. 1989). See also, Maxwell Land Grant Co. v. Dawson, 151 U.S. 586, 604, 14 S.Ct. 458, 463-64 (1898); New Orleans & N.E.R. Co. v. Harris, 247 U.S. 367, 38 S.Ct. 535 (1918). In this situation, as the parties who have asserted that the court should make a determination of value, that means Simon and JAS, have the burden of coming forward with evidence concerning what that value should be.

The conclusion that Simon and JAS have the burden of coming forward with evidence concerning the value of the liens they want the court to put a value on is not only consistent with the traditional approach to allocating the burden of proof on various issues, it is also consistent with the rules of pleading that pertain to determinations of secured status. Questions concerning a creditor’s secured status are usually raised through some type of motion, as a contested matter. See e.g., Fed R. Bankr P. Rules 3012, 9013. Motions initiating contested matters are subject to more rigorous requirements than the general rules of pleading that apply to adversary proceedings and traditional civil litigation. Compare, Fed R. Civ. P Rule 8 with Fed. R. Bankr. P. Rule 9013. A motion initiating a contested matter in a bankruptcy proceeding is required to “set forth the order or relief sought” and the grounds upon which it is based “with particularity.” Fed R Bankr P. Rule 9013. This is akin the requirements of pleading fraud and mistake under Rule 9 of the Federal Rules of Civil Procedure. In re Minton, 2006 WL 533352 *2, 2006 Bankr. LEXIS 4269 (Bankr. N.D. Ind. 2006). In this instance that would have required the motion to put some kind of value upon Shoaff and Millett’s liens and to allege facts substantiating that value. See, In re Hudson, 260 B.R. 421, 432 (Bankr. W.D. Mich. 2001). Although they have chosen to raise the issue through an adversary

proceeding, rather than as contested matter with a motion, the court sees no reason why that should allow Simon and JAS to avoid the rules of pleading or the burden of proof that are usually associated with the relief they seek. Indeed, had they observed those rules and set out what they were seeking and reasons why with the required particularity, the confusion over whether they were objecting to Shoaff and Millett's claims or doing something else would have been completely avoided.²

Section 506(a)'s instructions to value liens in connection with proceedings concerning the use or disposition of the property subject to those liens, 11 U.S.C. § 506(a), reveals another weakness in Simon and JAS's request. It is premature and they apparently lack standing to seek such a determination. At the present time, there are no proceedings concerning the use or disposition of the FCC licenses Shoaff and Millett may claim liens upon that would create a need to determine the value of those liens. The trustee has been authorized to sell the licenses, but has not yet taken any action to distribute the sale proceeds. See, N.D. Ind. L.B.R. B-6004-1(d) (proceeds of sale not disbursed except by order of the court following an appropriate motion and notice to all creditors). Without some kind of proceeding that will decide what is to be done with property there is no reason to value the liens against it. Without a reason for deciding the issue everyone involved may just be wasting their time. Furthermore, until that time comes and someone takes a position, one way or the other, with regard to the property and the value of the liens against it, there would seem to be no case or controversy capable of being entertained by the court. See,

²A motion seeking relief that Bankruptcy Rule 7001 requires to be sought through an adversary proceeding should be dismissed. Matter of Perkins, 902 F.2d 1254, 1258 (7th Cir. 1990). Because adversary proceedings are usually seen as giving defendants more procedural protection than contested matters, the converse may not always be true. Nonetheless, as this case demonstrates, there are important distinctions between adversary proceedings and contested matters which should not be overlooked because someone has chosen to file a complaint rather than a motion.

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126, 127 S.Ct. 764, 771 (2007) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461, 461 (1937) (case or controversy requires the dispute to be “‘definite and concrete, touching the legal relations of parties having adverse legal interests;’ and that it be ‘real and substantial’ and ‘admi[t] of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’”).

This leads the court to conclude that to have standing to seek a determination concerning the value of liens upon property, a party must be proposing some type of use or other disposition of that property. Since the ability to use, sell or lease property of the estate is given to the trustee, see, 11 U.S.C. § 363(b); Matter of Perkins, 902 F.2d 1254, 1258 (7th Cir. 1990) (“When a third party tries to assert an action still vested in the trustee, the court should dismiss the action.”), the trustee can seek such a determination in connection with those efforts. In certain situations creditors have the opportunity to seek a disposition of sorts, through a motion for relief from stay or abandonment, and in connection with doing so would have standing to seek a determination of the value of property and the liens against it. A Chapter 7 debtor has the opportunity to redeem property from liens and to do so may require the court to value those liens. In each of these instances, however, the court is being ask to make determinations concerning the value of liens for a particular reason and at the request of a party whose rights will be affected by that determination. It is not, as here, being asked to make the determination for no apparent reason other than for the sake of doing so.

Simon and JAS are not proposing any type of disposition of the estate’s property. They have simply asked the court to determine the value of Shoaff and Millett’s claimed liens, without any context or apparent purpose for doing so. (And without taking any position either in the complaint or in response to the motion for summary judgment as to what that value may be.) Admittedly, Rule

3012 does authorize “any party in interest” to request such a determination, but simply being a party in interest does not allow every creditor to raise or be heard on every issue. Matter of James Wilson Associates, 965 F.2d 160, 168 (7th Cir. 1992). Instead, to have standing a party must be among those the statute or the rule was designed to protect. See, Id. Since Simon and JAS are not proposing any type of disposition of the estate’s property, they have no standing to seek a determination of the value of liens upon it.

There is no genuine issue of material fact. Shoaff and Millett are entitled to judgment as a matter of law with regard to Simon and JAS’s objection to their proofs of claim and/or the request to determine the value of their claimed liens. Simon and JAS’s claim objection and/or request to determine Shoaff and Millett’s secured status are hereby DISMISSED.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court