

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 08-CR-30169-MJR-PMF
)	
STACIE GARY,)	
)	
Defendant.)	

**DEFENDANT’S MEMORANDUM IN SUPPORT OF OBJECTIONS TO THE
PRESENTENCE INVESTIGATION**

Introduction

The crux of Defendant’s objections to the Presentence Investigation Report involve the foreclosure of the residence where she lived with her family. Speculation as to what might have happened with the foreclosure is not evidence. The Government bears the burden of showing to this Honorable Court exactly what would have happened had the fraud from hiding the worker’s compensation settlement not been disclosed.

Memorandum

This simple Bankruptcy fraud case is as confusing as it is complex because Defendant was caught and stopped before the fraud was able to proceed any further. It is an attempted fraud and as such the calculation of actual loss, intended loss and restitution are difficult to calculate.

Actual Loss

In March of 2007 Keith and Stacie Gary filed for protection under Chapter 13 of the Bankruptcy Code so as not to lose their house. They had previously discharged their debts in 2003 under a Bankruptcy filed pursuant to Chapter 7. Since their debts were discharged under Chapter 7 within 8 years of the Bankruptcy at issue here, the Garys would have been prohibited from having their debts discharged had the Chapter 13 at issue here been

converted to a Chapter 7. In essence they were “stuck” with proceeding with the Chapter 13 so as to keep their house.

At the time of the March 2007 filing the Garys were behind on their house payment. Novastar Mortgage had already instituted foreclosure proceedings. They were approximately \$9,000.00 in arrears. When Defendant and her husband filed for Bankruptcy protection under Chapter 13 as part of the Plan (Exhibit A) entitled Residential and Non-Residential Mortgages on Real Estate and Mobile Homes they would have been required to pay \$1,650.00 per month as mortgage for the residence. Attached hereto and marked Exhibit B is the Complaint to Foreclose Mortgage filed February 7, 2007. On page 20 is the Balloon Note indicating that as of July 21, 2006 the Garys would have a monthly payment of \$1,412.52. This shows that the \$1,650.00 monthly payments called for in the Chapter 13 Bankruptcy Plan was considerably more than the payments they were already unable to make. Because they were prohibited from having the debt discharged as a result of their 2003 Chapter 7, the Garys’ Chapter 13 Plan was unrealistic.

When they appeared for the creditor’s meeting on May 3, 2007 the Garys lied about and hid the \$56,088.30 that Stacie received in a Worker’s Compensation settlement. It is the contention of the PSR that but for hiding the \$56,088.30 Norvastar would not have foreclosed on the home and as such there would not have been a deficiency of \$58,516.41. This is pure conjecture and pursuant to what the Seventh Circuit held in both *U.S.A. v. Schroeder*, 536 F.3d 746 (7th Cir. 2008) and *U.S.A. v. Soto-Piedra*, 525 F.3d 527 (7th Cir. 2008) the Government bears the burden of proving to this Honorable Court that this assumption is correct.

For purposes of actual loss, the Seventh Circuit’s finding in *Middlebrook* is clear. *Middlebrook* stands for the proposition that actual loss is that amount which is hidden from the bankruptcy estate. It defines actual loss as “the value of the property taken, damaged, or destroyed,” which here is the \$56,088.30 the Garys attempted to hide from the Bankruptcy Court.

Speculation

The problem, as the PSR correctly points out, is what impact the Garys fraud had on the foreclosure proceeding in the Chapter 13 proceeding. Individuals with cash flow problems are entitled to protection under Chapter 13 of the Bankruptcy Code, so insofar as the PSR claims that listing the \$56,088.30 worker's compensation settlement would have made them ineligible for a Chapter 13, the PSR is incorrect.

But, had the Garys included the \$56,088.30 in their Petition wheels would have begun to spin which would have impacted the actual loss. It is speculation as to what the precise figure for the actual loss would be. It is speculation as to what would have transpired. Based on Exhibit A, it is clear that the Plan adopted by the Trustee would have frustrated the Garys' intention and desire to remain in their house. It would have been impossible for them to make monthly payments of \$1,650.00 per month called for in the Plan because they were already incapable of making the \$1412.52 monthly payments called for in the mortgage.

On May 27, 2009 the undersigned and Steve Williams who represents Keith Gary met with Assistant U.S. Attorney Liam Coonan and Bankruptcy Trustee Mark Skaggs. After discussing the application of *Middlebrook* the parties discussed the impact that claiming the \$56,088.30 on their Chapter 13. Mark Skaggs, the obvious "bankruptcy expert" indicated that the Garys would have been prohibited by law to convert the Chapter 13 into a Chapter 7 and discharge the debt owed on the house because they had debts discharged in a Chapter 7 filed in 2003.

Based on this May 27, 2009 conversation, as a fallback position, Defendant believes that at most the actual loss would be approximately \$84,500.00. Defendant posits this figure as a means of showing what might have happened and would expect that the Government would be required to present evidence to meet its burden at Sentencing. Again, the Government bears the burden to show this Honorable Court what wheels would have begun to spin and what would have happened.

The undersigned states on information and belief, and in accord with the aforesaid

May 27, 2009 meeting, that in situations where a worker's compensation or personal injury claim is paid in a Chapter 13 proceeding that the Bankruptcy trustee and debtor's attorney will negotiate a settlement. There was a \$56,088.30 "pie" that would have had to be cut up in the Bankruptcy proceedings. Here, based on common practice in Bankruptcy court the Gary's would have been allowed to keep 33% of the \$56,088.30 or about \$18,000.00. Of the remaining \$38,088.30, the \$9,000.00 owed to Norvastar for the mortgage would have been paid and of the remaining \$29,088.30, the \$3,500.00 in attorney's fees would have been paid. The remaining portion of the \$25,588.30 would have been disbursed on a pro rata basis to the other creditors.

For purposes of actual loss, the approximately \$25,500.00 (\$54,000.00 - \$18,000.00 - \$9,000.00 - \$3,500.00) would be deducted from the \$54,000.00 deficiency that Norvastar had—since there would not have been a foreclosure—which would create a figure of \$28,500.00 which would be added to the \$56,000.00 the Garys hid. Defendant's fallback position on actual loss would be that at most the loss would be \$84,500.00, not \$113,032.59.

At that point the argument would go that there would have been no foreclosure. This is not correct because as stated above, their monthly mortgage payments under the Chapter 13 Plan would have been \$1,650.00. (Exhibit A) Keith Gary became unemployed shortly after the Bankruptcy filing and Stacie Gary became unemployed in July of 2008. They could not make monthly mortgage payments of \$1,412.52 so it would have been unrealistic for the Garys to pay nearly \$200.00 a month to remain in their home. Under this set of circumstances the Garys would not have been able to continue making payments under their Chapter 13 plan. Since they would have been unable to make those payments and the house would have been foreclosed. It is the Government's burden to show otherwise.

Assuming the improbable, had the Garys been able to continue making payments as part of their Chapter 13 plan and disclosed the \$56,000.00 settlement, they certainly would have been able to keep their house. \$25,588.30 would have gone on a pro rata basis to pay the other outstanding debts.

Exclusions From Loss

Application Note 3 (D)(i) to U.S.S.G. §2B1.1 states that loss shall not include “interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return [or] other similar costs.” As shown by Exhibit C entitled Affidavit of Prove-Up, the amount owed on the property was \$166,473.59. When all of the “extras” were taken into account the total owed was \$184,984.03. Attorney’s fees as shown by Exhibit D were \$2,306.00. The interest, late fees, attorney’s fees etc. totaled \$20,816.44. Ultimately, (Exhibit E) the property sold for \$141,015.00. As such, and in accord with Application Note 3 (D)(i), this \$20,816.44 should have been excluded from the loss calculation contained in paragraph 22 of the Presentence Investigation Report. The loss would have been \$37,699.97 which reflects the deficiency judgment of \$58,516.48 less \$20,816.44. This would accordingly reduce the \$113,032.59 mentioned in paragraph 23 accordingly.

Intended Loss

The amount of the assets Stacie and Keith Gary attempted to hide from their creditors— \$56,000.00—should be used for purposes of intended loss. *Middlebrook* requires the District Court to consider the defendant's subjective intent when determining intended loss.

The Garys sought protection under Chapter 13 of the Bankruptcy Code. They were legally prohibited from converting the Chapter 13 into a Chapter 7 and discharge debts. Their intent for purposes of Chapter 13 was to repay their creditors not to make them suffer a loss. The “loss” to the creditors was that they would have to wait for a longer period of time to be repaid.

Since the \$56,000.00 is less than Defendant’s actual loss fallback position of \$84,500.00, this is not really an issue for purposes of loss under the advisory Guideline calculations.

Restitution

Middlebrook takes a common sense approach to the issue of restitution.

“We recognize that “[u]nlike a determination of the amount of loss for sentencing purposes, which can include the amount that the defendant placed at risk, a **restitution order compensates a victim only for losses it has incurred.**” *United States v. Swanson*, 394 F.3d 520, 527 (7th Cir.2005) (internal citations omitted). Accordingly, **“an order of restitution that exceeds the victim’s actual losses or damages is an illegal sentence.”** *United States v. Webber*, 536 F.3d 584 (7th Cir.2008) (quoting *United States v. Wolf*, 90 F.3d 191, 194 n. 2 (7th Cir.1996)).” Emphasis added

It is Defendant’s position that at most the victims would be able to collect would be the \$56,000.00 which constitutes the amount of money the Garys attempted to hide from the Bankruptcy Court in addition to the \$10,750.00 that was part of the unemployment scam.

In reality, in the bankruptcy fraud, but for Norvostar Mortgage Company the other creditors have suffered no loss. It was the Garys’ intention to repay the debts as part of Chapter 13. The debts are still outstanding and if they so desire the creditors could file lawsuits against the Garys for any money owed.

Conclusion

WHEREFORE, Defendant requests that her objections to the Presentence Investigation Report be sustained and that the Court find as follows:

1. Actual loss: that the actual loss be \$56,088.30 for the bankruptcy fraud and \$10,750.00 for the mail fraud for a total of \$66,838.30 which would constitute a 6 level increase under United States Sentencing Guideline Section 2b1.1(b)(1)(D). Alternatively, Defendant would request that her actual loss be the \$84,500.00 mentioned above plus the \$10,700.00 mail fraud for a total of \$95,200.00 which would constitute an 8 level increase under U.S.S.G. §2b1.1(b)(1)(E).

2. Total offense level: pursuant to Defendant’s objections she would request a total offense level of 14 which produces an advisory Guideline sentencing range of 15-24 months. Alternatively, she would request a total offense level of 16 which produces an advisory Guideline sentencing range of 21-27 months.

3. Restitution: an amount not to exceed the \$56,088.30 which constitutes the bankruptcy fraud to be divided on a pro rata basis among the creditors as well as the \$10,700 for the mail fraud.

STACIE GARY

STOBBS LAW OFFICES

BY:

/s/ John D. Stobbs, II
John D. Stobbs II, NO. 06206358
Attorney for Defendant
307 Henry St. Suite 211
Alton, Illinois 62002
Telephone: (618)462-8484
FAX: (618)462-8585
Email: stobbsjohn@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2009 a copy of the attached *DEFENDANT'S MEMORANDUM IN SUPPORT OF OBJECTIONS TO THE PRESENTENCE INVESTIGATION* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Mr. William Coonan
Assistant U.S. Attorney
Nine Executive Drive
Fairview Heights, Illinois 62208

STOBBS LAW OFFICES

/s/John D. Stobbs, II
307 Henry St. Suite 211
Alton, Illinois 62002

RESIDENTIAL AND NON-RESIDENTIAL MORTGAGES ON REAL ESTATE AND MOBILE HOMES.

MONTHLY PAYMENT AND ARREARAGE SECTION

(a) Monthly payments on mortgage(s) secured by Debtor's real estate/mobile home shall be paid regardless of an arrearage claim:

X By the Trustee By the Debtor

Mortgage Holder	Monthly Payment	First Payment due	Collateral
NOVASTAR	\$1,650.00	APRIL, 2007	69 GLENDALE, GLEN CARBON, IL

The Mortgage Holder means the holder and/or servicer of a lien on real estate/mobile homes. If a servicer is listed as the mortgage holder the Mortgage Holder shall be bound by this plan as if it is specifically listed.

(b) Arrearage: The Trustee will pay 100% of arrearages (inclusive of interest at the rate of CONTRACT %) in equal monthly installments of \$ 00.00 for the first FIVE months then \$ 165.00 per month thereafter (this arrearage payment is calculated such that the arrearage will be paid no later than 90 days prior to the last scheduled distribution by the Trustee). The Trustee shall pay this arrearage notwithstanding the Debtor's selection in (a) above. Costs of collection, including attorney's fees incurred by the Mortgage Holder as a result of the filing of this bankruptcy case and before final payment of the arrearage amount specified below shall be added to the arrearage amount.

U.S. vs. Keith Gary and Stacie Gary
No. 8-30169

Government's Discovery

The amount of arrearage:
 First mortgage \$ 9,000.00
 Second mortgage \$

(c) IN THE EVENT THE MORTGAGE IS TO BE PAID INSIDE THE BANKRUPTCY BY THE TRUSTEE, THE FOLLOWING TERMS APPLY:

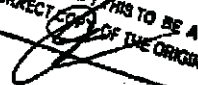
(1) Requirement of Mortgage Holders to timely determine and file a note with any changes to the mortgage payment during the bankruptcy.

If the amount of the monthly payment is adjusted, or should have been adjusted pursuant to applicable non-bankruptcy law, the contract, or standard industry practices, from the amount listed above during the course of this bankruptcy, the Mortgage Holder shall, not less than 30 days prior to the effective date of the change, file with the Court a Notice of Payment Change with an attachment indicating the amount of the change and the reason therefore, and shall serve the Debtor, the Trustee and the Debtor's attorney with said notice. Debtor may, within 30 days of the filing of the notice, file an objection to the notice. If no objection is filed, Debtor shall file with the Court a Motion to

Exhibit

A

Exhibit B

I HEREBY CERTIFY THIS TO BE A
TRUE & CORRECT COPY OF THE ORIGINAL
BY: 

MIN: 100080190058249350

Loan Number: 06-919028

BALLOON NOTE (Fixed Rate)

THIS LOAN IS PAYABLE IN FULL AT MATURITY. YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN AND UNPAID INTEREST THEN DUE. LENDER IS UNDER NO OBLIGATION TO REFINANCE THE LOAN AT THAT TIME. YOU WILL, THEREFORE, BE REQUIRED TO MAKE PAYMENT OUT OF OTHER ASSETS THAT YOU MAY OWN, OR YOU WILL HAVE TO FIND A LENDER, WHICH MAY BE THE LENDER YOU HAVE THIS LOAN WITH, WILLING TO LEND YOU THE MONEY. IF YOU REFINANCE THIS LOAN AT MATURITY, YOU MAY HAVE TO PAY SOME OR ALL OF THE CLOSING COSTS NORMALLY ASSOCIATED WITH A NEW LOAN EVEN IF YOU OBTAIN REFINANCING FROM THE SAME LENDER.

JULY 21, 2006
[Date]

LAKE FOREST
[City]

CALIFORNIA
[State]

69 GLENDALE DRIVE, GLEN CARBON, ILLINOIS 62034
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$166,500.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is NOVASTAR MORTGAGE, INC., A VIRGINIA CORPORATION. I will make all payments under this Note in the form of cash, check or money order. I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 9.990%. The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month. I will make my monthly payments on the 1st day of each month beginning on SEPTEMBER 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on AUGUST 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date." I will make my monthly payments at P.O. BOX 808911, KANSAS CITY, MISSOURI 64184--8911

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$1,412.52

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STATE OF ILLINOIS

COUNTY OF MADISON

IN THE CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
MADISON COUNTY, EDWARDSVILLE, ILLINOIS

NOVASTAR MORTGAGE, INC.

PLAINTIFF) NO. 07 CH 147

VS

) JUDGE

KEITH GARY; STACIE GARY; UNKNOWN OWNERS
AND NON RECORD CLAIMANTS ;

DEFENDANTS)

FILED

SEP 20 2007

AFFIDAVIT OF PROVE-UP

CLERK OF CIRCUIT COURT # 82
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

NICOLE TAYLOR

being first duly sworn on oath, deposes and says that he/she is a duly authorized agent for Plaintiff herein and is authorized to make this Affidavit on its behalf. He/She is familiar with the books and records of Plaintiff and has personally examined them; he/she is competent to testify if appeared in court as a witness at a trial of this matter; and he/she has personal knowledge of the facts stated in this Affidavit. This Affidavit is made pursuant to the Code of Civil Procedure, 735 ILCS 5/15-1506 and 735 ILCS 5/2-1005, for purposes of proving the facts and the amount due the Plaintiff herein.

The undersigned is familiar with the material allegations contained in the Complaint for Foreclosure filed herein by Plaintiff and said allegations are true and correct.

The mortgagor is in default for 12 payments. The amount necessary to reinstate is 11 payments at \$ 1680.76 and 1 payments at \$ 1687.55 each, totaling \$ 20,175.91 plus late charges, escrow shortages, attorneys fees and costs. To date the defendants have not rendered a sufficient sum to reinstate pursuant to 735 ILCS 5/15-1602, or otherwise; and that the Plaintiff has elected to claim the entire balance due under the terms of the said Promissory Note and Mortgage.

There is now due and owing to Plaintiff the following:

Principal Balance.....\$ 166,473.59

Accrued Interest to Date.....\$ 17,479.63

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NO. 07 CH 147

Late Charges Prior to Acceleration.....\$ 711.89

ADVANCES BY PLAINTIFF:

Starting Escrow Balance on Date of Default...\$ 0

Mortgage Insurance Premium.....\$ 0

Property Maintenance.....\$ 0

Real Estate Taxes.....\$ 2740.92

Hazard Insurance.....\$ 0

Inspections\$ 88.00

Broker's Price Opinion.....\$ 275.00

Suspense Balance (Credit).....\$ ()

OTHER: NSF.....\$ 15.00

Bk fees + costs
Subtotal of Advances.....\$ 3818.92

TOTAL.....\$ 184,984.03

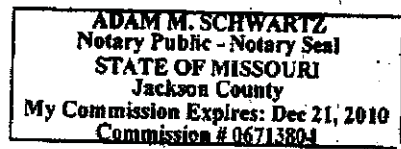
NOVASTAR MORTGAGE, INC.

BY: Cheryl Taylor
AUTHORIZED AGENT

TITLE: FORECLOSURE SPECIALIST

Subscribed and Sworn to before me
this 30th day of August, 2007.

Adam M. Schwartz
Notary Public



PIERCE & ASSOCIATES
Attorneys for Plaintiff
Thirteenth Floor
1 North Dearborn
Chicago, Illinois 60602
Tel. (312) 346-9088
Fax (312) 346-1557
PA0700684

STATE OF ILLINOIS

COUNTY OF MADISON

IN THE CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
MADISON COUNTY, EDWARDSVILLE, ILLINOIS

NOVASTAR MORTGAGE, INC.

PLAINTIFF

VS

KEITH GARY; STACIE GARY; UNKNOWN OWNERS
AND NON RECORD CLAIMANTS ;

DEFENDANTS

)
)
) NO. 07 CH 147
)
) JUDGE
) JUDGE JENSEN
)
)
)
)

FILED
SEP 20 2007

CLERK OF CIRCUIT COURT # 82
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Margaret O'Donne ATTORNEY AFFIDAVIT
ARDC #6287000

I, _____, attorney for the Plaintiff,
duly sworn under oath, state that pursuant to the subject Mortgage, the
mortgagors are obligated to pay the following;

Title Costs.....	\$.00
Clerk's Fee.....	\$	208.00
Service of Summons.....	\$	730.00
Recording Lis Pendens Notice.....	\$	28.00
Publication for Service.....	\$	240.00
Certified Documents.....	\$.00
Assignment Costs.....	\$.00
Bankruptcy Motion Cost.....	\$.00
Reasonable Attorneys Fees.....	\$	1,100.00

TOTAL.....\$ 2,306.00

PAGE 1 OF 2 PAGES
NO. 07 CH 147

That the attorney's fees will be received by and retained by PIERCE & ASSOCIATES as their fees in this cause.

FURTHER, Affiant sayeth not.

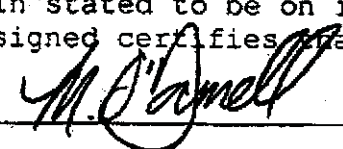
BY:



Attorney for Plaintiff

Margaret O'Donnell
ARDC #6287000

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument, are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies that he/she verily believes the same to be true.



Margaret O'Donnell
ARDC #6287000

PIERCE & ASSOCIATES
Attorneys for Plaintiff
Thirteenth Floor
1 North Dearborn
Chicago, Illinois 60602
TEL. (312) 346-9088
FAX (312) 346-1557
PA0700684

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FILED
MAR 11 2008
CLERK OF CIRCUIT COURT #9
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

County of Madison

Plaintiff: Nova Star Mortgage Inc.

State of Illinois

-v-

Case # 07 CH 147

Defendant: Keith Gary

Report of Selling Officer

I, Jackie Ortiz, selling officer and representative of The Judicial / Private Sales Corporation hereby report that I conducted a foreclosure auction on the above captioned case number in the county mentioned. See below for results.

This Property Sold to the Plaintiff for \$ 144,015⁰⁰

This Property Sold to a third party bidder _____ for their bid amount of \$ _____

This Sale has been cancelled per clients request.

This Sale has been cancelled due to loan reinstated.

This Sale has been cancelled due to loan paid off.

This Sale has been cancelled due to repayment plan.

This Sale has been cancelled due to bankruptcy.

This Sale has been continued to _____ Time _____

Other _____

5 Number of Sales Conducted
(on this day & in this county)

0 Number of Attendance at Sale
(on this day, people at sale)

That immediately after the auction, I reported the results of the auction to Nancy R. Vallone of the Judicial / Private Sales Corporation and filed this report with the Clerk of the Court.

Dated: 3-11-08

BY Jackie Ortiz Selling Officer