

Eleventh Circuit Holds That A Creditor's Due Process Claim Can Be Inadvertently Waived By Inaction

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On December 11, 2017, in a case entitled In re Iliceto,¹ the Eleventh Circuit Court of Appeals affirmed the district court's decision,² which held that Nationstar Mortgage, LLC ("Nationstar" or the "Creditor") received notice reasonably calculated under all the circumstances to apprise it that its status as a secured creditor was being challenged by Robert Iliceto ("Iliceto" or the "Debtor") in his Chapter 13 bankruptcy proceeding,³ even though the Debtor did not notify Nationstar that he was objecting to the validity of its mortgage. Citing inaction on the part of the Creditor for more than a year and a half, the Court determined that Nationstar was not denied due process when the district court invalidated its mortgage lien.

Factual Background

In In re Iliceto, the Debtor filed for Chapter 13 bankruptcy, listing a mortgage held by U.S. Bank, *inter alia*, on Schedule D. U.S. Bank then filed a proof of claim, including its service address. Some months later, Nationstar filed papers indicating that U.S. Bank's claim had been transferred to Nationstar, and listed its address for service. The Debtor filed an objection to U.S. Bank's claim, which was served on U.S. Bank but not on Nationstar. The Debtor then filed a proof of claim in Nationstar's name,⁴ followed by an objection to the proof of claim asserting that Nationstar is the proper transferee but not the proper assignee. The Debtor neglected to serve these papers on Nationstar, and there is no evidence that Nationstar received notice of the objection.

Ultimately, Nationstar did not respond to the objection, so the bankruptcy court issued an order sustaining the objection and declaring that Nationstar only had an unsecured claim in the amount of \$507,209.79, and that any claim to the real property would be void upon entry of the Debtor's discharge. Notably, this order was served on Nationstar. After various other filings, the Debtor filed a motion to deem Nationstar's mortgage extinguished because it was an unsecured claim that had been discharged.

Although Nationstar had continued to file certain papers related to the mortgage payments due and a change of address, it had not taken action in the case for more than a year and a half. After the Debtor filed the motion to deem Nationstar's mortgage extinguished, Nationstar filed a notice of appearance and request for service in the case, and then opposed the motion to deem the

¹ Nationstar Mortgage, LLC v. Iliceto (In re: Iliceto), 16-16815 (11th Cir. Dec. 11, 2017).

² The Eleventh Circuit affirmed a decision of the U.S. District Court for the Southern District of Florida.

³ In re: Iliceto, No. 16-16815, 706 F. App'x 636, 637 (11th Cir. 2017).

⁴ This was done pursuant to 11 U.S.C. § 501 (c).

mortgage extinguished. Nationstar asserted "a due process violation arising from the failure to serve it with earlier filings in the case."⁵

The Court's Analysis and Conclusion

The Debtor in this case did not provide Nationstar with the notice required under the rules,⁶ and the bankruptcy court acknowledged that these omissions were critical steps in the process.⁷ However, the court noted that although service of every document was not "perfect," Nationstar did have actual notice of "the key documents that impacted its status as a secured creditor."⁸ In particular, the bankruptcy court identified five orders or motions with which Nationstar was served, in which it was notified that it only had an unsecured claim, and to which it did not raise an objection or file an appeal.⁹ The bankruptcy court found this to be "ample notice, on multiple occasions, over an extended period of time" that Nationstar's mortgage was at risk.¹⁰

In its reasoning, the Eleventh Circuit Court of Appeals repeatedly cited the order which Nationstar had actually received from the court -- the order declaring that Nationstar only had an unsecured claim and that any claim to the real property would be void upon entry of the Debtor's discharge. Because Nationstar did not timely move for reconsideration of the order or appeal it, the Court deemed it to be a "failure to act to protect its secured interest."¹¹ Nationstar's inaction in the case resulted in the invalidation of its mortgage lien.

In this case, lack of service on a party did not overcome the rule that a confirmed plan is binding on the creditors, even when the creditor had no opportunity to object to the plan. Ultimately, this case should alert all parties in litigation to be aware of the docket, in case other parties have failed to comply with their service requirements. Even when another party fails to follow the procedural rules, the other party cannot complain if it has failed to act over an extended period of time.

To discuss this further, please contact:

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⁵ In re Iliceto, 706 F. App'x 636, 640 (11th Cir. 2017).

⁶ The court characterized the lack of notice as "irregularities in the service of certain filings and instances when Iliceto failed to provide it with any proper notice at all." In re Iliceto, 706 F. App'x 636, 641 (11th Cir. 2017).

⁷ The Debtor did not follow Federal Rule of Bankruptcy Procedure 3007 and 11 U.S.C. § 502.

⁸ In re Iliceto at 641.

⁹ In re Iliceto, at 640.

¹⁰ Id.

¹¹ In re Iliceto at 644.