


Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
April 08, 2016

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:)	Case No.: 13-17131-MKN
)	Chapter 13
MARK MADMON and SHERI MADMON,)	
)	
Debtors.)	Date: March 16, 2016
)	Time: 2:30 p.m.

**ORDER ON DEBTORS’ MOTION TO CLARIFY
AND ENFORCE LOAN MODIFICATION AGREEMENT¹**

On March 16, 2016, the court heard the Debtors’ Motion to Clarify and Enforce Loan Modification Agreement (“Clarification Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On August 20, 2013, a voluntary Chapter 13 petition was filed by Mark Madmon and Sheri Madmon (“Debtors”). (ECF No. 1). The case was assigned to Kathleen Leavitt as Chapter 13 trustee (“Trustee”).

On September 4, 2012, Debtors filed their real property Schedule “A” listing a residence located at 3640 Thom Boulevard, Las Vegas, Nevada (“Residence”), having a value of \$181,115.00. (ECF No. 16). Debtors’ Schedule “D” lists America’s Servicing Company (“ASC”) as having a first mortgage against the Residence securing a claim in the amount of

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 \$359,650. Schedule “F” lists Bank of America (BOA”) as having an unsecured claim based on a
2 secured credit line, but does not identify the collateral. On the same date, Debtors also filed a
3 proposed Chapter 13 plan. (ECF No. 18).

4 On September 11, 2013, a request for special notice was filed on behalf of ASC. (ECF
5 No. 20). The request indicated that ASC is the loan servicer for U.S. Bank National Association,
6 as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSFB Mortgage-Backed
7 Pass-Through.

8 On June 2, 2014, Debtors filed a motion to value the Residence (“Valuation Motion”).
9 (ECF No. 37). Notice of the hearing on the motion was given to ASC through their counsel of
10 record, as well as to BOA. (ECF No. 38).

11 On September 30, 2014, an order was entered granting the Valuation Motion (“Valuation
12 Order”). (ECF No. 44). Based on a valuation of the Residence at \$203,004.00, the Valuation
13 Order indicates that BOA, as the holder of a second lien against the property, has a wholly-
14 unsecured claim that is to be classified as a general unsecured claim.

15 On December 9, 2014, Debtors filed a motion for authorization to modify their loan
16 agreement with ASC (“Modification Motion”). (ECF No. 46). ASC had offered to modify its
17 loan on favorable terms (“First Loan Modification”), but required BOA to execute a
18 subordination agreement as a condition to such a modification.² Debtors apparently sought
19 authorization to complete the First Loan Modification without requiring BOA to sign a
20 subordination agreement. Along with filing the Modification Motion, Debtors also filed an ex
21 parte request to have the Modification Motion heard on an order shortening time. (ECF No. 47).

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23 ² Either ASC or BOA took the legal position that BOA’s deed of trust against the
24 Residence remained in place until Debtors discharged the underlying obligation by completing
25 their Chapter 13 plan payments. In this judicial district, a lien against real property remains in
26 place and is not “stripped” from the property until the underlying indebtedness is discharged.
27 The Valuation Order itself recognizes this requirement, expressly stating that “the Debtors must
28 complete their Chapter 13 plan and receive a discharge or Bank of America’s lien may be
reinstated” and that “in the event the instant Chapter 13 is dismissed or converted to a Chapter 7
the instant order shall be vacated.” Valuation Order at 3:6-13. Debtors apparently recorded the
Valuation Order in the county records, see Modification Motion at ¶ 11, but neither the order nor
its recordation accomplishes a “strip” of BOA’s lien.

1 On the same date, an order was entered shortening time (“OST”) so that the Modification Motion
2 could be heard on December 17, 2014. (ECF No. 49). The OST allowed opposition to be
3 presented at the hearing. Notice of the Modification Motion as well as the OST were served on
4 counsel for ASC. (ECF No. 51).

5 On December 31, 2014, an order was entered granting the Modification Motion
6 (“Modification Order”). (ECF No. 52). A copy of the First Loan Modification is attached as
7 Exhibit “A” to the Modification Order. No opposition had been filed nor did any party in
8 interest or their counsel appear at the hearing to object to the relief requested. The Modification
9 Order provides in pertinent part that “the Modification Agreement is approved without further
10 authorization from Bank of America, N.A., its successors or assigns; . . .” *Id.* at 2:11-12.
11 (emphasis added). No appeal was taken from the Modification Order.

12 On February 2, 2015, Debtors filed proposed Chapter 13 Plan #4 (“Plan”). (ECF No.
13 55). Section 2.14 of the Plan is entitled “Class 4 - Secured Claims Paid Directly by Debtor or a
14 Third Party.” ASC is listed with a reference to Section 6.02 of the Plan, and Section 2.14
15 provides for ASC to receive an installment payment amount of \$1,582.90.³ Section 6.02 of the
16 Plan is entitled “Loan Modification” and provides that “The Debtors entered into a trial loan
17 modification agreement with the secured creditor, ASC, relative to their [Residence]. On
18 December 31, 2014, the Court entered and Order Approving the Loan Modification (the “Loan
19 Modification”), Docket No. 52. The Debtors are paying pursuant to the Loan Modification.”
20 Pursuant to an order shortening time (ECF No. 58), a hearing to confirm the Plan was scheduled
21 for February 19, 2015. (ECF No. 59). A copy of the proposed Plan along with the notice of
22 hearing was served on ASC. (ECF No. 60). An objection deadline of February 12, 2015, was
23 set by the order shortening time. At the February 19, 2015 hearing, plan confirmation was
24 continued to March 5, 2015. (ECF No. 62).

25 On March 16, 2015, an order was entered confirming the Debtors’ Chapter 13 plan
26 (“Plan Confirmation Order”). (ECF No. 63). Debtors’ confirmed Chapter 13 plan had a 3-year
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28 ³ This \$1,582.90 secured payment is ninety cents more than the monthly payment amount
in the First Loan Modification.

1 applicable commitment period and a \$23,120 liquidation value. Debtors elected to pay 100% of
2 their non-priority unsecured claims. No appeal was taken from the Plan Confirmation Order.

3 On July 24, 2015, the Trustee filed a Final Account and Report certifying that the Debtor
4 had paid \$33,552.33 into their plan, thereby exceeding liquidation value of their assets, with all
5 allowed priority and nonpriority unsecured claims being paid in full. (ECF No. 64).

6 On July 27, 2015, the Debtors filed a certificate of compliance with the conditions
7 required for entry of a Chapter 13 discharge, including a notice giving any creditors or parties in
8 interest 21 days to object. (ECF No. 65). The certificate was served on all creditors, including
9 ASC. (ECF No. 66).

10 On August 28, 2015, a Discharge of Debtor After Completion of Chapter 13 Plan was
11 entered. (ECF No. 67).

12 On October 9, 2015, a final decree was entered closing the Chapter 13 case. (ECF No.
13 70).⁴

14 On January 4, 2016, Debtors filed an ex parte motion to reopen the case. (ECF No. 72).

15 On January 13, 2016, Debtors filed the instant Clarification Motion (ECF No. 74),
16 accompanied by the declaration of their counsel, Samuel A. Schwartz (“Schwartz Declaration”).
17 (ECF No. 75). The motion was noticed to be heard on February 18, 2016. (ECF No. 76).

18 On January 26, 2016, an order was entered reopening the case. (ECF No. 79).

19 On February 4, 2016, ASC filed opposition to the Clarification Motion. (ECF No. 80).

20 On February 17, 2016, Debtors filed a reply. (ECF No. 82).

21 On February 18, 2016, at the scheduled hearing, the court directed the parties to submit
22 supplemental briefing.

23 On March 9, 2016, Debtors filed their brief (“Debtors Supp. Br.”) (ECF No. 85) and on
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27 ⁴ On October 7, 2015, prior to entry of the final decree, the Trustee filed a Final Report
28 and Account confirming that the Debtors had paid \$33,552.33 under their confirmed Plan and
that the distributions set forth in the prior account had been made. (ECF No. 69).

1 March 11, 2016, ASC filed its supplemental brief (“ASC Supp. Br.”). (ECF No. 88).⁵

2 On March 16, 2015, Debtors filed a supplemental declaration (“Debtors Declaration”)
3 attesting that they have made all required loan modification payments. (ECF No. 90).

4 DISCUSSION

5 The Clarification Motion is brought under Section 105(a)⁶ and essentially seeks to
6 compel ASC to comply with the First Loan Modification. That modification is dated July 11,
7 2014, and provides for the Debtors’ original monthly loan payments to be reduced from
8 \$1,965.51 to \$1,582.00 for a three-month trial payment plan (“TPP”) commencing September 1,
9 2014.⁷ After successful completion of a TPP, the borrower typically is offered a permanent loan
10 modification under the federal Making Home Affordable Program (“HAMP”). In this case, the
11 First Loan Modification specifically provides that the Debtors’ TPP “may extend beyond the
12 dates provided.” It further explains that

13 Some of the reasons for the extension could be tied to other liens
14 you have on your property that may be required to be cleared prior
15 to final approval of your modification. For example, we may need
16 to receive a subordination agreement from other lenders so that we
can maintain our lien position...If you fail to provide a
subordination agreement from another lender.... your modification
may be denied even if you pay the trial period payments...

17 (emphasis added). Although the language required the Debtors to obtain the subordination
18 agreement from BOA, ASC undertook or joined in efforts to obtain the subordination agreement
19 from BOA in November 2014. See Schwartz Declaration at ¶ 6. Unfortunately, BOA
20 transferred the loan to United Guaranty shortly after the Modification Motion was filed. Id. at ¶

21 _____
22 ⁵ ASC originally delivered a copy of its supplemental brief to chambers, but the court
23 ordered that the brief be filed and served on Debtors’ counsel. (ECF No. 87). ASC’s
24 supplemental brief also goes far beyond addressing the limited issue requested by the court.

25 ⁶ Section 105(a) is a grant of equitable authority to the court to “issue any order . . . that is
26 necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Moreover,
27 the court may, sua sponte, take “any action . . . necessary or appropriate to enforce or implement
28 court orders or rules . . .” Id.

⁷ The \$1,582.00 monthly payment in the First Loan Modification apparently was based
on a \$205,000 value of the Residence (approximately the figure in the order granting the
Debtors’ Valuation Motion) along with projected monthly income of \$5,066.00.

1 8. In March, 2015, after the Modification Motion had been granted, United Guaranty refused to
2 sign a subordination agreement. As a result, ASC apparently insisted that the Debtors receive
3 their Chapter 13 discharge in order to avoid the wholly-unsecured second mortgage then-held by
4 United Guaranty. Id. at ¶ 10.

5 Debtors ultimately received their Chapter 13 discharge on August 28, 2015, but by then
6 ASC had closed their loan file. See Schwartz Declaration at ¶¶ 12, 13 and 14.

7 A copy of a Second Loan Modification is attached as Exhibit “A” to ASC’s Opposition.⁸
8 It is dated December 11, 2015, and provides for the Debtors’ original monthly loan payments to
9 be reduced from \$1,965.51 to \$1,722.56 for a three-month trial period commencing January 1,
10 2016.⁹ The Second Loan Modification contains the same language for extension of the TPP in
11 the event there are other liens, but there is no dispute that the Debtors’ discharge through
12 Chapter 13 allows the second mortgage of United Guaranty to be stripped from the Residence.¹⁰
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14 ⁸ The Second Loan Modification apparently was offered after the Debtors submitted a
15 Request for Mortgage Assistance (“RMA”) under HAMP on September 29, 2015. See ASC
16 Supp. Br. at Exhibit “E.”

17 ⁹ The \$1,722.56 monthly payment in the Second Loan Modification apparently is based
18 on a \$293,000 value of the Residence along with projected monthly income of \$5,551.00.
19 Debtors apparently provide the information for the increased monthly income projection in their
20 RMA, but it is not clear where ASC obtained the information to increase the estimated value of
21 the Residence from \$205,000 in the First Loan Modification to \$293,000 in the Second Loan
22 Modification.

23 ¹⁰ Although the First Loan Modification specifies that ASC might require a subordination
24 agreement to be obtained from another lender, the importance of a subordination agreement is
25 not explained until the following language appears in the Second Loan Modification: “A
26 subordination agreement is a legal document put in place when a home has two liens, and
27 determines which lien takes priority over the other. The benefit of being in first lien position is
28 that it prioritizes the loan for repayment in the event the homebuyer goes into default. This
agreement is typically put into effect when a homeowner tries to refinance or modify their first
mortgage. When a homeowner chooses to refinance or modify the first mortgage, the second
mortgage automatically moves up to the first mortgage position - upsetting the original order. In
order for the refinance or modification to be finalized, the lender of the second mortgage must
agree to subordinate their lien on the new mortgage.” See Second Loan Modification at 4 of 7.
In lieu of a subordination agreement from United Guaranty, ASC required that the Debtors
obtain their Chapter 13 discharge so that the lien of the second mortgage could be stripped from
the Residence.

1 It appears that after the March 1, 2016 payment is made, ASC would not be reluctant to make the
2 Second Loan Modification permanent.

3 In comparing the First Loan Modification and the Second Loan Modification, the
4 difference in the amount of the monthly payments is approximately \$140.00. The Second Loan
5 Modification offers a more favorable 2.000% interest rate while the First Loan Modification was
6 at a 4.375% estimated rate. The Second Loan Modification, however, does not appear to offer
7 the same principal forgiveness of \$83,981.26 that was included the First Loan Modification.
8 Instead, the Second Loan Modification includes a “pay-for-performance” formula for incentives
9 that do not appear to approach the principal forgiveness available under the First Loan
10 Modification. There is no apparent dispute that the Debtors have made all of the TPP payments
11 required under both the First Loan Modification and the Second Loan Modification. See
12 Debtors Declaration at ¶ 2 and Exhibit “1” attached thereto.

13 At the court’s direction, the parties submitted supplemental briefs concerning the
14 applicability of the Ninth Circuit’s decision in Corvello v. Wells Fargo Bank, N.A., 728 F.3d
15 878 (2013). In that case, the circuit panel reversed the district court’s order granting a motion to
16 dismiss a class action diversity complaint alleging breach of contract, unfair competition, and
17 other theories against a lender under California law. The district court concluded that the
18 plaintiff had failed to state a claim for breach of a TPP arising from the lender’s participation in
19 HAMP. Based on the language of the TPP,¹¹ the circuit panel concluded that upon receipt of the
20 TPP, the lender was obligated to notify the plaintiff if it had determined the plaintiff was not
21 eligible for a loan modification. 728 F.3d at 884. Moreover, once the plaintiff completed the
22 TPP, the lender was required to offer a permanent loan modification. Id. Thus, under California
23 law, the allegations of the plaintiff’s complaint were sufficient to state a claim for breach of
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26 ¹¹ HAMP went into effect on March 4, 2009. The Corvello litigation was commenced on
27 November 9, 2010. See Phillip R. Corvello v. Wells Fargo Bank N.A., Case No. 3:10-cv-05072-
28 VC (N.D.Cal.), Class Action Complaint at Docket 1, November 9, 2010. The 3-page TPP form
at issue in the Corvello case was created in March 2009, see id. at Exhibit “G,” and is
substantially different from the 6-page and 7-page TPP forms used for the Loan Modifications in
the instant case.

1 contract. Id. at 884-85.

2 Debtors argue that Corvello is controlling and required ASC to offer a permanent loan
3 modification once the TPP encompassed by the First Loan Modification was completed in
4 December 2014. See Debtors Supp. Br. at ¶¶ 7 and 9. Not surprisingly, ASC argues that
5 Corvello is distinguishable based on the different terms of the TPP involved in that case as well
6 as the Debtors' failure to meet the requirements of the First Loan Agreement, i.e., to obtain a
7 subordination from BOA. See ASC Supp. Br. at 5:1 to 7:5.¹² Having considered the parties'
8 arguments and having reviewed the respective TPP agreements, the court agrees with ASC that
9 Corvello is not controlling.

10 As Corvello does not dictate the outcome of the Clarification Motion, the court has
11 separately considered the arguments of the parties along with the record in this case. Based on
12 all of the circumstances, the court concludes that the Clarification Motion must be denied.

13 As a threshold matter, the language of the Modification Order does not eliminate the
14 requirement for a subordination agreement. Rather, the salient provision merely states that the
15 First Loan Modification "is approved without further authorization from Bank of America, N.A.,
16 its successors or assigns . . ." On its face, the First Loan Modification does not require any
17 authorization from BOA at all. Instead, the subordination agreement from BOA was a condition
18 for final approval of a loan modification. ASC could have waived the condition, but it did not do
19 so because of its concern that BOA's junior lien would prime ASC's priority position as a result
20 of a loan modification. The situation did not change after BOA's junior lien (and presumably the
21 Debtors' obligation to BOA) was transferred to United Guaranty. Moreover, no argument is
22 made nor has evidence been presented that BOA ever would have executed a subordination
23 agreement after the Valuation Order was obtained. Under the circumstances, BOA had little to
24 gain after the Valuation Order was entered and the same was true for United Guaranty.

25 The conduct of the parties also suggests that the Modification Order did not eliminate the

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27 ¹² ASC also argues that unlike the lender in Corvello, it did provide notice to the Debtors
28 on March 16, 2015, that title issues, e.g., the second mortgage, prevented completion of the loan
modification. See ASC Supp. Br. at 7:14-20 and Exhibit "D." The date of that notice and the
date of entry of the Plan Confirmation Order are the same.

1 requirement of a subordination agreement. The Modification Order was entered on December
2 31, 2014. The time to appeal the Modification Order under FRBP 8002(a)(1) expired on January
3 14, 2015. In spite of the language of the Modification Order, the parties were still pursuing a
4 subordination agreement from United Guaranty until March 3, 2015, when ASC was informed
5 that no such agreement would be provided. See Schwartz Declaration at ¶ 10. Thereafter, ASC
6 insisted that in lieu of a subordination agreement, the First Loan Modification could not be
7 finalized¹³ unless the Debtors obtained their Chapter 13 discharge and the second mortgage was
8 stripped. Id. While the Debtors clearly took steps to expedite entry of a discharge, there is
9 nothing in the record establishing an agreement or understanding between the Debtors and ASC
10 of how long the First Loan Modification would remain available.

11 Confirmation of the Plan also does not change this result. Treatment of ASC's claim in
12 Section 2.14 of the Plan is subject to the Modification Order referenced in Section 6.02. The
13 Plan Confirmation Order is a final order and no appeal was taken. While plan confirmation
14 orders typically have issue preclusive and claim preclusive effect on parties who receive notice,
15 those effects are limited by the express provisions applicable to a particular creditor's claim. In
16 this instance, the First Loan Modification approved by the Modification Order included the
17 subordination agreement as a condition to a final modification. Because that condition was not
18 met, nor was it eliminated by the language of the Modification Order, the confirmed Plan also
19 does not require a different result.

20 Under these circumstances, the record does not support the request that the Debtors seek
21 under Section 105(a). The court expresses no view on whether the Debtors have any other bases
22 for claims against ASC in connection with its withdrawal of the First Loan Modification.

23 **IT IS THEREFORE ORDERED** that the Debtors' Motion to Clarify and Enforce Loan
24 Modification Agreement, Docket No. 74, be, and the same hereby is, **DENIED**.

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¹³ The TPP expressly provided that the payment term could continue for non-payment
28 reasons, such as the necessity for the borrower to obtain a subordination agreement from another
lienholder.