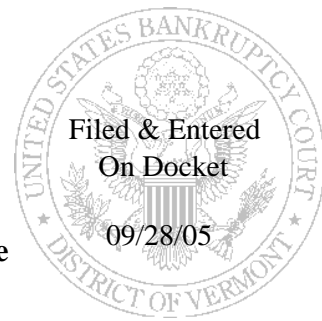


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



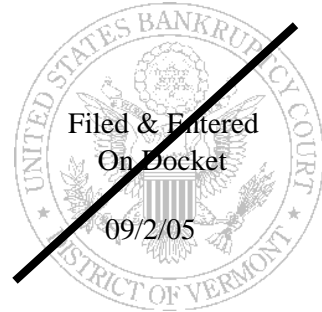
In re:

BERNADETTE M. COTA
Debtor.

Chapter 7 Case
04-11665

BERNADETTE M. COTA,
Plaintiff,
v.
HOMEQ SERVICING CORPORATION,
Defendant/ Third Party Defendant,
v.
DOUGLAS J. WOLINKSY, as Chapter 7 Trustee
For the Estate of Bernadette M. Cota,
Third Party Plaintiff.

Adversary Proceeding
05-1022



ORDER WITHDRAWING PENDING ORDER TO SHOW CAUSE

WHEREAS on July 18, 2005, the Court issued an Order to Show Cause in the above-referenced adversary proceeding (doc. # 22) ordering the Plaintiff, Defendant and Trustee to file memoranda of law setting forth their positions as to why sanctions should not be imposed on the Plaintiff and Defendant's counsel for proceeding to act upon a settlement without first obtaining the approval of the Court or Trustee; and

WHEREAS the Plaintiff, Defendant and the Trustee each filed memoranda of law (see docs. ## 35, 32, and 36, respectively); and

WHEREAS on September 12, 2005, the Court held a telephonic status hearing to address outstanding issues with respect to whether the estate suffered a financial loss due to the actions on a settlement that had the approval of neither the Court nor the Trustee; and


WHEREAS the Trustee represented during the telephonic hearing that he did not believe the estate suffered a financial loss but would consider the issue and if he determined the estate had suffered a loss he would file a supplemental memoranda of law with the Court, and he has not done so;

UPON CONSIDERATION of the circumstances of this case, the arguments of counsel, the papers filed and the impressions of the Trustee as articulated during the September 12, 2005 telephonic hearing, THE COURT FINDS that neither punitive nor compensatory sanctions are not warranted in this case.

Consequently, IT IS HEREBY ORDERED that the Court's Order to Show Cause is withdrawn.

SO ORDERED.

September 28, 2005
Rutland, Vermont


Colleen A. Brown
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**BERNADETTE M. COTA
Debtor.**

**Chapter 7 Case
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**BERNADETTE M. COTA,
Plaintiff,
v.
HOMEQ SERVICING CORPORATION,
Defendant/ Third Party Defendant,
v.
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For the Estate of Bernadette M. Cota,
Third Party Plaintiff.**

**Adversary Proceeding
05-1022**



**SUPPLEMENTAL ORDER
WITHDRAWING PENDING ORDER TO SHOW CAUSE**

WHEREAS, on September 28, 2005, the Court issued an Order Withdrawing the Pending Order to Show Cause herein based in part upon the fact that the Trustee had not filed a supplemental declaration by September 26, 2005, asserting a basis for compensatory damages; and

WHEREAS, on September 28, 2005, after the Court had issued its Order, the Trustee filed a supplemental statement in which he reiterated his argument that the estate has suffered an economic harm in this case as a result of the procedure followed by counsel for the debtor and mortgagee, and responded to the arguments of counsel to the contrary, but asserted no position with respect to whether compensatory damages are warranted in this case (see doc. # 48);

After considering the Trustee's Supplemental Statement, reviewing the entire record in this adversary proceeding, assessing the circumstances surrounding the violation of procedural requirements, reviewing the parties' response to the order to show cause, considering the economic data proffered by the Trustee, examining the nature of the legal issues presented in this proceeding, and taking into account the totality of circumstances presented, the Court finds that sanctions are not warranted. The Court issues this Supplemental Order to set forth its rationale for withdrawing the Order to Show Cause and articulate its findings with regard to the issues raised by the three parties.

Specifically, THE COURT FINDS that

1. since the instant chapter 7 case was not filed until after the redemption period had expired and the debtor had failed to redeem, absent a successful cause of action voiding the strict foreclosure transfer of the subject property *nunc pro tunc* to the filing date, neither the debtor nor the estate had any interest in the subject property as of the filing date;


2. there is no case law in this District establishing that under such circumstances a debtor is not entitled to a homestead exemption upon the recovery of the former homestead property, if the debtor resided in it as of the filing date;
3. under the principles articulated in Sensenich v. Molleur (In re Chase), 328 B.R. 675, 682- 683 (Bankr. D. Vt. 2005), when property is conveyed through strict foreclosure and the redemption price is more than 70% but less than 90% of the fair market value of the property being conveyed, no presumption is created with regard to whether the conveyance constitutes a fraudulent transfer and the party seeking to avoid the transfer must prove it is a fraudulent transfer;
4. here, the redemption amount (\$91,542) is more than 70% but less than 90% of the fair market value of the subject property (\$105,000), the fair market value was established through an arms length sale and verified by the Trustee's independent appraisal, and therefore the plaintiff herein would have had to introduce evidence to establish a fraudulent transfer in order to prevail in bringing the asset back into the estate;
5. if the Trustee /plaintiff had been successful in prosecuting the instant adversary proceeding, he would have been able to either (1) recover the difference between the fair market value and redemption value as of the date of the transfer from the foreclosing creditor, or (2) take possession of the property and sell it; and there is no guarantee that in such event the Trustee would have been successful in selling the property immediately, for the full fair market value, or that the Trustee would not have been required to pay legal fees of the foreclosing creditor (which have been waived under the terms of the subject settlement);
6. the foreclosing creditor's waiving of interest after the redemption date and of fees and expenses in connection with this proceeding, as well as the debtor's waiver of her right to claim a homestead exemption in any proceeds recovered through this adversary proceeding effectively provide the Trustee with the benefits he would have obtained if he litigated and prevailed in (a) the fraudulent conveyance action, applying for the first time the standard established in Chase and (b) his claim that the debtor is not entitled to exempt these proceeds under homestead exemption, even though he never objected to her claim of this exemption – both of which are currently open questions in this District -- without any litigation cost to the Trustee;
7. the Trustee has not established that he could have prevailed in this adversary proceeding, and obtained for the estate, more than the \$13,458 minus the attorney's fees he has actually incurred in this case, if the attorneys for the foreclosing creditor and debtor had followed the required procedures;
8. although it is speculative, it appears that the estimated differential in the Trustee's attorney's fees (\$2,707) might well be offset by the benefits obtained through the settlement, especially in light of the uncertainty of the outcome on the two specified questions;
9. the attorneys for the foreclosing creditor and debtor have persuaded the Court that their failure to comply with proper procedure was inadvertent, the settlement and sale were not undertaken for nefarious purpose, the two attorneys were not aware they were required to obtain the approval of the Court or Trustee, they will seek appropriate approval of settlements and conveyances of debtors' property in the future and punitive sanctions are not necessary to deter rule violations in the future; and

10. the only basis for imposing sanctions would be if the Trustee established a financial harm to the estate as a result of the parties' failure to comply with the approval requirements and it appears that although it is possible that the estate and unsecured creditors may be getting less than they might otherwise receive in such a case, that is not a basis for sanctions since the issues presented are issues of first impression that require litigation for resolution and that inevitably is funded from monies that would otherwise be distributed to creditors.

Accordingly, THE COURT reiterates its prior finding that neither punitive nor compensatory sanctions are warranted under the facts and circumstances in this case, and therefore the Court's Order to Show Cause is withdrawn.

SO ORDERED.

October 3, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge