2019 IL App (2d) 180173-U
No. 2-18-0173
Order filed April 3, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AMERICAN CHARTERED BANK, Plaintiff, v. PETER J. GALLICHIO; CARRIE GALLICHIO; CITIBANK, NATIONAL ASSOCIATION; CAPITAL ONE BANK, NATIONAL ASSOCIATION; UNKNOWN OWNERS; and NONRECORD CLAIMANTS, Defendants.	)	Appeal from the Circuit Court of Du Page County. No. 10-CH-5830 Honorable Robert W. Rohm, Judge, Presiding.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, as Successor in Interest to JPMorgan Chase Bank National Association, as Successor in Interest to Chase Manhattan Mortgage Corp., Plaintiff-Appellee, v. PETER GALLICHIO, a/k/a Peter J. Gallichio, a/k/a Peter James Gallichio; CARRIE GALLICHIO, a/k/a Carrie Capone Gallichio; AMERICAN CHARTERED BANK; H. NEIL JUHN; CITIBANK	)	Appeal from the Circuit Court of Du Page County. No. 13-CH-3024

(SOUTH DAKOTA) NATIONAL ASSOCIATION; CACH, LLC, as Successor in Interest to Chase Manhattan Bank; MIDLAND FUNDING, LLC; THERESA CAMPOBASSO; ELMHURST MEMORIAL HEALTHCARE; UNKNOWN OWNERS; and NONRECORD CLAIMANTS,	)	
Defendants	)	
(Peter Gallichio and Carrie Gallichio, Defendants-Appellants).	)	Honorable Robert W. Rohm, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendants' objection to the confirmation of sale, as plaintiff's proposed loan-modification agreement did not violate defendants' bankruptcy discharge.

¶ 2 Peter Gallichio (a/k/a Peter J. Gallichio or Peter James Gallichio) and Carrie Gallichio (a/k/a Carrie Capone Gallichio), the property owners in this foreclosure case, appeal from the order confirming the judicial sale concerning the foreclosure of their first mortgage. They assert that the court erred in entering "summary judgment"—actually default judgment—against them and in confirming the sale. The Gallichios have not set out a basis for reversal, and we accordingly affirm.

¶ 3 I. BACKGROUND

¶ 4 In this consolidated foreclosure case, American Chartered Bank (American), the second mortgage holder, filed the first foreclosure case against the Gallichios in 2010 (case No. 10-CH-5830). It also named Citibank, Capital One Bank, unknown owners, and nonrecord claimants as defendants. JPMorgan Chase Bank (JP Morgan), as successor in interest to Chase Manhattan Mortgage Corp., the first mortgage holder, filed the second foreclosure action, No. 13-CH-3024,

on October 25, 2013, naming the Gallichios, American, and others as defendants. (Later, the court allowed the Federal National Mortgage Association (Fannie Mae) to substitute for JPMorgan in the second action.)

¶ 5 In 2011, the Gallichios filed a petition for Chapter 13 bankruptcy (bankruptcy case No. 11-B-18177), and American dismissed its foreclosure case without prejudice. In December 2012, the bankruptcy court lifted the automatic stay under section 362 of the Bankruptcy Code (11 U.S.C. § 362) to the extent of permitting American to reinstate its foreclosure proceedings in the trial court; American did so. The Gallichios appeared and answered American in April 2013. On some date before September 16, 2013, the Gallichios converted their Chapter 13 bankruptcy into a Chapter 7 bankruptcy and the bankruptcy court granted them a discharge. In December 2013, the trial court granted summary judgment for American in the first case and entered a foreclosure judgment.

¶ 6 The court consolidated the two foreclosure cases in January 2014. Peter Gallichio filed a *pro se* appearance in the consolidated case in May 2014. A sale of the interest foreclosed in the first case took place in October 2014, and the court confirmed that sale in November 2014. Thomas F. Howard filed an appearance for the Gallichios in September 2015.

¶ 7 In July 2016, Fannie Mae filed a motion for summary judgment against American and for a default judgment against the Gallichios and other named defendants. The trial court granted summary judgment against American, default judgment against the Gallichios and other named defendants, and entered a foreclosure judgment in favor of Fannie Mae.

¶ 8 The second foreclosure sale took place on June 22, 2017. Fannie Mae filed a motion to confirm the sale on June 26, 2017. The Gallichios filed an objection to the confirmation on July 18, 2017; this was the first substantive filing by the Gallichios relating to the foreclosure of the

first mortgage. They asserted, among other things, that Fannie Mae, while attempting to negotiate a modified loan, had violated the couple's bankruptcy discharge:

> "The loan modification agreement could not be executed after it was reviewed by the defendant, because *the defendant had been discharged in a Chapter 7 bankruptcy proceeding of past due interest on the promissory note which is the subject of this foreclosure proceeding, as well as past due real estate taxes, insurance premiums, and attorney's fees that pertain to this foreclosure proceeding*. Nonetheless, the full amount of the past due interest, real estate taxes, insurance premiums and attorney's fees that were completely discharged in bankruptcy court were added to the actual principal balance due on the note which is the subject of these proceedings and capitalized as part of the new principal balance under the terms of the loan modification agreement." (Emphasis added.)

The Gallichios claimed that, because Fannie Mae's proposed additions to the principal were a violation of the bankruptcy discharge, making the additions was a "fraudulent act[]." They asserted that they had requested further modification of the agreement to comply with the discharge, but that the sale had taken place without their having received a response. They attached a copy of Fannie Mae's proposed modification agreement as an exhibit. Its provisions included the following:

> "Notwithstanding anything to the contrary contained in this Agreement, Borrower and Lender acknowledge the effect of a discharge in bankruptcy that has been granted to Borrower prior to the execution of this Agreement, and that *Lender may not pursue Borrower for personal liability*. However, Borrower acknowledges that Lender retains certain rights, including but not limited to the right to foreclose its lien, evidenced by the

> Security Instrument, under appropriate circumstances and as allowed by applicable law. The parties agree that the consideration for this Agreement is Lender's forbearance from presently exercising its rights and pursuing its remedies under the Security Instrument as a result of Borrower's default thereunder. Nothing in this Agreement shall be construed to be an attempt to collect against Borrower personally or an attempt to revive personal liability." (Emphasis added.)

¶ 9 Fannie Mae responded. It noted, among other things, that it was not attempting to make the Gallichios personally liable for the modified mortgage debt.

¶ 10 The court denied the Gallichios' objection and confirmed the sale on August 29, 2017. The Gallichios filed a "Motion *** for a New Trial" on September 27, 2017. They asserted that Fannie Mae failed to give them proper notice of a denial of modification under the Home Affordable Mortgage Program (HAMP) after they "objected to the inclusion of additional fees, that had already been discharged in bankruptcy court, into the modified loan principal." See 735 ILCS 5/15-1508(d-5) (West 2016) (stating conditions under which a court should refuse to confirm a foreclosure sale when the lender has failed to satisfy HAMP notice requirements). Fannie Mae responded. It argued that the motion was simply a restatement of the objection. It further noted that, given that the Gallichios had rejected the proposed modification, it could not have notified them that *it* had denied the modification. The court denied the Gallichios' motion on February 13, 2018. The Gallichios filed a notice of appeal on March 6, 2018.

¶ 11 II. ANALYSIS

¶ 12 To the extent that we can follow the Gallichios' argument on appeal, they suggest that the actions of Fannie Mae and its agent, Seterus, Inc., in negotiating a modification of the mortgage were such that the court should have vacated its July 26, 2016, grant of "summary judgment"—

actually a default judgment—against them. Their brief focuses on, and, as best we can determine, rests entirely on, the purported illegality of the modification offer. Although they cite few authorities, they rely on *In re Eppolito*, 583 B.R. 822, 827 (Bankr. S.D.N.Y. 2018), for the proposition that a loan modification that adds interest and fees to the loan principal violates a bankruptcy discharge.

¶ 13 The Gallichios assert that they are challenging the "summary judgment" against them and that our review is therefore *de novo*. They are incorrect; given the procedural posture of this case, they may challenge only the confirmation of the sale, a judgment that we review for an abuse of discretion (*e.g., Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 32). Our supreme court has held that, "after a motion to confirm the judicial sale has been filed, a borrower seeking to set aside a default judgment of foreclosure may only do so by filing objections to the confirmation of the sale under the provisions of section 15-1508(b) [of the Code of Civil Procedure (Code) (735 ILCS 5/15-1508(b) (West 2016))]." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27. Section 15-1508(b) provides:

> "Unless the court finds that (i) a notice [of the foreclosure sale] required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2016).

Thus, it is not enough for a defendant to show that some error occurred in the entry of the foreclosure judgment. Sections 15-1508(b)(i), (ii), and (iii) (735 ILCS 5/15-1508(b)(i)-(iii) (West 2016)) each relate to *the circumstances of the sale*. A successful objection to the

foreclosure judgment after the filing of a motion to confirm the sale must therefore be under section 15-1508(b)(iv) (735 ILCS 5/15-1508(b)(iv) (West 2016)), that "justice was otherwise not done." "After a motion to confirm the sale has been filed, it is not sufficient under section 15-1508(b)(iv) to merely raise a meritorious defense to the complaint." *McCluskey*, 2013 IL 115469, ¶ 26. Rather, "[t]o vacate both the sale and the underlying default judgment of foreclosure, the borrower must not only have a meritorious defense to the underlying judgment, but must establish under section 15-1508(b)(iv) that justice was not otherwise done because either the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests." *McCluskey*, 2013 IL 115469, ¶ 26. A party opposing confirmation has the burden of showing a basis to deny confirmation. *2010 Real Estate Foreclosure*, 2013 IL App (1st) 120711, ¶ 32.

¶ 14 In their primary argument, that Fannie Mae violated their bankruptcy discharge, the Gallichios fail to directly address the requirements of section 15-1508(b)(iv). However, we need not decide whether a discharge violation would give the court a basis to deny confirmation, as the proposed loan-modification agreement did not violate the discharge, something that the Gallichios' own cited authority makes clear. The Gallichios argue that, if we follow *Eppolito*, we will conclude that the proposed loan-modification agreement violated the discharge. As we will discuss after giving some general background in bankruptcy law, the holding in *Eppolito* is to the contrary.

¶ 15 Generally, a discharge in bankruptcy relieves the debtor of all personal liability for prepetition debt:

> "Sections 524(a) and 727 of the Bankruptcy Code [(11 U.S.C. § 524(a)] work in tandem to release a debtor from his or her *personal liability* on a debt or claim that existed at the time that the bankruptcy case was filed. [Citation.] *** Generally, a discharge in bankruptcy relieves a debtor from all pre-petition debt, and § 524(a) permanently enjoins creditor action to collect discharged debts." (Emphasis added and internal quotation marks omitted.) *Eppolito*, 583 B.R. at 826.

A debtor may reaffirm a debt that the bankruptcy would otherwise discharge, but only if he or she reaffirms the debt *before* the bankruptcy court enters the discharge order. 11 U.S.C. 524(c)(1); *Eppolito*, 583 B.R. at 826. Although a debtor's *personal* liability on the note associated with a mortgage ceases to exist on discharge, "it is well settled that a creditor's right to foreclose on a mortgage survives or passes through bankruptcy." *Eppolito*, 583 B.R. at 827 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991), and *Drew v. Chase Manhattan Bank, N.A.*, 185 B.R. 139, 142 (S.D.N.Y. 1995)). That is, unless the debtor acts to prevent it, a bankruptcy discharge ends a debtor's personal liability on a mortgage note, both for the principal and all other debt such as fees and interest, but does not affect the creditor's rights to its lien.

¶ 16 Thus, in *Eppolito*, where primary loan-modification documents stated that the debtor had no personal liability for the amount of the modified loan, but secondary documents merely deferred any personal liability for 30 years, the secondary documents, but not the primary documents, violated the discharge. *Eppolito*, 583 B.R. at 827-28. That is, the creditor violated the discharge only because it attempted to make the debtor personally liable for mortgage-related debt, and not because it tried to change the lien amount by increasing the principal.

¶ 17 Here, the proposed loan-modification agreement explicitly acknowledged the Gallichios' discharge and stated that they would not be personally liable for any part of the modified loan

amount. Thus, the inclusion of prepetition debt in the principal did not make it a violation of the discharge. Indeed, the original mortgage principal, which the Gallichios were actively seeking to continue to pay, was equally prepetition debt. As the proposed loan-modification agreement did not violate the discharge, any argument resting on a claim that the discharge was violated must fail.

¶ 18 The Gallichios also argue that the foreclosure judgment was improper because Fannie Mae's loss-mitigation affidavit failed to satisfy the requirements of Illinois Supreme Court Rule 114 (eff. May. 1, 2013). This argument too is defeated by the lack of a violation of the discharge. Even assuming that Fannie Mae failed to comply with Rule 114, that does not provide the Gallichios with a viable objection to confirmation under section 15-1508(b)(iv). As we noted, *McCluskey* provides that, "[a]fter a motion to confirm the sale has been filed, it is not sufficient under section 15-1508(b)(iv) to merely raise a meritorious defense to the complaint." *McCluskey*, 2013 IL 115469, ¶ 26. Given the failure of the Gallichios' claim that Fannie Mae's loss-mitigation efforts violated the discharge, and given the Gallichios' acknowledgment that Fannie Mae engaged in loss mitigation by making a loan-modification offer, any failure by Fannie Mae to comply with Rule 114's requirement for the documentation of its loss-mitigation efforts was solely a failure of technical compliance. In other words, the Gallichios have not shown prejudice from any noncompliance. Thus, they cannot show that justice was not otherwise done.

¶ 19 As the Gallichios have not set out any basis on which the court could have refused to confirm the sale, we conclude that the confirmation of the sale was not an abuse of discretion.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Du Page County confirming the judicial sale.

¶ 22 Affirmed.