

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
POUGHKEEPSIE DIVISION

In re:

NORMAN GREIG, d/b/a
GREIG FARM,

Debtor.

-----x
Chapter 7
Case No. 01-37163 (cgm)

-----x
A P P E A R A N C E S:

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**MEMORANDUM DECISION ON TRUSTEE'S MOTION FOR AN ORDER
REDUCING, EXPUNGING AND/OR MODIFYING CLAIMS**

CECELIA G. MORRIS, U.S.B.J.:

The matter before the Court is a continuation of the financial difficulties of Debtor Norman Greig, a member of a Dutchess County farm family. The contested matter *sub judice* arises from the Chapter 7 Trustee Paul Banner's (the "Trustee") Motion for an Order Reducing, Expunging and/or Modifying Claims, ECF Docket No. 228 (the "Claims Objection Motion"). To date, the parties have resolved the Trustee's

Motion with respect to all portions of Marion T. Greig's claim,¹ except that portion of her claim concerning a mortgage dated August 21, 1979 (the "Land Contract"). Marion T. Greig (the "Claimant") is Debtor's mother. For the foregoing reasons, upon consideration of the submissions of the parties and the hearings held before this Court on July 19, 2005 and September 20, 2005, the Court grants the Trustee's Claims Objection Motion, and expunges that portion of Claimant's claim relating to mortgages executed on August 21, 1979 as being time barred.

JURISDICTION

The Court has jurisdiction over this contested matter under 28 U.S.C. Sections 1334(a) and 157(a) and the standing order of reference to bankruptcy judges dated July 10, 1984 signed by acting Chief Judge Robert J. Ward. This is a core proceeding under 28 U.S.C. Section 157(b)(2)(B). The following opinion constitutes the Court's findings of fact and conclusions of law under Bankruptcy Rules 9014 and 7052.

BACKGROUND FACTS

On August 29, 2001, the Debtor filed a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code."). On November 12, 2002, this Court entered an order converting Debtor's Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code. The Debtor was a farmer who operated a farm, farm stand and related businesses in Red Hook, New York. On the date of the bankruptcy filing, the Debtor owned multiple parcels of real property alone or jointly with various family members. Several of Debtor's family members have filed proofs of claim seeking payment from Debtor's bankruptcy estate (collectively, the "Family

¹ Trustee's counsel represented on the record at the September 20, 2005 hearing that the remainder of the issues raised in the Claims Objection Motion have been resolved consensually.

Claims”).² The Trustee has had the unenviable task of examining these Family Claims in an attempt to ascertain their validity. As evidenced by the Claims Objection Motion, and is often the case among family members, the financial transactions at issue in the Family Claims are scantily documented, if memorialized at all; at times, money was lent and property changed hands pursuant to “oral” agreements among the siblings. *See, e.g.* Transcript of Norman Greig’s 2004 Examination, annexed to the Response as Exhibit “B,” pp. 5-6 (describing an oral agreement between brothers Norman and Robert Greig for the transfer of an “undescribed additional 33 acres”). As is also often the case with family members, the Greig relatives may have been reluctant to press their financially struggling brother for payment; no such compunction, however, prevents them from seeking payment from the bankruptcy estate for various undocumented, nebulous and stale claims, perhaps to the detriment of other creditors. Thus it is the Trustee’s duty to ensure that these family members do not “circle” the wagons to the disadvantage of Debtor’s other creditors, including, but not limited to, his estranged wife. With this background in mind, the Court turns to the claims objection relating to the 1979 Land Contracts.

At issue in this contested matter is a claim spawned from the sale of approximately 93.4 acres to the Debtor by Marion Greig and Robert G. Greig, deceased,

² Excluding Debtor’s estranged wife and father-in-law, Greig family members who have filed claims include: Peggy Greig, Claim No. 9, unsecured claim for \$15,208.60; Angie Greig, Claim No. 38, unsecured claim for \$30,803.00; Carolyn Greig, Claim No. 39, unsecured claim for \$37,350.00; Carolyn Greig a/g/f William Jurkowski, Claim No. 40, unsecured claim for \$46,700.00; Carolyn Greig a/g/f Kenneth Jurkowski, Claim No. 41, unsecured claim for \$46,700.00; Robert T. Greig a/c/f Katherine Greig, Claim No. 43, unsecured claim of \$34,405.00; Robert T. Greig, Claim No. 44, unsecured claim for \$85,589.00; Robert T. Greig a/c/f Fiona Greig, Claim No. 45, unsecured claim for \$34,405.00; Susan Greig, Claim No. 46, unsecured claim for \$47,237.00; Marion Greig, Claim No. 47, secured claim for \$412,224.00; and Robert T. Greig a/c/f Robert C. Greig, Claim No. 48, an unsecured claim for \$39,059.00.

that is allegedly secured by mortgages on the real property.³ The mortgage at issue provided for annual payments of \$500.00 on the last day of each year from 1979 through 1988 with a balloon payment in the amount of \$20,000 due on December 31, 1989. It is the Trustee's argument that payment has not been made on the mortgage since at least 1992. See Response to Opposition of Marion T. Greig and in Further Support of Trustee's Motion for an Order Reducing, Expunging and/or Modifying Claims, ECF. Docket No. 232, ¶ 2 (the "Response"). Annexed to the Response as Exhibit A is a copy of Claimant's accounting record concerning the debt at issue which shows no payment had been credited to the Land Contract in the period from December 31, 1992 through August 29, 2001, the petition date. Annexed to the Claims Objection Motion as Exhibit A is Greig Farm's Detail Trial Balance Sheet, dated December 31, 2001, which indicates that the entire \$37,025.39 was owed to Marion and Robert Greig pursuant to the Land Contract at the end of 2001.

Claimant acknowledges in the Opposition that the last payment of principal on the mortgages was made in 1991. Claimant's Reply contends however that Debtor made payments to Claimant as late as October, 2000. These payments were not intended by Debtor or Claimant to be allocated to any specific debt; rather, the "debts were treated as part of a whole⁴ and interest was partially paid on the whole." Reply, at ¶ 7. According

³ Pursuant to the Affidavit in Opposition filed by Angie Greig on behalf of Marion T. Greig, dated June 7, 2005, ECF Docket No. 229 (the "Opposition"), and the Reply of Marion T. Greig in Opposition to Trustee's Motion for an Order Expunging Claim with Respect to Land Sale Contract, ECF Docket No. 234 (the "Reply"), there is only one debt owing pursuant to the mortgages. According to the Opposition, the two mortgages "combined," whatever that means, to become the principal of the "Land Contract" portion of Claimant's claim. Claimant's proof of claim is confusing at best; the Trustee originally believed that Claimant was seeking payment on both mortgages. Since the Claims Objection Motion was filed, it has been argued, although not particularly coherently, that these mortgages constitute "one debt."

⁴ Claimant's proof of claim seeks a total of \$412,224.00, consisting of what Claimant denominates as 3 mortgages in her favor and five "running totals."

to Claimant, Debtor “made payments of interest as late as 2000 *without specification as to how such payment should be applied.*” Reply, at ¶ 5.

DISCUSSION

Pursuant to 11 U.S.C. § 502, a claim, proof of which is filed, is deemed allowed unless a party in interest objects and, after notice and a hearing, the Court disallows the claim in whole or in part. 11 U.S.C. § 502. Section 502(b)(1) requires a claim to be disallowed if:

Such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured. . .

11 U.S.C. § 502(b)(1). Section 502(b)(1) is further supported by 11 U.S.C. § 558 which provides:

Defenses of the Estate. The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation. . . A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

11 U.S.C. § 558. In other words, Sections 502(b)(1) and 558 make available to the Trustee any defense to a claim to the same extent that the debtor could assert such a defense under applicable law, including state law. *In re Brill*, 318 B.R. 49, 53 (Bankr. S.D.N.Y. 2004). An expired limitation period will render a claim unenforceable against the estate. *Id.* at 61 (expunging claim on note where limitations period expired pre-petition).

New York Civil Practice Law and Rules (“C.P.L.R.”) 213 provides that an action to collect sums due under a note, the payment of which is secured by real

property, or to foreclose such mortgage must be commenced within six (6) years. C.P.L.R. § 213(4). The statute of limitations applicable to such actions runs from the date the mortgagee is entitled to payment in full. *Williams v. Lopes*, 2005 WL 2451991 (N.Y. Sup. Ct. Sept. 30, 2005); *Saini v. Cinelli Enter. Inc.*, 733 N.Y.S.2d 824, 826 (N.Y. App. Div. 2001). Pursuant to New York Real Property Actions and Proceedings Law (“R.P.A.P.L.”) Section 1501(4), where the time to commence a foreclosure proceeding has expired, any person having an interest in the property may bring an action to cancel the mortgage.

There is no dispute that a final balloon payment on the Land Contract was due in 1989, and that this payment had never been made. According to Claimant’s submissions in opposition to the Claims Objection Motion, the last payment of principal on these mortgages was made in 1992. On the filing date, nine years had elapsed since Debtor had made a payment of principal toward the mortgages. Additionally, the Debtor and Claimant persist in carrying this debt on their respective books as an unpaid obligation that continues to accrue interest. Therefore, unless the six year statute of limitations has been tolled, enforcement of the Land Contract is time barred, and Claimant is not entitled to receive payment from the bankruptcy estate for this portion of her claim.

Claimant is apparently arguing that a payment made by Debtor in October, 2000 constituted a partial payment on the Land Contract sufficient to revive the expired Statute of Limitation. *See, generally*, New York Gen. Oblig. Law Section 17-101.⁵ “[I]n order to toll the statute or start it running anew, it must be shown

⁵ N.Y. Gen. Oblig. Law § 17-101. Acknowledgment or new promise must be in writing - An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only

that the payment was a portion of an admitted debt under circumstances amounting to a clearly demonstrated intention to pay the balance... The circumstances of partial payment may be proven by extrinsic evidence, including the books and records of the debtor, admissions of the debtor, as well as testimony of the debtor or persons having direct knowledge of the circumstances of the payment." See *Williams, supra*, at **2 (emphasis added). "In order for a partial payment to extend or renew the Statute of Limitations, the creditor must show that there was a payment by the debtor... of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgement by the debtor of more being due, from which a promise may be inferred to pay the remaining balance." *Saini, supra*, at 826 (emphasis supplied). Furthermore, "[t]he burden of proof rests upon such party as seeks, by a showing of a new matter, to avoid the impact of the statute [of limitations]. The burden rests upon [the mortgagee] to prove the facts needed to generate a bar, if any, to the deadly effect of the statute." See *Portnoy v. McFarland*, 130 N.Y.S.2d 448, 450 (N.Y. Sup. Ct. 1954). In this case, neither Debtor's or Claimant's books, insofar as the Court has been shown, credits Debtor for payments made in the past six years toward the balance owed on the Land Contract. Instead, in the Reply, Claimant admits that Debtor made the 2000 payments without any specification as to how the payments should be applied, without acknowledgment of the Land Contract or any explicit promise to repay in

competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest. (Emphasis supplied).

full any of the multitude of obligations owed to his aging mother. At best, it appears that when the 2000 payment was made Debtor was silent as to its application. Nor did Claimant receive the payment as made on the mortgages; her financial records indicate that no payment had been made on the mortgages from 1992 forward. The fact that Claimant indicates that a secretary was responsible for crediting payments to one account or another without any intention whatsoever as to legal consequences of that action does not change the analysis; in order for the statute to be revived specific intent to renew the obligation must be shown by the party seeking to obviate the statutory time bar. The Court finds that the Claimant has not met her burden to show that these partial payments were made under circumstances amounting to an absolute and unqualified acknowledgement by the Debtor of more being due, *see Saini, supra*, at 826, and thus, the Land Contract portion of the proof of claim must be expunged.

CONCLUSION

The Trustee is directed to submit an order consistent with this memorandum decision.

Dated: Poughkeepsie, New York

CECELIA G. MORRIS

Cecelia G. Morris, U.S.B.J.