UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Jacksonville Division

IN RE:
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,

Case No. 3:09-bk-07047

Chapter 11

Debtor.

MOVANTS' WRITTEN SUMMATION

Now come movants, Richard and Connie Cotta, Richard Cotta, Carol Hays, Franklin W. James, Jr., Charles Kerns and Jon Staats, ("Movants") and submit the following summation argument in support of their motion for limited modification of the § 524 injunction to permit an action to recover against Debtor's surety company. In the interests of justice and the reasons detailed below, this Court should grant the motion.

BACKGROUND

Movants are West Virginia consumers with a mortgage loan that was originated by the Debtor, Taylor, Bean & Whitaker Mortgage Corporation (TBW). The movants claim their mortgage loans were originated in violation of West Virginia law; they only discovered the violations after the claims bar date in the TBW bankruptcy; and they all seek redress against the surety bond TBW acquired in favor of the West Virginia Department of Financial Institutions to protect consumers from illegal lending activity should the lender become defunct. West Virginia law requires TBW to have had this surety bond in favor of the state as a prerequisite to making loans in West Virginia. This requirement was implemented in order to protect consumers such as movants from any illegal activity on the part of a mortgage lender or broker in the event of said lender or broker's insolvency. See W. Va. Code § 31-17-4.

Prior to October, 2014, the common practice in West Virginia was to, upon the assent of the Commissioner of Banking, bring suit directly against the surety for the illegal actions of an insolvent or bankrupt principal. However, on October 2, 2014 the West Virginia Supreme Court of Appeals found that an aggrieved party could not maintain an action against the surety alone, but that the proper procedure to collect on the statutory bond was to obtain judgment against the principal to determine the amount of liability, and present the judgment to the surety company for payment. Fidelity and Deposit Company of Maryland v.James, ___ S.E.2d ___ (2014). The bond company was able to successfully argue, although they would be willing to pay, a prerequisite of payment was a judgment in an amount certain against TBW. See Id. This decision has prompted the instant motion to modify the §524 injunction to determine the extent of the Debtor's liability to movants in order to collect against a third party obligated entity under §524(e). The liquidating trustee objects. If the objection is upheld, the movants will have no recourse from TBW's illegal activity and will not be provided the statutory protections afforded to them by West Virginia law and the surety contract with a company that is not protected by the bankruptcy stay. Further, the entire legislative purpose of requiring mortgage lenders to obtain bonds in the State of West Virginia will be undermined. Likewise, the federal legislative purpose that a discharge of the debtor should not affect co-debtors or guarantors will be unheeded. These consequences will be reached in the face of controlling 11th Circuit precedent which specifically allows the type of §524 modification for which the movants ask. Accordingly, the motion should be granted.

ARGUMENT

As an initial matter, it is of no consequence for the relief sought in the instant motion whether or not the movants filed claims in the instant bankruptcy action. In re Jet Florida Systems, Inc., 883 F.2d 970 (11th Cir. 2006). However, according to Zurich American Insurance Company (Zurich), the surety or bond company, the movants' claims are included in Zurich's

proof of claim filed in this matter. (Claim No. 6380052314.) As Zurich's representative Karen Turner testified, "they were always in the proof of claim." However, the amount of the West Virginia claims were not specified because the claims are still pending. Turner Deposition. 20-21. The movants now seek only the ability to reduce their claims to an amount certain.

The trustee's argument is that allowing the movants to recover against the bond naturally results in a diminution of estate assets. This is not true. The estate assets are finite, and Zurich's proofs of claim are filed and are in the process of resolution or claims adjudication. As Ms. Turner testified, the movants' claims are included in those previously filed claims concerning TBW's West Virginia bond. However, the adjudication of Zurich's claim is of no importance to the movants because the relief they seek is unrelated. They seek only to recover on the bond that Zurich issued on TBW's behalf for the protection and assurance of all of TBW's West Virginia borrowers. The instant motion, however, is the only path in which they can do so. To deny the borrowers the protections of the bond would be to ignore the statutory protection drafted and enacted by the West Virginia legislature. Indeed as Ms. Turner acknowledged in her testimony, in issuing the bond "the surety company is providing assurances to the state that a financially stable entity will be available, in this case, to pay a judgment." Turner Depo. 37. Further, Ms. Turner testified that insolvency and other credit risks are priced into the cost of the bond between the surety and the principal. Turner Depo. 38-39.

Despite the Trustee's attempt to split hairs and highlight the difference of insurers and sureties, the situation at hand is analogous to the situation in Jet Florida Systems., wherein the Court of Appeals held that 11 U.S.C. § 524(e) permits a creditor to seek recovery from "any other entity" who is liable on behalf of the debtor, even if that means naming the debtor as a nominal party to determine the extent of the liability. See also, e.g., Matter of Edgeworth, 993 F.2d 51 (5th Circuit 1993) (permitting modification of the bankruptcy injunction for the purpose of determining

extent of Debtor's liability in order to collect on obligated third party), Green v. Welsh, 956 F.2d 30 (2d Cir. 1992) (same); In re Walker, 927 F.2d 1138 (10th Cir. 1991) (same); Matter of Shondel, 950 F.2d 1301 (7th Cir. 1991) (same). Indeed, the Court of Appeals stated, "When it is necessary to commence or continue a suit against a debtor in order, for example, to establish liability of another, perhaps a ***surety***, such suit would not be barred." Jet Florida Systems at 973. (Internal quotations omitted)(emphasis added). The 11th Circuit makes no distinction between insurers and sureties.

This interpretation is consistent with the historical development of §524(e). Section 16 of the Bankruptcy Act stated, "[t[he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Act of July 1, 1898, ch. 541, §16, 30 Stat. 550 (formerly codified at 11 U.S.C. §34 (1976)). Without this historic protection, the discharge of a debtor might automatically extinguish relief against guarantors and sureties. See, In re Digital Impact, Inc., 223 B.R. 1, 10 (N.D. Okla. 1998) ("[S]ection 524(e) was intended to insure that co-debtors or guarantors ... are not automatically released from the debtor or guaranty upon the discharge of a debtor ....") (emphasis removed). See also, Landsing Div. Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, 600-01 (10th Cir. 1990) (noting that numerous courts have confirmed that "creditors whose claims have been discharged vis-à-vis the bankrupt [may] recover on the same claims from third parties.")

Accordingly, the indemnification agreement between TBW and Zurich is nothing more than a red herring as it pertains to the movants. Indemnity is not required by the West Virginia statute or the Commissioner of Banking. It is a contractual provision between TBW and Zurich and does not affect the responsibility of the non-debtor, bond company to pay out on the legitimate claim of a West Virginia consumer. Furthermore, the potential lack of a solvent principal from

which indemnification can be sought, is priced into the bond from the initial purchase by TBW from Zurich. Jet Florida Systems speaks directly to this point, as well. There, the 11th Circuit made clear that it is not the potential loss of the surety or insurance provider that is of concern in this analysis. Rather, so long as the movants do not seek to hold the debtor personally liable, the surety cannot escape the obligations that it undertook when issuing the bond. Whether the surety can then hold the debtor personally liable through any agreement between the two is a separate matter that must be examined under §524. What is clear, is that so long as the movants do not wish to hold the debtor personally liable, they are permitted to proceed in their action to determine the liability of the debtor. Simply stated, that is the law in this circuit, and accordingly, the movants' motion to modify the §524 injunction should be permitted.

CONCLUSION

The movants seek only to be permitted to nominally name the Debtor as a party to determine TBW's liability on their loan origination claims. Any monetary recovery sought by the movants will be paid by an obligated third party entity. Because the movants do not seek to assert any personal liability against the Debtor, the 11th Circuit has held that 11 U.S.C. § 524(e) permits them to proceed. Accordingly, the movants respectfully request this Court to grant their motion.

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/s/Lynn Drysdale

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31th day of July, 2015, I forwarded a copy of the foregoing summation to each and every creditor and interested party listed upon the attached Exhibit "A" attached hereto.

/s/Lynn Drysdale
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EXHIBIT "A"

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