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# Lien Stripping in Consumer Bankruptcy: Bringing or Defending Actions to Avoid Junior Mortgage Liens

TUESDAY, MARCH 12, 2019

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Today's faculty features:

Monette W. Cope, Counsel, **Weltman Weinberg & Reis Co.**, Chicago

Marc R. Kivitz, Founder, **The Law Offices of Marc R. Kivitz**, Baltimore

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# Lien Stripping and Modification in Bankruptcy

## March 12, 2019

**Presented by:**

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## LIEN STRIPPING AND MODIFICATION IN BANKRUPTCY

I. Lien Stripping: A Brief Overview of the Process.

The overriding concept to these materials is that "although any action to collect upon the lien was stayed during the bankruptcy case, the lien itself 'rode through' the bankruptcy case and remain[ed] viable upon property captured before the case commenced" *Keeler v. Acad. of Am. Franciscan History, Inc*., 257 B.R. 442, 448 (Bankr. D. Md. 2001)(Keir, J.), *affirmed,* 273 B.R. 416, 422 (D. Md. 2002), unless an action is instituted to avoid and cancel the lien. *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("However, such a discharge extinguishes *only* "the personal liability of the debtor." 11 U.S.C. § 524(a)(1). Codifying the rule of *Long v. Bullard*, 117 U.S. 617, 6 S.Ct. 917, 29 L.3d. 1004 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy"); *Nobelman v. American Savings Bank*, 508 U.S. 324, 331(1993) ("`a claim secured only by a [homestead lien]' as referring to the lienholder's entire claim, including both the secured and the unsecured components of the claim."). A lien passes through bankruptcy unaffected unless some affirmative action is taken to avoid the lien. *In re Deutchman*, 192 F.3d 457 (4th Cir. 1999), and a lien creditor has no legal duty to voluntarily give back lien rights to the debtor unless and until the lien is avoided); *In re Drazenovich*, 292 B.R. 101 (Bankr. D. Md 2003)(Keir, J.)(no obligation to voluntarily release pre-petition bank garnishment where no motion to avoid lien had been filed). After the entry of the discharge order, which lifts the automatic stay, 11 U.S.C. § 362(c)(2)(C), if the debtor has not avoided the creditor's lien, the lien may be enforced by the creditor, but the debtor is absolved of any personal liability in the event the collateral value fails to pay the former obligation in full. *In re Craig*, 40 C.B.C.2d 747, 750-52 (Bankr. E.D. Va. 1998) holding, as does *Johnson*, that a secured creditor is entitled to enforce his lien against the debtor's property even though the debtor has been discharged in a Chapter 7 case.

**To locate security interests, review the Maryland Land Records.** http://mdlandrec.net

**To locate Judgments which may be judicial liens, review the Maryland Judiciary Case Service:** http://mdcourts.gov/access/ro-accesstoctrecords.pdf

 

**Definitions and Terminology**

**Claim**: Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. 11 U.S.C. § 101(5)[2].

**Debt**: Liability on a claim. 11 U.S.C. § 101(12).

**Judicial Lien**: A lien obtained by judgment, levy sequestration, or other legal or equitable process or proceeding. 11 U.S.C. § 101(36).

**Lien**: A charge against or interest in property to secure payment of a debt or performance of an obligation. 11 U.S.C. § 101(37).

**Security Interest**: A lien created by an agreement consensually granted by the debtor. 11 U.S.C. § 101(51).

**Statutory Lien**: A lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, but does not include security interest or judicial lien. § 101(53).

**Stripdown**: The process by which a secured lien is undersecured and bifurcated or "crammed down" and divided into a secured and unsecured portion consistent with a § 506(a) valuation of the collateral. The secured portion of the lien equal to the collateral value may be restructured, and the undersecured portion of the lien – the amount of the claim in excess of the collateral value –is treated as an unsecured claim and upon discharge that portion of the lien is avoided.

**Stripoff**: To remove entirely a lien against collateral. This is a process the debtor uses when the secured claim is not secured by any value against the property despite the existence of the lien in the land records office of the county where the property is situated or is a judgment lien or is recorded in financing records relating to personal property. The claim, therefore, is not an allowed secured claim pursuant to § 506(a) and the debtor can avoid the lien pursuant to § 506(d). If the value of the collateral is one dollar ($1.00) in excess of any senior liens, then it is not wholly unsecured, and pursuant to § 1322(b)(2) the lien may not be stripped off because it attaches to some equity of the collateral at issue.

[2] All citations are to 11 U.S.C. unless otherwise noted.

 

**A. Is it a Security Interest at all?**

1. A Chapter 7 trustee permitted to avoid lien under 11 U.S.C. § 544(a)(3) against unrecorded deed of trust that does not describe the realty sought to be pledged as collateral in North Carolina. *SunTrust Bank, N.A. v. Macky, et al. (In re McCormick)*, 669 F.3d 177, 2012 WL 414667 (4th Cir. 2012). A debtor and his wife acquired two contiguous tract parcels and borrowed $178,275.00 from Central Carolina Bank and Trust Co., later merged into Suntrust Bank, secured by deed of trust on both parcels, however, the deed of trust only included the parcel identification number " PIN" of the second tract and not the first tract of land. Debtor thereafter borrowed $60,000 from Marc and Maryann Macky secured by four lots on first tract. Involuntary Ch 7 petition filed against debtor; trustee sold the first tract and commenced adversary to void Suntrust's claim to proceeds because the lien on the first tract had not been properly recorded. Suntrust contended that even though the first tract was not recorded on the PIN index that a title research would have revealed the deed of trust as a lien on both tracts. Bankruptcy Court rejected Suntrust's position on the basis that North Carolina is a "pure race" jurisdiction such that the first to record holds an interest superior to all others because a purchaser is entitled to rely exclusively on the official recordation index of the NC County regardless of the independent knowledge that a purchaser might have. District Court affirmed. Fourth Circuit affirmed, concluding that as of August, 2006, when the bankruptcy case was filed, a bona fide purchaser of the first tract would not be charged with notice of SunTrust's 1999 deed of trust based on an examination of the PIN index, and the trustee was not imputed with such knowledge because § 544(a)(3) provides that a trustee has the powers of a bona fide purchaser "without regard to any knowledge of the trustee or any creditor", held that a Chapter 7 trustee for an individual debtor pursuant to 11 U.S.C. § 544(a)(3) is entitled to avoid a lien on the first of two contiguous parcels of debtor's real property because the deed of trust, while recorded on the official County recordation index as to Tract II, was not so recorded as to Tract I, and North Carolina law requires recordation of lien with neither (i) constructive knowledge nor (ii) an unofficial recordation where deed of trust described Tract I and purported to create lien against it, were sufficient to establish a lien. Section 544(a)(3) gives the trustee the status of a hypothetical lien creditor but the extent of such power is governed entirely by applicable State law. *Havee v. Belk*, 775 F.2d 1209, 1218 (4th Cir. 1985).

*N.B.* There is no mention that the property was owned as tenancy by the entirety at the time of the bankruptcy filing. It was acquired in a husband-and-wife transaction, but evidently the husband only secured the property with a deed of trust as to the more recent loan from the Mackys, which suggests that the property was solely owned as of the petition date. Also, Maryland law apparently differs from North Carolina law -- specifically, in Maryland it is possible to go beyond the official record to find evidence of constructive notice (evidently not the case in North Carolina).

2. Security interests in personal property must also be granted and, if granted, properly perfected. *See, e.g.* Cyril Bell, Sr., and Michelle Bell, Chapter 13 Case No.: 16-13011-RAG, Objection to Proof of Claim of Wells Fargo Bank, N.A., alleging a secured claim against debtors' shower stall and tub, based *inter alia* upon absence of grant of security interest and absence of perfection of lien by alleged creditor/claimant. *See*, pp. 6 – 16, *infra*.

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |

* * * * * * * * * * * * *

**AMENDED OBJECTION TO THE AMENDED CLAIM OF WELLS FARGO FINANCIAL NATIONAL BANK**

Cyril Bell, Sr., and Michelle Bell, debtors, by their attorney, Marc R. Kivitz, hereby file this amended objection to the amended claim filed by Wells Fargo Financial National Bank, Proof of Claim No. 2 on June 21, 3016, as a secured claim, and as grounds for the disallowance of the claim as a secured claim respectfully represent that:

1. The Amended Claim. Wells Fargo Financial National Bank ("Claimant") initially filed on June 3, 3016, Proof of Claim No. 2 as a secured claim and on June 21, 2016, filed an Amended Proof of Claim, a complete copy of which is attached hereto as Exhibit A and is incorporated herein by reference, both of which were filed in the total amount of $6,902.90 alleging *inter alia* that (i) that the secured amount of the claim was $6,545.75; (ii) that the unsecured amount of the claim was $357.15; (iii) that the value of the property which Claimant alleged as collateral for the claim was $6,545.75; (iv) that the Annual Interest Rate was Fixed at Zero Percent (0.00%); (v) that the "Collateral Description: PMSI: ITEMS PURCHASED FROM LONG FENCE AND HOME", and (vi) that the "Basis for perfection: [is a] Sales Contract" ("the Amended Claim").

The Amended Claim as differs only from the claim as initially filed by the individual signing the amended claim and by the inclusion of (a) a Home Products Visa Credit Card Application (Page 5 of the Amended Claim); (b) an Important Terms of Your Credit Card Account (Page 6 of the Amended Claim); (c) a Home Remodeling Sale & Installation Agreement

 

with Long Fence and Home L.L.L.P. (Page 7 of the Amended Claim); and (d) a Bath and Shower Addendum with Long Fence and Home L.L.L.P. (Page 8 of the Amended Claim).

2. The Alleged Collateral. The Amended Claim does not specifically nor adequately describe the collateral that the Claimant alleges secures the Amended Claim. The debtors aver that on March 18, 2013, they executed with Long Fence and Home L.L.L.P., a two-page Home Remodeling Sale & Installation Agreement, a copy of which is attached hereto as Exhibit B and is incorporated herein by reference, and a Bath and Shower Addendum, a copy of which is attached hereto as Exhibit C and is incorporated herein by reference, by which the debtors remodeled their bathroom in their residential real property and improvements known as 5958 Glen Falls Avenue, Baltimore City, MD 21206; and purchased installation services and a replacement bathtub which, after the removal of the debtors' old bathtub, the replacement bathtub was permanently affixed to the bathroom floor and to the three (3) surrounding walls of their bathroom.

3. The Objection. The debtors dispute that any portion of the Amended Claim is secured. The Amended Claim, if allowed, should only be allowed as wholly unsecured and should be treated as an unsecured debt under the debtors' proposed Chapter 13 Plan.

4. No Security Interest Granted. Debtors contend that despite Page 2 (Exhibit B, Page 2) of the Home Remodeling Sale & Installation Agreement containing general ADDITIONAL TERMS AND CONDITIONS in which the fourth paragraph obliquely references "Liens/Security Interest", Page 1 of Exhibit B the Home Remodeling Sale & Installation Agreement in the portion captioned "This disclosure box only applies in Maryland" clearly states and the box is specifically checked that "This home improvement agreement ***does not*** create a mortgage or lien against your property to secure payment….." (Exhibit B, Page 1) (emphasis added). Claimant's own documents declare that no lien nor any security interest is created; no lien against personal property and no lien against real property – none whatsoever.

5. No Security Interest Granted. Debtors contend that the Amended Claim (Exhibit A) fails to include any document evidencing the grant of a security interest by the debtors and fails

 

to evidence the necessary and proper perfection of any security interest against any asset of the debtors.

6. No Security Interest Granted. The debtors contend that neither (a) the Home Products Visa Credit Card Account Application with Wells Fargo Retail Services – Pages 5 and 6 of the Amended Claim (Ex. A); nor (B) the Home Remodeling Sale and Installation Agreement with Long Fence and Home L.L.L.P. – Pages 7 and 8 of the Amended Claim (Ex. A) creates nor perfects any lien or security interest against any asset of the debtors.

7. The debtors object to the Amended Claim as secured for the following additional reasons:

(i) the Home Products Visa Credit Card Account Application with Wells Fargo Retail Services states that "[y]ou give us and we will retain a purchase money security interest in goods purchased under this Agreement" (Ex. A, p. 5) is ***not signed*** by the debtors. Consequently there is no grant of a security interest by the debtors in any asset.

(ii) the "agreement" purports to be with Wells Fargo Retail Services, whereas the Claimant is Wells Fargo Financial National Bank. There is no assignment of any alleged security interest between these two entities, the Amended Claim does not contain any assignment document, nor does the Claimant provide any explanation for the difference between these two entities.

(iii) Moreover, the replacement tub – the asset in question -- was purchased from Long Fence and Home L.L.L.P., and was **not** purchased from the Claimant/

(iv) There is no assignment of any alleged security interest between Long Fence and Home L.L.L.P., and Wells Fargo Retail Services, nor is there any assignment of any alleged security interest between Long Fence and Home L.L.L.P., and Wells Fargo Financial National Bank, and the Amended Claim does not contain any assignment document, nor does the Claimant provide any explanation for the difference between these two entities, Wells Fargo Retail Services and Wells Fargo Financial National Bank.

 

(v) the Home Products Visa Credit Card Account Application (Ex. A, Pages 5-6) fails to contain any description of the alleged collateral for any security interest to attach.

(vi) the Home Remodeling Sale and Installation Agreement with Long Fence and Home L.L.L.P., does not grant any security interest by the debtors in any asset; and

(vii) assuming *arguendo* a lien was granted, there is no document in the Amended Claim or otherwise to evidence that such lien is held by the Claimant nor that proper perfection of any security interest against any asset of the debtors. Debtors' search of the Maryland Land Records for Baltimore City, Maryland in where their residence is located, a copy of which is attached hereto as Exhibit C and is incorporated herein by reference, fails to evidence any recorded document by the Claimant. Debtors' search of the Financing Records of the Maryland Department of Assessments and Taxation, a copy of which is attached hereto as Exhibit D and is incorporated herein by reference, fails to evidence any recorded Uniform Commercial Code filing by the Claimant. Claimant is unsecured; the Amended Claim is not secured.

8. The debtors object to the Amended Claim as secured. The debtors claimed all of their household goods as exempt under ACM, CJ § 11-504(b)(4) on their Schedule C (Docket No. 1) and more than thirty (30) days has passed following their meeting of creditors on April 22, 2016, with no objection to that claim of exemption having been filed; the exemption has been allowed, *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), F.R.B.P. Rule 4003(b), and the debtors' bathroom fixtures installed in their residential realty at 5958 Glen Falls Avenue, Baltimore City, MD 21206 are exempt.

9. The debtors object to the Amended Claim as secured. The Claimant's security interest, assuming without conceding that any security interest was granted by the debtors, is unperfected. The debtors hereby assert their powers of avoidance pursuant to 11 U.S.C. § 544(a) to avoid and to cancel the Claimant's alleged lien.

10. The debtors object to the Amended Claim as secured. The debtors contend that

> … the goods sold to the debtors became permanently incorporated into the realty, the Bank would have to be able to establish under state law that the installment

 

> contracts were effective to convey an interest in land in order to maintain its lien. Md.CodeAnn.. Real Prop. § 3-101 (1996). In Maryland, with limited exceptions, an interest in real property may only be conveyed by a document which meets the requirements of a deed and is recorded in the appropriate land records. Md.CodeAnn.. Real Prop. § 3-101 (1996); *Kingsley v. Makay*, 253 Md. 24, 251 A.2d 585 (1969)(title to land does not pass until deed is properly executed and recorded).(citations omitted). The goods were purchased with the intent that they would be incorporated into the realty, as evidenced by the fact that the contract provided for the installation of the goods into the realty and the only use for the goods was as part of the respective dwellings. *In re Kriger*, 169 B.R. at 340. Second, the status of the debtors as the owners, as opposed to lessees, of the real estate suggests that they intended the installation to be permanent and did not intend to remove the goods

*I n re Reese*, 194 B.R. 782, 789 (Bankr. D.Md. 1996)(Mannes, C.J., and Keir, J.). The *Reese* the court determined that:

> Where goods affixed to realty can only be removed by doing serious damage to either the goods or the realty, an inference that the goods were intended to be permanently incorporated into the realty may be inferred as a matter of law. *Bay State York Co. v. Marvix, Inc.*, 331 Mass. 107, 119 N.E.2d 727, 729 (1954) ("Where the chattel is so affixed to the realty that its identity is lost, or where it cannot be removed without material injury to the realty or to itself, the intent to make it a part of the realty may be established as [sic] matter of law....");

*Reese*, 194 B.R. at 792, and held:

> The court finds that upon their installation the respective goods in question passed from being "pure personalty" to "pure realty." The goods were not removable fixtures, they were incorporated into the respective dwellings in the nature of ordinary building materials and, as such, completely lost their chattel character. Even were the court to find that the goods were "fixtures" retaining their chattel character or that the debtors contractually intended to permit the Bank's predecessors in interest to remove the goods upon the debtors' default, the court could not permit the Bank to remove the goods now as such removal would commit waste upon the collateral of senior lienors and property of the estate.

*Reese*, 194 B.R. at 793. The question that must be addressed is whether the Claimant, in fact, held an unperfected security interest in the goods or the debtors' dwelling on the date of the petition. *Reese*, 194 B.R. at 787. There are three possibilities:

> First, those which are manifestly furniture, as distinguished from improvements, and not peculiarly fitted to the property with which they are used; these always remain personalty. *Vaughen v. Haldeman*, 33 Pa. 522, 75 Am.Dec. 622; *Jarechi v.*

 

> *Philharmonic Society*, 79 Pa. 403, 21 Am.Rep. 78. Second, those which are so annexed to the property that they cannot be removed without material injury to the real estate or to themselves; these are realty, even in the face of an expressed intention that they should be considered personalty—to them the ancient maxim 'Quicquid planatatur solo, solo cedit,' applies in full force. *Bank v. North*, 160 Pa. 303, 28 A. 694 (steam heating pipes); *Morrow Mfg. Co. v. Race Creek Coal Co.*, 222 Ky. 807, 2 S.W.(2d) 662 (coal tipple); *Meagher v. Hates*, 152 Mass. 228, 25 N.E. 105, 23 Am.St.Rep. 819 (house); *Powers v. Dennison*, 30 Vt. 752 (house); See *Harmony Bldg. Ass'n v. Berger,* 99 Pa. 320; *Boeringa v. Perry*, 96 Wash. 57, 164 P. 773. Third, those which, although physically connected with the real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, depending upon the intention of the parties at the time of the annexation; in this class fall such chattels as boilers and machinery affixed for the use of an owner or tenant but readily removable.

*Reese*, 194 B.R. at 788. The *Reese* Court concluded that the third category applied to the goods in that case ("It is inconceivable that the parties could have contemplated, let alone intended, that a roof or windows once installed would ever revert to their chattel character or would be removed from the realty at some latter time." 194 B.R. at 792). These same conclusions pertain here. The debtors similarly contend that the goods here have become permanently affixed to the real property and could not be removed with damaging walls and floors. The Claimant's debt is unsecured and the debtors' Objection should be sustained.

11. The *Reese* Court also declined to permit the Bank in that case to enforce any security interest when the Court considered the impact of such enforcement upon the rights of creditors holding superior security interests in the debtors' real property. The *Reese* Court held:

> Even were the court to find that the goods were "fixtures" retaining their chattel character or that the debtors contractually intended to permit the Bank's predecessors in interest to remove the goods upon the debtors' default, the court could not permit the Bank to remove the goods now as such removal would commit waste upon the collateral of senior lienors and property of the estate.

194 B.R. at 793. This circumstance is also present in the instant case where Nationstar Mortgage, LLC, holds the first lien against the debtors' residence real property pursuant to a

 

Deed of Trust dated August 14, 2006, recorded August 28, 2006, among the Land Records of Baltimore City, MD at Liber 8253, folio 661 *et seq.*, in the original principal amount of $145,350.00, and Bank of America, N.A., holds a second lien against the debtors' residence real property pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., in the original principal amount of $10,000.00, which second lien remains until the completion of any confirmed plan only at which point would the second lien be avoidable under the Court's Order entered May 19, 2016, as Docket No. 31.

12. The Claimant has not recorded any lien among the Baltimore City Land Records to perfect any security interest or lien against the debtors' residence real property as demonstrated by the Maryland Land Records attached hereto as Exhibit C and incorporated herein by reference nor has the Claimant recorded any Financing Statement among the financing records of the Maryland Department of Assessments and Taxation as demonstrated by the security interest search under both of the debtors' names attached hereto as Exhibit D and incorporated herein by reference.

**13. Pursuant to Local Bankruptcy Rule of Procedure 3007-1(a)(1), the claimant is hereby advised that within thirty (30) days of the date of the certificate of the service of this objection the claimant shall file and serve upon the undersigned counsel for the debtor together with any documents or other evidence which the claimant wishes to attach in support of its claim, unless the claimant wishes to rely solely upon the proof of claim and responsive memorandum. If you desire a hearing on this objection, then you must request such a hearing in writing pursuant to Local Bankruptcy Rule of Procedure 3007-1(a)(2), and the scheduling of any such hearing is within the discretion of the Bankruptcy Court.**

 

WHEREFORE, Cyril Bell, Sr., and Michelle Bell, debtors respectfully request that this Honorable Court:

1. Sustain the amended objection of the debtors to the amended claim of Wells Fargo Financial National Bank, Proof of Claim No. 2 filed on June 21, 3016, as a secured claim;, and

2. Disallow the amended claim of Wells Fargo Financial National Bank, Proof of Claim No. 2 filed on June 21, 3016, as a secured claim; and

3. Allow the amended claim of Wells Fargo Financial National Bank, Proof of Claim No. 2 filed on June 21, 3016, as an unsecured claim; and

4. Award to the debtors such other and further relief as is just and proper.

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Attorney for debtors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2016, a copy of the foregoing amended objection was served electronically or by first class mail, postage prepaid or by Certified Mail as indicated, to:

By Certified Mail to:
Mr. Trang V. Truong
Bankruptcy Specialist
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Email: wffbankruptcy@wellsfargo.com

By Certified Mail to:
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By Certified Mail to:
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/s/ Marc R. Kivitz
Marc R. Kivitz

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**Entered October 28, 2016** **Docket No. 72**
**Dated October 27, 2016**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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|---|---|---|
| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |

* * * * * * * * * * * * *

**ORDER GRANTING JUDGMENT BY DEFAULT AND SUSTAINING DEBTORS' OBJECTION TO CLAIM OF WELLS FARGO FINANCIAL NATIONAL BANK**

Upon consideration of the objection of Cyril Bell, Sr., and Michelle Bell, debtors, to the claim filed by Wells Fargo Financial National Bank, Proof of Claim No. 2 filed on June 3, 2016, as a secured claim, and it appearing that the debtors have demonstrated that the claimant is not entitled to a secured claim, and it further appearing that the claimant has not timely file an answer or other response to the objection to its proof of claim as a secured claim, it is therefore by the United States Bankruptcy Court for the District of Maryland

ORDERED that the motion for judgment by default against the claimant, Wells Fargo Financial National Bank, and in favor of Cyril Bell, Sr., and Michelle Bell, debtors, be, and the same is hereby granted; and be it further

ORDERED that the objection of Cyril Bell, Sr., and Michelle Bell, debtors, to the claim filed by Wells Fargo Financial National Bank, Proof of Claim No. 2 filed on June 3, 2016, as a secured claim, be, and the same is hereby, sustained; and be it further

ORDERED that claim filed by Wells Fargo Financial National Bank, Proof of Claim No. 2 filed on June 3, 2016, be, and the same is hereby, allowed as a general unsecured claim.

cc: Marc R. Kivitz, Esquire
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Bkcy: 1bell michelle Cyril POC2 Wells OBJ2 DEFAULT order

**END OF ORDER**

**B. Is it a Judicial Lien?**

1. A judgment against title holder(s) in District Court Baltimore City IS a lien. "If indexed and recorded as prescribed by Md Rules, a money judgment of court constitutes a lien to the amount and from the date of the judgment on the judgment debtor's interest in land located in the county in which the judgment was rendered…." ACM, CJ § 11-402(b). A judgment in the DISTRICT Court for Baltimore City IS A LIEN if the judgment is against BOTH husband and wife who are both owners of real property as tenants by the entirety. A judgment against ONLY ONE SPOUSE is NOT A LIEN against entireties property.

2. A judgment against one tenant by the entirety is ***not*** a lien during the marriage and during the life of the other tenant by entirety. *Annapolis Banking & Trust Co. v. Smith*, 164 Md. 8, 9, 164 A. 157, 158 (1932) holds that property held as tenants by the entireties can neither be seized nor sold in order to satisfy the individual debts of the husband or the wife. Entireties property is thus exempt from process as to the claims of individual creditors. *In re Ford, Jr.*, 3 B.R. 559, 576 (Bankr. D.Md. 1980)(Lebowitz, J.)("Under the decision reached by this court as set out above, the ultimate effect of the Code on tenants by the entireties property in Maryland remains the same as it did under the Act. Presuming that the debtor elects to exempt his interest in tenants by the entireties property, the Code, as construed by this decision, in no way affects the rights of a joint creditor of both spouses as those rights existed under the Act. As in the past, a joint creditor may, prior to the discharge of the bankrupt spouse from the debt of such creditor and upon the lifting of the stay, proceed to obtain judgment, execute or foreclose upon property owned by both the bankrupt and the nonbankrupt spouse as tenants by the entireties.").

3. A judgment in the District Court for any other jurisdiction is NOT a lien against real property unless recorded as a lien in the CIRCUIT court for that jurisdiction (and is similarly against the record t/c or j/t owner with execution or both tenant by entirety owners. A judgment constitutes a lien if properly indexed and recorded as prescribed by the Maryland Rules. ACM, CJ § 11-402.

4. Although a judgment against one joint tenant can be lien on his interest which may sold for the payment of the judgment, the mere docketing of the judgment does not sever the tenancy. *Eder v. Rothamel*, 202 Md. 189, 95 A.2d 860 (1953). The mere entry of a judgment against one of the joint tenants does ***not*** destroy any of the four unities of interest, title, time and possession and hence, until there is an execution on the judgment which will destroy one or more of these unities, there is no severance of the joint tenancy; if there is a severance of the joint tenancy by way of an execution upon the judgment of one of the joint tenants, the judgment then becomes a lien upon the interest of the judgment debtor in the tenancy in common which then arises. If, however, the judgment creditor does not execute upon the judgment against the judgment debtor-joint tenant during his life, the entire joint estate is held by the surviving joint tenant or tenants by survivorship and without any lien of the judgment against the property thus held by them. *Eastern Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 253 A.2d 367 (1969); *Greenfeld v. Kim*, 288 B.R. 431, 434 (Bankr. *D. Md.* 2002)(Keir, J.)(bankruptcy filing severed joint tenancy but automatic stay prevented judgment from attaching as lien against judgment debtor's tenant in common interest).

5. A lien is also obtained in Maryland when there is an execution upon personal property. *Adler v. Greenfield*, 83 F.2d 955, 956 (2nd Cir. 1936) which holds that a judgment outside the preference period but a levy within the 90-days prior to the bankruptcy case would be avoidable. 5 *Collier on Bankruptcy*, ¶ 547.03[1][a] at p. 574-18 (15th ed. Rev.).

6. A judgment against the record title holder(s) in Circuit Court IS a lien. "If indexed and recorded as prescribed by the Maryland Rules, a money judgment constitutes a lien on the judgment debtor's interest in land located in a county other than the county in which the judgment was originally entered.…" ACM, CJ § 11-402(c).

7. An individual debtor filing a Chapter 7 case alone and owning real property as a tenant by the entirety with a non-debtor spouse CAN avoid a ***judicial*** lien – am adversarial lien by judgment or attachment – as an impairment of an exemption against tenancy by entirety property under 11 U.S.C. § 522(f)(1)(A). *Raskin v. Susquehanna Bank (In re Raskin),* 505 B.R. 684 (Bankr. D. Md. 2014)(Gordon, J.)(Maryland Legislature's enactment of owner-occupied real estate exemption assertable by one tenant-by-entirety spouse in ACM, CJ 11-504(f)(1)(ii) – a statutory exemption applicable only in federal bankruptcy cases -- distinguishes *Alvarez v. HSBC Bank USA, N.A.*)(requiring that property of estate include all interests affected by lien avoidance/stripoff of wholly unsecured consensual lien granted against tenants by entirety realty).

8. Exemption claim not required for avoidance of judicial lien as impairment of exemption. *Botkin v Dupont Community Federal Credit Union*, 650 F.3d 396, 400 (4th Cir 2011)(§ 522(f) lien avoidance permitted on residential realty with no equity and no claim of exemption; to avoid a judicial lien, the asset needs to be scheduled, but it does NOT need to be claimed as exempt - just be exemptible); *Owen v. Owen*. 500 U.S. 305, 308 (1991)("'No property can be exempted ... unless it first falls *within* the bankruptcy estate.'). Only if the lien is in fact avoided does the debtor become entitled to claim the exemption under that scenario, and a debtor can amend her Schedule C at that time to do so".). In *Botkin*, debtor filed Chapter 7 and moved to avoid creditor's judicial lien on her residential property that had a value of $22,500.00, was encumbered by a deed of trust lien of $24,124.00 and the creditor's judgment lien of $9,800.00, and that although the debtor had $2,777.00 in unused homestead exemption, no exemption had been claimed on Schedule C for any equity in her residence. The U.S. Bankruptcy Court for the Western District of Virginia refused to grant a judgment by default and denied the debtor's motion because no exemption had been claimed, and she appealed. The District Court reversed, 432 B.R. 230 (W.D.Va. 2010), holding that a debtor was not precluded from avoiding a creditor's judicial lien on her residential property even though she did not actually claim an exemption in the property which the lien would impair. The creditor appealed and the Fourth Circuit affirming held that to avoid a judicial lien as an impairment of an exemption, the asset needs to be scheduled, but it does NOT need to be claimed as exempt - just be exemptible. Under § 522(f), lien avoidance is permitted on residential realty with no equity and no claim of exemption; *Owen v. Owen*. 500 U.S. 305, 308 (1991)("'No property can be exempted ... unless it first falls *within* the bankruptcy estate.'). Only if the lien is in fact avoided does the debtor become entitled to claim the exemption under that scenario, and a debtor can amend her Schedule C at that time to do so". *Botkin,* 650 F.3d at 400. *See also, In re Ford, Jr.*, 3 B.R. 559, 576 (Bankr. D.Md.

1980)(Lebowitz, J.)("The court concludes that neither the existence of a lien nor the lack of equity in the debtor prevents the taking of an available exemption.")

9. HOA lien NOT avoidable under 11 U.S.C. § 522(f)(1) (A) as a nonjudicial lien. *In re King*, 208 B.R. 376, 1997 Bankr. LEXIS 596 (Bankr. D. Md. 1997)(Mannes, J.) citing *In re Stern*, 44 B.R. 15 (Bankr. D. Mass. 1984) which held that a condominium lien arising under a Massachusetts statute was a statutory lien notwithstanding the requirement of judicial action to enforce the lien. *King* holds that a lien created through the Maryland Contract Lien Act, Md. Real Prop. Code Ann. §§ 14-201 *et. seq.* (1974) is non-judicial and therefore not avoidable under 11 U.S.C. § 522(f) as a lien against the Chapter 7 debtor's townhouse which she purchased subject to a Declaration of Covenants, Conditions and Restrictions. Although the debtor/owner did not contest the notice of lien filed in the Circuit Court, the case suggests that this would not make a difference since the lien was created in the first place by statute rather than by judgment or levy. As the Chapter 7 was filed more than one (1) year after the recordation of the lien in the Land Records of Prince George's County, there is no discussion of avoidance as a preference. There is also no discussion of non-dischargeability, but the Court noted that "[w]hether or not debtor is entitled to a discharge of the debt owed to respondent, the respondent retains the right to proceed against the property. In keeping faithful to the longstanding policy articulated in *Johnson* [*v. Home State Bank*, 501 U.S. 78, 83-86 (1991)(a bankruptcy discharge does not extinguish a secured creditors right to seek redress against property encumbered by the security interest)], the respondent should be allowed this opportunity.

"Finally, while the issue was not argued, the law is settled that the obligation to pay condominium fees continues after the debtor's discharge. See *River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833, 837 (4th Cir.), *cert. denied*, 513 U.S. 874, 115 S.Ct. 200, 130 L.Ed.2d 131 (1994); *In re Whitten*, 92 B.R. 10, 15-16 (Bankr. D. Mass.1996)(`The financial obligations of a unit owner are covenants running with the land.').")"[3]

[3] Other HOA issues:

**Chapter 7**

Pre-petition fees in both a Chapter 7 and a Chapter 13 are dischargeable. *River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833, 837 (4th Cir.), *cert. denied*, 513 U.S. 874 (1994)(HOA fees arise postpetition; no discharge injunction violation for collection); *In re Whitten*, 92 B.R. 10, 15-16 (Bankr. D. Mass.1996)(`The financial obligations of a unit owner are covenants running with the land.')." In Chapter 7it is also well-established that post-petition assessments/dues remain a personal obligation of the debtor into perpetuity for as long as the debtor has a "legal, equitable, or possessory interest" in the real property." 11 U.S.C. § 523(a)(16); *Allard v. G & P Enterprises, LLC, et al. (In re Allard)*, 2012 WL 2830158 (Bankr. D. N.D. Cal. 2012).

HOA not entitled to Ch 7 administrative priority expense absent benefit to bankruptcy estate. *In re Hall*, 443 B.R. 59 (Bankr. D. Md 2010)(Mannes, J) denied the application holding that the townhouse association's claim, which had the burden of proof under *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 157 (4th Cir. 1999), *citing Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 865 (4th Cir. 1994), was not entitled to priority as administrative expense of debtor-homeowner's Ch 7 case absent a showing that services that association provided conferred some tangible benefit on debtor-homeowner's Ch 7 estate, relying upon *In re Shangra-La, Inc.*, 167 F.3d 843, 847 n. 2 (4th Cir. 1999); *In re Midway Airlines Corp.*, 496 F.3d 229, 237 (4th Cir. 2005).

Legal title to condo despite intention to surrender imposes Ch 7 non-dischargeable debt. *In re Langenderfer*, 2012 WL 1414301 (Bankr. N.D. Ohio 2012); *In re Ames*, 447 B.R. 680, 683 (Bankr. D. Mass. 2011).

Secured creditor's possession of property and failure to foreclose does NOT permit Court to fashion equitable relief of sanctions in order to alleviate postpetition debt for HOA fees. *In re Fristoe*, 2012 WL 4483891 (Bankr. D. Utah 2012).

Sanctions imposed for attempt at collection of interest and attorney's fees incurred postpetition charged on prepetition assessments even with Ch 7 non-discharge of postpetition assessments. *In re Moreno*, 479 B.R. 553 (Bankr. E,D. Cal. 2012).

Yearly HOA assessments, even after CH 7 filing, were prepetition liabilities relating back to the date of the contract -- dischargeable. *Fauser v. Property Owners Association of Canyon Village at Cypress Springs, et al. (In re Fauser)*, 2011 WL 5005608 (Bankr. D. TX. 2011).

Postpetition billing statements including prepetition assessment to be paid during postpetition timeframe violated automatic stay. *In re Kanohokula*, 2013 WL 1346020 (Bankr. D. Hawaii 2013).

**Chapter 13**

Wholly unsecured condo liens, whether judicial or statutory, avoidable in Chapter 13, using 11 U.S.C. § 506(a). *In re Reavis*, 11-28325-PM (Bankr. D. Md. 2012)(Mannes, J.).

Post-petition assessments/dues in Chapter 13 have been held to be dischargeable. No personal liability in Ch 13 for post-discharge fees which are dischargeable but remain *in rem* obligation of the realty; but relief from stay granted against non-estate debtor assets. *In re Khan*, 504 B.R. 409 (Bankr. D. Md. 2014)(Case No. 11-32248-PM)(Mannes, J.). Carrollan Gardens Condominium Assoc. filed a motion for relief from the automatic stay to pursue collection of unpaid post-petition fees against a Chapter 13 debtor. Court granted relief as to non-estate assets – property of the debtor – which excluded post-confirmation earnings which are property of the estate under 11 U.S.C. § 1306(a)(2) but which issue was not raised in the case. Condo association cannot garnish wages, bank accounts, property, etc. "*In re Reynard*, 250 B.R. 241, 244 (BC Va. 2000); *In re Zamora*, 2012 WL 4501680 (BC W.D. Tex. 2012); *cf. In re Schechter*, 2012 WL 3555414 (BC E.D. Va. 2012)(Collection activities must be limited to property of the debtors, not property of the estate, but all post-confirmation earnings are property of the estate under 11 U.S.C. §1306(a)(2))," The Court held that "[u]ntil the discharge is entered, Debtor is stuck for the payment of these fees" noting that "[t]his holding differs from that of *In re Spencer*, 457 B.R. 601, 605 (E.D. Mich. 2011)…." which held post-petition debts nondischargeable.

Court further held that (i) pre-petition claim for condo fees was discharged; (ii) the Court noted that following *Rosenfeld* and amendments to the Bankruptcy Code, personal liability continues after discharge on condominium fees in Chapter 7, but not in Chapter 13.because post-discharge 11 U.S.C. § 523(a)(16) does NOT impose a personal liability upon the debtor for continued payment of condominium fees because § 523 (a)(16) is not included among the non-dischargeable debts listed in 11 U.S.C. § 1328(a); and (iii) the condominium charges will continue to be an *in rem* obligation of the realty because they run with the land under *In re Rosenfeld* and under the Maryland Contract Lien Act.

Court further noted that debtor could have proposed a plan that included the transfer of condo unit to the condo association under 11 U.S.C. § 1328(b)(8) in satisfaction of creditor's secured debt. Upon confirmation, a plan can vest property of the estate in any entity; plan could have vested the unit in the association or in the mortgagee, citing by comparison *In re Bryant*, 323 B.R. 635 (Bankr. E.D. Pa. 2005)(creditor with notice its claim will be discharged may not ignore the confirmation process and fail to object notwithstanding that there either is no bar date for filing a claim or the time for filing a claim has yet to expire concluding that confirmation bars the creditor's later-filed claim under principles of *res judicata*).

BUT SEE: Debtor liable for post-petition HOA fees. *Heffner v. Elmore, Throop & Young, P.C.*, 2012 U.S. Dist.. LEXIS 80169 (D. Md. 2012)(Messite, J.), *affirmed sub. Nom., Heffner v. Brooksquare Condominium*, 2013 U.S. APP. LEXIS 4511 (4th Cir. 2013)(per curiam)(Unpublished). Robert C. Heffner, Jr., and his wife owned a condominium subject to Declarations for payment of homeowner association fees. In 2009, Heffner and his wife divorced, and Heffner fell behind on mortgage and homeowners' association payments. On June 2, 2009, he filed for bankruptcy under Chapter 13. On May 24, 2011, he received a discharge 11 U.S.C. § 1328(a). On July 1, 2011, the mortgagee instituted foreclosure and sold the property on September 19, 2011. From June 2, 2009, through September 19, 2011, Heffner and his now ex-wife remained record title holders of the property. On July 26, 2011,

two years after Ch 13 was filed, Ballenger Creek ("Ballenger Creek") through and on December 14, 2011, sued Heffner in the Frederick County District Court seeking to collect assessments.

Heffner has sued Ballenger Creek Meadows Homeowners Association, Inc., and its attorney, the law firm of Elmore, Throop & Young, P.C,., which sought lien against condo that was recorded 4 days before foreclosure sale, alleging violations of the Fair Debt Collection Practices Act, *15 U.S.C. § 1692, et seq.*, and the Maryland Consumer Debt Collection Act, *MD. CODE ANN., COM. LAW § 14-201, et seq.*, against both Defendants, and alleging a violation of the Maryland Consumer Protection Act, CODE ANN., COM. LAW *§ 13-101, et seq.* The District Court granted summary judgment for Ballenger Creek citing *Rosenfeld* held that homeowners' association assessments were nondischargeable, postpetition debts that arose from a covenant running with the land, also citing *In re Spencer*, 457 B.R. 601, 605 (E.D. Mich. 2011) (citing 11 U.S.C. §§ 101(5), (12), & 1328(a)) that held that debts arising after the filing of a bankruptcy petition are not dischargeable under § 1328(a). USDC also held that Maryland law supports the notion that homeowners' association assessments are obligations tied to the land at the time of ownership. *See* Maryland Homeowners Association Act, *MD. CODE ANN., REAL PROP. §§ 11B-101 et seq.*; *In re Mattera*, 203 B.R. 565, 570 (Bankr. D.N.J. 1997)("There is no question that under Maryland state law, the financial obligations of a unit owner of a condominium, time-share or cooperative are covenants running with the land."). Despite noting that Heffner filed a Ch 13 case and *Rosenfeld* was a Ch 7 case, the USDC concluded that the reasoning set forth in *Rosenfeld* could be imported here "because the definitions of 'debt' and 'claim', which are key to this discussion, apply equally to Chapters 7 and 13." *In re Mattera*, 203 B.R. at 570 (considering the *Rosenfeld* and *Rosteck* lines of cases in a Chapter 13 bankruptcy).

USDC rejected Heffner's argument that *Rosenfeld* was overruled the 1994 and 2005 amendments to the Code adding § 523(a)(16) and was not persuaded by the argument that Congress implicitly adopted *In re Rosteck*, 899 F.2d 694, 697 (7th Cir. 1990)(that such assessments are contractual, pre-petition obligations) and rejected *Rosenfeld* (that such assessments are post-petition obligations that run with the land) by specifically excluding § 523(a)(16) from discharge in that § 1328(a) does not incorporate § 523(a)(16) – holding § 523(a)(16) and § 1328(a) to be mutually inapplicable and citing *In re Spencer*. The Court declined to infer that by *not* expressly connecting these unrelated sections, Congress intended to broaden the § 1328(a) discharge to include assessments that are excluded from other types of bankruptcy discharges. *See In re Foster*, 435 B.R. 650, 659 (9th Cir. BAP 2010)("[W]e doubt the omission of § 1328(a) in § 523(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provisions under chapter 13 to stay in his or her property after the order for relief.").

USDC concluded that *Rosenfeld* still applied by virtue of its continued citation by Courts. *In re King*, 208 B.R. 376, 380 (Bankr. D. Md. 1997)("[T]he law is settled that the obligation to pay condominium fees continues after the debtor's discharge."); *In re Smith*, 206 B.R. 113, 116 (Bankr. D. Md. 1997)("The unpaid association charges arising after the date of the petition are post-petition obligations of the debtor which will not be discharged.").

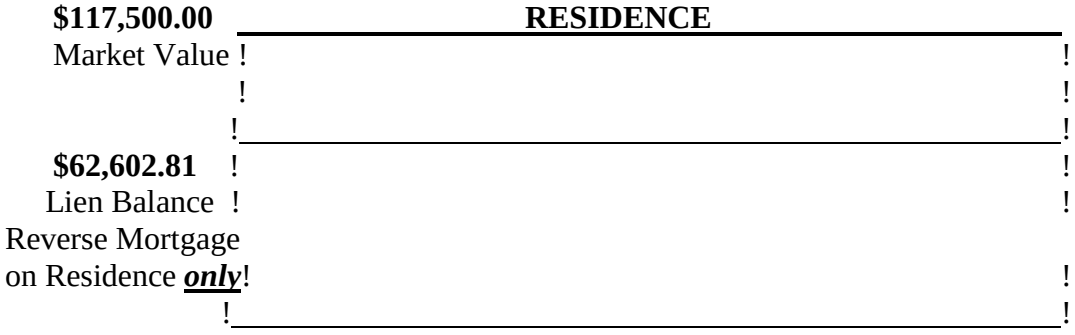
HELD: the assessments and fees that accrued on Heffner's property pursuant to the Homeowners' Declaration after Heffner filed for bankruptcy on June 2, 2009 were not discharged in that bankruptcy. Ballenger Creek and Elmore were legally permitted to pursue recovery of these post-petition debts.

Non-dischargeable Post-petition HOA NOT priority debt; creditor pre-petition attorney fee okay but not post-petition. *In re Smith*, 206 B.R. 113, 116 (Bankr. D. Md. 1997)(Keir, J.), Creditor-homeowner association filed proof of claim in Chapter 13 case for homeowner association assessments and asserted priority status for claim. Debtor objected. Court held that: (1) creditor was not entitled to priority status for claim for homeowner association assessments under provision granting priority to claims for prepetition deposits for property or services; (2) reasonable attorney fees and costs that creditor incurred prepetition would be allowed as part of creditor's general unsecured claim for assessments; and (3) creditor's postpetition attorney fees and costs would not be allowed as part of claim. ("The unpaid association charges arising after the date of the petition are post-petition obligations of the debtor which will not be discharged.")

File a Chapter 13 case and provide for vesting of the property in the mortgagee or condo association. *In re Rosa*, 495 B.R. 522 (Bankr. D. Hawaii July 8, 2013).

At time of Chapter 13 petition, obligation for post-petition condominium assessments was a contingent, unmatured, unliquidated, and unfixed right to payment which constituted a claim. *In re Mattera*, 203 B.R. 565, 571 (Bankr. D.NJ 1997))(applying Maryland law).

## C. Reverse Mortgage on Residence Matured Pre-petition Can Be Modified.

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No violation of automatic stay by post-petition action to collect post-petition HOA fees including attorney fees which exceeded HOA fee amount. *In re Zamora*, 2012 WL 4501680 (Bankr. W.D. Tex. 2012).

Legal title to condo despite intention to surrender imposes non-dischargeable debt. *In re Spencer*, 457 B.R. 601, 611-13 (Bankr. D. Mich. 2011)(discussing concept of "surrender" under both state law and bankruptcy law in context of Chapter 13 debtor),

§ 523(a)(16) exception DOES NOT apply in Chapter 13 as no Congressional intent is evidenced by its omission from § 1328(a) where debtors have vacated property, derive no benefit from it, and stay has been lifted but secured creditor has not foreclosed. *In re Colon*, 465 B.R. 657, 662 (Bankr. D. Utah 2011).

§ 523(a)(16) exception DOES NOT apply in CH 13 because HOA not contractual – postpetition fees arise from pre-petition ownership; debtor liable. *Foster v. Double R Ranch Association (In re Foster)*, 435 B.R. 650 (B.A.P. 9th Cir. 2010).

Post-petition Ch 13 HOA fees arise pre-petition from ownership; no Sanctions imposed, but actions violating stay were voided by Court. *In re Hawk*, 314 B.R. 312 (Bankr. D. NJ 2004).

Equity jurisdiction permits termination of Ch 7 liability under 11 U.S.C. § 523(a)(16). *Pigg v. BAC Home Loans Servicing, et al. (In re Pigg)*, 453 B.R. 728 (Bankr. M.D. TN 2011).

Surrender of Property in Ch 13. *In re Perry*, 2012 WL 4795675 (Bankr. E.D.N.C. 2012). Chapter 13 debtor filed motion to approve surrender of real property to lienholder, Beneficial Financial, Inc., pursuant to 11 U.S.C. § 1325(a)(5)(C) in order to avoid post-petition accruing personal liability for *ad valorem* taxes. Bankruptcy Court granted the motion providing Beneficial Financial, Inc., with sixty (60) days within which to foreclose failing which debtor was authorized to execute, deliver, and record a quitclaim deed of the real property to Beneficial.

**Chapter 11**.
Administrative expense allowed for postpetition HOA fees as title to realty bound debtors to covenants which provided that assessments, interest, and attorney's fees were enforceable as personal liability and by lien. *In re Lenz*, 90 B.R. 458 (Bankr. D. Colo. 1988)(prior to subsequent amendment of § 523(a) in 1994 and 2005).

Legal title to condo despite intention to surrender imposes non-dischargeable debt. *In re Burgueno*, 451 B.R. 1, 4 (Bankr. D. Az. 2011).

Condominium fees arising post-Chapter 11 and pre-conversion to Chapter 7 not dischargeable and grounds for relief from stay. *Hijiawi v. Five North Wabash Condominium Association (In re Hijiawi)*, 471 B.R. 917 (Bankr. N.D. Ill. 2012), *aff'd* 495 B.R. 839 (D. N.D. Ill. 2013).

A residential consensual **reverse mortgage** lien that matures prior to filing of Chapter 13 can be repaid in full under a five-year Chapter 13 Plan under 11 U.S.C. § 1322(c)(2) and the interest rate can be modified.. *In re Griffin,* 489 B.R. 638, 2013 WL 1123826 (Bank. D. Md. 2013)(Gordon, J.), citing *In re Brown*, 428 B.R. 672 (Bankr. SC 2010). Judge Gordon's preliminary statement captures the gist of the case:

> This dispute draws into question the ability of a Chapter 13 debtor to utilize 11 U.S.C. § 1322(c)(2) to modify the payment of a secured claim that arises from the type of consumer financing known as a "reverse mortgage". For the reasons explained below, the Court concludes that such modification is permitted by that subsection of the Code. Therefore the automatic stay shall remain in place, the objections of the mortgage holder shall be overruled and the Debtor's plan shall proceed to a final confirmation hearing.

The *Griffin* case dealt with a situation in which the debtor's mother entered into a reverse mortgage secured by her residence. The deed and deed of trust were in her name only. Upon her death, the lender accelerated the loan, demanded payment in full, and commenced foreclosure. Her son, who is co-beneficiary under her estate and personal representative, and who now resides in the real property valued at $117,500.00 with a lien balance of $62,602.81 and substantial equity, filed a Chapter 13 case. The debtor's Chapter 13 plan proposed paying the debt in full with *Till* interest during the life of the plan under §§ 1322(c)(2) and 1325(a)(5). Creditor, FNMA, moved for relief from the automatic stay and objected to the plan's repayment proposal to pay the debt in full over 47 months and to the proposed interest rate which was initially proposed at 1.21% and increased to 5.0%. Bankruptcy Court observing as did Judge Waites in *In re Brown*, 428 B.R. 672, 676 (Bankr. D. S.C. 2010) that the creditor's pre-bankruptcy acceleration of the loan made its last payment "due before the date on which the final payment under the plan is due" bringing the secured claim within the reach of § 1322(c)(2), permitted the restructuring of the lien and denied the motion for relief. The Court declined to rely upon *In re Henry*, 153 Fed.Appx. 146 (4th Cir. 2005) noting that it is unreported, thus not binding precedent, and although the subject property apparently a principal residence that the Fourth Circuit did not consider the effect of § 1322(c)(2). The Court observed that *Witt v. United Companies Lending Corp. (In re Witt)*, 113 F.3d 508, 512 (4th Cir. 21997) held that § 1322(c)(2) was enacted to permit the cure of a defaulted principal residence obligation through the modification of payment terms albeit concluding that § 1322(c)(2) did not overrule *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993) which held that a claim secured by a principal residence could not be bifurcated into secured and unsecured portions under 11 U.S.C. § 506(a) consistently with 11 U.S.C. § 1322(b)(2) but implied *in dicta* that § 1322(c)(2) should be interpreted as permitting the modification of payment terms even when the debt is due in full whether by maturity or by default. FNMA, relying upon *Gottron v OneWest Bank FSB (In re Gottron),* __ B.R. ___, 2012 WL 907489 at *2 (Bankr. D. Md. March 16, 2012) and *Alvarez v. HSBC Bank USA, N.A.*, 733 F.3d 136 (4th Cir. 2013)(see discussion *supra*) also contended that the fact that debtor is not the sole heir to his mother's estate prohibited modification without his sister as a necessary party, however the Bankruptcy Court distinguished those cases as not involving lien modification under § 1322 and rather dealt with avoidance of a lien against entireties property granted by a non-debtor party. With respect to the interest rate, the Court suggested the parties should work out a compromise of that issue and, failing that, the Court would hold an evidentiary hearing to resolve the matter. Accordingly, if the interest rate is not resolved by consent, the Court will hold an evidentiary hearing on that issue.

D. Stripoff of Wholly Unsecured Security Interest on Personalty under 11 U.S.C. § 506(a).

| | | |
|---|---|---|
| **$1,494.66** | **VEHICLE** | |
| 2nd Security Lien Balance | (Mariner Finance $1,494.66 wholly unsecured) | |
| **$20,609.84** | | |
| 1st Security Lien Balance | (Hyundai Finance undersecured) | |
| **$15,000.00** Market Value | | |

Wholly unsecured second lien held by Mariner Finance LLC., can be stripped off entirely and rendered unsecured and discharged upon completion of a Chapter 11 and Chapter 13 Plan.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| IN RE: | * |
| | * |
| Cyril Bell, Sr. | * CASE NO.: 16-13011-RAG |
| Michelle Bell | * Chapter 13 |
| | * |
| Debtors | * |
| | * |
| * * * * * * | * * * * * * * |
| | * |
| Cyril Bell, Sr. | * |
| Michelle Bell | * |
| 5958 Glen Falls Avenue | * |
| Baltimore, MD 21206 | * |
| | * |
| Movants/Debtors | * |
| | * |
| v. | * |
| | * |
| Mariner Finance LLC. | * |
| 7682 Belair Road | * |
| Baltimore, MD 21236 | * |
| SERVE ON: Mr. Josh Johnson | * |
| Chief Executive Officer and President | * |
| 8211 Town Center Drive | * |
| Baltimore, MD 21236 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street | * |
| Suite 820 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * | * * * * * * * |

**MOTION TO DETERMINE EXTENT OF SECURITY INEREST AND LIEN AND STATUS OF DEBT UNDER SECTION 506**

Cyril Bell, Sr., and Michelle Bell, movants and debtors, by their attorney, Marc R. Kivitz, pursuant to 11 U.S.C. § 506(a) and Rule 3012 of the Federal Rules of Bankruptcy Procedure hereby institute this action against Mariner Finance LLC., respondent, for the determination of

the extent of the security interest and lien held by the respondent and the status of its debt as unsecured against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, and as grounds therefore respectfully represents that:

1. On March 9, 2016, Cyril Bell, Sr., and Michelle Bell, debtors, filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 16-13011-RAG ("the reorganization case").

2. This Court has jurisdiction over this motion to determine extent of secured lien and status of debt under Section 506 pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a) and (d), 1322(b)(2), and Federal Rule of Bankruptcy Procedure 3012.

3. Mariner Finance LLC. ("Mariner" or "respondent") is in the business of lending money to individuals and does business within the State of Maryland.

4. At the time of the filing of the reorganization case, Cyril Bell and Michelle Bell, movants and debtors ("debtors") owned and still own a 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053 ("the vehicle"), pursuant to a Maryland Certificate of Title ("Title"). A copy of the Title is attached hereto as Exhibit A and is incorporated herein by reference.

5. The market value of the vehicle is $15,000.00 as of March 1, 2016, as determined by an appraisal performed by Mr. Mark Wintjen, a certified appraiser at CarMax, which valuation is attached hereto as Exhibit B and is incorporated herein by reference.

6. On or about April 10, 2013, the debtors pursuant to a Retail Installment Sale Contract Simple Finance Charge agreement purchased the vehicle from Bob Bell Ford for the sum of $29,549.14 ("contract") pursuant to which the debtors granted a security interest and lien against the vehicle, which security interest and lien are duly perfected on the Title (Ex. A). A copy of

the contract is attached hereto as Exhibit C and is incorporated herein by reference. The contract and the security interest and lien were assigned by Bob Bell Ford to Hyundai Motor Finance, which assignment is demonstrated on Page 2 of Exhibit C.

7. Hyundai Motor Finance issued a billing statement for its account number xx2573 for the balance due on its first security interest and lien as of November 25, 2015, in the amount of $20,609.84 ("first security interest and lien billing statement"). A copy of the first security interest and lien billing statement is attached hereto as Exhibit D and is incorporated herein by reference.

8. On or about December 20, 2013, the debtors borrowed the principal sum of $3,906.62 from Mariner Finance LLC pursuant to a Note, Security Agreement and Arbitration Agreement (Maryland) , account number xxxx0672-11,pursuant to which the debtors granted a second security interest and lien against the vehicle ("Mariner lien contract"). A copy of the Mariner lien contract is attached hereto as Exhibit E and is incorporated herein by reference. Mariner's second security interest and lien is also duly perfected on the Title (Ex. A).

9. Mariner issued an accounting for its second security interest and lien reflecting a balance due to the respondent on its second security interest and lien in the amount of $1,494.66. A copy of the Mariner's lien billing statement is attached hereto as Exhibit F and is incorporated herein by reference.

10. The consensual first security interest and lien held by Hyundai Motor Finance as described in paragraphs 6 and 7 above fully encumbers the market value of the vehicle rendering the second security interest and lien held by Mariner, respondent, as described in paragraphs 8 and 9 above wholly unsecured and voidable in its entirety pursuant to *Johnson v. Asset*

*Management Group, LLC*, 226 B.R. 364 (D. Md. 1998) and *First Mariner Bank v. Johnson*, 226 B.R. 411 (D. Md. 2009),.

11. The debtors' plan of reorganization will propose that the second security interest and lien held by Mariner, respondent, be avoided and canceled and that the respondent shall be treated as holding a non-priority general unsecured debt in the amount of the former second security interest and lien and entitled to receive a distribution thereon under the plan as a general unsecured creditor.

WHEREFORE, Cyril Bell, Sr., and Michelle Bell, movants and debtors, respectfully request that this Honorable Court:

1. Determine the secured claim held by Mariner Finance LLC, respondent, against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, in the original principal amount of $3,906.62, account number xxxx0672-11, to be Zero Dollars ($0.00); and

2. Determine the debt owed to Mariner Finance LLC,, respondent, pursuant to the second security interest and lien to be unsecured in its entirety; and

3. Upon the entry of a discharge pursuant to 11 U.S.C. § 1328(f), avoid and cancel the security interest and lien of record held by Mariner Finance LLC, respondent, pursuant to a Note, Security Agreement and Arbitration Agreement (Maryland) dated December 20, 2013, account number xxxx0672-11, against the 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053; and

4. Appoint the debtors as trustees in fact to act on behalf of Mariner Finance LLC, respondent, to execute any document necessary to release such second security interest and lien upon the entry of the debtors' discharge; and

5. Award to the debtors such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2016, a copy of this motion was served pursuant to Federal Bankruptcy Rule 7004 by Certified Mail, return receipt requested upon:

**BY CERIFIED MAIL:**
Mariner Finance LLC.
7682 Belair Road
Baltimore, MD 21236

**BY CERIFIED MAIL:**
Mariner Finance LLC.
Mr. Josh Johnson
Chief Executive Officer and President
8211 Town Center Drive
Baltimore, MD 21236

Mariner Finance LLC.
Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 820
Baltimore, MD 21202

Gerard R. Vetter, Esquire, Interim Trustee
300 E. Joppa Road
Suite #409
Towson, MD 21286-3020

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Cyril Bell, Sr.
Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

/s/ Marc R. Kivitz
Marc R. Kivitz

Bkcy: 1bell Cyril michelle CAR AVOID2d motion

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Cyril Bell, Sr. | * | |
| Michelle Bell | * | |
| 5958 Glen Falls Avenue | * | |
| Baltimore, MD 21206 | * | |
| | * | |
| Movants/Debtors | * | |
| | * | |
| v. | * | |
| | * | |
| Mariner Finance LLC. | * | |
| 7682 Belair Road | * | |
| Baltimore, MD 21236 | * | |
| SERVE ON: Mr. Josh Johnson | * | |
| Chief Executive Officer and President | * | |
| 8211 Town Center Drive | * | |
| Baltimore, MD 21236 | * | |
| SERVE ON: Resident Agent | * | |
| CSC Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street | * | |
| Suite 820 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**NOTICE OF MOTION TO DETERMINE EXTENT OF**
**SECURITY INEREST AND LIEN AND STATUS OF DEBT UNDER SECTION 506**

Cyril Bell, Sr., and Michelle Bell, movants and debtors, have filed papers with the court seeking to determine the secured claim held by Mariner Finance LLC, respondent, is the holder a second security interest and lien against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, pursuant to a Note, Security Agreement and Arbitration Agreement (Maryland) dated December 20, 2013, in the original principal amount of $3,906.62, account number xxxx0672-11, to be Zero Dollars ($0.00), and unsecured in its entirety, and the lien avoided and canceled upon the discharge of the underlying debt pursuant to 11 U.S.C. § 1328(f)

as a lien against the real property; and to appoint the debtors as trustees in fact to release the lien upon the entry of their discharge.

Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion for determination that the debt is unsecured, or if you want the court to consider your views on the motion, then by **April 13, 2016**, you or your lawyer must file a written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy to:

| | | |
|---|---|---|
| Marc R. Kivitz, Esquire | Gerard R. Vetter, Esquire | Gerard R. Vetter, Esquire |
| Suite 1330 | Assistant U.S. Trustee | Interim Chapter 13 Trustee |
| 201 North Charles Street | Suite 2650, 101 W. Lombard | 300 E. Joppa Road, #409 |
| Baltimore, MD 21201 | Baltimore, MD 21201 | Towson, MD 21286-3020 |

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

The hearing is scheduled for **Friday, May 20, 2016, at 10:30 a.m. in Courtroom 1B**, 1st Floor, United States Bankruptcy Court, 101 West Lombard Street, Baltimore, MD 21201.

IF YOU OR YOUR LAWYER DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

03/11/16
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 N. Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2016, a copy of this notice was served pursuant to Federal Bankruptcy Rule 7004 by Certified Mail, return receipt requested upon:

**BY CERIFIED MAIL:**
Mariner Finance LLC.
7682 Belair Road
Baltimore, MD 21236

**BY CERIFIED MAIL:**
Mariner Finance LLC.
Mr. Josh Johnson
Chief Executive Officer and President
8211 Town Center Drive
Baltimore, MD 21236

Mariner Finance LLC.
Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 820
Baltimore, MD 21202

Gerard R. Vetter, Esquire, Interim Trustee
300 E. Joppa Road
Suite #409
Towson, MD 21286-3020

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Cyril Bell, Sr.
Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

/s/ Marc R. Kivitz
Marc R. Kivitz

Bkcy: 1bell Cyril michelle CAR AVOID2d notice

**Entered: May 25, 2016** **Docket No. 38**
**Dated: May 23, 2016**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| IN RE: | * |
| | * |
| Cyril Bell, Sr. | * CASE NO.: 16-13011-RAG |
| Michelle Bell | * Chapter 13 |
| | * |
| Debtors | * |
| * * * * * * * * * * * * * | |
| Cyril Bell, Sr. | * |
| Michelle Bell | * |
| 5958 Glen Falls Avenue | * |
| Baltimore, MD 21206 | * |
| | * |
| Movants/Debtors | * |
| | * |
| v. | * |
| | * |
| Mariner Finance LLC. | * |
| 7682 Belair Road | * |
| Baltimore, MD 21236 | * |
| SERVE ON: Mr. Josh Johnson | * |
| Chief Executive Officer and President | * |
| 8211 Town Center Drive | * |
| Baltimore, MD 21236 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street | * |
| Suite 820 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| * * * * * * * * * * * * * | |

**ORDER GRANTING MOTION TO VAUE COLLATERAL**
**AND TO AVOID SECURITY INTEREST**

Having considered debtors' Motion to Avoid Lien, and any response filed thereto, and it appearing that proper notice has been given, pursuant to 11 U.S.C. § 506 and for the reasons set forth in the cases of *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998) and

*First Mariner Bank v. Johnson*, 226 B.R. 411 (D. Md. 2009), it is by the United States Bankruptcy Court for the District of Maryland

ORDERED that the claim of Respondent, Mariner Finance LLC, against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, be and is hereby deemed wholly unsecured; and it is further

ORDERED that at such time as a discharge Order is entered pursuant to 11 U.S.C. § 1328(a) in this case, the security interest and lien held in favor of Respondent, Mariner Finance LLC, on the debtors' interest in the 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, pursuant to a Note, Security Agreement and Arbitration Agreement (Maryland) dated December 20, 2013, in the original principal amount of $3,906.62, account number xxxx0672-11, is avoided; and it is further

ORDERED that if the Respondent, Mariner Finance LLC, has filed a proof of claim, the claim of the Respondent, be, and hereby is allowed as a general unsecured claim for purposes of distribution under the Debtors' plan; and it is further

ORDERED that if the Respondent, Mariner Finance LLC,, has not filed a proof of claim, the claim of the Respondent, be, and hereby is allowed as a general unsecured claim for purposes of distribution under the Debtors' plan if a proof of claim is filed on or before the later of (i) the claims bar date previously fixed by this court, or (ii) twenty-eight (28) days after the entry of this order; and it is further

ORDERED that allowance of the claim of the Respondent, Mariner Finance LLC, , as an unsecured claim pursuant to this order is without prejudice to objection to such claim on other grounds; and it is further

ORDERED that Cyril Bell, Sr., and Michelle Bell, movants and debtors, be, and are hereby, appointed as trustees in fact to act on behalf of Mariner Finance LLC, respondent, to execute any document necessary to release such second security interest and lien upon the entry of the debtors' discharge.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard St..
Baltimore, MD 21201

Gerard R. Vetter, Esquire, Interim Trustee
300 E. Joppa Road, Suite #409
Towson, MD 21286-3020

Cyril Bell, Sr.
Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

Mariner Finance LLC.
7682 Belair Road
Baltimore, MD 21236

Mariner Finance LLC.
Mr. Josh Johnson
Chief Executive Officer and President
8211 Town Center Drive
Baltimore, MD 21236

Mariner Finance LLC.
Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street
Suite 820
Baltimore, MD 21202

Bkc: 1bell Cyril michelle CAR AVOID2d order

**END OF ORDER**

E. Stripdown of Security Interest on Personalty under §§ 506(a) and (d) – which can be paid over time with interest in Chapters 11 and 13 -- unlike § 722 redemption which must be paid in a lump sum.

| | **VEHICLE** |
|---|---|
| **$1,494.66** 2nd Security Lien Balance | (Mariner Finance $1,494.66 wholly unsecured) |
| **$20,609.84** 1st Security Lien Balance | (**Hyundai Finance** undersecured) |
| **$15,000.00** Market Value | |

Partially secured and underscored first lien held by Hyundai Motor Finance LLC., can be stripped down to the value of the vehicle and the new, reduced principal lien balance – equal to the value of the car – can be repaid with interest over time – five (5) years maximum in Chapter 13 and longer, if necessary, in Chapter 11, and the balance of the debt that exceeds the value of the car is rendered unsecured and discharged upon completion of a Chapter 11 and Chapter 13 Plan.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Cyril Bell, Sr. | * | |
| Michelle Bell | * | |
| 5958 Glen Falls Avenue | * | |
| Baltimore, MD 21206 | * | |
| | * | |
| Movants/Debtors | * | |
| | * | |
| v. | * | |
| | * | |
| HYUNDAI MOTOR FINANCE INC. | * | |
| c/o HYUNDAI CAPITAL AMERICA INC. | * | |
| 11 East Chase Street | * | |
| Baltimore, MD 21202 | * | |
| SERVE ON: Resident Agent | * | |
| National Registered Agents, Inc. of MD | * | |
| 351 W. Camden Street | * | |
| Baltimore, MD 21201 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**MOTION TO DETERMINE SECURED STATUS OF CLAIM AND TO MODIFY RATE OF INTEREST OF LIEN HELD BY HYUNDAI MOTOR FINANCE INC.**

Cyril Bell, Sr., and Michelle Bell, movants and debtors, by their attorney, Marc R. Kivitz, pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2) and Rules 3012, 4003(d) and 9014 of the Federal Rules of Bankruptcy Procedure hereby institutes this action against Hyundai Motor Finance, Inc., respondent, for the determination of the secured status of the respondent's claim against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, and to

modify the rate of interest payable to the respondent, and as grounds therefore respectfully represents that:

1. On March 9, 2016, Cyril Bell, Sr., and Michelle Bell, debtors, filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 16-13011-RAG (“the reorganization case”).

2. This Court has jurisdiction over this motion to determine secured status pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a) and (d), 522(f)(1)(B), and 1322(b)(2), and Rules 3012, 4003(d) and 9014 of the F.R.Bank.Proc.

3. Hyundai Motor Finance, Inc. ("Hyundai” or “respondent”) is a lending institution, is engaged in the business of financing the purchase of motor vehicles to the consuming public, and does business within the State of Maryland.

4. At the time of the filing of the reorganization case, Cyril Bell and Michelle Bell, movants and debtors (“debtors”) owned and still own a 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053 ("the vehicle"), pursuant to a Maryland Certificate of Title (“Title”). A copy of the Title is attached hereto as Exhibit A and is incorporated herein by reference.

5. The market value of the vehicle is $15,000.00 as of March 1, 2016, as determined by an appraisal performed by Mr. Mark Wintjen, a certified appraiser at CarMax, which valuation is attached hereto as Exhibit B and is incorporated herein by reference.

6. On or about April 10, 2013, more than 910 days prior to the filing of the debtors’ Chapter 13 case, the debtors pursuant to a Retail Installment Sale Contract Simple Finance Charge agreement purchased the vehicle from Bob Bell Ford for the sum of $29,549.14 ("contract") pursuant to which the debtors granted a security interest and lien against the vehicle,

which security interest and lien are duly perfected on the Title (Ex. A). A copy of the contract is attached hereto as Exhibit C and is incorporated herein by reference. The contract and the security interest and lien were assigned by Bob Bell Ford to Hyundai Motor Finance, which assignment is demonstrated on Page 2 of Exhibit C.

7. Hyundai issued a billing statement for its account number xx2573 for the balance due on its security interest and lien as of November 25, 2015, in the amount of $20,609.84 ("billing statement"). A copy of the billing statement is attached hereto as Exhibit D and is incorporated herein by reference.

8. The debtors contend that to the extent that the secured claim of Hyundai exceeds the value of the vehicle that the claim of Hyundai is unsecured:

| | | |
|---|---|---|
| | $20,609.84 | balance due on secured debt |
| - | $15,000.00 | value of the vehicle collateral |
| | $ 5,609.84 | debt exceeding value of vehicle collateral |

The debtors contend the secured claim held by Hyundai, respondent, is in the amount of $15,000.00, the replacement and market value of the vehicle, and the respondent has an unsecured claim for the balance of the debt in excess of $15,000.00, that is an unsecured debt in the amount of $5,609.84 ($20,609.84 - $15,000.00 = $5,609.84).

9. The balance allegedly owed to the respondent under the contract is being financed at an annual rate of interest of 7.29% which is shown on the contract (Exhibit C).

10. The debtors believe that the national financial market's prime rate of interest is three and one-quarter percent (3.25%) *per annum* and that four and one-quarter percent (4.25%) *per annum* is a reasonable rate of interest for the debtors' acquisition of the vehicle and a fair market rate of return to the respondent for the vehicle in the present market in the absence of any other relief awarded to the debtor. *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d

787, 51 C.B.C.2d 642 (2004). At four and one-quarter percent *per annum* the $15,000.00 value of the vehicle would be payable to the respondent in equal monthly installments each in the amount of $277.94 over a sixty (60) month term.

WHEREFORE, Cyril Bell, Sr., and Michelle Bell, movants and debtors, respectfully request that this Honorable Court:

1. Determine that pursuant to §§ 506 and 1322(b) of the Bankruptcy Code, 11 U.S.C., and Bankruptcy Rule 3012 that the respondent's lien against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, is in the amount of $15,000.00, the replacement value and market value of the vehicle; and

2. Determine the applicable rate of interest payable on the allowed secured claim of $15,000.00 held by the respondent to be in the amount of four and one-quarter percent (4.25%) *per annum*; and

3. Enter an Order modifying the secured claim of Hyundai Motor Finance, Inc., respondent, and permitting the debtors to pay the modified lien directly to the respondent in the amount of the replacement value of its collateral in the amount of $8,000.00 at four and one-quarter percent (4.25%) *per annum* annual interest over a term of sixty (60) months in equal monthly installments each in the amount of $277.94 commencing on the first (1st) day of the month occurring at least thirty (30) days following the date of the entry of an Order with a five-day grace period for any payment; and

4. Determine that pursuant to §§ 506 and 1322(b) of the Bankruptcy Code, 11 U.S.C., and Bankruptcy Rule 3012 that the respondent's lien against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, is unsecured to the extent that it exceeds the replacement value of the debtors' vehicle and is to be treated as a general unsecured non-priority

claim under the debtors' plan of reorganization, however, in the event that the respondent (or any assignee) shall obtain possession of the vehicle then such event shall be in full satisfaction of the respondent's claim pursuant to the last unnumbered paragraph of 11 U.S.C. § 1325(a) and the respondent shall not be entitled to any claim on account of any deficiency upon the sale of the vehicle; and

5. Award to the debtors such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
EMAIL: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2016, a copy of the foregoing motion to determine extent of secured lien was served electronically or by first class mail, postage prepaid, to:

Cyril Bell, Sr., and Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

Hyundai Motor Finance, Inc.
P. O. Box 105299
Atlanta, GA 30348

Hyundai Motor Finance, Inc.
c/o Hyundai Capital America, Inc.
SERVE ON: Resident Agent
National Registered Agents, Inc. of MD
351 W. Camden Street
Baltimore, MD 21201

Hyundai Motor Finance, Inc.
c/o Hyundai Capital America, Inc.
11 East Chase Street
Baltimore, MD 21202

Gerard R. Vetter, Esquire, Trustee
300 E. Joppa Road
Suite #409
Towson, MD 21286-3020

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

/s/ Marc R. Kivitz
Marc R. Kivitz

Bkcy:1bell michelle cyril CAR REDUCE HYUNDAI

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Cyril Bell, Sr. | * | |
| Michelle Bell | * | |
| 5958 Glen Falls Avenue | * | |
| Baltimore, MD 21206 | * | |
| | * | |
| Movants/Debtors | * | |
| | * | |
| v. | * | |
| | * | |
| HYUNDAI MOTOR FINANCE INC. | * | |
| c/o HYUNDAI CAPITAL AMERICA INC. | * | |
| 11 East Chase Street | * | |
| Baltimore, MD 21202 | * | |
| SERVE ON: Resident Agent | * | |
| National Registered Agents, Inc. of MD | * | |
| 351 W. Camden Street | * | |
| Baltimore, MD 21201 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**NOTICE OF MOTION TO DETERMINE EXTENT OF SECURED LIEN AND STATUS OF DEBT UNDER SECTION 506**

Cyril Bell, Sr., and Michelle Bell, movants and debtors, have filed papers with the court seeking the modification of the lien held by Hyundai Motor Finance, Inc., against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, pursuant to 11 U.S.C. §§ 506(a) and 1322(b) and Rule 3012 of the Federal Rules of Bankruptcy Procedure and for the determination of the extent of the lien held by the respondent as unsecured. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion for determination that the debt is unsecured, or if you want the court to consider your views on the motion, then by **April 13, 2016**, you or your lawyer must file a written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy to:

| | | |
|---|---|---|
| Marc R. Kivitz, Esquire<br>Suite 1330<br>201 North Charles Street<br>Baltimore, MD 21201 | Gerard R. Vetter, Esquire<br>Assistant U.S. Trustee<br>Suite 2650, 101 W. Lombard<br>Baltimore, MD 21201 | Gerard R. Vetter, Esquire<br>Interim Chapter 13 Trustee<br>300 E. Joppa Road, #409<br>Towson, MD 21286-3020 |

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

The hearing is scheduled for **Friday, May 20, 2016, at 10:30 a.m. in Courtroom 1B**, 1st Floor, United States Bankruptcy Court, 101 West Lombard Street, Baltimore, MD 21201.

IF YOU OR YOUR LAWYER DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

03/11/16
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 N. Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2016, copies of this notice were served pursuant to Federal Bankruptcy Rule 7004 by first class mail, postage prepaid upon:

| | |
|---|---|
| Cyril Bell, Sr., and Michelle Bell<br>5958 Glen Falls Avenue<br>Baltimore, MD 21206 | Hyundai Motor Finance, Inc.<br>P. O. Box 105299<br>Atlanta, GA 30348 |
| Hyundai Motor Finance, Inc.<br>c/o Hyundai Capital America, Inc.<br>SERVE ON: Resident Agent<br>National Registered Agents, Inc. of MD<br>351 W. Camden Street<br>Baltimore, MD 21201 | Hyundai Motor Finance, Inc.<br>c/o Hyundai Capital America, Inc.<br>11 East Chase Street<br>Baltimore, MD 21202 |

Gerard R. Vetter, Esquire
Interim Chapter 13 Trustee
300 E. Joppa Road, Suite #409
Towson, MD 21286-3020

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

/s/ Marc R. Kivitz
Marc R. Kivitz

Bkcy:1bell michelle cyril CAR REDUCE HYUNDAI notice

**Entered: May 19, 2016** **Docket No. 29**
**Dated: May 18, 2016**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| IN RE: | * |
| | * |
| Cyril Bell, Sr. | * CASE NO.: 16-13011-RAG |
| Michelle Bell | * Chapter 13 |
| | * |
| Debtors | * |
| * * * * * * * * * * * * * | |
| Cyril Bell, Sr. | * |
| Michelle Bell | * |
| 5958 Glen Falls Avenue | * |
| Baltimore, MD 21206 | * |
| | * |
| Movants/Debtors | * |
| | * |
| v. | * |
| | * |
| HYUNDAI MOTOR FINANCE INC. | * |
| c/o HYUNDAI CAPITAL AMERICA INC. | * |
| 11 East Chase Street | * |
| Baltimore, MD 21202 | * |
| SERVE ON: Resident Agent | * |
| National Registered Agents, Inc. of MD | * |
| 351 W. Camden Street | * |
| Baltimore, MD 21201 | * |
| | * |
| Respondent | * |
| * * * * * * * * * * * * * | |

**CONSENT ORDER DETERMINING STATUS OF CLAIM AND MODIFYING RATE OF INTEREST ON SECURED CLAIM OF HYUNDAI MOTOR FINANCE INC.**

Upon consideration of the motion of Cyril Bell, Sr., and Michelle Bell, movants and debtors, for the determination of the status of the claim held by Hyundai Motor Finance, Inc., respondent, against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, and for the modification of the interest rate payable to the respondent; and for the modification of the interest rate payable to the respondent; and upon consideration of

the response filed by Hyundai Motor Finance, Inc., respondent, and upon consideration of the limited objection filed by Gerard R. Vetter, Esquire, the interim Chapter 13 Trustee, and upon the consent of the parties as evidenced by the signatures below of their respective representatives, and good cause having been shown, it is therefore by the United States Bankruptcy Court for the District of Maryland

ORDERED that the motion of Cyril Bell, Sr., and Michelle Bell, movants and debtors, to determine the status of the claim held by Hyundai Motor Finance, Inc., respondent, against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, and the modification of the interest rate payable to the respondent, be, and the same is hereby, granted; and be it further

ORDERED that the secured claim held by Hyundai Motor Finance, Inc., respondent, be, and the same is hereby, determined to be Seventeen Thousand Five Hundred Dollars ($17,500.00), the replacement and market value of the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053; and be it further

ORDERED that Hyundai Motor Finance, Inc., respondent, shall have a general unsecured claim for the amount it is owed under the contract for the acquisition of the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, for any amount in excess of the $17,500.00 replacement and market value secured claim amount as determined in the preceding decretal paragraph; and be it further

ORDERED that the secured claim in the amount of $17,500.00 held by Hyundai Motor Finance, Inc., respondent, against the debtors' 2013 Hyundai Santa Fe Sport 4D utility truck VIN 5XYZU3LB0DG076053, as determined by the preceding decretal paragraphs, be, and the same shall be, paid to the respondent with interest at four and one-quarter percent (4.25%) *per annum*

pursuant to the debtors' plan of reorganization contemporaneously with administrative expenses; and be it further

ORDERED that any payments made post-petition to Hyundai Motor Finance, Inc., respondent, but prior to the entry of this Order, shall be applied to the direct reduction of the new principal balance of $17,500.00 and shall shorten the term of this restructured secured obligation.

AGREED AND CONSENTED TO:

/s/ Marc R. Kivitz
Marc R. Kivitz, Esquire
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Email: mkivitz@aol.com
Attorney for debtor/movant

/s/ Michael J. Klima, Jr.
Michael J. Klima, Jr., Esquire
Trial Bar No. 25562
8028 Ritchie Highway
Suite 300
Pasadena, MD 21122
(410) 768-2280
Email: jklima@peroutkalaw.com
Attorney File No.: 1504438
Attorney for creditor/respondent

/s/ Gerard R. Vetter
Gerard R. Vetter, Esquire
300 E. Joppa Road, Suite #409
Towson, MD 21286
Interim Chapter 13 Trustee
inquiries@ch13balt.com

**CONSENT CERTIFICATION**

I HEREBY CERTIFY That the terms of the copy of this Consent Order submitted to the Court are identical to those set forth in the original Consent Order, and the signatures represented by the /s/_____ on this copy have been authorized and reference the signatures of the consenting parties on the original Consent Order.

/s/ Marc R. Kivitz
Marc R. Kivitz

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

\Michael J. Klima, Jr., Esquire
8028 Ritchie Highway
Suite 300
Pasadena, MD 21122

Cyril Bell, Sr., and Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

Hyundai Motor Finance, Inc.
c/o Hyundai Capital America, Inc.
11 East Chase Street
Baltimore, MD 21202

Hyundai Motor Finance, Inc.
Hyundai Capital America, Inc.
c/o Resident Agent
National Registered Agents, Inc. of MD
351 W. Camden Street
Baltimore, MD 21201

Hyundai Motor Finance, Inc.
P. O. Box 105299
Atlanta, GA 30348

Bkcy: 1bell michelle cyril CAR REDUCE FINAL

**END OF ORDER**

**F. Debt Limit Issue for Chapter 13.** *Caution*: Under § 109(e), in Chapter 13, even if stripdown cannot be accomplished, the undersecured portion of the debt is counted toward the Chapter 13 unsecured debt limit of $394,725.00. *In re Balbus*, 933 F.2d 246 (4th Cir. 1991). And, certainly, if the lien – judicial or security interest – is bifurcated into a secured and an unsecured portion, the unsecured portion **will be counted** toward the unsecured debt limit of Chapter 13, presently $394,725.00. The unwitting result of successful lien stripping – and even the scheduling of the value of the asset on Schedule A/B and the amount due on the lien on Schedule D – can have the "harmful" consequence of resulting in the dismissal of a Chapter 13 case, or, its conversion to another Chapter. Is it possible: Client does not qualify for Chapter 7 as income is too high or disposable income exists for debt repayment; Client cannot afford the filing fee, U.S. Trustee quarterly fees and/or attorney's fees warranted or required by a Chapter 11 case; Client does not qualify for Chapter 13 because debts exceed the statutory limit for either secured, $1,184,200.00, or unsecured, $394,725.00, set by 11 U.S.C. § 109(e). On April 1, 2019, these limits increase to $419,275 unsecured and $1,257,850 secured and the Maryland homestead exemption increases to $25,150.00. Is it possible that bankruptcy is not available to the Client? Yes.

## III. The New 2018 Bankruptcy Rules and How They Affect Liens.

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil Procedure and the Federal Rules of Evidence were issued in August, 2018, for comment on or before February 15, 2019, by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. In particular, amendments were proposed to Appellate Rules 35 and 40, Bankruptcy Rule 2002 – regarding notices to creditors and other parties in interest against whom provisional relief is sought in ancillary and cross-border cases; Bankruptcy Rule 2004 – regarding examination; and Bankruptcy Rule 8012 – regarding corporate disclosure statement; and Evidence Rule 404.

With respect to Bankruptcy Rule 2002, the proposed amendments would (i) require giving notice of the entry of an order confirming a Chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in Chapter 12 and Chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a Chapter 13 plan.

A. *Rule 2002(f)*. Rule 2002(f)(7) currently requires the Clerk, or someone else designated by the Clerk, to give notice to the debtor and all creditors of the "entry of an order confirming a Chapter 9, 11, or 12 plan." Noticeably absent from the list is an order confirming a ***Chapter 13 plan***. The Bankruptcy Rules Committee concluded that "it would be helpful to have a rule that specifically addresses this notice in Chapter 13 cases in order that it be made clear who should receive it," and voted unanimously to seek publication for public comment of the proposed amendment. The adoption of this proposed Rule amendment becomes critical in this writer's opinion where the present form Chapter 13 plan can by confirmation alter and avoid a secured creditor's lien rights

For example, Section 5.1. of the Model Form Chapter 13 Plan provides for "Valuing a Claim or Avoiding a Lien Under 11 U.S.C. § 506 Through the Plan" and specifies:

> The Debtors seek to value a claim or avoid a lien under 11 U.S.C. § 506 through the Plan for: *None* X or the *Claims Listed Below* ☐ (mark one box only). The

claims listed below include: *Claims Secured by the Debtors' Principal Residence* □ and/or *Other Property* □. Make sure to list the value of the collateral proposed to be paid through the Plan plus any interest below and in Section 4.6.3 above, as appropriate. Separately file: evidence of the collateral's value; the existence of any superior lien; the exemption claimed; and the name, address, and nature of ownership of any non-debtor owner of the property. If the lienholder has not filed a proof of claim, also separately file evidence of the amount of the debt secured by the collateral. The amount and interest rate of the claim is set as listed below or by superseding Court order. A proof of claim must be filed before the Trustee makes payments. Any undersecured portion of such claim shall be treated as unsecured.

| Lienholder | Collateral | Value | %Rate | Monthly Payment | No. of Months |
|---|---|---|---|---|---|

As an alternative, Section 5.2. the Model Form Chapter 13 Plan provides for **"Valuing a Claim or Avoiding a Lien Under 11 U.S.C. § 506 by Separate Motion or an Adversary Proceeding."** This separate practice remains the writer's preference for the following reasons:

(1) the lienholder may consent or might not respond to the separate motion which has a hearing date distinct and separate from the confirmation hearing and thus could obviate attendance at such a separate contested matter hearing, AND, if all other requirements have been met counsel's appearance at the confirmation hearing might be excused – but not so if the Plan itself provides for lien avoidance or modification;

(2) service of a separate motion with its distinct proof of value and possibly proof of other encumbrances will be evident from that separate contested matter – rather than a Certificate of Service of the Plan upon all parties; and

(3) a separate Order with regard to the affected – reduced (stripped down) or removed (stripped off) or modified (with new payment terms, interest rates, dates, and/or amounts) would be entered by the Bankruptcy Court which separate Order would enable its recordation among the Land Records of Financing Records with clarity as to the collateral and the effects upon that one specific lien – but not so if the Confirmation Order addressed several liens on several assets with multiple effects.

Service of the Confirmation Order is also important as Section 5.3. of the Model Form Chapter 13 Plan provides for "**5.3**. **Valuing a Claim or Avoiding a Lien Under 11 U.S.C. § 522(f)* Through the Plan"** by which:

> The Debtors seek to value a claim or avoid a lien under 11 U.S.C. § 522(f)* through the Plan for: *None* X or the *Claims Listed Below* □ (mark one box only). Make sure to list the value of the collateral proposed to be paid through the Plan plus any interest below and in Section 4.6.3 above, as appropriate. Separately file: evidence of the collateral's value; the existence of any superior lien; the exemption claimed; and the name, address, and nature of ownership of any non-debtor owner of the property. If the lienholder has not filed a proof of claim, also separately file evidence of the amount of the debt secured by the collateral. The amount and interest rate of the claim is set as listed below or by superseding

Court order. A proof of claim must be filed before the Trustee makes payments. Any undersecured portion of such claim shall be treated as unsecured.

| Lienholder | Collateral | Value | %Rate | Monthly Payment | No. of Months |
|---|---|---|---|---|---|

**Under 11 U.S.C. § 522(f) the Debtors may avoid a lien to the extent it impairs an exemption if the lien is a judicial lien or a nonpossessory, non-purchase money security interest in certain property.*

Whereas conversely, in the same manner as Section 5.4, Section of the Model Form Chapter 13 Plan provides for "**5.4. Valuing a Claim or Avoiding a Lien Under 11 U.S.C. § 522(f)* by Separate Motion or an Adversary Proceeding**" specifying

The Debtors seek to value a claim or avoid a lien under 11 U.S.C. § 522(f)* by separate motion or an adversary proceeding for: *None* X or the *Claims Listed Below* □ (mark one box only)**.** The amount and interest rate of the claim will be set by Court order. Make sure to list the value of the collateral proposed to be paid through the Plan plus any interest as determined by the Court in Section 4.6.3 above, as appropriate. A proof of claim must be filed before the Trustee makes payments. Any undersecured portion of such claim shall be treated as unsecured.

| Lienholder | Collateral |
|---|---|

**Under 11 U.S.C. § 522(f) the Debtors may avoid a lien to the extent it impairs an exemption if the lien is a judicial lien or a nonpossessory, non-purchase money security interest in certain property.*

B. *Rule 2002(h).* The Rules Committee then addressed Bankruptcy Rule 2002(h) which provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the Clerk (or some other party as directed by the Court) to give "the debtor, the trustee, all creditors and indenture trustees" at least 21 days' notice by mail of certain matters in bankruptcy cases. But Rule 2002(h) eliminates that requirement in Chapter 7 cases with respect to **creditors that fail to file a timely proof of claim**. Bankruptcy Judge Scott W. Dales (W.D. Mich.) submitted a suggestion (12-BK-M) that this exception also be made applicable to Chapter 13 cases, noting that the time and cost associated with providing extensive notice in Chapter 13 cases and lawyers' desire to mitigate these expenses to the extent possible.

In considering the proposed amendment, the Rules Committee concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in both Chapter 12 and Chapter 13, as well as Chapter 7, cases support an amendment. Committee members pointed out that even creditors that do not file timely proofs of claim will still be required to receive notice of the filing of the case and the date of the meeting of creditors (which notice also includes relevant deadlines); notice of the confirmation hearing; and, if the proposed amendment to Rule 2002(f)(7) is approved, notice of the confirmation order. Because an amendment to Rule 3002 that became effective on December 1, 2017, changes the deadline for filing a proof of claim, the time provisions of Rule 2002(f)(7) would also be amended. **The writer raises concerns about**

**this proposed amended procedure by which a Plan proposing in Section 5.1 or 5.3 to avoid or modify a lien could be served upon the soon-to-be-affected creditor but that the Confirmation Order which effectuates the proposed avoidance or modification might not be served upon the affected creditor if the affected creditor did not file timely a proof of clam – particularly in light of *Burkhart v. Grigsby, Trustee, and Community Bank of Tri-County.*** 886 F.3d 434 (4th Cir. 2018), reversing *Burkhart v. Community Bank of Tri-County PNC Bank (In re Burkhart),* 505 B.R. 444 2014 WL 271627 (Bankr. D.Md. 2014)(Mannes, J.), *see infra* at page 63 where the **Fourth Circuit held that a proof of claim is not required for a determination of the status of the lien and its possible modification or avoidance under § 1322(b)(2)**. The proposed amendment could produce the result where the soon-to-be-affected creditor receives the Plan but not the Confirmation Order that avoids or modifies its lien, further supporting the writer's preference of the filing of a separate motion contested matter as envisioned under Sections 5.2 and 5.4 of the Model Form Chapter 13 Plan by which the affected creditor would receive the Court's Order that resolved the debtor's motion seeking avoidance or modification of the lien or security interest.

C. *Rule 2002(k).* The Rules Committee then addressed Bankruptcy Rule 2002(k) which was added by an amendment to Rule 2002 that added a **new subdivision (a)(9)** which went into effect on December 1, 2017, and provides that at least **21 days' notice** be given to the debtor, trustee, creditors, and indenture trustees of "the **time fixed for filing objections to confirmation** of a Chapter 13 plan." Previously Rule 2002(b) *had required that at least 28 days*' notice of that deadline for filing objections be given. In making this change and relocating the provision from subdivision (b) to subdivision (a)(9), the need to amend Rule 2002(k) was overlooked.

Subdivision (k) of Rule 2002 provides for transmitting notices under specified parts of Rule 2002 to the U.S. trustee. Included within this provision is the requirement to provide the U.S. Trustee with notices under subdivision (b). Thus, prior to December, the Rule required transmitting notice to the U.S. Trustee of the deadline for objecting to confirmation of a Chapter 13 plan. Because that deadline is now located in subdivision (a)(9), which is not specified in subdivision (k), the Rule **no longer requires that notice be transmitted to the U.S. Trustee**. The Rules Committee voted to publish an **amendment that would cure this oversight** by amending the first sentence of Rule 2002(k) to include a reference to subdivision (a)(9).

D. *Rule 2004(c).* Addressing the scope of documents that could be required to be produced in litigation, including lien avoidance and modification actions, the Rules Committee then considered Bankruptcy Rule 2004(c) which provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion (17-BK-B) that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information ("ESI"). The Rules Committee by a close vote decided ***not*** **to add a proportionality requirement to the rule**, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current

provisions of Rule 45 of the Rules of Civil Procedure, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

The proposal before the Committee would have added to Rule 2004(c) a provision similar to the proportionality requirement of Rule 26(b)(1) of the Federal Rules of Civil Procedure. The following sentence would have been added to the end of the paragraph:

> A request for the production of documents or electronically stored information in connection with an examination under this rule shall be proportional to the needs of the case and of the party seeking production, in light of the following factors, to the extent relevant: the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving issues, whether the burden or expense of the proposed discovery outweighs its likely benefit, and the purpose for which the request is being made.

Members of the Rules Committee initially expressed differing views about whether consideration of proportionality is appropriate for Rule 2004 examinations and what factors a Bankruptcy Court should consider in assessing proportionality. **The Rules Committee voted in favor of the concept of adding a proportionality requirement, although specific language was not agreed upon, but referred the question back to a Subcommittee**. There seemed to be general support for the other proposed amendments to Rule The Committee was closely divided about the proportionality proposal. Those opposing it did not think that the elimination of specific factors improved the amendment, and some members expressed concern that such a provision would lead to more litigation. After a full discussion, the Rules Committee voted 7 to 6 ***not*** to proceed with a proportionality amendment. Nevertheless, the Rules Committee unanimously approved seeking publication of amendments to Rule 2004(c) that would add a reference to electronically stored information to the title and first sentence of the subdivision. Doing so acknowledges the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

The Rules Committee also unanimously approved publication of the revised subpoena provisions of Rule 2004(c), which eliminate the reference to "the court in which the examination is to be held." This change conforms the rule to the current provisions of Civil Rule 45 and Bankruptcy Rule 9016, under which a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it.

E. *Rule 8012* (Corporate Disclosure Statement). Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a **statement identifying any parent corporation and any publicly held corporation that owns 10% or more of the party's stock** (or file a statement that there is no such corporation). It is modeled on Federal Rule of Appellate Procedure 26.1. The Appellate Rules Committee has proposed amendments to FRAP 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Rules Committee requested that conforming amendments to Rule 8012 be published for public comment.

Prior to publication of the amendments to FRAP 26.1, the Appellate Rules Committee consulted with the Bankruptcy Rules Committee about the possible addition of a provision to deal specifically with bankruptcy cases. Although initially considering a broader provision, the Appellate Rules Committee agreed with Bankruptcy Rules Committee's recommendation that, insofar as bankruptcy appeals are concerned, an amendment was needed to require only the disclosure of the names of any debtors not revealed by the caption and that the requirements of subdivision (a) should be made to apply to any corporate debtors requiring disclosure by corporations seeking to intervene in a bankruptcy appeal and would make stylistic changes to what would become subdivision (c), regarding supplemental disclosure statements.

F. Proposed Amendments to the Federal Rules of Bankruptcy Procedure.
New material is underlined in red; matter to be omitted is lined through.

**Rule 2002. Notices to Creditors, Equity Security** 1 **Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee**

(f) OTHER NOTICES. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

(7) entry of an order confirming a chapter 9, 11, or 12, or 13 plan;

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code,

(1) *Voluntary Case.* In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor,
- the trustee,
- all indenture trustees,
- creditors that hold claims for which proofs of claim have been filed, and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(2) *Involuntary Case.* In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter,

- the debtor,
- the trustee,
- all indenture trustees,
- creditors that hold claims for which proofs of claim have been filed, and
- creditors, if any, that are still permitted to file claims ~~by reason of~~ because an extension was granted ~~pursuant to~~ under Rule 3002(c)(1) or (c)(2).

(3) *Insufficient Assets.* In a case where notice of insufficient assets to pay a dividend has been given to creditors ~~pursuant to~~ under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims ~~pursuant to~~ under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence. (3) *Insufficient Assets.* In a case where notice of insufficient assets to pay a dividend has been given to creditors ~~pursuant to~~ under subdivision (e) of this rule, after 90 days following the mailing of a notice of the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in 61 subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses.

* * * * *

**Committee Note**

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7). ~~pursuant to~~ under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence. Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c). Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

**Rule 2004. Examination**

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held where the case is pending if the attorney is admitted to practice in that court or in the court in which the case is pending. * * * * *

**Committee Note**

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R. Civ. P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue

and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

**Rule 8012. Corporate Disclosure Statement**

(a) WHO MUST FILE NONGOVERNMENTAL CORPORATIONS. Any nongovernmental corporate party appearing corporation that is a party to a proceeding in the 4 district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) DISCLOSURE ABOUT THE DEBTOR. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor that is a corporation, discloses the information required by Rule 8012(a). (b)(c) TIME TO FILE; SUPPLEMENTAL FILING. A party must file ~~the~~ A Rule 8012 must: statement

(1) be filed with its the principal brief or upon 1filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing.;

(2) Even if the statement has already been filed, the party's principal brief must be included ~~include~~ a statement before the table of contents in the principal brief.; and

(3) A party must supplement its statement be supplemented whenever the required information required by Rule 8012 changes.

**Committee Note**

The rule is amended to conform to recent amendments to Fed. R. App. P. 26.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of appeals. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

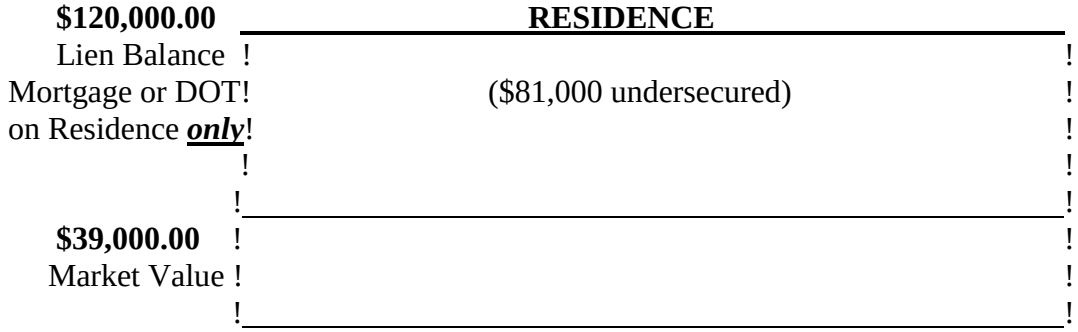
Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

**IV. 11 U.S.C. §§ 506(a) and (d): Wholly Unsecured and Undersecured Liens.**
**(§ 722 *In*applicable to stripoff lien on real property; only applicable to personal property)**

**WHAT YOU *CANNOT* DO IN ANY CHAPTER:**

**A. YOU CANNOT STRIPDOWN A SECURITY INTEREST – MORTGAGE / DOT -- SECURED SOLELY BY PRINCIPAL RESIDENCE REAL PROPERTY.**




These are the facts and amounts in *Dewsnup v. Timm*, 502 U.S. 410 (1992) holding that in Chapter 7, a security interest against real property collateral cannot be reduced to its value -- stripdown of mortgage debt of $120,000 to realty's value of $39,000 NOT permitted under § 506(d) in Chapter 7, concluding that lienholder has an allowed secured claim – thus a mortgage lien cannot be stripped down to the lower value of the house.

Modification prohibited in Chapter 11 by § 1123(b)(5) and prohibited in Chapter 13 by § 1322(b)(2).

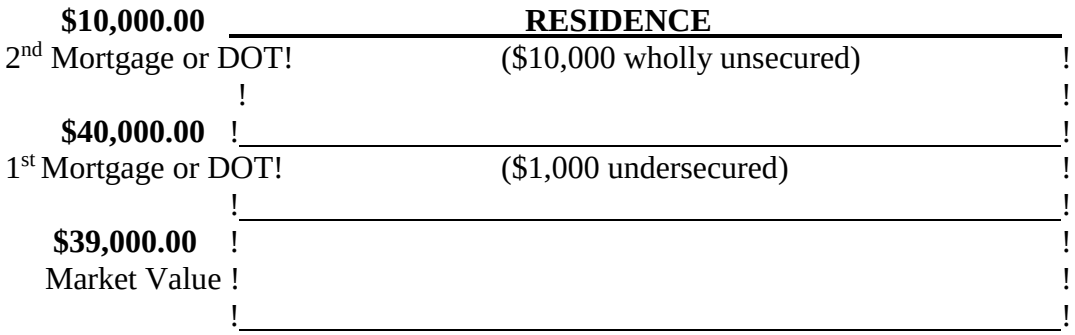
 

BUT in **Chapter 11 and Chapter 13 only: Can Stripoff Wholly Unsecured Residence Security Interest (Not allowed in Ch 7 under *Dewsnup* or *Caulkett*).**

**WHAT YOU *CANNOT* DO IN CHAPTER 7:**

**IN CHAPTER 7 YOU CANNOT STRIPOFF A WHOLLY UNSECURED SECOND SECURITY INTEREST – MORTGAGE/DOT -- LIEN.**

**BUT CAN DO IN BOTH CHAPTER 13 AND CHAPTER 11:**




These are the facts of, but ***not*** the actual dollar figures which are not mentioned by either the Eleventh Circuit nor by the Supreme Court in, *Bank of America, N.A. v. Caulkett*, ___U.S.___. 135 S.Ct. 1995, 2015 WL 2464049 (2015) holding that a debtor in a Chapter 7 bankruptcy case may not void a junior mortgage lien under Section 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral. Respondent debtors each filed Chapter 7 bankruptcy, and each owned a home encumbered with a senor mortgage lien and a junior mortgage lien. In both cases the property was not worth more than what was owed on the first mortgage. The debtors sought to void their junior mortgage liens under Section 506 of the Bankruptcy Code, which provides, "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." 11 U.S.C. Section 506(d). Order was entered on May 2, 2013, by the U.S. Bankruptcy Court for the Middle District of Florida, Case Number 6:13-BK-05537, allowing Chapter 7 debtor to "strip off" junior mortgagee's wholly underwater lien. Junior mortgagee appealed. The District Court on January 16, 2014, Case No. 6:14-CV-00078, affirmed, and mortgagee again appealed. The U.S. Court of Appeals for the Eleventh Circuit, 566 Fed.Appx. 879, affirmed on February 25, 2014, Case No. 14-10803. In separate case, order was again entered voiding a junior mortgage lien wholly unsupported by any equity in property, and the United States Court of Appeals for the Eleventh Circuit, 556 Fed. Appx. 911, again affirmed. Certiorari was granted.

The parties did not dispute that the second mortgage claims are "allowed" under the Code. Instead, the debtors argued that the bank's claims are not "secured" because of Section 506(a)(1) provides that "[a]n allowed claim...is a secured claim to the extent of the value of such creditor's interest in...such property" and "an unsecured claim to the extent that the value of such creditor's interest...is less than the amount of such allowed claim." "Because the value of the bank's interest here is zero, a straightforward reading of the statute would seem to favor the debtors. The Supreme Court cites its construction of Section 506(d)'s term "secured claim" in *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903, however, forecloses that reading and resolves the question presented here. "In declining to permit a Chapter 7 debtor to "strip down" a partially underwater lien under Section 506(d) to the value of the collateral, the

Court in *Dewsnup* concluded that an allowed claim "secured by a lien with recourse to the underlying collateral...does not come within the scope of Section 506(d)." *Id.*, at 415, 112 S.Ct. 773. "Thus, under *Dewsnup*, a "secured claim" is a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim. Pp. 1998-1999.

The Court held: "A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under Section 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under Section 502 of the Bankruptcy Code." The Court prohibited the stripoff, holding that "[t]he definition it settled on – that a claim is `secured' if it is `secured by a lien' and `has been fully allowed pursuant to § 502)[4].

Prior to *Caulkett*, the Fourth Circuit had similarly held that in Chapter 7 a wholly unsecured junior mortgage lien could not be stripped off in *Cunningham v. Homecomings Fin. Network (In re Cunningham),* 246 B.R. 241 (Bankr. D. Md. 2000), *affirmed sub nom., Ryan v. Homecomings Fin. Network,* 253 F.3d 778 (4th Cir. 2001)(real property value $179,000, first mortgage balance $181,768.00 prohibiting the stripoff on the basis of the denial of stripdown in *Dewsnup*). *Accord*, *In re Smith*, 79 B.R. 650 (Bankr. D. Md. 1987)(wholly unsecured junior consensual mortgage lien may not be stripped off in Chapter 7), adopting the reasoning of *In re Mahaner*, 34 B.R. 308 (Bankr. W.D.N.Y. 1983); *accord*, *In re Maitland*, 61 B.R. 130 (Bankr. E.D. Va. 1986).

1. Stripdown NEVER in Chapter 11 or Chapter 13 of a claim secured only by a security interest against real property that is the debtor's principal residence. Modification prohibited by § 1123(b)(5) and § 1322(b)(2).

11 U.S.C. § 1123(b)(5):

> (b) Subject to subsection (a) of this section, a plan may –
>
> (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence….

[4] Overruling *McNeal v. GMAC Mortgage, LLC, HomeComings Financial, LLC (In re McNeal)*, 477 Fed.Appx. 562 (11th Cir. 2012)(unpublished *per curiam* decision); *Howard v. National Westminster Bank*, 184 B.R. 644, 647 (Bankr. E.D.N.Y. 1995)(Chapter 7 debtor filed adversary complaint under §§ 506(a) and (d) seeking to avoid a bank's non-consensual judicial lien on the debtor's residence. The Bankruptcy Court held that, by virtue of a large first mortgage balance, the bank's claim was wholly unsecured, and thus the judgment lien could be avoided in full under statute allowing avoidance of lien to extent that it secures claim that is not "allowed secured claim" reasoning that due to nonconsensual nature of lien, underpinnings of *Dewsnup* were inapplicable); *Yi v. Citibank (Maryland), N.A. (In re Yi)*, 219 B.R. 394, 402 (E.D. Va. 1998)(Chapter 7 case voiding third mortgage lien on realty), but which was overruled by *Ryan v. Homecomings. See also, Crossroads of Hillsville v. Payne,* 179 B.R. 486, 490-91 (W.D. Va. 1995)(collecting cases that deny motions to avoid subordinate liens). *See also, Laskin v. First Nat'l Bank of Keystone (In re Laskin),* 222 B.R. 872, 876 (9th Cir. BAP 1998)(finding that Chapter 7 debtor lacked standing to seek avoidance of second mortgage lien on residence).

11 U.S.C. § 1322(b)(2):

> (b) Subject to subsections (a) and (c) of this section, a plan may –
>
> > (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence….

2. But Chapter 13 Plan could surrender in full satisfaction of debt: 11 U.S.C. § 1322(b)(8):

> (b) Subject to subsections (a) and (c) of this section, a plan may –
>
> > (8) provide for the sale of all or any part of the property of the estate or the distribution of all or any part of the property of the estate among those having an interest in such property;…

*See, e.g. In re Khan*, 504 B.R. 409 (Bankr. D. Md. Jan, 7, 2014)(Case No. 11-32248-PM)(Mannes, J.). The Court noted that the debtor could have proposed a plan that included he transfer of condo unit to the condo association under 11 U.S.C. § 1322(b)(8) in satisfaction of creditor's secured debt. Upon confirmation, a plan can vest property of the estate in any entity; plan could have vested the unit in the association or in the mortgagee, citing by comparison *In re Bryant*, 323 B.R. 635 (Bankr. E.D. Pa. 2005). In *Bryant*, debtor in 1994 filed a Chapter 13 case and a plan providing "[h]olders of allowed secured claims shall retain the liens securing such claims and shall be paid as follows: "Bal Paid in Full $41,471.59–HUD Loan Management: 1341 E. Mt. Pleasant Ave. The Debtor intends to RETAIN" confirmed without objection and on the following day, creditor filed a secured claim for $67,736.17 with arrearages of $41,471.59 -- the exact amount contemplated to be paid under the Plan, which upon completion debtor was discharged. Five years later, with no payment in the interim, creditor commenced foreclosure and Bryant filed a new Chapter 13 case in which secured creditor filed a proof of claim for $44,224.69 to which the debtor objected that the POC was barred by the prior discharge or because the claim in the 1994 case was untimely or claimant failed to meet its ultimate burden to sustain its claim except for escrow advances. The *Bryant* Court held that a creditor with timely and unambiguous notice that its claim will be compromised and discharged may not ignore the confirmation process and fail to object notwithstanding that there either is no bar date for filing a claim or the time for filing a claim has yet to expire concluding that confirmation bars the creditor's later-filed claim under principles of *res judicata*.

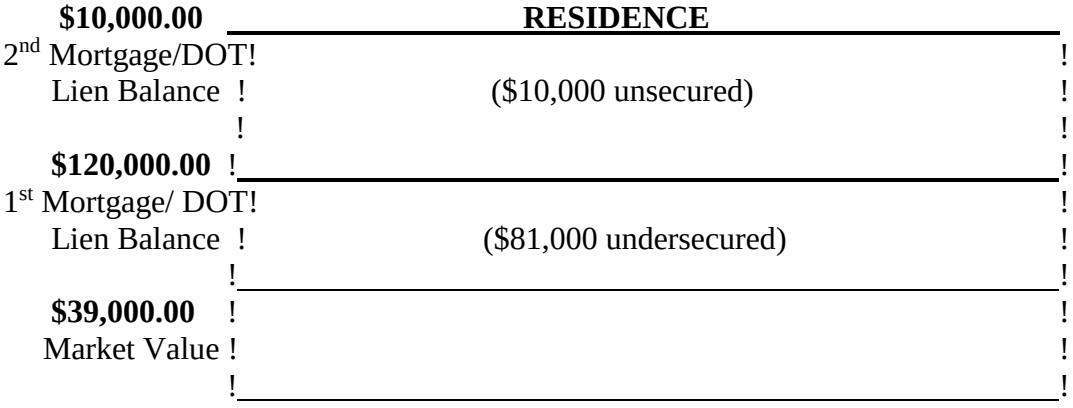
2. In Chapter 7 stripdown CAN be done with JUDICIAL liens under § 522(f)(1)(A) because there is separate statutory authority – Pages 101 - 125, *infra*.

3. In Chapter 7 stripdown CAN be done with a security interest against a motor vehicle under § 722 because there is separate statutory authority, and can also be done in Chapter 13 under circumstances if the purchase money lien were granted more than 910 days pre-petition under § 1322(b)(2) and the "hanging paragraph" after §1325(b)(9) because there is separate statutory authority – see Pages 191 - 215.

***WHAT YOU CAN DO*:**

**In Chapters 11 and 13 only:** Under § 506(a) and (d) stripoff and avoid and cancel the lien of a **wholly unsecured second security interest** mortgage or deed of trust against **residence** rendering it unsecured. (Not allowed in Chapter 7 under *Dewsnup* or *Caulkett*).




1. S**tripoff of wholly unsecured consensual security interest** (even if there is other collateral) -- deed of trust or mortgage – permitted in Chapter 13. *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998).

2. Lien Stripoff on tenants by entirety residential real property requires both spouses to be debtors. In Chapter 13, stripoff of wholly unsecured **consensual security interest lien** requires that property of the bankruptcy estate include all interests in tenants by entirety realty, thus if security interest were granted by both husband and wife then both husband and wife must be debtors before the Court, *Alvarez v. HSBC Bank USA, N.A.*, 733 F.3d 136 (4th Cir. 2013), *affirming* 2011 WL 6941670 (D. Md. 2011)(Garbis, J.), *affirming* October 7, 2011, Opinion of Judge Lipp, in Case No. 11-02886 (follows *Hunter v. Citifinancial, Inc. (In re Hunter)*, 284 B.R. 806 (Bankr. E.D. Va. 2002)(debtor husband cannot add non-filing wife as movant; now wholly unsecured second mortgage lien against non-residential Pennsylvania tenant by entirety realty owned "per tout et non per my", residence at time of joint grant of lien, not voidable in Chapter 13 filed in Virginia only by husband; "debtor and his spouse have a concurrent interest in the entire property. Even if the lien were somehow avoided as to the debtor's interest, it would remain as to the wife's interest and would encumber the entire property." 284 B.R. at 813)) and declines to follow *Strausbough v. Co-op Serv. C.U. (In re Strausbough)*, 426 B.R. 243 (Bankr. E.D. Mich. 2010))(husband discharged from mortgage *debts in his Chapter 7 case denied joinder due to lack of standing as non-filing spouse in wife's sole Chapter 13 case and motion granted to avoid wholly unsecured consensual second* mortgage lien against tenant by entirety residential realty).[5]

[5] *Strausbough* decided based upon binding authority of *Lane v. Western Interstate Bancorp. (In re Lane)*, 280 F.3d 663, 664 (6th Cir. 2002) holding that "Where a creditor holds a second mortgage on a homestead valued at less than the debtor's secured obligation to a first mortgagee, … the holder of the second mortgage has only an `unsecured claim' for § 506(a) purposes." and "Further `[i]f a claimant's lien on the debtor's homestead has no value at all … the claimant holds an `unsecured claim' and the claimants' contractual rights are subject to modification' under § 1322(b)(2) of the Bankruptcy Code." 280 F.3d at 669; *Strausbough* 426 B.R. at 246.

This is the same conclusion reached in *In re Davis,* 447 B.R. 738, 745 (Bankr. D. Md. 2011) (Lipp, J.)("In other words, a creditor must demonstrate that it has an allowed secured claim under Section 506(a) before it can invoke the anti-modification provision of Section 1322(b)(2)."; "In this case, as of the Petition Date, TD Bank had an *in rem claim* against the Debtors' bankruptcy estate in the form of a lien against the Debtors' real property. TD Bank's *in rem* claim has been valued at $0.00 because there is no value in the Debtors' real property to which it could attach in light of the existing liens with higher priority. Accordingly, TD Bank's *in rem* claim is wholly unsecured in the Debtors' Chapter 13 case pursuant to Section 506(a) and can be avoided pursuant to Section 506(d). *See First Mariner Bank v. Johnson*, 411 B.R. at 223-24. This determination is consistent with the plain language of Section 506(a), and with the procedures established by this Court, which require debtors to complete the lien valuation/stripping process prior to confirmation.").

*See also, Williams v. Montgomery County Federal Credit Union*, ___B.R.___, (Case No 11-28610-PM)(February 9, 2012)(avoidance of wholly unsecured consensual lien permitted against realty formerly owned as tenants by entirety but owned tenants in common upon divorce and solely by debtor on petition date) Debtor owned realty received from his parents, and three years later after his marriage he in 2001 conveyed it to himself and his spouse as tenants by entirety without consideration. In 2007, they pledged realty as collateral to Credit Union owed $60,059.15 on the petition date. Debtor divorced June 30, 2010, and by Voluntary Separation and Marital Settlement Agreement dated June 16, 2010, ex-wife agreed to transfer all her right, title and interest to debtor by December 1, 2010, with debtor being solely responsible for lien repayment and holding harmless ex-wife, a liability often found to be a domestic support obligation. *In re Westerfield*, 403 B.R. 545 (W.D. Tenn 2009); *In re Poole*, 383 B.R. 308 (Bankr. S.C. 2007).

On September 2, 2011, ex-wife executed a quit claim deed conveying her undivided one-half interest to the debtor former husband; deed was recorded on September 13 or 14, 2011, and the Chapter 13 case was filed on September 15, 2011. Credit Union argued under *In re Hunter*, 284 B.R. 806 (BC E.D. Va. 2002); *Alvarez v. HSBC Bank USA, National Association*, 2011 WL 6941670 (D. Md.), and *Phillips v. Krakower*, 46 F.2d 764 (4th Cir. 1931), that its lien should only be avoided as to the one-half interest in the real property held by the debtor and not as to the one-half interest formerly held by the ex-wife. The Bankruptcy Court disagreed. The case should not be considered as one involving entireties property; on the petition date the property was owned only by the debtor and for more than one year prior the property was owned as tenants in common. In *Phillips v. Krakower*, in order to avoid a legal fraud, the court affirmed an Order suspending Samuel Phillips' discharge until the creditor of Samuel Phillips and his wife had the opportunity to obtain judgment against both on the promissory note that they signed and thereafter to enforce the judgment against property held as tenants by the entireties. Otherwise, if the claim against Samuel were discharged before the creditor obtained judgment on the note and enforced the judgment against the entireties property, the creditor's collection efforts would be frustrated so long as the Phillips were married.

*Alvarez* and *Hunter* hold that an individual debtor may not avoid a lien on entireties property, carrying on the *Krakower* reasoning. A non-filing tenant by the entirety cannot have the benefits of bankruptcy without the burden of submitting her non-exempt and entireties assets for the payment of creditors. Here, at the time the case was filed, while the parties held legal title to the property as tenants in common, the ex-wife was obligated by the parties' agreement to

3. Stripoff or stripdown of jointly granted consensual lien on *non*-residential investment realty requires that property of the estate include all tenants by entirety interest or a joint bankruptcy filing. *Gottron v.OneWest Bank FSB*, 2012 WL 907489 (Bankr. D. Md. 2012)(applies *Alvarez v. HSBC Bank*).

4. *Burkhart v. Grigsby, Trustee, and Community Bank of Tri-County*. 886 F.3d 434 (4th Cir. 2018), reversing *Burkhart v. Community Bank of Tri-County PNC Bank (In re Burkhart).* 505 B.R. 444 2014 WL 271627 (Bankr. D.Md. 2014)(Mannes, J.).Facts: Chapter 13 debtors' residence valued at $435,000 encumbered by mortgage and judgment liens: (i) $609,500 Chase Bank; (ii) $49.411.80 by Community Bank of Tri-County; (iii) $78,289.11 by Community Bank of Tri-County; and (iv) $105,995.75 and by PNC Bank. Chase and PNC filed POCs but Community Bank of Tri-County did not. Debtors filed an adversary proceeding to avoid Community Bank of Tri-County's two judgment liens. Bankruptcy Court denied relief under § 506(d)(2) which prohibits lien avoidance where no proof of claim has been filed; District Court affirmed concluding that lien stripoff could not occur without first applying § 506(d)(2) disagreeing with the debtors' contention that lien avoidance achievable under § 1322(b)(2) alone, concluding that it could not turn to section 1322(b)(2) until after the claim had been valued under § 506(a). The Fourth Circuit reversed, concluding that the filing of a proof of claim was not required for a determination under section 1322(b)(2) that the claim was without value.

Held: Addressing first the role of § 506(d) in a Chapter 13 lien stripoff and then whether Tri-County held an unsecured claim under § 1322(b)(2). Under *Bank of America v. Caulkett*, 135 S.Ct. at 1999, 506(d)'s function is voiding a lien whenever the claim secured by the lien itself has not been allowed. The Fourth Circuit observed that § 1322(b)(2) modifies the ***rights of the holders*** of secured clams and not the claims themselves. The Court further observed that the bankruptcy code routinely modifies the rights of non-participating creditors. Debtors look to section 506(a) for a judicial valuation of the collateral to determine the status of the banks' claim as secured. The Court also noted that amendments to the bankruptcy rules now permit a Chapter 13 debtor to request a valuation of a secured claim directly in a Plan. The Court concluded that the debtor's ability to stripoff an underwater lien stems from § 1322(b)(2) and NOT from § 506(d). A proof of claim is not required for a determination of the status of the lien under § 1322(b)(2).

**N.B. Practice Pointer:** Where motions to avoid liens may be required to be filed prior to a § 341 meeting, select a hearing date after the claims bar date, and, if secured creditor/respondent has not by then filed a claim, then debtor within 30 days after bar date can file a claim on behalf of the creditor pursuant to F.R.B.P. 3004.

5. In a Chapter 11 and 13 cases, unlike Chapter 7, the second lien is voidable entirely as wholly unsecured pursuant to *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998). The security interest of a voluntary second mortgage/deed of trust lien, or the judicial lien of an involuntary judgment lien, may be avoided and canceled, and the formerly secured creditor

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reconvey to the Debtor her interests. The Court found nothing approached the legal fraud described in *Krakower* and approved the avoidance of the wholly unsecured lien against the entire property.

 

will be treated as unsecured, and is entitled to receive a distribution under the plan as a creditor holding an unsecured debt in the amount of the mortgage/deed of trust or judgment former lien. A motion to determine the secured status of the second lien must be filed pursuant to Fed.R.Bank.P. 3012 to accomplish this result which is permitted by the special provisions found in 11 U.S.C. §§ 1123(a)(3) and (b)(5) and found in 11 U.S.C. § 1322(b)(2) and (5) -- which are NOT applicable in Chapter 7 cases. An appeal was noted to the Fourth Circuit Court of Appeals regarding the correctness of the *Johnson* decision, and the Fourth Circuit in *Suntrust Bank v. Millard (In re Millard)*, 414 B.R. 73 (D. Md. 2009), *aff'd* 2010 WL 5158561 (4th Cir. 2010) -- an appeal to the District Court from the Bankruptcy Court's Order Avoiding the junior lien held by Suntrust Bank, and Suntrust appealed to the District Court from the Bankruptcy Court's decision avoiding the lien, in an unpublished opinion affirmed *per curiam* Judge Garbis' ruling in *Millard* that Chapter 13 stripping of wholly unsecured liens is allowed (4th Cir. No. 09-2266). Coincidentally, Judge Garbis, the author of the *Johnson* opinion, denied Suntrust's appeal. *First Mariner Bank v. Johnson*, 411 B.R. 211 (D. Md. 2009), *aff'd*, 407 Fed. Appx. 713, 2011 WL 52358 (4th Cir. Jan. 6, 2011), similarly permits the stripping of a wholly unsecured consensual lien, and both *Millard* and *Johnson* are post-BAPCPA cases unlike *Dewsnup v. Timm*, 502 U.S. 410 (1992) and *Cunningham v. Homecomings Fin. Network (In re Cunningham)*, 246 B.R. 241 (Bankr. D. Md. 2000), *affirmed, sub nom., Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001) which were decided prior to the enactment of BAPCPA.

6. *Compare*, Stripoff under § 522(f)(1)(A) in Chapter 7 of wholly unsecured *judicial lien* against tenants by entirety realty does not require filing of joint bankruptcy petition. Avoidance of judicial lien on tenants by entirety realty does not require joint bankruptcy petition. *Raskin v. Susquehanna Bank (In re Raskin)*, 505 B.R. 684 (Bankr. D. Md. 2014)(Gordon, J.)(Maryland Legislature's enactment of owner-occupied real estate exemption assertable by one tenant-by-entirety spouse in ACM, CJ 11-504(f)(1)(ii) -- distinguishes *Alvarez v. HSBC Bank USA, N.A.*)(requiring that property of estate include all interests affected by lien avoidance/stripoff of wholly unsecured consensual lien granted against tenants by entirety realty).

7. Lien Stripoff with No Discharge Available. Stripoff of wholly unsecured consensually granted security interest lien permitted where debtor is ineligible for Chapter 13 discharge due to Chapter 13 filed less than 4 years from filing date of Chapter 7 in which discharge was granted. *In re Davis*, 447 B.R. 738 (Bankr. D. Md. 2011)(Lipp, J.), *aff'd*, *T.D. Bank, N.A. v. Davis*, 2012 WL 439701 (D. Md. 2012), *aff'd*, *Branigan and T.D. Bank, N.A. v. Davis, et al.*, 716 F.3d 331 (4th Cir. 2013)("In other words, a creditor must demonstrate that it has an allowed secured claim under Section 506(a) before it can invoke the anti-modification provision of Section 1322(b)(2)")(confirmation of Ch 13 Plan still requires showing of debtors' good faith); *First Mariner Bank v. Johnson*, 411 B.R. 211 (D. Md. 2009), *aff'd*, 407 Fed.Appx. 713, 2011 WL 52358 (4th Cir. 2011). On March 30, 2011, Judge Lipp held that a wholly unsecured junior lien can be stripped under Sections 506(a) and (d) in a "Chapter 20," *i.e.*, that a discharge is not necessary to strip a lien. The analysis begins with a determination of whether the creditor holds an allowed secured claim pursuant to Section 506(a) and by its terms, Section 1325(a)(5)(B)(i)(I)(bb) is inapplicable If the lien is not an allowed secured claim under Sections 506(a) and (d), then Section 1325(a)(5) requiring discharge under Section 1328(f) to eliminate the lien is never invoked, as Section 1325(a)(5) only applies to allowed secured claims, declining to follow *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008), and distinguishing *In re Mendoza*,

2010 WL 736834 (Bankr. D. Co. 2010) as disregarding binding precedent in that jurisdiction, *Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166 (B.A.P. 10th Cir. 2005) which held that Section 1322(b)(2) does not prohibit the modification of a wholly unsecured claim, and distinguishing *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010) where critical to the analysis in *Fenn* was whether a lien can be avoided under Section 506(d) being determined by whether its underlying claim has been allowed but how the unsecured lienholder can establish an allowed secured claim to trigger the application of Section 1325(a)(5) where there is no value to support the lien was not clearly explained in *Fenn*; and agreeing with the minority view in *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010),. In rendering its opinion in *Davis*, the Fourth Circuit became the first Circuit Court to decide the issues of whether stripping a lien in a Chapter 20 case is permissible. It is also noteworthy that the *Davis* opinion explicitly states that prior Fourth Circuit opinions that allowed for lien stripping pursuant to Section 506 in Chapter 13 cases were unpublished opinions, meaning that they were not binding precedent in the Fourth Circuit. The *Davis* court explicitly states that a Chapter 13 debtor may use the valuation process under Sections 506 and 1322(b)(2) to strip valueless liens on residential property, thereby codifying this process into binding precedent in the Fourth Circuit.[6]

8. Chapter 20 lien stripoff of wholly unsecured second mortgage lien on residence as the sole purpose for Chapter 13 case is bad faith and plan confirmation denied and case dismissed. *In re Mulhern*, 2014 WL 3992458, Case No. 12-20857 (Dkt. 48)(Mannes, J.).

9. Creditor does <u>not</u> hold Chapter 13 claim with lien avoidance after previous Chapter 7 discharge. In a "Chapter 20" case, due to prior Chapter 7 discharge of underlying personal liability for debt and Chapter 13 debtors' lien avoidance stripoff of wholly unsecured second mortgage lien, Bankruptcy Court sustained debtors' objection to creditor Real Time's claim holding that after avoidance of its fully unsecured lien, the creditor did not hold any *in personam* or other rights against the debtors that were allowable as an unsecured claim for purposes of distributions under a Chapter 13 plan. *In re Sweitzer*, 476 B.R. 463 (Bankr. D. Md. 2012)(Rice, J.).

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[6] *Davis* holds that "[w]here a creditor holds a second mortgage on a homestead valued at less than the debtor's secured obligation to a first mortgagee, … the holder of the second mortgage has only an `unsecured claim' for § 506(a) purposes." and "[f]urther `[i]f a claimant's lien on the debtor's homestead has no value at all … the claimant holds an `unsecured claim' and the claimants' contractual rights are subject to modification' under § 1322(b)(2) of the Bankruptcy Code." *Lane v. Western Interstate Bancorp. (In re Lane)*, 280 F.3d 663, 669 (6th Cir. 2002); *Strausbough v. Co-op Services Credit Union (In re Strausbough)*, 426 B.R. 243, 246 (Bankr. E.D. Mich. 2010). "In this case [*Davis*], as of the Petition Date, TD Bank had an *in rem claim* against the Debtors' bankruptcy estate in the form of a lien against the Debtors' real property. TD Bank's *in rem* claim has been valued at $0.00 because there is no value in the Debtors' real property to which it could attach in light of the existing liens with higher priority. Accordingly, TD Bank's *in rem* claim is wholly unsecured in the Debtors' Chapter 13 case pursuant to Section 506(a) and can be avoided pursuant to Section 506(d).

 

10. No *per se* prohibition of simultaneous Chapter 20 filing, citing *In re Davis* – Chapter 13 filed after grant of Chapter 7 discharge but while Chapter 7 case remained open pending Chapter 7 trustee's final report. *Sood v. Business Lenders LLC*, 2012 WL 2847613 (D. Md. 2012).

11. Wholly unsecured Homeowners' Association assessments avoidable in Chapter 13, using 11 U.S.C. § 506(a); 523(a)(16) exception to discharge not applicable in Chapter 13 cases. *In re Cook*, 2010 Bankr. Lexis 4372 (Bankr. E.D.V.A. 2010)(Mitchell, J.).

12. Ability to strip off wholly unsecured liens can be impacted by "special priority" provisions available to homeowner associations. *In re Plummer*, 484 B.R. 882 (Bankr. M.D. FL 2013)(where applicable, special priority provisions may make an association first priority, rendering it completely secured, and thus eliminating a debtor's ability to lien strip).

13. Remember in Chapter 7 § 506(d) is inapplicable: Stripoff NOT permitted of wholly unsecured consensually granted junior lien. *Bank of America v. Caulkett*, _ U.S. __, 135 S.Ct. _, 2015 WL 2464049 (June 1, 2015); *See also, Ryan v. Homecomings Fin. Network*, 353 F.3d 778 (4th Cir. 2001) applying *Dewsnup v. Timm*, 502 U.S. 410 (1992)(Chapter 7 debtor could not stripdown partially secured mortgage lien under § 506(d)).

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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|---|---|
| IN RE: | * |
| | * |
| Cyril Bell, Sr. | * CASE NO.: 16-13011-RAG |
| Michelle Bell | * Chapter 13 |
| | * |
| Debtors | * |
| | * |
| * * * * * * * * * * * * * | |
| | * |
| Cyril Bell, Sr. | * |
| Michelle Bell | * |
| 5958 Glen Falls Avenue | * |
| Baltimore, MD 21206 | * |
| | * |
| Movants/Debtors | * |
| | * |
| v. | * |
| | * |
| Bank of America, N.A. | * |
| 100 North Tryon Street | * |
| Charlotte, NC 28255 | * |
| SERVE ON: Mr. Brian Moynihan | * |
| Chairman of the Board and CEO | * |
| 214 North Tryon Street | * |
| NC-1-027-20-05 | * |
| Charlotte, NC 28255 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * * * * * * * * | |

**MOTION TO DETERMINE EXTENT OF SECURED DEED OF TRUST LIEN AND STATUS OF DEBT UNDER SECTION 506**

Cyril Bell, Sr., and Michelle Bell, movants and debtors, by their attorney, Marc R. Kivitz, pursuant to 11 U.S.C. § 506(a) and Rule 3012 of the Federal Rules of Bankruptcy Procedure hereby institutes this action against Bank of America, N.A., respondent, for the determination of the extent of the lien held by the respondent and the status of its debt as unsecured against the debtors' real property and improvements known as 5958 Glen Falls Avenue, Baltimore, MD 21206, and as grounds therefore respectfully represents that:

 

1. On March 9, 2016, Cyril Bell, Sr., and Michelle Bell, debtors, filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 16-13011-RAG ("the reorganization case").

2. This Court has jurisdiction over this motion to determine extent of secured lien and status of debt under Section 506 pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a) and (d), 1322(b)(2), and Federal Rule of Bankruptcy Procedure 3012.

3. Bank of America, N.A. ("Bank" or "respondent") is in the business of lending money to individuals and does business within the State of Maryland.

4. At the time of the filing of the reorganization case, Cyril Bell and Michelle Bell, movants and debtors ("debtors") owned and still own the real property and improvements known as 5958 Glen Falls Avenue, Baltimore, MD 21206 ("the real property"), pursuant to a Deed dated July 26, 2005, recorded August 24, 2005, among the Land Records of Baltimore City, MD at Liber 6720, folio 217 *et seq* ("Deed"). A copy of the recorded Deed is attached hereto as Exhibit A and is incorporated herein by reference.

5. The market value of the real property is $75,000.00 as of February 28, 2016, as determined by a comparative market analysis performed by Mr. Patrick Carter, a real estate broker with RE/Max Components, which valuation is attached hereto as Exhibit B and is incorporated herein by reference.

6. Nationstar Mortgage, LLC ("Nationstar"), is the holder and owner of the first lien against the real property pursuant to a Deed of Trust dated August 14, 2006, recorded August 28, 2006, among the Land Records of Baltimore City, MD at Liber 8253, folio 661 *et seq.,* in the original principal amount of $145,350.00 ("first Deed of Trust lien"). A copy of the first Deed of Trust lien is attached hereto as Exhibit C and is incorporated herein by reference. The first Deed

 

of Trust was assigned to Nationstar by Assignment of Deed of Trust dated August 28, 2013, recorded September 12, 2013, among the Land Records of Baltimore City, MD at Liber 15620, folio 111 *et seq*.. a copy of which Assignment is attached hereto as Exhibit D and is incorporated herein by reference. Nationstar has appointed substitute trustees by Deed of Appointment of Substitute Trustee dated October 5, 2015, recorded October 14, 2015, among the Land Records of Baltimore City, MD at Liber 17573, folio 241 *et seq.* ("Appointment"), a copy of which Appointment is attached hereto as Exhibit E and is incorporated herein by reference.

7. On information and belief, the debtors have listed on their Schedule D filed under a Declaration of the penalty of perjury that the balance due and owing to Nationstar on the first Deed of Trust lien on Nationstar's account number xxx0984 is $139,000.00 ("first Deed of Trust lien balance"). A copy of the debtor's Schedule D and Declaration under Perjury is attached hereto as Exhibit F and is incorporated herein by reference.

8. Bank of America, N.A., respondent, is the holder a second lien against the real property pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., in the original principal amount of $10,000.00 ("second Deed of Trust lien"). A copy of the second Deed of Trust lien is attached hereto as Exhibit G and is incorporated herein by reference.

9. The Bank, respondent, regarding the second Deed of Trust lien for its account number xxx9399 issued an on-line billing statement stating a balance due on the second Deed of Trust lien of $4,504.63 ("second Monthly Billing Statement"). A copy of the second Monthly Billing Statement is attached collectively hereto as Exhibit H and are incorporated herein by reference.

10. The consensual first Deed of Trust lien held by Nationstar as described in paragraphs 6 and 7 above fully encumbers the market value of the real property rendering the second

 

Deed of Trust lien held by the Bank, respondent, as described in paragraphs 8 and 9 above wholly unsecured and voidable in its entirety pursuant to *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998).

11. The debtors' plan of reorganization will propose that the second Deed of Trust lien held by the Bank, respondent, be avoided and canceled and that the respondent shall be treated as holding a non-priority general unsecured debt in the amount of the former lien and entitled to receive a distribution thereon under the plan as a general unsecured creditor.

WHEREFORE, Cyril Bell, Sr., and Michelle Bell, movants and debtors, respectfully request that this Honorable Court:

1. Determine the secured claim held by Bank of America, N.A., respondent, against the real property and improvements known as 5958 Glen Falls Avenue, Baltimore, MD 21206 pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., in the original principal amount of $10,000.00, account number xxx9399, to be Zero Dollars ($0.00); and

2. Determine the debt owed to Bank of America, N.A., respondent, pursuant to the second Deed of Trust and second Note to be unsecured in its entirety; and

3. Upon the entry of a discharge pursuant to 11 U.S.C. § 1328(f), avoid and cancel the lien of record held by Bank of America, N.A., respondent, pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., account number xxx9399, against the debtors' real property and improvements known as 5958 Glen Falls Avenue, Baltimore, MD 21206; and

 

4. Appoint the debtors as trustees in fact to act on behalf of Bank of America, N.A., , respondent, to execute any document necessary to release such second Deed of Trust lien upon the entry of the debtors' discharge; and

5. Award to the debtors such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2016, a copy of this motion was served pursuant to Federal Bankruptcy Rule 7004 by Certified Mail, return receipt requested upon:

**BY CERIFIED MAIL:**
Bank of America, N.A.
100 North Tryon Street
Charlotte, NC 28255

**BY CERIFIED MAIL:**
Bank of America, N.A.
Mr. Brian Moynihan
Chairman of the Board and CEO
214 North Tryon Street
NC-1-027-20-05
Charlotte, NC 28255

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Interim Chapter 13 Trustee
300 E. Joppa Road, #409
Towson, MD 21286-3020

Cyril Bell, Sr., and Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

/s/ Marc R. Kivitz
Marc R. Kivitz

Bkcy: 1bell Cyril michelle AVOID 2d mtg motion

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
| * * * * * * * * * * * * * | | |
| | * | |
| Cyril Bell, Sr. | * | |
| Michelle Bell | * | |
| 5958 Glen Falls Avenue | * | |
| Baltimore, MD 21206 | * | |
| | * | |
| Movants/Debtors | * | |
| | * | |
| v. | * | |
| | * | |
| Bank of America, N.A. | * | |
| 100 North Tryon Street | * | |
| Charlotte, NC 28255 | * | |
| SERVE ON: Mr. Brian Moynihan | * | |
| Chairman of the Board and CEO | * | |
| 214 North Tryon Street | * | |
| NC-1-027-20-05 | * | |
| Charlotte, NC 28255 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * * * * * * * * | | |

**ORDER GRANTING MOTION TO VAUE COLLATERAL**
**AND TO AVOID SECURITY INTEREST**

Having considered debtors' Motion to Avoid Lien, and any response filed thereto, and it appearing that proper notice has been given, pursuant to 11 U.S.C. § 506 and for the reasons set forth in the cases of *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998) and *First Mariner Bank v. Johnson*, 226 B.R. 411 (D. Md. 2009), it is by the United States Bankruptcy Court for the District of Maryland

 

ORDERED that the claim of Respondent, Bank of America, N.A., be and is hereby deemed wholly unsecured; and it is further

ORDERED that at such time as a discharge Order is entered pursuant to 11 U.S.C. § 1328(a) in this case, the lien held in favor of Respondent, Bank of America, N.A., on the debtors' interest in the real property described as 5958 Glen Falls Avenue, Baltimore, MD 21206, pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., in the original principal amount of $10,000.00, account number xxx9399, is avoided; and it is further

ORDERED that if the Respondent Bank of America, N.A., has filed a proof of claim, the claim of the Respondent, be, and hereby is allowed as a general unsecured claim for purposes of distribution under the Debtors' plan; and it is further

ORDERED that if the Respondent, Bank of America, N.A., has not filed a proof of claim, the claim of the Respondent, be, and hereby is allowed as a general unsecured claim for purposes of distribution under the Debtors' plan if a proof of claim is filed on or before the later of (i) the claims bar date previously fixed by this court, or (ii) twenty-eight (28) days after the entry of this order; and it is further

ORDERED that allowance of the claim of the Respondent, Bank of America, N.A., as an unsecured claim pursuant to this order is without prejudice to objection to such claim on other grounds; and it is further

ORDERED that Cyril Bell, Sr., and Michelle Bell, movants and debtors, be, and are hereby, appointed as trustees in fact to act on behalf of Bank of America, N.A., respondent, to execute any document necessary to release such second Deed of Trust lien upon the entry of the debtors' discharge.

 

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard St..
Baltimore, MD 21201

Gerard R. Vetter, Esquire, Interim Chapter 13 Trustee
300 E. Joppa Road
Suite #409
Towson, MD 21286-3020

Cyril Bell, Sr., and Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

Bank of America, N.A.
100 North Tryon Street
Charlotte, NC 28255

Bank of America, N.A.
SERVE ON: Mr. Brian Moynihan
Chairman of the Board and CEO
214 North Tryon Street
NC-1-027-20-05
Charlotte, NC 28255

Bkcy: 1bell Cyril michelle AVOID 2d mtg order

**END OF ORDER**

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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| IN RE: | * | |
| | * | |
| Cyril Bell, Sr. | * | CASE NO.: 16-13011-RAG |
| Michelle Bell | * | Chapter 13 |
| | * | |
| Debtors | * | |
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| * * * * * * | * | * * * * * * * |
| Cyril Bell, Sr. | * | |
| Michelle Bell | * | |
| 5958 Glen Falls Avenue | * | |
| Baltimore, MD 21206 | * | |
| | * | |
| Movants/Debtors | * | |
| | * | |
| v. | * | |
| | * | |
| Bank of America, N.A. | * | |
| 100 North Tryon Street | * | |
| Charlotte, NC 28255 | * | |
| SERVE ON: Mr. Brian Moynihan | * | |
| Chairman of the Board and CEO | * | |
| 214 North Tryon Street | * | |
| NC-1-027-20-05 | * | |
| Charlotte, NC 28255 | * | |
| | * | |
| Respondent | * | |
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**NOTICE OF MOTION TO DETERMINE EXTENT OF DEED OF TRUST SECURED LIEN AND STATUS OF DEBT UNDER SECTION 506**

Cyril Bell, Sr., and Michelle Bell, movants and debtors, have filed papers with the court seeking to determine the secured claim held by Bank of America, N.A., respondent, is the holder a second lien against the real property pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., in the original principal amount of $10,000.00, account number xxx9399, against the debtors' real property and improvements known as 5958 Glen Falls Avenue, Baltimore, MD 21206 to be Zero Dollars ($0.00), and unsecured in its entirety, and the lien avoided and canceled upon the discharge of the underlying debt pursuant to 11 U.S.C. § 1328(f) as a lien against the real property; and to appoint the debtors as trustees in fact to release the lien upon the entry of their discharge.

 

Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion avoiding the lien, or if you want the court to consider your views on the motion, then by **April 13, 2016**, you or your lawyer must file a written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy of the response to:

| | | |
|---|---|---|
| Marc R. Kivitz, Esquire<br>Suite 1330<br>201 North Charles Street<br>Baltimore, MD 21201 | Gerard R. Vetter, Esquire<br>Assistant U.S. Trustee<br>Suite 2650, 101 W. Lombard<br>Baltimore, MD 21201 | Gerard R. Vetter, Esquire<br>Interim Chapter 13 Trustee<br>300 E. Joppa Road, #409<br>Towson, MD 21286-3020 |

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

The hearing is scheduled for **Friday, May 20, 2016, at 10:30 a.m. in Courtroom 1B**, 1st Floor, United States Bankruptcy Court, First Floor, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

IF YOU OR YOUR LAWYER DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

03/11/16
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 N. Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2016, a copy of this notice was served pursuant to Federal Bankruptcy Rule 7004 by Certified Mail, return receipt requested upon:

**BY CERIFIED MAIL:**
Bank of America, N.A.
100 North Tryon Street
Charlotte, NC 28255

**BY CERIFIED MAIL:**
Bank of America, N.A.
Mr. Brian Moynihan
Chairman of the Board and CEO
214 North Tryon Street
NC-1-027-20-05
Charlotte, NC 28255

 

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Interim Chapter 13 Trustee
300 E. Joppa Road, #409
Towson, MD 21286-3020

Cyril Bell, Sr., and Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

/s/ Marc R. Kivitz
Marc R. Kivitz

Bkcy: 1bell Cyril michelle AVOID 2d notice

 

**Entered: May 19, 2016** **Docket No. 31**
**Dated: May 18, 2016**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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| IN RE: | * |
| | * |
| Cyril Bell, Sr. | * CASE NO.: 16-13011-RAG |
| Michelle Bell | * Chapter 13 |
| | * |
| Debtors | * |
| * * * * * * * * * * * * * | |
| | * |
| Cyril Bell, Sr. | * |
| Michelle Bell | * |
| 5958 Glen Falls Avenue | * |
| Baltimore, MD 21206 | * |
| | * |
| Movants/Debtors | * |
| | * |
| v. | * |
| | * |
| Bank of America, N.A. | * |
| 100 North Tryon Street | * |
| Charlotte, NC 28255 | * |
| SERVE ON: Mr. Brian Moynihan | * |
| Chairman of the Board and CEO | * |
| 214 North Tryon Street | * |
| NC-1-027-20-05 | * |
| Charlotte, NC 28255 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * * * * * * * * | |

**CONSENT ORDER GRANTING MOTION TO VAUE COLLATERAL AND TO AVOID SECURITY INTEREST**

Having considered debtors' Motion to Avoid Lien, and any response filed thereto, and it appearing that proper notice has been given, pursuant to 11 U.S.C. § 506 and for the reasons set forth in the cases of *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998) and *First Mariner Bank v. Johnson*, 226 B.R. 411 (D. Md. 2009), and upon the consent of the parties

 

as evidenced by the signatures below of their respective representatives, and good cause having been shown, it is by the United States Bankruptcy Court for the District of Maryland

ORDERED that the claim of Respondent, Bank of America, N.A., be and is hereby deemed wholly unsecured; and it is further

ORDERED that at such time as a discharge Order is entered pursuant to 11 U.S.C. § 1328(a) in this case, the lien held in favor of Respondent, Bank of America, N.A., on the debtors' interest in the real property described as 5958 Glen Falls Avenue, Baltimore, MD 21206, pursuant to a Deed of Trust dated February 26, 2007, recorded April 9, 2007, among the Land Records of Baltimore City, MD at Liber 9279, folio 668 *et seq*., in the original principal amount of $10,000.00, account number xxx9399, is avoided; and it is further

ORDERED that the avoidance of the Respondent Bank of America, N.A., lien provided for in the preceding decretal paragraph is contingent upon the debtors' receipt of a Chapter 13 discharge; and it is further

ORDERED that Respondent Creditor shall retain its lien for the full amount due under the subject loan should the subject property be sold or should a refinance take place prior to the Chapter 13 Plan completion and entry of a Discharge; and it is further

ORDERED that Respondent Creditor shall retain its lien for the full amount due under the subject loan in the event of either the dismissal of the Debtors' Chapter 13 case or the conversion of the Debtors' Chapter 13 case to any other Chapter under the United States Bankruptcy Code; and it is further

ORDERED that if the Respondent Bank of America, N.A., has filed a proof of claim, the claim of the Respondent, be, and hereby is allowed as a non-priority general unsecured claim for purposes of distribution under the Debtors' plan; and it is further

 

ORDERED that if the Respondent, Bank of America, N.A., has not filed a proof of claim, the claim of the Respondent, be, and hereby is allowed as a general unsecured claim for purposes of distribution under the Debtors' plan if a proof of claim is filed on or before the later of (i) the claims bar date previously fixed by this court, or (ii) twenty-eight (28) days after the entry of this order; and it is further

ORDERED that allowance of the claim of the Respondent, Bank of America, N.A., as an unsecured claim pursuant to this order is without prejudice to objection to such claim on other grounds; and it is further

ORDERED that Cyril Bell, Sr., and Michelle Bell, movants and debtors, be, and are hereby, appointed as trustees in fact to act on behalf of Bank of America, N.A., respondent, to execute any document necessary to release such second Deed of Trust lien upon the entry of the debtors' discharge; and it is further

ORDERED that in the event that any entity, including the holder of the first lien on the Subject Property, forecloses on its security interest and extinguishes Creditor's lien prior to the Debtor's completion of the Chapter 13 Plan and receipt of a Chapter 13 discharge, Creditor's lien shall attach to the surplus proceeds of the foreclosure sale for the full amount of the subject loan balance at the time of the sale; and it is further

ORDERED that upon receipt of the Debtor's Chapter 13 discharge and completion of their Chapter 13 Plan, this Order avoiding lien may without further notice be recorded at the County Recorder's Office; and it is further

ORDERED that in the event that the property is destroyed or damaged, pursuant to the mortgage, Respondent creditor is entitled to its full rights as a loss payee with respect to the

 

insurance proceeds and has a security interest in such proceeds up to the entire balance due on the mortgage; and it is further

ORDERED that each party shall bear their own attorneys' fees and costs incurred in the present case number 16-13011-RAG.

AGREED AND CONSENTED TO:


/s/ Marc R. Kivitz
Marc R. Kivitz, Esquire
Trial Bar No. 02878
201 North Charles Street ,Ste 1330
Baltimore, MD 21201
(410) 625-2300
Email: mkivitz@aol.com
Attorney for debtors/movants

/s/ James C. Olson
James C. Olson, Esquire
10451 Mill Run Circle
Suite 400
Owings Mills, MD 21117
Phone 410-356-8852
jolson@jamesolsonattorney.com
Attorney for creditor/respondent


**CONSENT CERTIFICATION**

I HEREBY CERTIFY That the terms of the copy of this Consent Order submitted to the Court are identical to those set forth in the original Consent Order, and the signatures represented by the /s/_____ on this copy have been authorized and reference the signatures of the consenting parties on the original Consent Order.

/s/ Marc R. Kivitz
Marc R. Kivitz

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard St..
Baltimore, MD 21201

Gerard R. Vetter, Esquire, Interim Chapter 13 Trustee
300 E. Joppa Road
Suite #409
Towson, MD 21286-3020

Cyril Bell, Sr., and Michelle Bell
5958 Glen Falls Avenue
Baltimore, MD 21206

Bkcy: 1bell Cyril michelle AVOID 2d mtg CONSENT3

**END OF ORDER**

The majority of the Seventh Circuit affirmed and endorsed a modified version of the District Court's "coerced" or "forced" loan approach using the contract rate as the presumptive rate but which could be challenged by either the debtor or creditor recognizing risks of nonpayment that would not be incurred in a new loan to a debtor not in default. In dissent, Judge Rovner suggested a "cost of funds" approach which assesses the cost to the creditor to obtain the cash equivalent of the collateral from an alternative source.

In a 5-4 plurality opinion, the Supreme Court on May 17, 2004, reversed, addressing the question of the appropriate rate of interest and method of calculation for the cramdown of a vehicle and payment of the secured claim over time in a Chapter 13 case under11 U.S.C. § 1325(a)(5)(B)[7]. Justice Stevens rendered the opinion in *Till* in which Justices Souter, Ginsburg, and Breyer joined Justice Thomas filing a concurring opinion, and in which Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist, and Justices O'Connor and Kennedy joined.

The Court considered the applicability of: (a) the "coerced loan" rate of interest, which was found to be inappropriate because it required the Bankruptcy Court to consider evidence about the market for comparable loans to similar debtors which the Court considered to be an inquiry far removed from the Bankruptcy Court's usual task of evaluating debtors' financial circumstances and feasibility of debt adjustment plans, and that it overcompensated creditors;

(b) the "presumptive contract rate" of interest - which was 21%, the maximum rate to avoid usury in a consumer transaction in Indiana, which was found not to be appropriate because it improperly focused on the creditor's use of the proceeds of sale and required debtors to obtain information on the creditor's overhead costs, financial circumstances and lending practices in order to rebut the presumption, and would produce the absurd results entitling inefficient and poorly managed lenders with lower profit margins to obtain higher rates of cramdown interest than well managed, better capitalized lenders;

(c) the "cost of funds" approach, which was not appropriate because it focused on the creditworthiness of the creditor rather than the debtor, and imposed a significant evidentiary burden upon the debtor seeking to rebut the creditor's asserted cost of borrowing; and

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[7] The Supreme Court in *Rake v. Wade*, 508 U.S. 464, 472 n.8, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) held that property distributions under 11 U.S.C. § 1325(a)(5)(B)(ii) may take the form of "a stream of future payments". The Court in *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997) held that a debtor over a creditor's objection could surrender the vehicle under 11 U.S.C. § 1325(a)(5)(C), and that with regard to the valuation of the vehicle, forming the principal balance to which the interest rate is attributed in order to calculate the monthly payment, held that the debtor's actual use, rather than a value based upon a foreclosure sale that will not take place, is the proper guide concluding that the proper valuation was replacement value. *Compare*, *In re Zell*, 284 B.R. 569 (Bankr. D. Md. 2002)(Keir, J.), holding in Chapter 7 for redemption under 11 U.S.C. § 722, where the creditor would receive a lump sum for its lien, the risks to creditors (such as subsequent non-payment and increase in collateral value creating a windfall to debtors) that gave concern to the Supreme Court in *Rash*, were not present in Chapter 7 redemption valuations. In *Zell*, the Bankruptcy Court concluded that when valuing the secured creditor's claim against a motor vehicle **for redemption purposes**, the proper standard of valuation to be applied is the value that a creditor would receive if it repossessed the motor vehicle and sold it in a commercially reasonable manner -- not replacement value, but wholesale, liquidation, or foreclosure value, which terms may be used interchangeably.

 

(d) applied a formula approach based on the national financial market's prime rate of interest adjusted for the risk of nonpayment, which was found to be straightforward, familiar, and objective, and minimized the need for costly evidentiary hearings – resulting in a "prime plus" rate of interest.

Courts have generally approved upward adjustments to the national prime rate of 1% to 3% under the formula approach, *Till,* 124 S.Ct. at 1962, and it is the creditor's evidentiary burden to justify the upward adjustment. Factors to consider when determining the amount of the upward adjustment are the circumstances of the bankruptcy estate; the nature of the security, characteristics of the loan, and the state of financial markets; and the duration and feasibility of the debtor's chapter 13 plan, *Id.,* at 1961, rather than the creditor's circumstances or its prior interactions with the debtor.

Justice Thomas concurring held that § 1325(a)(5)(B)(ii) did not require that the proper rate of interest reflect a risk of nonpayment. In *Till*, the rate of 9.5% was held proper where 9.5% was higher than a risk-free rate and was sufficient to account for the time-value of money, which is all that 11 U.S.C. § 1325(a)(5)(B)(ii) requires.

**B. Ch 11 & 13, Can Stripdown Security Interest on Investment Realty.**

**See, e.g.:** Michael J. Kursch Chapter 11 CASE NO. 11-23932-DK
Class 18 under Revised Second Amended Plan of Reorganization dated August 1, 2012 (Dkt. 232) confirmed by Order dated November 27, 2012, entered November 28, 2012 (Dkt. 233).

JPMorgan Chase Bank, N.A., holds a Deed of Trust dated May 5, 2008, recorded in Talbot County, MD at Liber 1620, folio 379, *et seq*., having a balance of $239,142.76, with a monthly payment of $1,500.00, secured by investment/rental property at 611 Goldsboro Street, Easton, MD 21601, with a value of $160,000.00. Lien modified to a new principal balance of $160,000.00 at a reduced interest rate of 5.00% *per annum* amortized over an extended term of thirty (30) years payable in equal monthly installments of principal and interest each in the amount of $858.91, with a $79,142.76 general unsecured claim.

| | |
|---|---|
| $239,142.76 | **INVESTMENT REALTY** |
| | $79,142.76 general unsecured claim |
| $160,000.00 Market value | ***Restructure*** **Modify Interest Rate** ***Till vs. SCS Credit Corp.*** 541 U.S. 465 (2004) |

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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|---|---|---|
| IN RE: | * | |
| | * | |
| Michael J. Kursch | * | CASE NO. 11-23932-DK |
| | * | Chapter 11 |
| Debtor | * | |
| | * | |
| * * * * * * * | * | * * * * * * * |
| | * | |
| JPMorgan Chase Bank, National Association* | | |
| SERVE ON: Jamie Dimon, Chrmn, Pres. and CEO | | |
| 270 Park Avenue | * | |
| New York, NY 10017 | * | |
| | * | |
| Movant/Counter Respondent | * | Property Address: |
| | * | 611 Goldsborough Street |
| v. | * | Easton, MD 21601 |
| | * | |
| Michael J. Kursch | * | |
| | * | |
| Respondent/Counter Movant | * | |
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| * * * * * * * | * | * * * * * * * |

**ANSWER OF DEBTOR TO MOTION FOR RELIEF FROM AUTHOMATIC STAY AND COUNTERCLAIM MOTION TO DETERMINE SECURED STATUS AND OFFER OF ADEQUATE PROTECTION OF SECURED CLAIM**

Michael J. Kursch, debtor and respondent, by his attorney, Marc R. Kivitz, hereby answers the motion of JPMorgan Chase Bank, National Association, movant, seeking relief from the automatic stay imposed by 11 U.S.C. § 362(a) to foreclose its lien against and to sell the debtor's investment real property and improvements known as 611 Goldsborough Street, Easton, MD 21601 ("the motion") and, pursuant to 11 U.S.C. § 506(a)(1) and F.R.B.P. 3012 counterclaims for a determination of the extent of the movant's lien and offers adequate protection of the movant's secured interest, as grounds for therefore respectfully represents that:

1. He admits that the Chapter 11 case was commenced on July 6, 2011.

2. He admits that the Court has jurisdiction over this contested matter.

3. He admits that he owns the investment real property and improvements known as 611 Goldsborough Street, Easton, MD 21601 ("real property").

 

4. He admits that the real property is encumbered by the Deed of Trust dated May 5, 2008, recorded on May 6, 2008, among the Land Records of Talbot County, MD at Liber 1620, folio 379, *et seq*.

5. He admits the allegations made in paragraph 5 of the motion, however, in further answer, he states that the movant's secured interest may be determined under 11 U.S.C. § 506(a)(1) and F.R.B.P. 3012 may be restructured and repaid and in so doing cure or waive any default pursuant to 11 U.S.C. § 1123(a)(5)(G).

6. He is without sufficient information to either admit or deny the allegations made in paragraph 6 of the motion. In further answer, he states that the real property has a present market value of $150,000.00 and that the movant's secured interest does not exceed $150,000.00.

7. He is without sufficient information to either admit or deny the allegations made in paragraph 7 of the motion. In further answer, he states that the movant's secured interest may be determined and any default cured or waived.

8. He is without sufficient information to either admit or deny the allegations made in paragraph 8 of the motion. In further answer, he states that the movant's secured interest does not exceed the market value of the real property of $150,000.00.

9. He admits the allegations made in paragraph 9 of the motion.

10. He denies the allegations made in paragraph 10 of the motion, and in further answer states that the movant's secured interest does not exceed the market value of the real property of $150,000.00.

11. He denies the allegations made in paragraph 11 of the motion, and in further answer states that the debtor has herein made an offer to adequately protect the movant's secured interest.

12. He denies the allegations made in paragraph 12 of the motion.

13. He denies the allegations made in paragraph 13 of the motion.

WHEREFORE, Michael J. Kursch, debtor, respectfully requests that this Honorable Court:

 

1. Deny the relief requested by the movant; and

2. Award to the debtor such other and further relief as is just and proper.

**Counterclaim and Motion to Determine Secured Status of and Avoid Lien of JPMorgan Chase Bank, National Association, Pursuant to 11 U.S.C. § 506(a)(1) against 611 Goldsborough Street, Easton, MD 21601**

Michael J. Kursch, debtor and countermovant, by his attorney, Marc R. Kivitz, pursuant to 11 U.S.C. §§ 506(a)(1) and (d) and F.R.B.P. 3012, hereby files this motion to determine the secured status and to avoid the lien of JPMorgan Chase Bank, National Association, counterrespondent against the debtor's investment real property and improvements known as 611 Goldsborough Street, Easton, MD 21601, and as grounds for therefore respectfully represents that:

1. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334 and 157(b). The motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. § 1409.

2. The debtor commenced this Chapter 11 case July 6, 2011. The debtor has continued in possession of his property and has continue to manage his property for the benefit of his estate and his creditors pursuant to 11 U.S.C. §§ 1107 and 1108.

3. As set forth on the debtor's Schedule A, the debtor owns the real property and improvements known as 611 Goldsborough Street, Easton, MD 21601 ("real property").

4. The real property is encumbered by the Deed of Trust dated May 5, 2008, recorded on May 6, 2008, among the Land Records of Talbot County, MD at Liber 1620, folio 379, *et seq*., held by the counterrespondent, JPMorgan Chase Bank, National Association. The counterrespondent has alleged that the balance due on the Deed of Trust is $247,084.08.

5. The debtor believes and therefore avers as he stated under oath on Schedule A that the real property has a present market value of $150,000.00. The debtor premises his opinion of the value of the real property upon comparable sales of properties similar to the real property. The

 

debtor therefore avers that the value of the property is less than the lien balance asserted by the counterrespondent.

6. The Bankruptcy Code provides that the "allowed claim of a creditor secured by a lien on property in which the estate has an interest … is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property … and is an unsecured claim to the extent that the value of such creditor's interest … is less than the amount of such allowed claim." 11 U.S.C. §§ 506(a)(1). In addition, the Bankruptcy Code provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void…."

7. Therefore the debtor avers that the lien of JPMorgan Chase Bank, National Association, is secured only to the extent of the value of the real property of $150,000.00 and is unsecured for any sum in excess of that amount. The lien of JPMorgan Chase Bank, National Association, is void to the extent that any sum owed to JPMorgan Chase Bank, National Association, exceeds the $150,000.00 value of the real property. This relief is necessary and appropriate to effectuate the provisions of the Bankruptcy Code. 11 U.S.C. §§ 506(a) and (d).

8. The debtor offers to adequately protect the $150,000.00 secured claim of JPMorgan Chase Bank, National Association, by commencing payments of the principal sum of $150,000.00 with interest at five percent (5.00%) per annum over a term of thirty (30) years in equal monthly installments of principal and interest each in the amount of $805.23 on the first day of each month commencing January 1, 2012, with a ten-day grace period.

WHEREFORE, Michael J. Kursch, debtor and countermovant, respectfully requests that this Honorable Court:

1. Determine the value of the secured claim of JPMorgan Chase Bank, National Association, against the real property and improvements known as 611 Goldsborough Street, Easton, MD 21601, to be One Hundred Fifty Thousand Dollars ($150,000.00); and

 

2. Determine that any amount claimed by JPMorgan Chase Bank, National Association, in excess of One Hundred Fifty Thousand Dollars ($150,000.00) constitutes an unsecured claim; and

3. Enter an Order voiding any lien held by JPMorgan Chase Bank, National Association, against the real property and improvements known as 611 Goldsborough Street, Easton, MD 21601, in excess of One Hundred Fifty Thousand Dollars ($150,000.00); and

4. Award to the debtor such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 North Charles Street
Baltimore, MD 2l201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for Michael J. Kursch, debtor/respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2011, a copy of this answer to motion for relief and countermotion to determine extent of lien was served electronically or by first class mail, postage prepaid or pursuant to Federal Bankruptcy Rule 7004 by Certified Mail, return receipt requested upon:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard St.
Baltimore, MD 21201

Michael T. Cantrell, Esquire
Friedman & MacFadyen, P.A
210 East Redwood Street
Baltimore, MD 21202-3399

Michael J. Kursch
427 North Street
Easton, MD 21601

JPMorgan Chase Bank, National Association
SERVE ON: Jamie Dimon, Chrmn, Pres. and CEO
270 Park Avenue
New York, NY 10017

/s/ Marc R. Kivitz
Marc R. Kivitz



 

**Entered December 4, 2012** **Docket No. 235**
**Signed December 3, 3012**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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| IN RE: | * | |
| | * | |
| Michael J. Kursch | * | CASE NO. 11-23932-DK |
| | * | Chapter 11 |
| Debtor | * | |
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| * * * * * * * * * * * * * | | |
| | * | |
| JPMorgan Chase Bank, National Association* | | |
| SERVE ON: Jamie Dimon, Chrmn, Pres. and CEO | | |
| 270 Park Avenue | * | |
| New York, NY 10017 | * | |
| | * | |
| Movant/Counter Respondent | * | Property Address: |
| | * | 611 Goldsborough Street |
| v. | * | Easton, MD 21601 |
| | * | |
| Michael J. Kursch | * | |
| | * | |
| Respondent/Counter Movant | * | |
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| * * * * * * * * * * * * * | | |

**CONSENT ORDER RESOLVING MOTION FOR RELIEF FROM STAY AND DEBTOR'S OBJECTION TO CLAIM REGARDING 611 GOLDSBOROUGH STREET, EASTON, MD 21601**

Upon consideration of the motion (Docket No. 55) filed by JPMorgan Chase Bank, National Association ("movant") for relief from the automatic stay of 11 U.S.C. § 362(a) to proceed with the foreclosure of its Deed of Trust dated May 5, 2008, recorded on May 6, 2008, among the Land Records of Talbot County, MD at Liber 1620, folio 379, *et seq*., against the real property and improvements known as 611 Goldsborough Street, Talbot County, Easton, MD 21601; and upon consideration of the answer and counterclaim filed by Michael J. Kursch ("debtor") and the debtor's Objection (Docket No. 124) to the movant's Proof of Claim No. 18, and upon the consent of the parties as evidenced by their signatures below of their representatives, it is therefore, by the United States Bankruptcy Court for the District of Maryland

 

ORDERED that the Deed of Trust dated May 5, 2008, recorded on May 6, 2008, among the Land Records of Talbot County, MD at Liber 1620, folio 379, *et seq*., against the real property and improvements known as 611 Goldsborough Street, Talbot County, Easton, MD 21601 shall be restructured to a new principal balance of One Hundred Sixty Thousand Dollars and Zero Cents ($160,000.00) ("the new principal balance") with interest accruing at five percent (5.00%) *per annum* amortized over thirty (30) years payable in equal monthly installments of principal and interest in the amount of Eight Hundred Fifty-eight Dollars and Ninety-one Cents ($858.91) per month beginning July 1, 2012, with a fifteen-day grace period for all payments and no pre-payment penalty or fee. In addition to the principal and interest payment of $858.91, the monthly payment shall also account for any future change in escrow payments attributable to property taxes and/or insurance premium adjustments, and at present the Debtor shall also tender a monthly payment of One Hundred Forty-two Dollars and Thirty-three Cents ($142.33) as an escrow for real estate taxes and Fifty-five Dollars and Ninety-two Cents ($55.92) for hazard and risk insurance resulting in a total monthly payment of principal, interest, taxes and insurance of One Thousand Fifty-seven Dollars and Sixteen Cents ($1,057.16) ($858.91 + $142.33 + $55.92 = $1,057.16) and Movant shall cast a ballot accepting Debtor's Plan of Reorganization which incorporates the terms set forth herein; and be it further

ORDERED that the automatic stay of 11 U.S.C. § 362(a) shall remain in full force and effect so long as the debtor shall timely and fully make the payments required by the preceding decretal paragraph; and be it further

ORDERED that, during the pendency of this Bankruptcy Case, if any payment or portion of any payment required to be made hereunder is not received by Movant by the date that it is due, including any payment due on or after July 1, 2012, Debtor shall be deemed to be in default under this Order. In such event, Movant's attorney shall file a notice with this Court stating the amount due under this Order and shall mail a copy of said notice to the Debtors and to Debtors' attorney. If the Debtors do not cure the default by paying the amount stated in the notice within fifteen (15) days of the date of the notice, the automatic stay of 11 U.S.C. § 362(a) shall

 

terminate as to the Property and Movant shall be free to commence a foreclosure proceeding against the Property without any further proceeding in this Court.

ORDERED that acceptance of partial payment by the Movant during the cure period shall not constitute a satisfaction or waiver of the Notice of Default.

ORDERED that upon the filing of the third such notice of default, the Movant shall be free to cause the commencement or continuation of a foreclosure proceeding against the Property.

ORDERED that the debtor's Objection to the movant's Proof of Claim No. 18, be, and the same is hereby, granted and the movant, the Class 20 Creditor under the debtor's Plan, shall have a secured claim in the principal balance of One Hundred Sixty Thousand Dollars ($160,000.00) and shall be entitled to receive a distribution on a general Unsecured Claim in the amount of $79,142.76 ($239,142.76 - $160,000.00 = $79,142.76) in Class 22.

AGREED AND CONSENTED TO:

/s/ Marc R. Kivitz
Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
mkivitz@aol.com
Attorney for debtor

/s/ Christina Williamson
Christina Williamson, Esquire
Bierman, Ward & Wood
4520 East West Highway, Suite 200
Bethesda, MD 20814
(240) 482-0813
Christina.Williamson@bww-law.com
Attorney for JP Morgan Chase Bank, N.A.

**CONSENT CERTIFICATION**

I HEREBY CERTIFY That the terms of the copy of this Consent Order submitted to the Court are identical to those set forth in the original Consent Order, and the signatures represented by the /s/_____ on this copy have been authorized and reference the signatures of the consenting parties on the original Consent Order.

/s/ Marc R. Kivitz
Marc R. Kivitz

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

**END OF ORDER**

 

***WHAT YOU CAN DO*:**

**C. (Differentiate as to the collateral of the second lien). Cramdown/Avoidance of Partially Secured *Security Interests* on INVESTMENT realty** 11 U.S.C. §**§ 506(a)** and (d).

| | | |
|---|---|---|
| **$40,000.00** | **INVESTMENT REALTY** | |
| **!** | 2nd Encumbrance DOT or Mortgage (or Judicial Lien) | **!** |
| **!** | $39,000.00 remainder of Lien is Undersecured | **!** |
| **$121,000 !** | | **!** |
| market value **!** | | **!** |
| **!** | ***Restructure*** $1,000.00 of value attributable to 2nd Lien | **!** |
| **$120,000.00 !** | Balance on 1st DOT or Mortgage or Judgment Lien) | **!** |
| 1st DOT Balance ! | | ! |
| ! | | ! |

Motion to Value Collateral pursuant to F.R.B.P. 3012.

Value collateral at $121,000.00 and prove $120,000.00 first lien; determine extent of second lien stripped down to $1,000.00 and $39,000.00 balance of second lien of stripped off to be $0.00 and treated as unsecured.

***Restructure*** new terms for payment of $1,000.00 second lien over time with interest.

**RESULT: BIFURCATE LIEN ($1,000.00 Secured and $39,000.00 Undersecured debts).**

**PAY $1,000.00 LIEN IN FULL with interest.**

**RESTRUCTURE LIEN – repayment term of years with interest in a Plan**

**Modify Interest Rate *Till vs. SCS Credit Corp.,*** 541 U.S. 465 (2004) – national prime rate of interest (presently 5.25%) plus additional 1% - 3% for risk of loss

**$39,000.00 Balance of Lien stripped off and wiped out upon entry of Discharge Order or upon completion of payments due under a Plan if ineligible for Discharge.**

**Undersecured $39,000.00 debt receives percentage distribution in a Plan**

**N.B. $39,000.00 is added to unsecured debt and must remain under Ch 13 limit of $394,725.00 under 11 U.S.C. § 109(e).**

 

D. ***ISSUE***: **At what point in time does the Court determine if the realty was Residential or Investment property?**

1. Date of Petition Filing: In *In re Abdelgadir*, 455 B.R. 896 (9th Cir. B.A.P. 2011) the leading decision in support of focusing on the petition date, the bankruptcy court confirmed the debtors' chapter 11 plan and allowed modification of a claim secured by real property that the debtors considered their principal residence as of the *petition* date, but not as of the *confirmation* date. Focusing on this latter date, and noting that the debtors no longer lived in the residence at the time of the confirmation hearing, the bankruptcy court concluded that the lender's claim was not secured by real property that "*is* the debtor's principal residence." *Id.* at 902. On appeal, the lender argued that "the character of property must be determined at the time the creditor takes a security interest in the collateral" or, alternatively, as of the petition date. *Id.*, at 899. The bankruptcy appellate panel reversed and held that the petition date controls, not the loan transaction date or the confirmation date. Although *Abdelgadir* was a chapter 11 case, the Ninth Circuit BAP subsequently reasoned that the same analysis applied equally to chapter 13 cases as well. *Benafel v. One West, FSB (In re Benafel),* 461 B.R. 581 (9th Cir. B.A.P. 2011).

2. Date of Mortgage Transaction: Other courts, with an identical focus on the statutory language, reach the opposite conclusion. In *In re Scarborough*, 461 F.3d 406, 412 (3rd Cir. 2006), the Third Circuit considered a creditor's security interest in a multi-family dwelling, with respect to which the lender took its security interest knowing that the property was acquired in part as an investment and that the borrower would lease a portion of the real property to a third party. Interpreting § 1322(b)(2) (§ 1123(b)(5)'s substantive twin), the court examined the loan documents to determine whether the creditor's claim was secured by "*any* real property that is not the debtor's principal residence." *Id*., at 411. The creditor argued that this approach encouraged bad faith, in that a debtor could avoid the anti-modification exception by, for example, adding a second living unit to the secured property. The court was not persuaded, and instead emphasized what it viewed as a fundamental aspect of the exception:

> for purposes of § 1322(b)(2), the critical moment is when the creditor takes a security interest in the collateral. "It is at that point in time that the underwriting decision is made and it therefore at that point in time that the lender must know whether the loan it is making may be subject to modification in a Chapter 13 proceeding at some later date.

*Id*., at 411 *quoting In re Bulson*, 327 B.R. 830, 846 (Bankr. W.D. Mich. 2005). The *Scarborough* court reasoned that the bank "cannot, and does not, claim surprise," and that there simply was "no question in the instant case that the Mortgage and Family Rider granted Chase Manhattan an interest in real property that was not the debtor's residence." *Id*. The court concluded that the mobile home constituted personal property, and that the mortgage could be modified. *Ennis*¸ 558 F.3d [343] at 346 [(4th Cir. 2009)]; *see also, In re Hughes*, 333 B.R. 360, 362 (Bankr. M.D.N.C. 2005)(in a multi-faceted use of primary residence case, the court held that whether a creditor's claim was secured "solely by the security interest in the Debtor's residence within the meaning of section 1322(b)(2) is a determination which should be made by examining the GMAC loan documents.").

The *Ennis* court, 558 F.3d 343 (4th Cir. 2009), did not delve into legislative history, but it

 

did rely on an earlier Fourth Circuit case, *In re Witt*, 113 F.3d 508 (4th Cir. 1997), which did. In *Witt*, the court held that 11 U.S.C. § 1322(c)(2) "precluded bifurcation of an undersecured loan into secured and unsecured claims if the only security for the loan is a lien on the debtor's principal residence." *Id.*, at 513-14. The court acknowledged that the effect of the court's decision would be to require the debtors to pay back the full amount of their mortgage loan, which was facially contrary to bankruptcy's "fresh start" goals. However, as the court pointed out, other factors are relevant:

> As Justice Stevens recognized in *Nobelman*, "[a]t first blush it seems somewhat strange that the Bankruptcy Code should provide less protection to an individual's interest in retaining possession of his or her home than of other assets." *Nobelman*, 508 U.S. at 332. 113 S.Ct. 1206 (Stevens, J., concurring). Permitting bifurcation of home mortgage loans, however, could make lenders more hesitant to make such loans in the first place. Although a broader reading of § 1322(c)(2) might help the Witts today, it could make it more difficult in the future for those similarly situated to the Witts to obtain any financing at all. Congress appears to have designed another important section, § 1322(b)(2), *with this result in mind*. *See id.* (stating that § 1322(b)(2)'s "legislative history indicat[es] that favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market").

*Id*. at 514 (emphasis added); *see also Zaldivar*, 441 B.R. 389, 390-91 (collecting and discussing cases).

In *In re Proctor*, 494 B.R. 833 (Bankr. E.D.N.C., 2013),the Bankruptcy Court held that in determining whether real property is a debtor's "principal residence," for purposes of the Bankruptcy Code's anti-modification provision, the court looks to whether the property was the debtor's principal residence at the time of the mortgage transaction, not to the time the petition was filed, and in *Proctor*, because the real property in question was originally purchased for use as a second home, debtor could modify the loan secured by the property, even though he currently used the home as his principal residence.

**Practice Pointer**: Review the debtor's Deed of Trust and beware. Many deeds of trust contain an occupancy provision which the debtor signed indicating that s/he would occupy the premises and that the premises would be the principal residence. If the Debtor bought the property as an investment property and never intended to reside there, and did not in fact live there, but executed the deed of trust that contained an occupancy requirement – on which basis the interest rate and/or other terms may have been premised, the filing of a motion to bifurcate a lien on alleged investment realty may expose the debtor to a complaint for non-dischargeability based upon a fraudulent representation under 11 U.S.C. § 523(a)(2).

***ISSUES***: Is the realty a principal residence? *In Re Addams* (Bankr. E.D.N.Y. 08-15-75191) , holding that a duplex, even if divided at the time of purchase (and where the debtor told the lender she intended to rent the second half at purchase to service the loan), was "principal residence and therefore the loan could **not** be modified. But see, *In Re Abrego*, 506 B.R. 509 (Bankr ND Ill, 2014) holding opposite, since under Illinois law "principal residence" can include up to two units.

*In Re Galaske*, 2011 WL 5598356 (Bankr VT. 11-10891 2011) the debtor operated an automotive repair shop on the premises and the lien was held to be subject to modification.

*In Re Santiago*, 404 B.R. 564 (Bankr. S.D.FL 2009) the debtor moved to another house one month prior to the filing of the bankruptcy case and lien was held to be subject to modification.

 

***WHAT YOU CAN DO*:**

E**. (Differentiating as to the collateral of the lien). Cramdown/Avoidance of Partially Secured *Security Interest* on RESIDENTIAL REALTY and OTHER Collateral** 11 U.S.C. §§ **506(a)** and (d). **What if the Mortgage or Deed of Trust Security Interest were initially secured by RESIDENCE REALTY AND SOME OTHER ASSET – such as corporate assets as collateral?**

Facts: Loan to LLC is secured by LLC assets – a secured debt of the LLC; members of LLC personally guarantee the loan to the LLC – at that point, an Unsecured debt of the individual members, but then the Lender is given an Indemnity Deed of Trust ("IDOT") against the members' residential real property – now a secured debt of the individuals. Lender enforces lien on LLC assets and obtains a Confessed Judgment against the individuals on the personal guarantees for the balance remaining due which debt is also secured by the IDOT. Debtors file Chapter 13 to reduce the IDOT balance to the amount of equity remaining in their residence above first mortgage balance and to restructure secured debt and also to avoid and cancel the Confessed Judgment lien against the real property.

**$40,000.00** RESIDENCE

2nd Encumbrance Consensual Security Interest IDOT)
$39,000.00 remainder of Lien is Undersecured

FMV **$121,000**
Market Value

***Restructure*** $1,000.00 of value attributable to 2nd Lien
Balance on 1st Mortgage or Deed of Trust Lien)

**$120,000.00**
1st Mortgage Bal.

**Facts:** Corporate loan secured by business equipment under Security Interest.
Debt personally guaranteed by principals of corporation.
Personal guarantees collateralized with Indemnity Deed of Trust (IDOT) against principal residence.
Debt owed under Security Interest is NOT solely secured by principal residence.
Corporate assets already foreclosed upon by secured creditor (does not alter fact that debt was not solely secured by the principal residence.

**RESULT: BIFURCATE LIEN ($1,000.00 Secured & $39,000.00 Undersecured debts)**
**PAY $1,000.00 LIEN IN FULL with interest**
**RESTRUCTURE LIEN – repayment term of years with interest in a Plan**
**Modify Interest Rate *Till vs. SCS Credit Corp.*,** 541 U.S. 465 (2004) – national prime rate of interest (presently 5.25%) plus an additional 1% - 3% for risk of loss
**$39,000.00 Balance of Lien stripped off upon entry of Discharge order upon completion of payments due under a Plan**
**Undersecured $39,000.00 debt receives percentage distribution in a Plan**

**Actual facts of the Rosen/Berman v. PNC Bank adversary proceeding:**
$629,000.00 value of real property collateral (Exhibit B)
- $348,474.65 balance due on first lien held by Wells Fargo (Exhibit E)
$280,525.35 value attributable to second lien held by PNC ("the IDOT lien")

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Edward H. Rosen | * | CASE NO.: 11-10512-PM |
| Stacy J. Berman | * | Chapter 13 |
| | * | |
| Debtors | * | |

* * * * * * * * * * * * *

| | |
|---|---|
| Edward H. Rosen | * |
| Stacy J. Berman | * |
| 9107 Brierly Road | * |
| Chevy Chase, MD 20815 | * |
| | * |
| Debtors/Movants | * |
| | * |
| v. | * |
| | * |
| PNC BANK, NATIONAL ASSOCIATION | * |
| 249 Fifth Avenue | * |
| Pittsburgh, PA 15222 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |

* * * * * * * * * * * * *

**MOTION TO DETERMINE SECURED STATUS OF CLAIM AND TO MODIFY RATE OF INTEREST OF LIEN HELD BY PNC BANK, NATIONAL ASSOCIATION**

Edward H. Rosen, and Stacy J. Berman, debtors, by their attorney, Marc R. Kivitz, pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2) and Rules 3012, 4003(d) and 9014 of the Federal Rules of Bankruptcy Procedure hereby institute this action against PNC Bank, National Association, respondent, for the determination of the secured status of the respondent's claim against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, and to modify the rate of interest payable to the respondent, and as grounds therefore respectfully represents that:

 

1. On January 10, 2011, Edward H. Rosen, and Stacy J. Berman ("debtors") filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 11-10512-PM (“the reorganization case”).

2. This Court has jurisdiction over this motion to determine secured status pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a) and (d), 1322(b)(2), and 1325(a)(5)(B)(iii), and Rules 3012, 4003(d) and 9014 of the F.R.Bank.Proc.

3. PNC Bank, National Association ("PNC” or “respondent”) is a lending and financing institution and is engaged in business within the State of Maryland.

4. At the time of the filing of the reorganization case, the debtors owned and still own and occupy the residential real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815 (“the real property”) pursuant to a Deed dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, at Liber 35661, folio 082 *et seq*. to Stacy J. Berman, and thereafter by Deed dated April 16, 2008, also recorded on May 14, 2008, among the Land Records of Montgomery County, at Liber 35661, folio 099 *et seq.* conveyed by Stacy J. Berman to Edward H. Rosen and Stacy J. Berman as tenants by entirety ("the Deed"). A copy of the Deed is attached hereto as Exhibit A and is incorporated herein by reference.

5. The market value of the real property is $629,000.00 as of November 30, 2010, as determined by a comparative market analysis performed by Ms. Gisela Goldberg, an associate licensed real estate broker with Fairfax Realty Brokerage, which valuation is attached hereto as Exhibit B and is incorporated herein by reference.

6. Wells Fargo Bank, N.A., (“Wells Fargo”) is the holder of the first lien against the real property pursuant to a Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the

 

Land Records of Montgomery County, at Liber 35661, folio 089 *et seq*., in the original principal amount of $361,340.00 ("first Deed of Trust lien"). A copy of the recorded first Deed of Trust lien is attached hereto as Exhibit C and is incorporated herein by reference.

7. The first Deed of Trust lien secures the repayment of a Note dated April 15, 2008, in the original principal amount of $361,340.00 ("first Note"). A copy of the first Note is attached hereto as Exhibit D and is incorporated herein by reference.

8. The balance due on the first Deed of Trust lien held by Wells Fargo on the first Note, its account number 144705362, is $348,474.65 as shown on its monthly billing statement dated October 6, 2010, for the first lien ("first Monthly Billing Statement"). A copy of the first Monthly Billing Statement is attached hereto as Exhibit E and is incorporated herein by reference.

9. PNC as successor by merger to Mercantile Potomac Bank loaned to L & P Rosen Enterprises, LLC d/b/a Gymboree the original principal amount of $400,000.00 through a U.S. Small Business Administration Note dated July 9, 2007, which Note was amended on February 28, 2008; a Second Amendment of the Note was dated December 3, 2008; and a Third Amendment of the Note was dated April 24, 2009, effective as of February 28, 2009 (collectively "the PNC loan"). Copies of the Second Amended Note and Third Amended Note are attached hereto as Exhibits F and G, respectively, and are incorporated herein by reference.

10. The amount due on the PNC loan as of May 10, 2010, was $343,703.93 as set forth in a letter dated June 15, 2010, to the debtors from PNC's counsel. A copy of the demand letter is attached hereto as Exhibit H and is incorporated herein by reference.

11. The PNC loan to L & P Rosen Enterprises, LLC d/b/a Gymboree through the U.S. Small Business Administration Note dated July 9, 2007, was secured by the corporation's

 

pledge of accounts, receivables, furniture, fixtures, machinery and equipment, inventory, general intangibles, raw materials, work in progress and supplies, contract rights, chattel paper and instruments, and other corporate assets, which security interest was perfected by the filing of a Financing Statement among the financing records of the Maryland State Department of Assessments and taxation on July 26, 2007, File # 0000000181314441, Film U00528, folio 1246. A copy of the Financing Statement is attached hereto as Exhibit I and is incorporated herein by reference.

12. The PNC loan was jointly personally guaranteed by both of the debtors and their guaranty was collateralized through the pledge of the real property through an Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq*. ("the IDOT"). A copy of the IDOT is attached hereto as Exhibit J and is incorporated herein by reference.

13. The debtors contend that lien held by PNC Bank under the IDOT is secured by the real property only to the extent that the value of the real property exceeds the first Deed of Trust lien held by Wells Fargo -- $280,525.35:

$629,000.00 value of real property collateral (Exhibit B)
- $348,474.65 balance due on first lien held by Wells Fargo (Exhibit E)
$280,525.35 value attributable to second lien held by PNC

14. The debtors contend that to the extent that the debt owed to PNC exceeds the value attributable to second lien held by PNC, then PNC is unsecured -- $63,178.58:

$343,703.93 amount of PNC debt (Exhibit H)
- $280,525.35 value attributable to second lien held by PNC
$ 63,178.58 unsecured portion of PNC's claim

15. The balance due on the PNC loan is being financed at an annual rate of interest of seven percent (7.0%) as stated in the Second Amended Note (Exhibit F).

 

16. The debtors believe that the national financial market's prime rate of interest is three and one-quarter percent (3.25%) *per annum* and that that rate is a reasonable rate of interest for the debtors' repayment of the value attributable to second lien held by PNC and a fair market rate of return to the respondent for the real property in the present market in the absence of any other relief awarded to the debtors. *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787, 51 C.B.C.2d 642 (2004). A copy of the current national prime rate of interest is attached hereto as Exhibit K and is incorporated herein by reference. Adding an additional one percent to protect PNC from risk of loss, at four and one-quarter percent (4.25%) *per annum* the $280,525.35 value attributable to second lien held by PNC would be payable to the respondent in equal monthly installments each in the amount of principal and interest of One Thousand Three Hundred Seventy-five Dollars and Fifty-three Cents ($1,375.53) payable on a direct reduction amortization basis based on a thirty (30) year amortization commencing thirty (30) days following the entry of an Order confirming the debtors' plan.

17 PNC's security interest lien against the real property under the IDOT, not having been solely secured by the real property, as evidenced by Exhibit I, shall be treated under the debtors' plan of reorganization as secured to the extent of $280,525.35 and will be satisfied in full on the date of confirmation of the Plan by delivering to PNC a Promissory Note in the principal amount of $280,525.35, or such other value as the Court may determine, and recording a Deed of Trust against the real property in the Land Records of Montgomery County, Maryland; and the Promissory Note shall bear interest at 4.25% *per annum* and shall fully amortize the principal balance of $280,525.35 over 30 years (360 monthly payments of $1,375.53) commencing 30 days following the entry of a final, non-appealable Order granting this motion.

 

The balance of the debt owed to PNC shall be a general unsecured claim to be paid *pro rata* with other general unsecured claims.

WHEREFORE, Edward H. Rosen, and Stacy J. Berman, debtors, respectfully request that this Honorable Court:

1. Determine the secured claim held by PNC Bank, National Association, respondent, pursuant to the Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq*., against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, to be only to the extent of $280,525.35; and

2. Determine the applicable rate of interest payable on the determined allowed secured claim of $280,525.35 held by PNC Bank, National Association, respondent, to be in the amount of four and one-quarter percent (4.25%) *per annum*; and

3. Enter an Order modifying the secured claim of PNC Bank, National Association, respondent, and permitting the modified lien of $280,525.35 to be paid at four and one-quarter percent (4.25%) *per annum* annual interest over a term of three hundred sixty (360) months in equal monthly installments each in the amount of $1,375.53 commencing thirty (30) days following the entry of an Order confirming the debtors' plan; and

4. Determine the debt owed to PNC Bank, National Association, respondent, to be unsecured to the extent it exceeds the determined value of its lien of $280,525.35; and

5. Award to the debtors such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201

 

(410) 625-2300
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of January, 2011, a copy of the foregoing motion to determine extent of secured lien was served electronically or by first class mail, postage prepaid, to:

Gerard Vetter, Esquire
Assistant U.S. Trustee
6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

Timothy P. Branigan, Esquire
Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

PNC Bank, National Association
7235 Wisconsin Avenue
Bethesda, MD 20814

PNC Bank, National Association
249 Fifth Avenue
Pittsburgh, PA 15222

PNC Bank, National Association
c/o Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Mary R. McCliggott, Esquire
Weinstock, Friedman & Friedman, P.A.
Executive Center
4 Reservoir Circle
Baltimore, MD 21208

Mr. Edward H. Rosen
Ms. Stacy J. Berman
9107 Brierly Road
Chevy Chase, MD 20815

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:1berman PNC lien bifurcate

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

| | |
|---|---|
| IN RE: | * |
| | * |
| Edward H. Rosen | * CASE NO.: 11-10512-PM |
| Stacy J. Berman | * Chapter 13 |
| | * |
| Debtors | * |
| | * |
| * * * * * * | * * * * * * * |
| | * |
| Edward H. Rosen | * |
| Stacy J. Berman | * |
| 9107 Brierly Road | * |
| Chevy Chase, MD 20815 | * |
| | * |
| Debtors/Movants | * |
| | * |
| v. | * |
| | * |
| PNC BANK, NATIONAL ASSOCIATION | * |
| 249 Fifth Avenue | * |
| Pittsburgh, PA 15222 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * | * * * * * * * |

**ORDER GRANTING MOTION TO DETERMINE SECURED STATUS OF CLAIM AND TO MODIFY RATE OF INTEREST OF LIEN HELD BY PNC BANK, NATIONAL ASSOCIATION**

Having considered debtors' Motion to Determine Secured Status of Claim and to Modify Rate of Interest of the Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq*., in favor of PNC Bank, National Association, respondent, against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, and any response filed thereto, and it appearing that proper notice has been given, pursuant to 11 U.S.C. § 506 and for

 

the reasons set forth in the case of *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998), it is by the United States Bankruptcy Court for the District of Maryland

ORDERED that the claim held by PNC Bank, National Association, respondent, pursuant to the Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq*., against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, is secured only to the extent of $280,525.35; and be it further

ORDERED that the applicable rate of interest payable on the determined allowed secured claim of $280,525.35 held by PNC Bank, National Association, respondent, is in the amount of four and one-quarter percent (4.25%) *per annum*; and be it further

ORDERED that the modified secured claim of PNC Bank, National Association, respondent, of $280,525.35 shall be paid at four and one-quarter percent (4.25%) *per annum* interest over a term of three hundred sixty (360) months in equal monthly installments each in the amount of $1,375.53 commencing thirty (30) days following the entry of an Order confirming the debtors' plan of reorganization; and be it further

ORDERED that PNC Bank, National Association, respondent, shall be allowed as a general unsecured claim under the debtors' plan to the extent the debt owed to the respondent exceeds the determined value of its lien of $280,525.35; and be it further

ORDERED that at such time as a discharge Order is entered pursuant to 11 U.S.C. § 1328(a) in this case, the lien held in favor of Respondent on the debtors' real property shall be void to the extent it exceeds the determined value of $280,525.35.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

 

Timothy P. Branigan, Esquire
Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

PNC Bank, National Association
7235 Wisconsin Avenue
Bethesda, MD 20814

PNC Bank, National Association
249 Fifth Avenue
Pittsburgh, PA 15222

PNC Bank, National Association
c/o Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Mary R. McCliggott, Esquire
Weinstock, Friedman & Friedman, P.A.
4 Reservoir Circle. Executive Center
Baltimore, MD 21208

Mr. Edward H. Rosen
Ms. Stacy J. Berman
9107 Brierly Road
Chevy Chase, MD 20815

motions: 1berman PNC lien bifurcate Order

**END OF ORDER**

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

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|---|---|---|
| IN RE: | * | |
| | * | |
| Edward H. Rosen | * | CASE NO.: 11-10512-PM |
| Stacy J. Berman | * | Chapter 13 |
| | * | |
| Debtors | * | |
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| * * * * * * | * * * * * * * | |
| | * | |
| Edward H. Rosen | * | |
| Stacy J. Berman | * | |
| 9107 Brierly Road | * | |
| Chevy Chase, MD 20815 | * | |
| | * | |
| Debtors/Movants | * | |
| | * | |
| v. | * | |
| | * | |
| PNC BANK, NATIONAL ASSOCIATION | * | |
| 249 Fifth Avenue | * | |
| Pittsburgh, PA 15222 | * | |
| SERVE ON: Resident Agent | * | |
| CSC Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street, Suite 1660 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * * * * * * * | |

**NOTICE OF MOTION DETERMINE SECURED STATUS OF CLAIM AND TO MODIFY RATE OF INTEREST OF LIEN HELD BY PNC BANK, NATIONAL ASSOCIATION**

Edward H. Rosen and Stacy J. Berman, debtors/movants, have filed papers with the court seeking (i) to determine the extent of the secured claim held by PNC Bank, National Association, respondent, pursuant to an Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq*., against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, to be only to the extent of $280,525.35; (ii) and to determine the interest rate applicable to that secured claim to be in the amount of four and one-quarter percent (4.25%) *per annum*; (iii) to permit the modified secured claim of PNC Bank, National Association of $280,525.35 to be paid at four and one-quarter percent (4.25%) *per annum* interest over a term of three hundred sixty (360) months in equal monthly installments each in the amount of $1,375.53

 

commencing thirty (30) days following the entry of an Order confirming the debtors' plan; and (iv) to determine the debt owed to PNC Bank, National Association, respondent, to be unsecured to the extent it exceeds the determined value of its lien of $280,525.35. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion for determination that the debt is unsecured, or if you want the court to consider your views on the motion, then within twenty-eight (28) days from the date of this Notice, that is on or before, **February 14, 2011**, you or your lawyer must file a written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy to:

Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Timothy P. Branigan, Esquire
Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

The hearing is scheduled for **Thursday, March 10, 2011, at 3: 00 p.m. in Courtroom 3D**, on the Third Floor, United States Bankruptcy Court for the District of Maryland, Southern Division, 6500 Cherrywood Lane, Greenbelt, MD 20770.

IF YOU OR YOUR LAWYER DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

01/10/11
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 N. Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtor/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of January, 2011, a copy of this notice was served pursuant to Federal Bankruptcy Rule 7004 by first class mail, postage prepaid or electronically upon:

Gerard Vetter, Esquire

Timothy P. Branigan, Esquire

 

Assistant U.S. Trustee
6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

PNC Bank, National Association
7235 Wisconsin Avenue
Bethesda, MD 20814

PNC Bank, National Association
249 Fifth Avenue
Pittsburgh, PA 15222

PNC Bank, National Association
c/o Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Mary R. McCliggott, Esquire
Weinstock, Friedman & Friedman, P.A.
Executive Center
4 Reservoir Circle
Baltimore, MD 21208

Mr. Edward H. Rosen
Ms. Stacy J. Berman
9107 Brierly Road
Chevy Chase, MD 20815

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:1berman PNC lien bifurcate notice

 

**Entered: February 25, 2011** **Docket No. 24**
**Dated: February 24, 2011**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

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|---|---|
| IN RE: | * |
| | * |
| Edward H. Rosen | * CASE NO.: 11-10512-PM |
| Stacy J. Berman | * Chapter 13 |
| | * |
| Debtors | * |
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| | * |
| Edward H. Rosen | * |
| Stacy J. Berman | * |
| 9107 Brierly Road | * |
| Chevy Chase, MD 20815 | * |
| | * |
| Debtors/Movants | * |
| | * |
| v. | * |
| | * |
| PNC BANK, NATIONAL ASSOCIATION | * |
| 249 Fifth Avenue | * |
| Pittsburgh, PA 15222 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * * * * * * * * | |

**CONSENT ORDER GRANTING MOTION TO DETERMINE SECURED STATUS OF CLAIM AND TO MODIFY RATE OF INTEREST OF LIEN HELD BY PNC BANK, NATIONAL ASSOCIATION**

Having considered debtors' Motion to Determine Secured Status of Claim and to Modify Rate of Interest of the Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq.*, in favor of PNC Bank, National Association, respondent, against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, and any response filed

thereto, and it appearing that proper notice has been given, pursuant to 11 U.S.C. § 506 and for the reasons set forth in the case of *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998), it is by the United States Bankruptcy Court for the District of Maryland

ORDERED that the claim held by PNC Bank, National Association, respondent, pursuant to the Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq*., against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, is secured only to the extent of $309,725.35 (based on a value of the real property of $658,200.00 and the first priority lien held by Wells Fargo Bank, N.A.); and be it further

ORDERED that the applicable rate of interest payable on the determined allowed secured claim of $309,725.35 held by PNC Bank, National Association, respondent, is in the amount of five and one-quarter percent (5.25%) *per annum*; and be it further

ORDERED that the modified secured claim of PNC Bank, National Association, respondent, of$309,725.35 shall be paid at five and one-quarter percent (5.25%) *per annum* interest amortized over a term of three hundred sixty (360) months in equal monthly installments each in the amount of principal and interest of $1,703.72 commencing April 1, 2011 with a ten-day grace period for all payments with a balloon payment of the then-unpaid principal balance due in twenty (20) years on March 1, 2031; and be it further

ORDERED that PNC Bank, National Association, respondent, based upon the confessed judgment which it obtained on the date of the filing of the Chapter 13 case in the amount of $405,949.47 shall be allowed as a general unsecured claim under the debtors' plan in the agreed and reduced amount of $75,164.65; and be it further

ORDERED that at such time as a discharge Order is entered pursuant to 11 U.S.C. § 1328(a) in this case, the lien held in favor of Respondent on the debtors' real property shall be void to the extent it exceeds the determined value of $309,725.35; and be it further

ORDERED that this Order shall supersede any previously or subsequently filed Proof of Claim by the respondent.

AGREED AND CONSENTED TO:

/s/ Shannon Kreshtool
Shannon Kreshtool, Esquire
Weinstock, Friedman & Friedman, P.A.
4 Reservoir Circle. Executive Center
Baltimore, MD 21208
Attorney for PNC Bank, National Association

/s/ Marc R. Kivitz
Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201
Attorney for debtors

**CONSENT CERTIFICATION**

I HEREBY CERTIFY That the terms of the copy of this Consent Order submitted to the Court are identical to those set forth in the original Consent Order, and the signatures represented by the /s/_____ on this copy have been authorized and reference the signatures of the consenting parties on the original Consent Order.

/s/ Marc R. Kivitz
Marc R. Kivitz

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard Vetter, Esquire
Assistant U.S. Trustee
6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

Timothy P. Branigan, Esquire
Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

PNC Bank, National Association
7235 Wisconsin Avenue
Bethesda, MD 20814

PNC Bank, National Association
249 Fifth Avenue
Pittsburgh, PA 15222

motions: 1berman PNC lien bifurcate Order consent 658,200 value

**END OF ORDER**

**Confirmed by Order August 10, 2011 Docket No. 52**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

IN RE: *
*
Edward H. Rosen * CASE NO.: 11-10512-PM
Stacy J. Berman * Chapter 13
* Filed 01/10/11
Debtors *
* * * * * * * * * * * * *

**SECOND AMENDED CHAPTER 13 PLAN**

/ /Original Plan /X/ Amended Plan / / Modified Plan

The Debtors propose the following Second Amended Chapter 13 plan and make the following declarations:

1. The future earnings of the Debtors are submitted to the supervision and control of the Trustee, and the Debtors will pay as follows (select only one):

   a. $ 00 per month for a term of sixty (60) months. OR

   b.$109.00 per month for two (2) month(s), totaling $218.00, and
   $405.00 per month for thirty-six (36) month(s), totaling $14,580.00, and
   $1,000.00 per month for twenty-two (22) month(s), totaling $22,000.00, and
   for a total term of sixty (60) months totaling $36,798.00. OR

2. From the payments received, the Trustee will make the disbursements described below:

   a. Allowed unsecured claims for domestic support obligations and Trustee's commissions.

   b. Administrative claims under 11 U.S.C. § 507(a)(2), including attorney's fee balance of **$2,500.00** (unless allowed for a different amount upon prior or subsequent objection) **payable in accordance with Appendix F) before any disbursement to any other creditor other than claims pursuant to 11 U.S.C. § 507(a)(1) to be paid under this plan by the trustee.**

   c. Claims payable under 11 U.S.C. § 1326(b)(3). Specify the monthly payment: **$0.00**.

   d. Other priority claims defined by 11 U.S.C. § 507(a)(3) – (10). The Debtor anticipates the following priority claims:
   **i. Internal Revenue Service, $499.09 (POC 1 for FUTA);**
   **ii. Internal Revenue Service 2010 Federal Form 1040 tax of $11,225.00 (of which $4,809.25 is shown on POC1 for returns not filed as of that date);**
   **iii. Montgomery County, MD tangible personal property taxes arising from L and P Rosen Enterprises, LLC, scheduled for $1,466.62.**
   **iv. DLLR, Division of Unemployment Insurance, unemployment insurance arising from L and P Rosen Enterprises, LLC, scheduled for $420.59**

   e. Concurrent with payments on non-administrative priority claims, the

Trustee will pay secured creditors as follows:

i. Until the plan is confirmed, adequate protection payments and/or personal property lease payments on the following claims will be paid directly by the Debtor; and, after confirmation of the plan, the claims will be treated as specified in 2.e.ii or 2.e.iii, below (designate the amount of the monthly payment to be made by the Debtor, and provide the redacted account number (last 4 digits only), if any, used by the claimant to identify the claim):

| Claimant | Redacted Acct. No. | Monthly Payment |
|---|---|---|
| **Wells Fargo Bank, N.A.** | **xxxxx67545** | **$2,912.05** |

ii. Pre-petition arrears on the following claims will be paid through equal monthly amounts under the plan while the Debtor maintains post-petition payments directly (designate the amount of anticipated arrears, and the amount of the monthly payment for arrears to be made under the plan):

| Claimant | Anticipated Arrears | Monthly Payment | No. of Mos. |
|---|---|---|---|
| **Wells Fargo Bank, N.A.** | **$0.00** | | |

iii. The following secured claims will be paid in full, as allowed, at the designated interest rates through equal monthly amounts under the plan: **not applicable**

| Claimant | Amount | % Rate | Monthly Payment | No. of Mos. |
|---|---|---|---|---|

iv. The following secured claims will be satisfied through surrender of the collateral securing the claims (describe the collateral); any allowed claims for deficiencies will be paid *pro rata* with general unsecured creditors; upon confirmation of the plan, the automatic stay is lifted, if not modified earlier, as to the collateral of the listed creditors: n**ot applicable.**

| Claimant | Amount | % Rate | Monthly Payment | No. of Mos. |
|---|---|---|---|---|

v. The following secured claims are not affected by this plan and will be paid outside of the plan directly by the Debtors:

**(A) The Indemnity Deed of Trust lien held by PNC Bank, N.A., against the debtors' principal residence at 9107 Brierly Road, Chevy Chase, MD 20815, shall be bifurcated and paid in the new principal amount of $309,725.35 at 5.25% in monthly installments of $1,703.72 pursuant to the terms of the Order dated February 24, 2011, and entered February 25, 2011 as Docket No. 24.and the unsecured debt of PNC Bank, N.A., shall be treated as provided in Section 2(f) of the Plan pursuant to the terms of the Order dated February 24, 2011, and entered February 25, 2011 as Dkt. No. 24.**

vi. If any secured claim not described in the previous paragraphs is filed and not disallowed, that claim shall be paid or otherwise dealt with outside of the plan directly by the Debtor, and it will not be discharged upon completion of the plan.

vii. In the event that the trustee is holding funds in excess of those needed to make the payments specified in the Plan for any month, the trustee may pay secured claims listed in paragraphs 2.e.ii and 2.e.iii amounts larger than those specified in such paragraphs.

f. After payment of priority and secured claims, the balance of funds will be paid *pro rata* on allowed general, unsecured claims. (If there is more than one class of unsecured claims, describe each class.)

3. The amount of each claim to be paid under the plan will be established by the creditor's proof of claim or superseding Court order. The Debtors anticipate filing the following motion(s) to value a claim or avoid a lien. (Indicate the asserted value of the secured claim for any motion to value collateral.):

**(A) The Indemnity Deed of Trust lien held by PNC Bank, N.A., against the debtors' principal residence at 9107 Brierly Road, Chevy Chase, MD 20815, shall be bifurcated and paid, and its unsecured debt treated, pursuant to the terms of the Order dated February 24, 2011, and entered February 25, 2011 as Docket No. 24.**

**(B) The Confessed Judgment lien held by PNC Bank, N.A., against the debtors' principal residence at 9107 Brierly Road, Chevy Chase, MD 20815, shall be voided and canceled in its entirety pursuant to the terms of the Order dated and entered February14, 2011, as Docket No. 20.**

4. Payments made by the Chapter 13 trustee on account of arrearages on pre-petition secured claims may be applied only to the portion of the clam pertaining to the pre-petition arrears, so that upon completion of all payments due under the Plan, the loan will be deemed current through the date of the filing of this case. For the purposes of the imposition of default interest and post-petition charges, the loan shall be deemed current as of the filing of this case.

5. Secured Creditors who are holding claim subject to cramdown will retain their liens until the earlier of the payment of the underlying debt determined under nonbankruptcy law, or discharge under § 1328; and if the case is dismissed or converted without completion of the plan, the lien shall also be retained by such holders to the extent recognized under applicable nonbankruptcy law.

6. The following executory contracts and/or unexpired leases are assumed (or rejected, so indicate); any unexpired lease with respect to personal property that has not previously been assumed during the case, and is not assumed in the plan, is deemed rejected and the stay of §§ 362 and/or 1301 is automatically terminated:

7. Title to the Debtors' property shall revest in the Debtors when the Debtors are granted a discharge pursuant to 11 U.S.C. § 1328, or upon dismissal of the case, or upon closing of the case.

8. Non-standard Provisions: **not applicable.**

Date: 04/04/11

/s/ Edward H. Rosen
Edward H. Rosen, Debtor

/s/ Marc R. Kivitz
Attorney for Debtors

/s/ Stacy J. Berman
Stacy J. Berman, Joint Debtor

Bkcy:1berman rosen Plan 04 04 11

F**. 1. Stripoff of <u>Wholly Unsecured</u> Judicial Lien.**
11 U.S.C. §**§ 506(a)** and (d) – Available in Chapters 11 and 13; **<u>Not</u>** available in Chapter 7

**RESIDENCE**

| | |
|---|---|
| $ 15,155.58 | 2nd Encumbrance (Judgment Lien) (Wholly Unsecured Judicial Lien) |
| $121,000.00 | Balance on 1st Mortgage or Deed of Trust or Judicial Lien) |
| $120,000.00 market value | |

**F. 2. (Differentiate (Flip) the Numbers so that there is SOME equity/value attributable to second lien.**

**RESIDENCE**

| | |
|---|---|
| $15,155.58 | 2nd Encumbrance (Judgment Lien) $1,000.00 Equity Attributable to Judicial Lien |
| $121,000.00 | market value |
| $120,000.00 | Balance on 1st Mortgage or Deed of Trust or Judicial Lien |

**RESULT: NO Cramdown of <u>Partially Secured</u> <u>*Security Interest*</u> Mortgage or Deed of Trust secured ONLY against RESIDENTIAL realty under** 11 U.S.C. §**§ 506(a)** and (d).

**BUT Under §§ 506(a) and (d) JUDGMENT LIEN CAN BE REDUCED TO $1,000.00 in Chapters 11 and 13, and a Plan can propose to repay the reduced principal plus interest with the remaining balance of the debt unsecured and dischargeable.**

**AND although §§ 506(a) and (d) are NIOT available in Chapter 7, see Section II. as to how the Judicial Lien CAN be affected in ALL Chapters under § 522(f)(1)(A) and (2).**

**<u>N.B. Effect of Conversion from Chapter 13</u>.** 11 U.S.C. § 1325(a)(5)(B)(i)(II) provides that a plan in order to be confirmed must provide that if the Chapter 13 case is dismissed or converted without completion of the plan that "such lien shall also be retained by such holder to the extent recognized by applicable non-bankruptcy law" and 11 U.S.C. § 348(f)(1)(C)(i) provides that with respect to a case converted from Chapter 13 that "the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable non-bankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and (ii) unless a pre-bankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable non-bankruptcy law."

## V. What the SCOTUS Decision Means for Lien Stripping in Chapter 7.

### 1. Chapter 7 Cannot Stripoff Wholly Unsecured Security Interest.

As discussed at Page 59 above, the Supreme Court in, *Bank of America, N.A. v. Caulkett*, __U.S. .__, 135 S.Ct. 1995, 2015 WL 2464049 (2015) held that a debtor in a Chapter 7 bankruptcy case may not void a junior mortgage lien under Section 506(d) when the debt owed on a senior lien exceeds the value of the collateral:

| | | |
|---|---|---|
| **$10,000.00** | **RESIDENCE** | |
| 2nd Mortgage or DOT! | ($10,000 wholly unsecured) | ! |
| ! | | ! |
| **$40,000.00** ! | | ! |
| 1st Mortgage or DOT! | ($1,000 undersecured) | ! |
| ! | | ! |
| **$39,000.00** ! | | ! |
| Market Value ! | | ! |
| ! | | ! |

Similarly, *Caulkett* relying upon *Dewsnup* held that Section 506(d) ***prohibits*** the cramdown reduction of the first mortgage lien from $40,000.00 down to the value of the collateral of $39,000.00 and does ***not*** permit the rendering of the $1,000.00 portion of the consensually granted mortgage of deed of trust to be unsecured.

### 2. 11 U.S.C. § 522(f)(1)(A) Impairment of Exemption by Judicial Liens.

A(i). Avoidance of judicial liens against either real or personal property held constitutional unless lien were obtained prior to November 6, 1978, the enactment date of the Bankruptcy Code, but judicial lien obtained during the "gap period" between the enactment date of the Code on November 6, 1978, and the effective date of the Code on October 1, 1979, constitutionally can be avoided. *Hoffman v. Internal Revenue Service (In re Hoffman),* 28 B.R. 503 (Bankr. D.Md. 1983)(Schneider, J.)(In cases consolidated for purposes of opinion, the Bankruptcy Court held that: (1) the exemption provision of the Bankruptcy Code could not constitutionally be applied so as to avoid a judicial lien created prior to effective date of the Bankruptcy Reform Act of 1978, but (2) gap period judicial liens perfected after enactment of the Bankruptcy Reform Act on November 6, 1978, and before its effective date on October 1, 1979, may be subjected to avoidance pursuant to such exemption provision.[8]

(ii) **Limitation on the amount of Exemption.**

(a) 11 U.S.C. § 522(o) (2005) provides that for purposes of exemption under 11 U.S.C. § 522(b)(3)(A) (2005) - State law and non-Title 11 federal law [formerly 11 U.S.C. § 522(b)(2)(B)] -- the value of a debtor's interest in (1) real or personal property used as a

[8] In *Esler v. Orix Credit Alliance (In re Esler),* 165 B.R. 583 (Bankr. D. Md. 1994) (Schneider, J.), tenant in common debtors owned $62,500.00 interest in real property with a $5,063.44 claimed exemption and could not stripdown Orix's judicial lien due to *Dewsnup v. Timm*, 502 U.S. 410 (1992)(prohibition of stripdown in Chapter 7, but could avoid judicial lien by the amount of the exemption with the balance of owed on the judicial lien surviving the closing of the case). *Esler*, 165 B.R. at 585-86.

residence, (2) a cooperative used as a residence, (3) a burial plot, or (4) real or personal property claimed as a homestead, shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditors and that the debtor could not exemption under subsection (b) if on such date the debtor had held the property so disposed of.

(b) 11 U.S.C. § 522(p)(1) provides that as a result of the election under 11 U.S.C. § 522(b)(3)(A), a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day [3 years 4 months] period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in (1) real or personal property used as a residence, (2) a cooperative used as a residence, (3) a burial plot, or (4) real or personal property claimed as a homestead; except this limitation does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of the 1215-day period) into the debtor's current principal residence if the debtor's previous and current residences are located in the same State.

(iii) Twelve-year period for enforcement of Judgment. If lien has not been enforced, it can expire and become unenforceable. *Blocher v. Worthington*, 10 Md. 1 (1856)("A mechanics lien law provided, that the *lien* for every debt for which a claim shall be filed as directed, "shall expire at the end of three years from the day" the claim was filed, "unless the same shall be revived by *scire facias* in the manner provided by law in other cases of judgments; in which case such lien shall continue" for another period of three years, and so from one such period to another, unless satisfied or extinguished by sheriff's sale or otherwise according to law. HELD: That under this law the *scire facias* must issue before the expiration of three years from filing the claim; the lien stands on the footing of a judgment, except that the limitation is *three years* instead of *twelve*, and when revived by *scire facias* the lien continues for three years longer instead of twelve.")

*See also*, *Stockett v. Howard*, 34 Md. 121, 126-27 (1871)("The judgment creditors, having suffered the term to expire before selling under their execution, have lost the liens given them by the Act of 1861, and are not entitled to the sum fixed upon as the value of the improvements upon the demised premises.")

In *Wells Fargo Equipment Finance v Asterbadi*, No. 15-2182 (4th Cir. 2016), CIT obtained a judgment against defendant in the Eastern District of Virginia. Under Virginia law, that judgment remained viable for 20 years. Roughly 10 years after the judgment had been entered, on August 27, 2003, CIT registered the judgment in the District of Maryland pursuant to 28 U.S.C. § 1963. Under Maryland law, made relevant by Federal Rule of Civil Procedure 69(a), judgments expire 12 years after entry. After CIT sold the judgment to Wells Fargo, Wells Fargo began collection efforts in April, 2015. The District Court concluded that the time limitation for enforcement of the judgment began with the date of its registration in Maryland, on August 27, 2003, and that therefore it was still enforceable against defendant. The Court held that the registration of the Virginia district court judgment in the District of Maryland at a time when the judgment was not time-barred by Virginia law functions as a new judgment in the District of Maryland, and Maryland's 12-year limitations period for enforcement on the judgment begins running from the date of registration in Maryland. Accordingly, the Fourth Circuit affirmed the judgment.

**B. Valuation of Realty for Judicial Lien Avoidance.**

1. **Valuation must be as of Petition Date**. *Prangley v. Cokinos,* 509 B.R. 822, 2014 WL 1814262 (D.Md. 2014). Chapter 7 debtor, Monica Cokinos, filed two motions to avoid two judicial liens that encumbered her residential property. Patrick Prangley, one of the Defendant/Creditors who held one of the liens, objected. After consolidating the two avoidance motions for hearing – the other motion being unopposed, the Bankruptcy Court allowed the avoidance of both liens in their entirety. Prangley appealed.

Facts: Debtor Cokinos called Paul D'Anna, an experienced residential appraiser but first-time expert witness who appraised the Property at $545,000 as of October 14, 2012, sixteen days after the Petition Date, using comparable properties that were sold *after* the Petition Date. Creditor Prangley called Jennifer Horn, an appraiser since 2001, also never previously testified as an expert witness, who appraised the Property at $625,000 as of the Petition Date. Both looked to size, location, and condition. D'Anna disagreed with Creditor's values because MRIS reports demonstrated sharp declines in more recent (post-petition) sales. Prangley objected to the MRIS reports because the sales dates therein postdated the Petition Date and his appraiser, Horn, responded that her valuations were preferable because they related back to the Petition Date.

Bankruptcy Court: overruled the objections, holding that the MRIS reports were not admitted to determine value, but rather to establish the basis for D'Anna's appraisal. found the parties' experts equally credible and valued Cokinos' property at the midpoint between their appraisals, even though Cokinos' appraisal did not express an opinion as to the property's value on the Petition Date, September 28, 2012

District Court: vacated and remanded with instructions holding that in the absence of evidence to show that the expert's valuation, which expresses an opinion as to the property's value sixteen days later, also fairly values the property as of the Petition Date, it is not relevant for the purposes of determining value on the Petition Date.

Rationale: Relevance is a two-step determination. *See* Fed.R.Evid. 401; *see also* Fed.R.Bankr.P. 9017 ("The Federal Rules of Evidence ... apply in cases under the [Bankruptcy] Code."); Fed.R.Evid. 1101(a)-(b), Fed.R.Evid. 401(a) looks to whether the evidence "has any tendency to make a fact more or less probable." The D'Anna Appraisal certainly has some tendency to make it more probable that the Property's fair market value *on October 14, 2012* was $545,000. Next, however, Fed.R.Evid. 401(b) requires a showing that the Property's value on October 14, 2012 "is of consequence in determining" the value on the Petition Date. *See* 11 U.S.C. § 522(a)(2).

Absent additional facts to provide a logical nexus, the value of the Property on October 14, 2012 does not help to establish the value of the Property on September 28, 2012. *See In re Sarno,* 463 B.R. 163, 167 (Bankr. D.Mass. 2011). There are many ways that the nexus could have been provided at the hearing. It might have consisted of evidence that real property value is unlikely to change between two dates that are only sixteen days apart. But this evidence is nowhere apparent from the record below. Not only did Cokinos fail to provide the nexus, but Prangley's expert also disputed the possibility that the value remained static for that sixteen-day period by testifying that market fluctuations produce quick changes in the real estate market. Absent this factual nexus, the Horn Appraisal provides the only expert evidence of the Property's value on the Petition Date.

Methodology: Once the bankruptcy court has determined the Property's value as of the Petition Date, it calculates the extent of avoidance under § 522(f)(2)(A). This is done by subtracting from the Property's value any exemptions and consensual liens (usually mortgages),

leaving the remainder "for the partial satisfaction of [the] judicial lien[s]." *E. Cambridge Savs. Bank v. Silveira (In re Silveira)*, 141 F.3d 34, 36 (1st Cir. 1998) Even though the remainder might be *de minimis*, it nevertheless may be significant because any remainder would allow a creditor, such as Prangley, to retain a secured claim against Cokinos and also may allow for post-petition recourse against the Property. *See* 11 U.S.C. §§ 522(c), 524.

Accepting *arguendo* the bankruptcy court's valuation of $585,000:

$585,000.00 value, then subtract the exemptions, which the parties agree are
$ 22,126.00
$562,874.00 in equity, then subtract two mortgage $562,138.69
$562,138.69 leaves $735.31 "for the partial satisfaction of judicial lien[s]."
$ 735.31 *In re Silveira*, 141 F.3d at 38

HELD: (1) the valuation of debtor's expert appraiser, which expressed an opinion as to the value of debtor's property 16 days after the petition date, was not relevant – "value" means fair market value as of the petition date, and no additional evidence had been provided.

(2) the bankruptcy court erred in avoiding the two judicial liens in their entirety, rather than avoiding only the portion of the liens that did, in fact, impair debtor's exemptions; and

(3) the bankruptcy court did not abuse its discretion when it consolidated for hearing debtor's unopposed and opposed motions.

2. **Valuation of the asset therefore becomes an issue**. Failing to provide a precise valuation of an asset claimed as exempt is not permissible. *In re Forti*, 224 B.R. 323 (Bankr. D. Md. 1998)(zero dollars claimed, although permissible, the exemption in that asset is limited to the exemption stated, namely, zero).

As to the sales, risk, and contingency costs, the Fourth Circuit has held that these costs are NOT to be considered in determining fair market value of a residence. *See, In re Balbus*, 933 F.2d 246 (4th Cir. 1991); *In re Coker*, 973 F.2d 258, 260 (4th Cir. 1992). As to the cost of repairs to reduce the value of the realty, reasonable estimates are admissible in evidence.

In *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the Supreme Court determined that the appropriate method of valuation for a debtor's property is the fair market value in light of the purpose of the valuation and the proposed use of the property -- the replacement value. Judge Derby in *Forti*, with respect to the cramdown of a lien against a motor vehicle, when presented with a market value, a third-party purchase value, and a liquidation value, declined to accept the liquidation value and accepted ***the third-party purchase value (the price at which the vehicle might be sold to a neighbor without the dealer's advertising costs and warranty expenses)***.

**Replacement value** in Chapters 7, 11, and 13 cases is the value of personal property securing an allowed claim and shall be determined as of the date of the filing of the petition without deduction for costs of sale or marketing. 11 U.S.C. § 506(a)(2). The term "replacement value" is defined as "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." *Balbus*, 933 F.2d at 255. Replacement value is the standard for determining the amount to which a secured claim may be reduced and should also be the basis for the valuation of assets on a debtor's Schedule A/B.

Value is to be judicially determined, *In re Hamlett*, 322 F.3d 342 (4th Cir. 2003), and although a realtor's market analysis or broker's price opinion is sufficient basis upon which to file a motion to determine the extent of the lien – and some debtor's counsel have consulted www.zillow.com, whereas others believe it to be inaccurate and/or unreliable, should the lienholder contest the valuation, a licensed appraiser's testimony would be required at any evidentiary hearing.

Issues have also arisen as to the balances owed on liens for purposes of determining the extent or equity or lack thereof. For example, a proof of claim filed by a first priority lienholder might include a post-petition, pre-confirmation expense for the preparation of the proof of claim and/or for review of a debtor's plan, which costs would not have been part of the lien as of the date of the filing of the petition.

3. 11 U.S.C. §§ 522(f)(1)(A) and (f)(2)(A) are inapplicable to consensual liens (security interests) and also inapplicable to statutory liens – such as condominium or homeowner association liens which arise under the Maryland Contract Lien Act. *See, e.g. In re Khan*, 504 B.R. 409 (Bankr. D.Md. 2014) (Mannes, J.).

4. Section 522(f)(1)(A) now also provides that judicial liens securing the repayment of a debt of a kind under Section 523(a)(5) -- for a domestic support obligation ("***DSO***"), changing the description of the debt from one for alimony, support, or maintenance -- may ***NOT*** be ***avoided*** as an impairment of any claimed or allowable exemption.

5. **Effect of Conversion from Chapter 13.** 11 U.S.C. § 1325(a)(5)(B)(i)(II) provides that a plan in order to be confirmed must provide that if the Chapter 13 case is dismissed or converted without completion of the plan that "such lien shall also be retained by such holder to the extent recognized by applicable non-bankruptcy law" and 11 U.S.C. § 348(f)(1)(C)(i) provides that with respect to a case converted from Chapter 13 that "the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable non-bankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and (ii) unless a pre-bankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable non-bankruptcy law."

Fact Pattern: Residential Realty: Baltimore County
Principal Residence Value: $125,000.00
Mortgage Balance: $75,000.00
Equity Before Judgment: $50,000.00
Judgment Lien: $100,000.00
Exemption: $10,000.00

Under 11 U.S.C. §§ 506(a), 506(d), and 1322(b)(2), $50,000.00 would remain secured, the judgment lien could be stripped and bifurcated between its $50,000.00 secured portion which would be paid through the plan as a secured claim and its $50,000.00 unsecured portion, but

upon conversion the lien would be reinstated to $100,000.00 less the amount that had been paid prior to conversion.

Under 11 U.S.C. § 522(f)(1)(A), the judgment lien would be avoided by the amount of the exemption, $10,000.00, and would remain secured only to the extent of $40,000.00, and if the case is subsequently converted the result does not appear to be altered:

| | |
|---|---|
| Amount of respondent's judicial lien | $100,000.00 |
| Other liens on the property: mortgage | 75,000.00 |
| Exemption | + 10,000.00 |
| Total | = $185,000.00 |
| Debtor's interest (fair market value) | - $125,000.00 |
| Extent to which lien impairs exemption | $ 60,000.00 |

| | |
|---|---|
| Amount of respondent's judicial lien | $100,000.00 |
| Extent to which lien impairs exemption | - 60,000.00 |
| Amount of respondent's lien remaining | $ 40,000.00 |

***Upon conversion, the debtor would fare better by lien avoidance to the extent of the impairment of exemption under § 522(f)(1)(A) than the debtor would fare by lien stripping under § 506(d).***

As a result of these provisions, a **lien avoidance** as an impairment of an exemption under 11 U.S.C. § **522(f)** achieved in a Chapter 13 case will **survive conversion** to Chapter 7 **but a lien stripping** under 11 U.S.C. §§ **506** and 1322(b)(2) (2009) **will not**.

**C. Avoidance of Confessed Judgment lien.** In the Rosen/Berman case (Pages 97 – 115, *supra*), because PNC Bank also held a Confessed Judgment lien – a judicial lien (in addition to the indemnity deed of trust security interest consensually granted), the Confessed Judgment lien ALSO was voided. The motion to avoid the Confessed Judgment lien challenged its validity under as wholly unsecured under 11 U.S.C. §.506; as preferentially obtained under (1 U.S.C. § 547; and as an impairment of the debtors' exemption under (11 U.S.C. § 522(f)(1)(A).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Edward H. Rosen | * | CASE NO.: 11-10512-PM |
| Stacy J. Berman | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |

* * * * * * * * * * * * *

| | |
|---|---|
| | * |
| Edward H. Rosen | * |
| Stacy J. Berman | * |
| 9107 Brierly Road | * |
| Chevy Chase, MD 20815 | * |
| | * |
| Debtors/Movants | * |
| | * |
| v. | * |
| | * |
| PNC BANK, NATIONAL ASSOCIATION | * |
| 249 Fifth Avenue | * |
| Pittsburgh, PA 15222 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |

* * * * * * * * * * * * *

**MOTION TO DETERMINE EXTENT OF CONFESSED JUDGMENT LIEN HELD BY PNC BANK, NATIONAL ASSOCIATION AND STATUS OF DEBT UNDER SECTION 506**

Edward H. Rosen, and Stacy J. Berman, debtors, by their attorney, Marc R. Kivitz, pursuant to 11 U.S.C. §§ 506(a), 522(f)(1)(A), and 547, and Rules 3012, 4003(d) and 9014 of the Federal Rules of Bankruptcy Procedure hereby institute this action against PNC Bank, National Association, respondent, for the determination of the secured status of the respondent's

Confessed Judgment against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815, and as grounds therefore respectfully represents that:

**Jurisdiction and Parties**

1. On January 10, 2011 (“the Petition Date”), Edward H. Rosen, and Stacy J. Berman ("debtors") filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 11-10512-PM (“the reorganization case”).

2. This Court has jurisdiction over this motion to determine secured status pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a), 522(f)(1)(A), and 547, and Rules 3012, 4003(d) and 9014 of the F.R.Bank.Proc.

3. PNC Bank, National Association ("PNC” or “respondent”) is a lending and financing institution and is engaged in business within the State of Maryland.

**Facts Common to All Counts**

4. At the time of the filing of the reorganization case, the debtors owned and still own and occupy the residential real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815 (“the real property”) pursuant to a Deed dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, at Liber 35661, folio 082 *et seq*. to Stacy J. Berman, and thereafter by Deed dated April 16, 2008, also recorded on May 14, 2008, among the Land Records of Montgomery County, at Liber 35661, folio 099 *et seq.* conveyed by Stacy J. Berman to Edward H. Rosen and Stacy J. Berman as tenants by entirety ("the Deed"). A copy of the Deed is attached hereto as Exhibit A and is incorporated herein by reference.

5. The market value of the real property is $629,000.00 as of November 30, 2010, as determined by a comparative market analysis performed by Ms. Gisela Goldberg, an associate

licensed real estate broker with Fairfax Realty Brokerage, which valuation is attached hereto as Exhibit B and is incorporated herein by reference.

6. Wells Fargo Bank, N.A., ("Wells Fargo") is the holder of the first lien against the real property pursuant to a Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, at Liber 35661, folio 089 *et seq*., in the original principal amount of $361,340.00 ("first Deed of Trust lien"). A copy of the recorded first Deed of Trust lien is attached hereto as Exhibit C and is incorporated herein by reference.

7. The first Deed of Trust lien secures the repayment of a Note dated April 15, 2008, in the original principal amount of $361,340.00 ("first Note"). A copy of the first Note is attached hereto as Exhibit D and is incorporated herein by reference.

8. The balance due on the first Deed of Trust lien held by Wells Fargo on the first Note, its account number 144705362, is $348,474.65 as shown on its monthly billing statement dated October 6, 2010, for the first lien ("first Monthly Billing Statement"). A copy of the first Monthly Billing Statement is attached hereto as Exhibit E and is incorporated herein by reference.

9. PNC as successor by merger to Mercantile Potomac Bank loaned to L & P Rosen Enterprises, LLC d/b/a Gymboree the original principal amount of $400,000.00 through a U.S. Small Business Administration Note dated July 9, 2007, which Note was amended on February 28, 2008; a Second Amendment of the Note was dated December 3, 2008; and a Third Amendment of the Note was dated April 24, 2009, effective as of February 28, 2009 (collectively "the PNC loan"). Copies of the Second Amended Note and Third Amended Note are attached hereto as Exhibits F and G, respectively, and are incorporated herein by reference.

10. The amount due on the PNC loan as of May 10, 2010, was $343,703.93 as set forth in a letter dated June 15, 2010, to the debtors from PNC's counsel. A copy of the demand letter is attached hereto as Exhibit H and is incorporated herein by reference.

11. The PNC loan was jointly personally guaranteed by both of the debtors and their guaranty was collateralized through the pledge of the real property through an Indemnity Deed of Trust dated April 15, 2008, recorded on May 14, 2008, among the Land Records of Montgomery County, MD at Liber 35661, folio 1045, *et seq.* ("the IDOT lien"). A copy of the IDOT is attached hereto as Exhibit I and is incorporated herein by reference. By separate motion, the debtors have sought a determination that the IDOT lien held by PNC is secured by the real property only to the extent that the value of the real property exceeds the first Deed of Trust lien held by Wells Fargo -- $280,525.35:

$629,000.00 value of real property collateral (Exhibit B)
- $348,474.65 balance due on first lien held by Wells Fargo (Exhibit E)
$280,525.35 value attributable to second lien held by PNC ("the IDOT lien")

12. On January 10, 2011, the same date as the Petition Date, PNC obtained a Confessed Judgment in the amount of $405,949.47, against both of the debtors and their defunct corporation, L & P Rosen Enterprises, LLC, in the case styled *PNC Bank, National Association v. L & P Rosen Enterprises, LLC, et al.,* in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V, which is a lien against the real property pursuant to Maryland Annotated Code, CJ § 11-402 ("the judgment lien"). A copy of the judgment lien is attached hereto as Exhibit J and incorporated herein by reference.

**Count I**
**Confessed Judgment Lien Wholly Unsecured (11 U.S.C. §.506)**

13. The debtors incorporate herein reference the allegations made in paragraphs 1 through 12, inclusive, as if fully set forth.

14. The debtors contend that the consensual first Deed of Trust lien held by Wells Fargo as described in paragraphs 6 through 8 above and the IDOT lien held by PNC as described in paragraphs 9 through 11 above fully encumber the market value of the real property rendering PNC's confessed judgment lien as described in paragraph 12 above wholly unsecured and voidable in its entirety pursuant to *Johnson v. Asset Management Group, LLC*, 226 B.R. 364 (D. Md. 1998).

15. The debtors contend that the debt secured by the IDOT is the same debt for which PNC obtained its confessed judgment.

16. The debtors' plan of reorganization will treat as a non-priority general unsecured debt the portion of PNC's debt under the IDOT and under the confessed judgment debt which exceed the amount due to Wells Fargo on the first consensual lien and the amount determined to be due to PNC under the IDOT lien.

WHEREFORE, Edward H. Rosen and Stacy J. Berman, debtors, respectfully request that this Honorable Court:

1. Determine the Confessed Judgment obtained by PNC Bank, National Association, respondent, in the amount of $405,949.47, against both of the debtors, in the case styled *PNC Bank, National Association v. L & P Rosen Enterprises, LLC, et al.*, in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V, to be Zero Dollars ($0.00) as a lien against the real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815; and

2. Determine the debt owed to PNC Bank, National Association, respondent, pursuant to the Confessed Judgment in the case styled *PNC Bank, National Association v. L & P Rosen*

*Enterprises, LLC, et al.,* in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V,to be unsecured in its entirety; and

3. Upon the entry of a discharge, avoid and cancel the lien of record held by PNC Bank, National Association, respondent, pursuant to the confessed judgment obtained in the case styled *PNC Bank, National Association v. L & P Rosen Enterprises, LLC, et al.,* in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V, against the debtors' real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815; and

4. Appoint the debtors as trustees in fact to act on behalf of PNC Bank, National Association, respondent, to execute any document necessary to release such second Deed of Trust lien upon the entry of the debtors' discharge; and

5. Award to the debtors such other and further relief as is just and proper.

**Count II**
**Confessed Judgment Lien Voidable Preferential Transfer**
**(11 U.S.C. § 547)**

17. The debtors incorporate herein reference the allegations made in paragraphs 1 through 16, inclusive, as if fully set forth.

18. The confessed judgment was obtained by the respondent within ninety (90) days from the date of the filing of the debtors' voluntary petition.

19. The confessed judgment constitutes a transfer of an interest in the debtors' real property from the debtors to the respondent.

20. The confessed judgment was obtained for and on account of an antecedent debt owed by the debtors to the respondent.

21. The debtors were insolvent at the time the confessed judgment was obtained against them which insolvency is presumed by 11 U.S.C. §547(f).

22. That by reason of the confessed judgment, the respondent would receive more than the respondent would have otherwise received had the confessed judgment not been obtained and

had the respondent received payment of its debt in accordance with the provisions of Chapter 7, 11 U.S.C., through a distribution pursuant to the Bankruptcy Code.

WHEREFORE, Edward H. Rosen and Stacy J. Berman, debtors, respectfully request that this Honorable Court:

1. Avoid and cancel in its entirety the judicial lien of the Confessed Judgment obtained by PNC Bank, National Association, respondent, in the amount of $405,949.47, against both of the debtors, in the case styled *PNC Bank, National Association v. L & P Rosen Enterprises, LLC, et al.*, in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V, as a preferential transfer of the debtors' interest in the real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815; and

2. Award to the debtors such other and further relief as is just and proper.

**Count III**
**Confessed Judgment Lien Impairs Exemption**
**(11 U.S.C. § 522(f)(1)(A)**

23. The debtors incorporate herein reference the allegations made in paragraphs 1 through 22, inclusive, as if fully set forth.

24. The debtors own and reside in the real property and have claimed their interest in the real property as exempt.

25. The amount of the exemption which the debtors could claim if there were no confessed judgment lien against the real property would be Twenty-one Thousand Six Hundred Twenty-five Dollars ($23,675.00) pursuant to 11 U.S.C. § 522(b)(3)(B) and Md. Ann. Code, CJ §§ 11-504(f)(1)(i)(2)(A) and (f)(1)(ii) which the debtors have in fact claimed under that statutory authority.

26. The debtors aver that the analysis of the amount of the respondent's confessed judgment judicial lien which the debtors may avoid pursuant to 11 U.S.C. §§ 522(f)(1)(A) and 522(f)(2) is as follows:

| | | |
|---|---|---|
| Amount of respondent's confessed judgment judicial lien: | | $ 405,949.47 |
| Other liens on the property: | | |
| Wells Fargo Bank, N.A. first lien (Exhibit E): | | $ 348,474.65 |
| PNC Bank, N.A. IDOT lien (Exhibit H): | | $ 343,703.93 |
| Exemption | + | $ 22,675.00 |
| Total: | | $1,121,803.05 |
| Debtors' interest -- fair market value (Exhibit B) | - | $ 629,000.00 |
| Extent to which lien impairs exemption: | | $ 492,803.05 |

| | | |
|---|---|---|
| Amount of respondent's judicial lien: | | $ 405,949.47 |
| Extent to which lien impairs exemption: | - | $ 492,803.05 |
| Amount of respondent's judicial lien: | | $ 0.00 |

*Canelos v. Mignini t/a TAM-D Construction, et al. (In re Canelos)*, 216 B.R. 159, 163-64 (Bankr.D.Md.1997).

27. The debtors contend that the judicial lien held by the respondent impairs entirely their claimed and allowable exemption of the real property..

WHEREFORE, Edward H. Rosen and Stacy J. Berman, debtors, respectfully request that this Honorable Court:

1. Avoid and cancel in its entirety the judicial lien of the Confessed Judgment obtained by PNC Bank, National Association, respondent, in the amount of $405,949.47, against both of the debtors, in the case styled *PNC Bank, National Association v. L & P Rosen Enterprises, LLC, et al.,* in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V, which impairs the debtors' claimed and allowable exemption of their interest in the real property and improvements known as 9107 Brierly Road, Chevy Chase, MD 20815; and

2. Award to the debtors such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtors/movants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of January, 2011, a copy of the foregoing motion to determine extent of secured lien was served electronically or by first class mail, postage prepaid, to:

Gerard Vetter, Esquire
Assistant U.S. Trustee
6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

Timothy P. Branigan, Esquire
Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

PNC Bank, National Association
7235 Wisconsin Avenue
Bethesda, MD 20814

PNC Bank, National Association
249 Fifth Avenue
Pittsburgh, PA 15222

PNC Bank, National Association
c/o Resident Agent
CSC Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Mary R. McCliggott, Esquire
Weinstock, Friedman & Friedman, P.A.
Executive Center
4 Reservoir Circle
Baltimore, MD 21208

Mr. Edward H. Rosen
Ms. Stacy J. Berman
9107 Brierly Road
Chevy Chase, MD 20815

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:1berman PNC Avoid CJ lien

**Entered: February 14, 2011 Docket No. 20**
**Dated: February 14, 2011**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

| | |
|---|---|
| IN RE: | * |
| | * |
| Edward H. Rosen | * CASE NO.: 11-10512-PM |
| Stacy J. Berman | * Chapter 13 |
| | * |
| Debtors | * |
| | * |
| * * * * * * * * * * * * * | |
| | * |
| Edward H. Rosen | * |
| Stacy J. Berman | * |
| 9107 Brierly Road | * |
| Chevy Chase, MD 20815 | * |
| | * |
| Debtors/Movants | * |
| | * |
| v. | * |
| | * |
| PNC BANK, NATIONAL ASSOCIATION | * |
| 222 Delaware Avenue | * |
| Wilmington, DE 19801 | * |
| SERVE ON: Resident Agent | * |
| CSC Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * * * * * * * * | |

**ORDER GRANTING MOTION TO AVOID LIEN**
**ON DEBTORS' PRINCIPAL RESIDENCE**

Having considered debtors' Motion to Avoid Lien obtained on January 10, 2011, by a Confessed Judgment in the case styled *PNC Bank, National Association v. L & P Rosen Enterprises, LLC, et al.*, in the Circuit Court of Maryland for Montgomery County, Case No. 342508-V; and any response filed thereto, and it appearing that proper notice has been given, pursuant to 11 U.S.C. § 506 and for the reasons set forth in the case of *Johnson v. Asset*

*Management Group, LLC*, 226 B.R. 364 (D. Md. 1998), it is by the United States Bankruptcy Court for the District of Maryland

ORDERED that the claim of Respondent be and is hereby deemed wholly unsecured,

ORDERED that at such time as a discharge Order is entered pursuant to 11 U.S.C. § 1328(a) in this case, the lien held in favor of Respondent on the debtors' real property described as 9107 Brierly Road, Chevy Chase, MD 20815, shall be void; and it is further

ORDERED that the claim of Respondent herein shall be allowed as a general unsecured claim under the debtors' plan.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard Vetter, Esquire
Assistant U.S. Trustee
6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

Timothy P. Branigan, Esquire
Chapter 13 Trustee
P. O. Box 1902
Laurel, MD 20725-1902

PNC Bank, National Association
7235 Wisconsin Avenue
Bethesda, MD 20814

Mary R. McCliggott, Esquire
Weinstock, Friedman & Friedman, P.A.
4 Reservoir Circle
Baltimore, MD 21208

Mr. Edward H. Rosen
Ms. Stacy J. Berman
9107 Brierly Road
Chevy Chase, MD 20815

Motions: 1berman avoid CJ lien Order

**END OF ORDER**

D. *Canelos v. Mignini t/a Tam-D Construction, et al.* ***WHAT YOU CAN DO*:**

In *Canelos v. Mignini t/a Tam-D Construction, et al. (In re Canelos)*, 216 B.R. 159, 163-64 (Bankr. D. Md. 1997)(Schneider, J.), the court addressed the issue of disputing a claimed exemption in the context of a lien avoidance action. The court acknowledged the Supreme Court's holding in *Taylor v. Freeland & Kronz, et al*, 503 U.S. 638 (1992)(unless a party in interest objects to an exemption within 30 days after the conclusion of the meeting of creditors, the property is exempt in the amount claimed. 11 U.S.C. § 522(1); Fed.R.Bankr.P. 4003(b). This is true even if the debtor had no colorable basis for claiming the exemption); *see also, Williams v. Peyton (In re Williams)*, 104 F.3d 688 (4th Cir. 1997). Judge Schneider supported the exemption, however, the court held that a creditor may contest an exemption for the first time in defense to a motion to avoid a lien. The exemption itself may not be attacked, but the amount of the exemption may be attacked for the purpose of limiting the amount of the lien to be avoided even after the time period for raising an objection to a claimed exemption has expired. Therefore, objections to exemptions may be a defense to a lien avoidance action under 11 U.S.C. § 522(f). *Id.*

The court in *Canelos* analyzed and applied 11 U.S.C. § 522(f)(2)(A) in determining the amount of a judgment that might be avoided as an impairment of an exemption.

| | |
|---|---|
| Amount of respondent's judicial lien | $15,155.58 |
| Other liens on the property: | |
| Lee Servicing Co. (first mortgage) | 56,600.00 |
| Signet Bank (second mortgage) | 14,500.00 |
| Exemption | + 5,500.00 |
| Total | = $91,755.58 |
| Debtor's interest (fair market value) | - $83,000.00 |
| Extent to which lien impairs exemption | $ 8,755.58 |

| | |
|---|---|
| Amount of respondent's judicial lien | $15,155.58 |
| Extent to which lien impairs exemption | - $ 8,755.58 |
| Amount of respondent's lien remaining | $ 6,400.00 |

The "debtor's interest" as used in the Section 522(f)(2)(A) formula is the fair market value of the real property. *Fitzgerald v. Davis (In re Fitzgerald)*, 729 F.3d 306 (4th Cir. 1984); *In re Abrahimzadeh*, 162 B.R. 676 (Bankr. D. N.J. 1994); *In re Gonzalez*, 149 B.R. 9 (Bankr. D. Mass. 1993), *rev'd on other grounds sub nom. Gonzalez v. First National Bank of Boston*, 191 B.R. 2 (D. Mass 1996). The debtors need not have equity in the property as a condition of avoiding a lien encumbering the property, so long as the lien impairs an exemption they had validly claimed in the property. *Hoffman v. Internal Revenue Service (In re Hoffman)*, 28 B.R. 503 (Bankr. D.Md. 1983); *In re Ford*, 3 B.R. 559 (Bankr. D.Md. 1980), *aff'd sub nom. Greenblatt v. Ford*, 638 F.2d 14 (4th Cir. 1981). *See 4 Collier on Bankruptcy* ¶ 522.11[3] (citing 140 Cong.Rec. at H10769 (daily ed. Oct. 4, 1994)). Lien avoidance under Section 522(f) has the effect of protecting the debtor's interest in property in the future. Once the lien is avoided, it does not reattach to the property; the property is forever free of the lien. Therefore, the future increase in value or equity of the property is not encumbered by the lien.

Applying the analysis in *Canelos* to the fact pattern above:

| | 2005 | 2018 |
|---|---|---|
| Amount of respondent's judicial lien | $ 40,000.00 | $ 40,000.00 |
| Liens on the property: first mortgage | 75,000.00 | 75,000.00 |
| Exemption | + 22,000.00 | 23,675.00[9] |
| Total | = $137,000.00 | = $138,675.00 |
| Debtor's interest (fair market value) | - $ 80,000.00 | - $ 80,000.00 |
| Extent to which lien impairs exemption | $ 57,000.00 | $ 58,675.00 |
| | | |
| Amount of respondent's judicial lien | $ 40,000.00 | $ 40,000.00 |
| Extent to which lien impairs exemption | - 57,000.00 | - 58,675.00 |
| Amount of respondent's lien remaining | $ 0.00 | $ 0.00 |

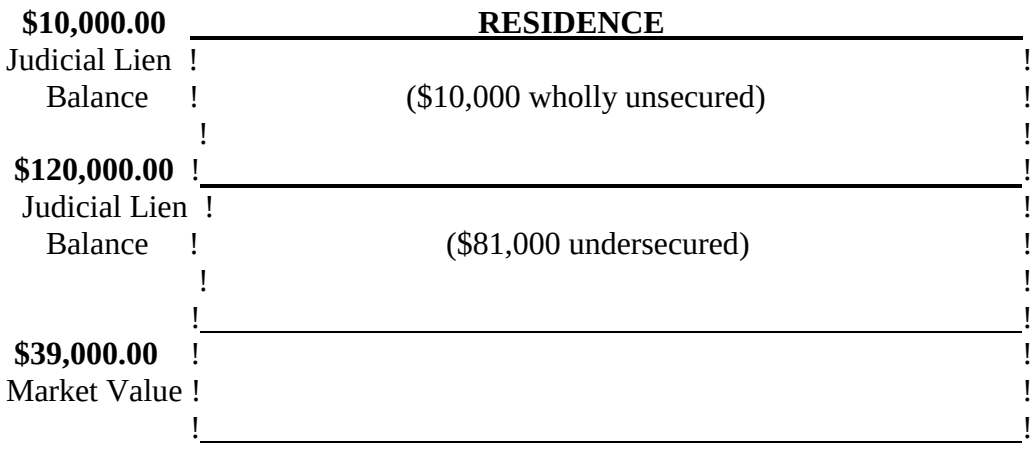
Revised Facts: If the judicial lien were in the amount of $10,000.00 but the real property had a market value of $100,000.00, then the result is as follows:

| | | |
|---|---|---|
| Amount of respondent's judicial lien | $ 10,000.00 | $ 10,000.00 |
| Liens on the property: first mortgage | 75,000.00 | 75,000.00 |
| Exemption | + 22,000.00 | 23,675.00 |
| Total | = $107,000.00 | = $108,675.00 |
| Debtor's interest (fair market value) | - $100,000.00 | - $100,000.00 |
| Extent to which lien impairs exemption | $ 7,000.00 | $ 8,675.00 |
| | | |
| Amount of respondent's judicial lien | $ 10,000.00 | $ 10,000.00 |
| Extent to which lien impairs exemption | - 7,000.00 | - 8,675.00 |
| Amount of respondent's lien remaining | $ 3,000.00 | $ 1,375.00 |

[9] ACM, CJ 11-504(f)(1)(ii) is $23,675.00 but is limited to one spouse and may violate 11 U.S.C. § 522(m) which is explicit in its provision that "[s]ubject to the limitation in subsection (b)[9], this section shall apply ***separately*** with respect to each debtor in a joint case." (emphasis added). See, *In re Nguyen*, 211 F.3d 105 (4th Cir. 2000)(car claimed under Va. homestead exemption permitted); *Cheeseman v. Nachman*, 656 F.2d 60, 63 (4th Cir. 1981)(liberal exemption construction allows both husband and wife to be householders). Exemption in ACM, CJ 11-504(f)(1)(i) is limited to personal property, however, the $6,000.00 exemption in ACM, CJ 11-504(b)(5) is not, so the maximum exemption might be $29,675.00 for one spouse, or $47,450.00 or perhaps $59,350.00 for two spouses filing a joint petition. "The test of whether a State statute conflicts with federal bankruptcy legislation and is therefore unconstitutional in light of the Supremacy Clause is set forth in the leading case of *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct.1704, 29 L.Ed.2d 233 (1971)." *Rubenstein, Trustee v. Sachs, et al. (In re Locarno),* 23 B.R. 622, 629 (Bankr. D.Md. 1982)(Schneider, J.).

E. (**Differentiating from the Facts on Page 135, above):**
**What if the nature of the lien were a wholly unsecured Judicial Lien?**




**As to the Second Judicial Lien, it can be entirely avoided – NOT because it is wholly unsecured – barred by *Caulkett* – but because the calculation under *Canelos* allows it:**

| | | |
|---|---|---|
| Amount of respondent's 2nd judicial lien | $ 10,000.00 | |
| Liens on the property: 1st judicial lien | $121,000.00 | |
| Exemption | + $ 23,675.00 | |
| Total | = $154,675.00 | |
| Debtor's interest (fair market value) | - $ 39,000.00 | |
| Extent to which lien impairs exemption | $115,675.00 | |
| | Amount of respondent's judicial lien | $ 10,000.00 |
| | Extent to which lien impairs exemption | - $115,675.00 |
| | Amount of respondent's lien remaining | $ 0.00 |

**AND As to the First Judicial Lien, it can be partially avoided:**

| | | |
|---|---|---|
| Amount of respondent's 1st judicial lien | $121,000.00 | |
| Liens on the property: 2nd judicial lien | 10,000.00 | |
| Exemption | + 23,675.00 | |
| Total | = $154,675.00 | |
| Debtor's interest (fair market value) | - $ 39,000.00 | |
| Extent to which lien impairs exemption | $115,675.00 | |
| | Amount of respondent's judicial lien | $121,000.00 |
| | Extent to which lien impairs exemption | - 115,675.00 |
| | Amount of respondent's lien remaining | $ 5,325.00 |

**F. Proceeding By Motion**. F.R.B.P. Rule 7001(2) requires a proceeding to determine the extent, priority, or validity of a lien be commenced by an adversary proceeding through the filing of a complaint if the issues go beyond the valuation of the property subject to the lien. However, a motion to value the collateral is sufficient under F.R.P.B. Rule 3012 if the proceeding is solely to strip down the lien. *Harmon v. U.S.*, 101 F.3d 574 (8th Cir. 1996); *Keene v. Charles*, 222 B.R. 511 (E. D. Va. 1998), *aff'd* 178 F.3d 1284 (4th Cir. 1999).

Although the following example was filed in a Chapter 7 case, it is applicable to Chapters 11 and 13:

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Thomas L. Cox | * | Case No.: 14-13943-RAG |
| | * | Chapter 7 |
| Debtor | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Thomas L. Cox<br>512 Woodbourne Avenue<br>Baltimore, MD 21212 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Allied Building Products Corp.<br>15 Union Avenue<br>East Rutherford, NJ 07073<br>SERVE ON: Resident Agent<br>CSC-Lawyers Incorporating Service Co.<br>7 St. Paul Street<br>Suite 1660<br>Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**MOTION TO AVOID JUDICIAL LIEN AS IMPAIRING EXEMPTION**

Thomas L. Cox, debtor/movant, by his attorney, Marc R. Kivitz, hereby files this motion against Allied Building Products Corp., respondent, for the avoidance and cancellation of a judicial lien against his residential real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212, which lien impairs the debtor's exemption, and as grounds therefore respectfully represents that:

1. On March 14, 2014, Thomas L. Cox ("debtor" or "movant") filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 14-13943-RAG.

2. This Court has jurisdiction over this motion to avoid judicial lien pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (K), (O), 11 U.S.C. §§ 522(f)(1)(A) and 522(f)(2), and Federal Rules of Bankruptcy Procedure 4003(d) and 9014.

3. On information and belief, the debtor alleges that Allied Building Products Corp., ("respondent"), is a corporation organized under the laws of the State of Maryland and does business within the State of Maryland.

4. At the time of the filing of the bankruptcy case, the debtor owned and still owns the real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212 ("the real property") pursuant to a Deed dated March 12, 2007, recorded on March 14, 2007, among the Land records of Baltimore City, MD at Liber 9160, folio 268 *et seq*., which the debtor owns as joint tenant with his daughter Benita N. McFarland. A copy of the recorded Deed is attached hereto as Exhibit A and is incorporated herein by reference.

5. The real property has a market value of Fifty Thousand Dollars ($50,000.00) as evidenced by the appraisal performed by Roger W. Hughes, an associate real estate broker with D.E. Hughes Realty Company on February 25, 2014, a copy of which is attached hereto as Exhibit B and incorporated herein by reference.

6. The real property is encumbered by a first lien held by Wells Fargo Bank, N.A, pursuant to a Deed of Trust dated April 7, 2007, recorded on May 4, 2007, among the Land records of Baltimore City, MD at Liber 9404, folio 704 *et seq.*, in the original amount of $35,570.00 with a balance of $32,794.57 as shown on the creditor's account statement, which is attached hereto as Exhibit C with the deed of trust and incorporated herein by reference.

7. The real property is encumbered by a second lien held by Wells Fargo Bank, N.A, pursuant to a Deed of Trust dated April 7, 2007 recorded on June 4, 2007 among the Land records of Baltimore City, MD at Liber 09521, folio 753 *et seq*. in the original amount of $31,400.00 with a balance of $34,422.21, which is attached hereto as Exhibit D with the deed of trust and incorporated herein by reference.

8. On or about March 25, 2013, Allied Building Products Corp., respondent, obtained a judgment against the debtor in the District Court of Maryland for Baltimore City in the case styled *Allied Building Products Corp., v. Thomas L. Cox*, Case No. 010100017212013 in the amount of $13,561.83, interest of $1,775.00, costs of $98.00, and post-judgment interest of $2,034.28, totaling $17.371.19 ("the judgment").

9. A judgment against one joint tenant in District Court of Baltimore City does not sever the joint tenancy and is not a lien on the judgment debtor's/tenant's interest until the joint tenancy is severed by an execution on the judgment. *Eastern Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 253 A.2d. 367 (1969); *Greenfeld v. Kim* 288 B.R. 431, 434 (Bankr. D. Md. 2002)(Keir, J.). On or about April 23, 2013, the respondent obtained a writ in execution of levy against the real property effectuating a judgment lien which is reflected in the Docket entries of the District Court ("judicial lien"), a copy of which is attached hereto as Exhibit E and incorporated herein by reference.

10. The debtor resides in the real property and has claimed his interest in it as exempt.

11. The amount of the exemption which the debtor could claim if there were no lien against the real property would be Twenty-two Thousand Nine Hundred Seventy-five Dollars ($22,975.00) pursuant to 11 U.S.C. § 522(b)(3)(B) and Md. Ann. Code, CJ § 11-504(b)(f)(1)(ii).

12. The amount of the exemption which the debtor has in fact claimed on Schedule C is Ten Thousand Dollars ($10,000.00) pursuant to 11 U.S.C. § 522(b)(3)(B) and Md. Ann. Code, CJ § 11-504(f)(1)(ii).

13. The debtor avers that the analysis of the amount of the respondent's judicial lien which the debtor may avoid pursuant to 11 U.S.C. §§ 522(f)(1)(A) and 522(f)(2) is as follows:

| | | |
|---|---|---|
| Amount of respondent's judicial lien | | $ 17.371.19 |
| Other liens on the property: | | |
| Wells Fargo Bank, N.A. first DOT lien | | $ 32,794.57 |
| Wells Fargo Bank, N.A. second DOT lien | | $ 34,422.21 |
| Exemption | + | $ 22,975.00 |
| Total | | $107,562.97 |

| | |
|---|---|
| Total (from previous page) | $107,562.97 |
| Debtor's interest (fair market value) | - $ 50,000.00 |
| Extent to which lien impairs exemption | $ 57.562.97 |
| | |
| Amount of respondent's judicial lien | $ 17.371.19 |
| Extent to which lien impairs exemption | - $ 57.562.97 |
| Amount of respondent's judicial lien | $ 0.00 |

*Canelos v. Mignini t/a TAM-D Construction, et al. (In re Canelos)*, 216 B.R. 159, 163-64 (Bankr.D.Md.1997).

14. The debtor contends that the judicial lien held by the respondent of $17.371.19 impairs entirely his claimed and his allowable exemption of $22,975.00 for the real property and, that respondent's judicial lien must be avoided and canceled in its entirety.

WHEREFORE, Thomas L. Cox, debtor/movant, respectfully requests that this Honorable Court:

1. Avoid entirely and cancel the judicial lien held by Allied Building Products Corp., respondent, arising from a judgment against the debtor in the District Court of Maryland for Baltimore City in the case styled *Allied Building Products Corp., v. Thomas L. Cox*, Case No. 010100017212013 as a lien which impairs the debtor's claimed and allowable exemption of his interest in the residential real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212; and

2. Award to the debtor/movant such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Email: mkivitz@aol.com
Attorney for debtor/movant

CERTIFICATE OF MAILING

‘

I HEREBY CERTIFY that on this 17th day of March, 2014, a copy of the foregoing motion to avoid judicial lien was served electronically or by first class mail, postage prepaid, to:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Richard Kremen, Esquire, Trustee
DLA Piper Rudnick Gray Cary US LLP
6225 Smith Avenue
Baltimore, MD 21209

Thomas L. Cox
512 Woodbourne Avenue
Baltimore, MD 21212

Allied Building Products Corp.
15 E. Union Avenue
East Rutherford, NJ 07073

Allied Building Products Corp.
Route 17 North
Box 511
East Rutherford, NJ

Richard M. Kind, Esquire
One Church Lane
Baltimore, MD 21208

Allied Building Products Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

/s/ Marc R. Kivitz
Marc R. Kivitz

motions 1cox thomas 522F Allied.DOC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Thomas L. Cox | * | Case No.: 14-13943-RAG |
| | * | Chapter 7 |
| Debtor | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Thomas L. Cox<br>512 Woodbourne Avenue<br>Baltimore, MD 21212 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Allied Building Products Corp.<br>15 Union Avenue<br>East Rutherford, NJ 07073<br>SERVE ON: Resident Agent<br>CSC-Lawyers Incorporating Service Co.<br>7 St. Paul Street<br>Suite 1660<br>Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**ORDER AVOIDING JUDICIAL LIEN AS IMPAIRING EXEMPTION**

Upon consideration of the motion of Thomas L. Cox, debtor/movant, against Allied Building Products Corp., respondent, to avoid and cancel a judicial lien arising from a judgment against the debtor in the District Court of Maryland for Baltimore City in the case styled *Allied Building Products Corp., v. Thomas L. Cox*, Case No. 010100017212013 as a lien which impairs the debtor's claimed and allowable exemption of his interest in the residential real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212, and good cause having been shown, it is there by the United States Bankruptcy Court for the District of Maryland

ORDERED that motion filed by Thomas L. Cox, debtor/movant, against Allied Building Products Corp., respondent, to avoid and cancel a judicial lien arising from a judgment against the debtor in the District Court of Maryland for Baltimore City in the case styled *Allied Building Products Corp., v. Thomas L. Cox*, Case No. 010100017212013, as a lien which impairs the debtor's claimed and allowable exemption of his interest in the residential real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212, be, and the same is hereby, granted; and be it further

ORDERED that the judicial lien arising from the case styled *Allied Building Products Corp., v. Thomas L. Cox*, in the District Court of Maryland for Baltimore City, Case No. 010100017212013, against the residential real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212, be, and the same are hereby, avoided, released, and canceled in its entirety.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Thomas L. Cox
512 Woodbourne Avenue
Baltimore, MD 21212

Allied Building Products Corp.
Route 17 North
Box 511
East Rutherford, NJ 07073

Allied Building Products Corp.
15 E. Union Avenue
East Rutherford, NJ 07073

Allied Building Products Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Allied Building Products Corp.
c/o Richard M. Kind, Esquire
One Church Lane
Baltimore, MD 21208

Richard Kremen, Esquire, Trustee
DLA Piper Rudnick Gray Cary US LLP
6225 Smith Avenue
Baltimore, MD 21209

motions 1cox Thomas 522f allied order

**END OF ORDER**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Thomas L. Cox | * | Case No.: 14-13943-RAG |
| | * | Chapter 7 |
| Debtor | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Thomas L. Cox | * | |
| 512 Woodbourne Avenue | * | |
| Baltimore, MD 21212 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Allied Building Products Corp. | * | |
| 15 Union Avenue | * | |
| East Rutherford, NJ 07073 | * | |
| SERVE ON: Resident Agent | * | |
| CSC-Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street | * | |
| Suite 1660 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**NOTICE OF DEBTOR'S MOTION TO AVOID LIEN PURSUANT TO 11 U.S.C. §522(f) AND HEARING THEREON**

A motion has been filed on behalf of the debtor. Thomas L. Cox, to avoid and cancel a judgment lien held by Allied Building Products Corp., respondent, arising from the case styled *Allied Building Products Corp.,v. Thomas L. Cox*, in the District Court of Maryland for Baltimore City, Case No. 010100017212013. as a lien which impairs the debtor's claimed and allowable exemption of his interest in the residential real property and improvements known as 512 Woodbourne Avenue, Baltimore, MD 21212. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion avoiding the lien, or if you want the court to consider your views on the motion, then by **April 17, 2014**, you or your lawyer must file a written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy of the response to:

Marc R. Kivitz, Esquire
Suite 1330
201 N. Charles Street
Baltimore, MD 21201

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Richard Kremen, Esquire, Chapter 7 trustee
DLA Piper Rudnick Gray Cary US LLP
6225 Smith Avenue
Baltimore, MD 21209

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

The hearing is scheduled for ***Friday, May 9, 2014, at 10:30 a.m. in Courtroom 1B***, United States Bankruptcy Court, 1st Floor, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

IF YOU OR YOUR LAWYER DO NOT FILE AND SERVE A TIMELY RESPONSE TO THE MOTION, THE COURT MAY FIND THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

03/17/14
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtor/movant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of March, 2014, copies of the notice and motion to avoid lien were served electronically or by first class mail, postage prepaid pursuant to Federal Bankruptcy Rule 7004 to:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Richard Kremen, Esquire
DLA Piper Rudnick Gray Cary US LLP
6225 Smith Avenue
Baltimore, MD 21209

Thomas L. Cox
512 Woodbourne Avenue
Baltimore, MD 21212

Allied Building Products Corp.
15 E. Union Avenue
East Rutherford, NJ 07073

Allied Building Products Corp.
Route 17 North
Box 511
East Rutherford, NJ

Allied Building Products Corp.
c/o Richard M. Kind, Esquire
One Church Lane
Baltimore, MD 21208

Allied Building Products Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions: 1cox Thomas 522f allied notice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Thomas L. Cox | * | Case No.: 14-13943-RAG |
| | * | Chapter 7 |
| Debtor | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Thomas L. Cox<br>512 Woodbourne Avenue<br>Baltimore, MD 21212 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Allied Building Products Corp.<br>15 Union Avenue<br>East Rutherford, NJ 07073<br>SERVE ON: Resident Agent<br>CSC-Lawyers Incorporating Service Co.<br>7 St. Paul Street<br>Suite 1660<br>Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**CERTIFICATE OF SERVICE OF**
**SUPPORT DOCUMENTS TO**
**MOTION TO AVOID JUDICIAL LIEN AS IMPAIRING EXEMPTION**

I HEREBY CERTIFY that on this 24th day of March, 2014, a copy of the foregoing support documents; Exhibits C & D to the motion to avoid judicial lien was served electronically or by first class mail, postage prepaid, to:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Richard Kremen, Esquire, Trustee
DLA Piper Rudnick Gray Cary US LLP
6225 Smith Avenue
Baltimore, MD 21209

Thomas L. Cox
512 Woodbourne Avenue
Baltimore, MD 21212

Allied Building Products Corp.
15 E. Union Avenue
East Rutherford, NJ 07073

Allied Building Products Corp.
Route 17 North
Box 511
East Rutherford, NJ

Richard M. Kind, Esquire
One Church Lane
Baltimore, MD 21208

Allied Building Products Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

/s/ Marc R. Kivitz

Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtor/movant

motions 1cox thomas 522F Allied.cert support

G. Avoidance of Judicial Lien – Garnishment – against Wages. **as Impairment of Exemption. 11 U.S.C. §§ 522(f)(1)(A) and (f)(2)(A) and (B).**

**1.** *In re Buzzell*, 56 B.R. 197 (Bankr. D. Md. 1986)(Schneider, J.) holds that "a debtor may either recover those funds (if otherwise exempt) by avoiding the lien under § 522(f)(1)(A), or by setting aside the preferential transfer under §§ 547 and 522(h)..." *Id.*, at 198. The debtor in *Buzzell* was entitled to receive his garnished wages back from the creditor during the preferential period, even though under the threshold of $600.00 established by 11 U.S.C. § 547(c)(8) for the recovery of a preferential transfer in a case filed by an individual whose debts are primarily consumer debts.

Two cases on this point from the Eastern District of Virginia reached similar conclusions of law prior to *Buzzell*. In *In re Mayo*, 6 C.B.C.2d 391 (D. E.D. Va. 1981), the Virginia District Court held that although the garnishment summons was served more than 90 days prior to the filing of the petition, the wages garnished were subject to the avoidance powers of section 547(b). The *Mayo* Court relied on a Maryland decision, *In re Cox*, 4 C.B.C.2d 456, 7 B.C.D. 733, 10 B.R. 268 (D. Md. 1981)(interpreting 11 U.S.C. Section 547(e)(3), which held:

> ...Inasmuch as section 547(e)(3) establishes that a transfer does not occur until the debtor has rights in the collateral, the transfer of wages garnished pursuant to a writ of garnishment cannot occur until the judgment debtor has earned the wages garnished. Thus, a payment on the garnishment attributable to wages earned by the debtor within ninety days of the filing of a bankruptcy petition is a preferential transfer to a judgment creditor."

*Mayo*, 6 C.B.C. at 394, quoting *Cox*, 4 C.B.C.2d at 459, 460, 7 B.C.D. at 735; *See also*, *In re Lewis*, 116 B.R. 54 (Bankr. D. Md. 1990).

In *Lewis v. State Employees Credit Union of Maryland, Inc. (In re Lewis)*, 116 B.R. 54 (Bankr. D. Md. 1990)(Derby, J.), wages earned from July 1 through July 29 were deemed payable on July 29 with August 11 garnishment of $282.50 determined to be preferential as occurring on 90th day prior to an October 27, 1988, Chapter 7 bankruptcy filing (and therefore with other subsequent garnishments totaling more than $600.00, the statutory threshold for recovery under 11 U.S.C. § 547(c)(7) was met), the transfer occurring when the garnished wages became payable on July 29, 116 B.R. 55. *In re Holyfield*, 50 B.R. 695 (Bankr. D. Md. 1985) holding that recovery of involuntary transfers under $600.00 threshold was undesirable. *But see*, *In re Buzzell*, 56 B.R. 197 (Bankr. D. Md. 1986)(Schneider, J.) holding that 11 U.S.C. §§ 522(f)(1), 522(g), 522(h), and 547(b) permitted the recovery of the transfers which were ***less*** than $600.00 as the avoidance of liens which impaired claimed and allowed exemptions.

In *In re Baum*, 5 C.B.C.2d 745 (Bankr. E.D. Va. 1981), the Virginia Bankruptcy Court held that where a trustee has abandoned the avoidance of the preferential transfer, the debtor may step into the trustee's shoes and avoid the transfer himself, as allowed by § 522(h). *Id.*, at 749.

The second issue raised in *Baum* relates to the creditor's liabilities once the debtor files his bankruptcy proceeding. Not only did the court find that the creditor must stop the collection

of garnished wages at once and turn over to the debtor or trustee any withheld wages, but failure to do so "is a violation of the automatic stay provision of section 362 and may be **punishable by contempt**." *Id*. at 750 (emphasis added).

The question of whether a garnishment of wages is preferential is determined not by the date of the service of summons on the garnishee, but by the date that the debtor acquired rights to the wages, i.e., when earned. The debtor can demand the return of wages collected within ninety (90) days prior to the filing of a Chapter 7 bankruptcy petition as preferential transfers. *In re Smoot*, 237 B.R. 875 (Bankr. D. Md. 1999)(Mannes, J.)(preference actions available to debtors using 11 U.S.C. § 547).

Section 11-504(e), when read in conjunction with Md.Annot Code CL § 15-601.1 provides a shield for a creditor who has properly garnished wages against a debtor's misuse of the exemptions. *Bank of America, N.A. v. Stine*, 252 B.R. 902 (Bankr. D. Md. 2000). 25% wages are not exemptible from execution in Maryland, but the Maryland Court has nonetheless found that wages are entirely exemptible in bankruptcy (*Bank of America v. Stine*, 379 Md. 76 (2003).

The Maryland Court of Appeals of Maryland on certification from the United States Court of Appeals for the Fourth Circuit, held that the Maryland exemption scheme, Md.Annot Code CJ § 11-504(e) and Md.Annot.Code CL § 15-601.1, does not prevent a debtor from avoiding a preferential transfer of garnished wages. *Bank of America, N.A. v. Stine*, Misc. No. 3, September Term, 2001 (December 30, 2003)(subsequently affirmed by the Fourth Circuit Court of Appeals, March, 2004).

Bankruptcy Rule 9011 mandates that in addition to the amount owed garnished within the 90-day pre-petition period, as listed above, the creditor can also be responsible for court costs, attorneys' fees and interest as of the date of the demand in the event that the garnished wages are not immediately refunded. Your demand letter for the return of the garnished wages can be attached as Exhibit A to the debtor's motion for contempt.

> You may consider this letter to be a demand upon * to refund to Mr. *through this office all sums that it obtained under its garnishment on or after *, 2016, pursuant to the provisions of 11 U.S.C. §§ 522(f)(1)(A), 522(g), 522(h), and 547(b) which enable the recovery of the transfers as decided by Judge James F. Schneider in the case of *In re Buzzell*, 56 B.R. 197 (Bankr. D. Md. 1986).

**2. Wage garnishments as Preferences under § 547(b)**: Special concerns exist.

Bankruptcy filing will enjoin further deductions but restrictions on avoidance and recovery of deducted funds result from limitation of exemption under ACM, CJ § 11-504(e), which provides that:

> Wage attachments. -- The exemptions in this section do not apply to wage attachments.

The question of whether a garnishment of wages is preferential is determined not by the date of the service of summons on the garnishee, but by the date that the debtor acquired rights to the wages, i.e., when earned.[10] In *In re Stine*, 360 F.3d 455 (4th Cir. 2004)(*per curiam*), the Fourth Circuit considered the order appealed from in *Bank of America, N.A. (USA) v. Stine*, 252 B.R. 902 (D. Md. 2000) and referred the case to the Court of Appeals of Maryland) under style of *In re Stine Kenneth W. Stine v. NationsBank*, No. 00-2352 (4th Cir. 2001); the Court of Appeals of Maryland filed its opinion under *Bank of America f/k/a NationsBank v. Kenneth W. Stine*, 379 Md. 76, 839 A.2d 727, 731 (2003), and responded in the affirmative to the question: "[w]hether a debtor in bankruptcy may claim as exempt from the bankruptcy estate, pursuant to Maryland Code, Annotated, Courts and Judicial Proceedings § 11-504 (1998) wages previously garnished by a judgment creditor pursuant to Maryland Code, Annotated, Commercial Law II, §§ 15-601 - 607 (2000), when the garnishment is avoided as a preferential transfer. 839 A.2d at 740. The Fourth Circuit accordingly affirmed the decision of the U.S. District Court on the opinion of the Court of Appeals of Maryland. ACM, CJ § 11-504(e) and ACM, CL § 15-601.1, do not prevent a debtor from avoiding a preferential transfer of garnished wages.

---

[10] *Henderson v. Esisto (In re Henderson)* (Bankr. D. Md. 1999)(Derby, J.) holds that the exclusion in CJ § 11-504(e) does not prevent the debtor from applying to wages earned but not paid as of the instant before the effect of the garnishment permitting the debtor to exempt the 25% of his wages which were paid to the garnishing creditor.

*Compare, In re Opher* (Bankr. D. Md. 1999) (Kier, J.), disagreeing with Judge Derby in *Henderson v. Esisto* and holding that the intent of the Maryland Legislature in enacting the exclusion was the opposite -- to exclude garnished wages from exempt property under State law.

*In re Cox*, 10 B.R. 268 (Bankr. D. Md. 1981) and *In re Krumpe*, 60 B.R. 575 (Bankr. D. Md. 1986) involved the recovery of garnished wages as preferential transfers with garnishments served *outside* the 90-day preference period. In both cases the court concluded that the transfer did not occur when the writ of garnishment was served on the employer but rather it could only occur after the wages had been earned and the debtor had acquired rights in the wages.

In *In re Mayo*, 6 C.B.C.2d 391 (D. E.D. Va. 1981), the Virginia District Court held that although the garnishment summons was served more than 90 days prior to the filing of the petition, the wages garnished were subject to the avoidance powers of section 547(b). The *Mayo* Court relied on a Maryland decision, *In re Cox*, 10 B.R. 268, 4 C.B.C.2d 456, 7 B.C.D. 733 (D. Md. 1981)(interpreting 11 U.S.C. § 547(e)(3), which held:

> ...Inasmuch as section 547(e)(3) establishes that a transfer does not occur until the debtor has rights in the collateral, the transfer of wages garnished pursuant to a writ of garnishment cannot occur until the judgment debtor has earned the wages garnished. Thus, a payment on the garnishment attributable to wages earned by the debtor within ninety days of the filing of a bankruptcy petition is a preferential transfer to a judgment creditor."

*Mayo*, 6 C.B.C.2d at 394, quoting *Cox*, 4 C.B.C.2d at 459, 460, 7 B.C.D. at 735.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| IN RE: | * |
| | * |
| Shumin Ching | * CASE NO.: 10-30083-DK |
| Wingshan Gloria Ching | * Chapter 13 |
| | * |
| Debtors | * |
| | * |
| * * * * * * | * * * * * * * |
| | * |
| Wingshan Gloria Ching | * |
| 4842 Bonnie View Court | * |
| Ellicott City, MD 21043 | * |
| | * |
| Plaintiff | * |
| | * |
| v. | * |
| | * |
| American Express Centurion Bank | * |
| 4315 South 2700 West | * |
| Salt Lake City, UT 84184 | * |
| SERVE ON: Resident Agent | * |
| The Corporation Trust, Inc. | * |
| 351 W. Camden Street | * |
| Baltimore, MD 21201 | * |
| | * |
| and | * |
| | * |
| Goldman & Goldman, P.A | * |
| Suite 2401 | * |
| 36 South Charles Street | * |
| Baltimore, MD 21201 | * |
| SERVE ON: Resident Agent | * |
| Brian A. Goldman, Esquire | * |
| 36 South Charles Street | * |
| 24th Floor, Suite 2401 | * |
| Baltimore, MD 21201 | * |
| | * |
| Defendants | * |
| | * |
| * * * * * * | * * * * * * * |

**COMPLAINT TO AVOID LIENS AS IMPAIRMENTS OF EXEMPTIONS**
**AND TO RECOVER PREFERENTIAL TRANSFERS**

Wingshan Gloria Ching, debtor/plaintiff, by her attorney, Marc R. Kivitz, hereby institutes this action American Express Centurion Bank, and against Goldman & Goldman, P.A., counsel to American Express Centurion Bank, defendants, for the avoidance of a judicial lien against the debtor's wages and bank account as an impairment of the debtor's exemption and to recover preferential transfers, and as grounds therefore respectfully represents that:

1. On August 31, 2010, Wingshan Gloria Ching ("debtor") along with her husband, Shumin Ching, filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 10-30083-DK ("the bankruptcy case").

2. This Court has jurisdiction over this motion which is a core proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (K), (O), 11 U.S.C. §§ 362(h), 522(f)(1)(A), 522(g), 522(h), 547(b) and Federal Rule of Bankruptcy Procedure 7001(1).

3 American Express Centurion Bank, defendant, ("Amex" or "defendant") is a lending institution incorporated under the laws of the United States and does business in the State of Maryland.

4. Goldman & Goldman, P.A. ("Goldman"), is a law firm incorporated under the laws of the State of Maryland, does business in the State of Maryland, and is counsel to Amex.

COUNT I
(Judicial Lien Impairs Exemption)

5. The debtor incorporates herein the allegations set forth in paragraphs 1 through 4 as if fully set forth herein.

6. On or about January 8, 2010, a judgment in the original amount of $12,000.00 was awarded in favor of Amex against the debtor in the case of *American Express Centurion Bank, v. Wingshan Ching*, in the Circuit Court of Maryland for Howard County, Case No. 13-C-09-080401-CN ("the judgment").

7. In execution on the judgment, Amex obtained a Writ of Garnishment against the debtor's wages and which attachment through the action of Goldman, acting as counsel to and agent of Amex, was laid in the hands of the debtor's employer, Maxim Healthcare Services, as garnishee. The Writ of Garnishment constitutes a judicial lien against the debtor's accrued wages pursuant to Maryland Annotated Code, CJ § 11-403 and Maryland Annotated Code, CL § 15-602.

8. Pursuant to the Writ of Garnishment, Maxim Healthcare Services on a weekly basis from withheld from the debtor's pre-petition wages during the 90-day period prior to the filing of the debtor's bankruptcy case the sum of $1,960.87, and pursuant to the judicial lien forwarded a portion of this sum to Amex through the offices of Goldman, Amex's counsel and agent, which attached sum is calculated as follows from the deductions made from the debtor's wages and from the reimbursement to the debtor of a portion of the funds withheld:

| Pay Period Ending Date | Amount Garnished |
|---|---|
| 06/16/10 | $ 169.01 |
| 06/23/10 | $ 152.63 |
| 06/30/10 | $ 145.23 |
| 07/07/10 | $ 161.62 |
| 07/14/10 | $ 205.89 |
| 07/21/10 | $ 170.16 |
| 07/28/10 | $ 175.09 |
| 08/04/10 | $ 168.70 |
| 08/11/10 | $ 155.14 |
| 08/18/10 | $ 154.19 |
| 08/25/10 | $ 143.16 |
| 09/01/10 | $ 160.05 |
| Total: | $1,960.87 |

Of the $1,960.87 withheld by Maxim Healthcare Services from the debtor's wages pursuant to the Writ of Garnishment, Maxim Healthcare Services remitted back to the debtor the sum of $781.24 which it had withheld but which it had not paid over to Amex through Goldman's office pursuant to the Writ of Garnishment as of the date of the filing of the bankruptcy case; accordingly, the resulting sum of $1,179.63 was garnished and paid to Amex through Goldman's office pursuant to the Writ of Garnishment ($1,960.87 - $781.24 = $1,179.63).

9. Also in execution on the judgment, Amex obtained a Writ of Attachment against the debtor's bank account at M&T Bank. Following M&T Bank's Confession of Assets of Property Other Than Wages, Amex on June 2, 2010, obtained from the Circuit Court of Maryland for Howard County an Order Granting Judgment Against Garnishee pursuant to which Order on June 9, 2010, within 90 days prior to the filing of the bankruptcy case, Amex through Goldman received from M&T Bank the additional sum of $237.55. The Writ of Attachment constitutes a judicial lien against the debtor's against the debtor's M&T Bank account number 17958925 pursuant to Maryland Annotated Code, CJ § 11-403.

10. The debtor has scheduled her interests in the accrued but unpaid garnished wages and the attached MT& Bank account as exempt property under 11 U.S.C. § 522(b)(3) and Maryland Annotated Code, CJ §§ 11-504(b)(5) and (f), and Maryland Annotated Code, CL § 15-601 *et seq*.

11. The judicial liens in favor of Amex against the debtor's wages and against the debtor's bank account impair the debtor's entitlement to the exemptions which she has claimed.

12. Demand for the return of the exempt wages and the exempt bank account was made upon Amex by and through its counsel and agent, Goldman, on September 3, 2010, a copy of which demand letter and facsimile confirmation are attached hereto as Exhibit A and incorporated herein by reference.

13. The debtor avers on information and belief that Maxim Healthcare Services disbursed to Goldman the sum of $1,179.63 from the wages garnished from her paycheck and that M&T Bank disbursed to Goldman the $237.55 attached from her bank account, totaling $1,147.18, but the debtor is not aware of whether Goldman and/or Amex are presently in possession of the garnished wages and/or the attached bank account funds.

14. Amex and Goldman have failed and refused to respond to the debtor's demand or to remit to the debtor her exempt assets. Amex and/or Goldman wrongfully and willfully continue to hold the debtor's exempt assets in violation of this Court's automatic stay. 11 U.S.C. § 362(a)(2)(5).

WHEREFORE, Wingshan Ching, debtor, respectfully requests that this Honorable Court:

a. Avoid the judicial lien in favor of American Express Centurion Bank, as impairing the debtor's exemption of her interest in her personal property consisting of accrued but unpaid wages and her bank account; and

b. Enter a judgment in favor of the debtor and against American Express Centurion Bank, and against Goldman & Goldman, P.A., for a sum not less than $1,147.18 for sums withheld from the debtor's pre-petition wages from June 16, 2010, through September 1, 2010, and attached from her bank account, and forwarded to American Express Centurion Bank, and/or Goldman & Goldman, P.A., pursuant to the judicial liens; and

c. Enter a judgment in favor of the debtor and against American Express Centurion Bank, and against Goldman & Goldman, P.A., for punitive damages for the wrongful holding of the debtor's exempt assets; and

d. Require American Express Centurion Bank, and/or Goldman & Goldman, P.A. to bear all costs of the avoidance and cancellation of the judicial lien; and

e. Award to the debtor her costs and expenses, including a reasonable attorney's fee, incurred in the prosecution of this matter; and

f. Award to the debtor such other and further relief as is just and proper.

Count II
(Avoidance of Preferential Transfer)

15. The debtor hereby incorporates the allegations set forth in Paragraphs 1 through 14 as if fully set forth herein.

16. The withholding of funds from the debtor's wages pursuant to the Writ of Garnishment and the attachment of the debtor’s M&T Bank account constitute involuntary transfers of interests in the debtor's personal property and have enabled Amex to improve its position *vis-a-vis* the debtor's other creditors.

17. The debtor avers that these transfers may be avoided by the debtor's Chapter 13 trustee and that the Chapter 13 trustee has not attempted to avoid these transfers.

18. The transfers of the debtor's interests in her property were:

a. To or for the benefit of Amex;

b. For or on account of an antecedent debt owed by the debtor before such transfers were made;

c. Made while the debtor was insolvent, in accordance with the presumption established by 11 U.S.C. § 547(f);

d. Made on or within ninety (90) days before the date of the filing of the debtor's Voluntary Petition; and

e. Enable Amex to receive more than it would otherwise have received in distribution from the debtor's estate in bankruptcy and to receive more than it would receive had the transfers not been made.

19. As this Court has pronounced in *In re Buzzell*, 56 B.R. 197 (Bankr. D. Md. 1986) (Schneider, J.), "a debtor may either recover those funds (if otherwise exempt) by avoiding the lien under section 522(f)(1), or by setting aside the preferential transfer under section 547 and 522(h)..." *Id*., at 198. The facts in the case at bar are similar to *Buzzell* in that the debtor's wages were garnished within the ninety (90) day preference period and the judicial lien may be avoided and the garnished wages recovered by the debtor. *In re Stine*, 360 F.3d 455 (4th Cir. 2004)(*per curiam*), affirming *Bank of America, N.A. (USA) v. Stine*, 252 B.R. 902 (D. Md. 2000) following the opinion of the Court of Appeals of Maryland in *Bank of America f/k/a NationsBank v. Kenneth W. Stine*, 379 Md. 76, 839 A.2d 727, 731 (2003), responding affirmatively to the question: "[w]hether a debtor in bankruptcy may claim as exempt from the bankruptcy estate, pursuant to Maryland Code, Annotated, Courts and Judicial Proceedings § 11-504 (1998) wages previously garnished by a judgment creditor pursuant to Maryland Code, Annotated, Commercial Law II, §§ 15-601 - 607 (2000), when the garnishment is avoided as a preferential transfer. 839 A.2d at 740 (ACM, CJ § 11-504(e) and ACM, CL § 15-601.1, do not prevent a debtor from avoiding a preferential transfer of garnished wages).

20. The date the transfer occurred has been held to be the date the debtor earned her wages, that is the date the debtor acquired rights to the wages. *In re Cox*, 10 B.R. 268 (Bankr. D.

Md. 1981) (interpreting 11 U.S.C. § 547(e)(3); *See also, In re Lewis*, 116 B.R. 54 (Bankr. D. Md. 1990). Therefore, the debtor's wages were subject to the avoidance powers of Section 547(b) for wages earned on and after June 4, 2010, even though the garnishment summons was served more than ninety (90) days prior to the filing of the petition.

21. Once a creditor has received notice of the debtor's bankruptcy, the creditor must stop collection of the garnished wages and return any withheld wages collected during the ninety (90) day preference period. Failure to do so "is a violation of the automatic stay provision of section 362 and may be punishable by contempt." *In re Baum*, 5 C.B.C.2d 745, 750 (Bankr. E.D. Va. 1981).

22. The debtor made demand on Amex and Goldman for the return of the preferential transfers and has informed Amex and Goldman of the provisions of the Bankruptcy Code, as well as relevant case law, supporting the return of the garnished wages and the attached bank account. Despite demand, Amex and Goldman have failed and refused to return the debtor's garnished wages and bank account funds.

WHEREFORE, Wingshan Ching, debtor, requests that this Honorable Court:

a. Avoid the judicial liens in favor of American Express Centurion Bank, against the debtor's wages and bank account as preferential transfers; and

b. Enter a judgment in favor of the debtor and against American Express Centurion Bank, and against Goldman & Goldman, P.A., for a sum not less than $1,147.18 for sums withheld from the debtor's pre-petition wages from June 16, 2010, through September 1, 2010, and attached from her bank account, and forwarded to American Express Centurion Bank, and/or Goldman & Goldman, P.A., pursuant to the judicial liens; and

c. Enter a judgment in favor of the debtor and against American Express Centurion Bank, and against Goldman & Goldman, P.A., for punitive damages for the wrongful holding of the debtor's exempt assets; and

d. Require American Express Centurion Bank, and/or Goldman & Goldman, P.A. to bear all costs of the avoidance and cancellation of the judicial lien; and

e. Award to the debtor her costs and expenses, including a reasonable attorney's fee, incurred in the prosecution of this matter; and

f. Award to the debtor such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for the debtor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of November, 2010, a copy of the foregoing motion was served electronically or by first class mail, postage prepaid, to

Wingshan Gloria Ching
4842 Bonnie View Court
Ellicott City, MD 21043

American Express Centurion Bank
4315 South 2700 West
Salt Lake City, UT 84184

American Express Centurion Bank
SERVE ON: Resident Agent
The Corporation Trust, Inc.
351 W. Camden Street
Baltimore, MD 21201

Brian A. Goldman, Esquire
Goldman & Goldman, P.A
Suite 2401
36 South Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard St..
Baltimore, MD 21201

Ellen W. Cosby, Trustee
300 E. Joppa Road
Towson, MD 21286-3020

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:wages ching

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
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| Shumin Ching | * | CASE NO.: 10-30083-DK |
| Wingshan Gloria Ching | * | Chapter 13 |
| | * | |
| Debtors | * | |
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| * * * * * * | * * * * * * * | |
| | * | |
| Wingshan Gloria Ching | * | |
| 4842 Bonnie View Court | * | |
| Ellicott City, MD 21043 | * | |
| | * | |
| Plaintiff | * | |
| | * | |
| v. | * | |
| | * | |
| American Express Centurion Bank | * | |
| 4315 South 2700 West | * | |
| Salt Lake City, UT 84184 | * | |
| SERVE ON: Resident Agent | * | |
| The Corporation Trust, Inc. | * | |
| 351 W. Camden Street | * | |
| Baltimore, MD 21201 | * | |
| | * | |
| and | * | |
| | * | |
| Goldman & Goldman, P.A | * | |
| Suite 2401 | * | |
| 36 South Charles Street | * | |
| Baltimore, MD 21201 | * | |
| SERVE ON: Resident Agent | * | |
| Brian A. Goldman, Esquire | * | |
| 36 South Charles Street | * | |
| 24th Floor, Suite 2401 | * | |
| Baltimore, MD 21201 | * | |
| | * | |
| Defendants | * | |
| | * | |
| * * * * * * | * * * * * * * | |

**ORDER AVOIDING LIENS AS IMPAIRMENTS**
**OF EXEMPTIONS AND AS PREFERENTIAL TRANSFERS**

 

Upon consideration of the complaint to avoid judicial liens filed by Wingshan Ching, debtor, and it appearing that the judicial liens obtained against the debtor's wages and the debtor's M&T Bank account in favor of American Express Centurion Bank, under a Writ of Garnishment and a Writ of Attachment impair the debtor's exemption of her accrued, but unpaid, wages and of her bank account; and it further appearing that the withholding of the debtor's wages pursuant to the Writ of Garnishment and of the funds from her bank account pursuant to a Writ of Attachment constitute involuntary transfers and said transfers occurred within ninety (90) days from the date of the filing of the debtor's bankruptcy case, and the Court finding that the refusal of American Express Centurion Bank, and its counsel, Goldman & Goldman, P.A., to remit to the debtor the garnished wages and the bank account funds in the total amount of $1,147.18 from June 4, 2010, through September 1, 2010, is a wrongful and willful violation of the automatic stay; it is therefore by the United States Bankruptcy Court for the District of Maryland

ORDERED that the Writ of Garnishment and the Writ of Attachment obtained by American Express Centurion Bank,, in the case of *American Express Centurion Bank, v. Wingshan Ching*, in the Circuit Court of Maryland for Howard County, Case No. 13-C-09-080401-CN, be, and the same are hereby, avoided and canceled; and be it further

ORDERED that American Express Centurion Bank, and/or Goldman & Goldman, P.A., be, and they are hereby, required within five (5) days from the date of the entry of this Order to turn over to Wingshan Ching, debtor, all money which it has been received from the debtor's wages and the debtor's M&T Bank account from June 4, 2010, through September 1, 2010, that is within 90 days prior to August 31, 2010, in an amount not less than $1,147.18 and to release at its own cost the Writ of Garnishment and the Writ of Attachment; and be it further

ORDERED that American Express Centurion Bank, and Goldman & Goldman, P.A., be, and are hereby, determined to be in violation of the automatic stay as mandated by 11 U.S.C. Section 362(a) by the continuing withholding of the debtor's assets and failure to remit

 

subsequent to the filing of the debtor's voluntary petition and subsequent to demand having been made upon them for the return of the debtor's property; and be it further

ORDERED that American Express Centurion Bank, and Goldman & Goldman, P.A., be, and are hereby, required within five (5) days from the date of this Order to pay to Wingshan Ching, debtor, her costs and expenses, including a reasonable attorney's fee, incurred in the prosecution of this matter in the amount set forth in the upper left corner of this Order; and be it further

ORDERED that American Express Centurion Bank, and Goldman & Goldman, P.A., be, and are hereby, required within five (5) days from the date of this Order to pay to Wingshan Ching, debtor, punitive damages in the amount of set forth in the upper left corner of this Order for the defendants' unjustified holding of the debtor's property subsequent to the debtor's demand for its return and subsequent to the filing of the debtor's voluntary petition.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assist ant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
300 E. Joppa Road
Towson, MD 21286-3020

Shumin Ching
Wingshan Gloria Ching
4842 Bonnie View Court
Ellicott City, MD 21043

American Express Centurion Bank
4315 South 2700 West
Salt Lake City, UT 84184

 

American Express Centurion Bank
SERVE ON: Resident Agent
The Corporation Trust, Inc.
351 W. Camden Street
Baltimore, MD 21201

Brian A. Goldman, Esquire
Goldman & Goldman, P.A
Suite 2401
36 South Charles Street
Baltimore, MD 21201

motions:wages ching

**END OF ORDER**

 

H. **Avoidance and cancellation of a non-possessory, non-purchase money security interest** pursuant to 11 U.S.C. § 522(f)(1)(B) secured by certain personal property such as household furnishings under § (B)(i); implements and professional books under § (B)(ii), or professionally prescribed health aids under § (B)(iii).

A. Constitutionality. Avoidance of security interest consensually granted against personal property held constitutional unless lien were granted prior to November 6, 1978, the enactment date of the Bankruptcy Code; but security interests granted in the "gap period" between the enactment date of the Code on November 6, 1978, and the effective date of the Code on October 1, 1979, constitutionally can be avoided. *Coleman v. American Finance Corp., (In re Coleman),* 10 B.R. 772, 777 (Bankr. D.Md. 1981)(Lebowitz, J.)(In cases consolidated for purposes of opinion, the Bankruptcy Court held that: (1) the exemption provision of the Bankruptcy Code could not constitutionally be applied so as to avoid security interest created prior to effective date of the Bankruptcy Reform Act of 1978, but (2) gap period security interests, acquired after enactment of the Bankruptcy Reform Act and before its effective date, may be subjected to avoidance pursuant to such exemption provision. ply retroactively to nonpossessory, nonpurchase-money security interests in existence prior to the October 1, 1979 effective date of the Code.

**Facts: Debtor borrows money and grants to the lender a security interest lien against personal property assets which the debtor already owns – the debtor did NOT use the lender's funds to purchase the collateral, and of which personal property the debtor retains possession.**

The term "household goods" for purposes of the avoidance of non-possessory, non-purchase money liens under 11 U.S.C. § 522(f)(1)(B) has been defined as (i) clothing, (ii) furniture, (iii) appliances, (iv) 1 radio, (v) 1 television, (vi) 1 VCR, (vii) linens, (viii) china, (ix) crockery, (x) kitchenware, (xi) educational materials and equipment, (xii) medical equipment, (xiii) furniture used exclusively by minors, elderly or dependents, (xiv) personal effects of minor children and wedding rings, and (xv) 1 personal computer. 11 U.S.C. § 522(f)(4)(A)(i) through (xv) (2005). A non-possessory non-purchase money security interest and lien may only be avoided against these items – so if the debtor pledged two televisions, one of them will remain collateralized.

11 U.S.C. § 522(f)(4)(B) provides that "household goods" EXCLUDES, and therefore liens can NOT be avoided under this section against (i) works of art, (ii) electronic equipment with a fair market value of more than $500 in value except 1 television, 1 radio, and 1 VCR, (iii) antiques with a fair market value of more than $500 in value, (iv) jewelry with a fair market value of more than $500 in value, and (v) computer (except as otherwise provided in this section), motor vehicle, boat, motorized recreational device, or aircraft. 11 U.S.C. § 522(f)(4)(B)(i) through (v) (2005).

**Practice Pointer.** Review the multi-page 11" x 14" security agreement to determine if there is a check mark or "X" in the box: __/X/__.

that pledges some asset as collateral. If the security agreement does not pledge an asset as collateral – perhaps it is not properly executed, and the creditor files a proof of claim alleging a secured debt, then file an objection to the claim. See Pages 65 - 74 above.

If the asset pledged is a motor vehicle, and the security interest lien is properly perfected by a notation of the secured creditor on the title to the vehicle, then that security interest lien may NOT be avoided under § 522(f)(1)(B) because motor vehicles are NOT listed among the

 

collateral against which such liens may be avoided, may NOT be avoided under § 522(f)(1)(A) because the lien is NOT a judicial lien, BUT CAN BE AVOIDED AND CANELED under 11 U.S.C. §§ 506(a) and (d) – see Pages 24 – 36, above.

11 U.S.C. § 522(f)(1)(B) is NOT APPLICABLE to liens against motor vehicles. This avoidance provision is applicable to other personal property assets, primarily, household goods and furnishings.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Stephanie Ann Ivey | * | Case No.: 10-30069-DK |
| | * | Chapter 13 |
| Debtor | * | |
| | * | |
| * * * * * * * | * | * * * * * * * |
| | * | |
| Stephanie Ann Ivey<br>927 Argonne Drive<br>Baltimore, MD 21218 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Lendmark Financial Services, Inc.<br>7620 Belair Road<br>Baltimore, MD 21236<br>SERVE ON: Resident Agent<br>The Corporation Trust, Inc.<br>351 W. Camden Street<br>Baltimore, MD 21201 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * * | * | * * * * * * * |

**MOTION FOR AVOIDANCE OF NON-POSSESSORY NON-PURCHASE MONEY LIEN HELD BY LENDMARK FINANCIAL SERVICES, INC.**

Stephanie Ann Ivey, debtor, by her attorney, Marc R. Kivitz, hereby institutes this action Lendmark Financial Services, Inc., respondent, for the avoidance of a non-possessory non-purchase money lien against her household goods and respectfully represents that:

1. On August 31, 2010, Stephanie Ann Ivey ("debtor" ), filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 10-30069-DK.

2. This Court has jurisdiction over this motion to Avoid non-possessory, non-purchase money lien pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (K), (O), 11 U.S.C. § 522(f)(2)(A) and Federal Rules of Bankruptcy Procedure 4003(d) and 9014.

3. Lendmark Financial Services, Inc., respondent ("Lendmark" or "respondent") is a lending institution doing business in the State of Maryland.

 

4. On or about February 17, 2008, the debtor on account no. xxxx-017383-6 borrowed from the respondent the sum of $2,705.80 at an annual percentage interest rate of 25.295% and agreed to repay the sum of $4,843.80. Of the sum borrowed, the debtor avers that $2,560.58 was used to repay in full a then-existing obligation to the respondent. As security for this debt, Lendmark insisted upon and the debtor executed a Security Agreement granting to the respondent a security interest in and to the debtor's consumer goods which were not specifically identified as household goods, appliances, or furniture, which are held by the debtor for her personal and household use. A copy of the contract and security agreement are attached hereto as Exhibit A and are incorporated herein by reference.

5. The money which the debtor borrowed from the respondent formed no part of any of the purchase money for any of the assets pledged as collateral to the respondent in the Security Agreement executed by the debtor.

6. The debtor has retained possession of all of the assets pledged as collateral to the respondent.

7. The debtor has claimed her consumer household goods, appliances, and furnishings, which were pledged as collateral to the respondent as exempt in the amount of $4,640.00 pursuant to 11 U.S.C. §§ 522(b) and Maryland Annotated Code, CJ §§ 11-504(b)(4) and (f).

8. The amount of the lien owed to the respondent is scheduled at $2,942.14. No other liens exist against these same assets to the debtor's knowledge. The amount of the exemption which the debtor could claim if there were no liens of these assets would be $11,000.00.

9. The lien in favor of the respondent impairs the exemption to which the debtor is entitled.

WHEREFORE, Stephanie Ann Ivey, debtor, respectfully requests that this Honorable Court:

1. Avoid and cancel the security interest in favor of Lendmark Financial Services, Inc., against the debtor's consumer household goods, appliances, and furniture; and

2. Award to the debtor such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for Stephanie Ann Ivey, debtor/movant

 

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of September, 2010, copies of the notice and motion to avoid lien were served pursuant to Federal Bankruptcy Rule 7004 by first class mail, postage prepaid upon:

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
300 E. Joppa Road
Towson, MD 21286-3020

Lendmark Financial Services, Inc.
Fradkin & Weber, P.A.
200 East Joppa Road, Suite 301
Towson, MD 21286

Lendmark Financial Services, Inc.
The Corporation Trust, Inc., Res. Agent
351 W. Camden Street
Baltimore, MD 21201

Stephanie Ann Ivey
927 Argonne Avenue
Baltimore, MD 21218

Lendmark Financial Services, Inc.
7620 Belair Road
Baltimore, MD 21236

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:1ivey Lendmark

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

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|---|---|---|
| IN RE: | * | |
| | * | |
| Stephanie Ann Ivey | * | Case No.: 10-30069-DK |
| | * | Chapter 13 |
| Debtor | * | |
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| | * | |
| Stephanie Ann Ivey | * | |
| 927 Argonne Drive | * | |
| Baltimore, MD 21218 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Lendmark Financial Services, Inc. | * | |
| 7620 Belair Road | * | |
| Baltimore, MD 21236 | * | |
| SERVE ON: Resident Agent | * | |
| The Corporation Trust, Inc. | * | |
| 351 W. Camden Street | * | |
| Baltimore, MD 21201 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**ORDER AVOIDING NON-POSSESSORY, NON-PURCHASE MONEY LIEN HELD BY LENDMARK FINANCIAL SERVICES, INC.**

Upon consideration of the motion of Stephanie Ann Ivey, debtor, to avoid a non-possessory, non-purchase money lien in favor of Lendmark Financial Services, Inc., respondent, against her consumer household goods, appliances and furniture, and it appearing that the lien held by the respondent impairs the debtor's exemption in the collateral, it is therefore by the United States Bankruptcy Court for the District of Maryland

ORDERED that the non-possessory, non-purchase money lien in favor of Lendmark Financial Services, Inc., respondent, against the consumer household goods, appliances, and

 

furniture owned by Stephanie Ann Ivey, debtor, be, and the same is hereby, avoided, released, and canceled; and be it further

ORDERED that Lendmark Financial Services, Inc., be, and it is hereby, required to release its lien against the household goods, appliances, and furniture, owned by the debtor, Stephanie Ann Ivey, within five (5) days from the date of this Order and shall bear all costs for the release of said lien and security interest.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Stephanie Ann Ivey
927 Argonne Avenue
Baltimore, MD 21218

Lendmark Financial Services, Inc.
Fradkin & Weber, P.A.
200 East Joppa Road, Suite 301
Towson, MD 21286

Lendmark Financial Services, Inc.
7620 Belair Road
Baltimore, MD 21236

Lendmark Financial Services, Inc.
The Corporation Trust, Inc., Res. Agent
351 W. Camden Street
Baltimore, MD 21201

Ms. Ellen W. Cosby, Chapter 13 Trustee
300 E. Joppa Road
Towson, MD 21286-3020

motions:1ivey LENDMARK order

**END OF ORDER**

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Stephanie Ann Ivey | * | Case No.: 10-30069-DK |
| | * | Chapter 13 |
| Debtor | * | |
| | * | |
| * * * * * * | * * * * * * * | |
| | * | |
| Stephanie Ann Ivey | * | |
| 927 Argonne Drive | * | |
| Baltimore, MD 21218 | * | |
| | * | |
| Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Lendmark Financial Services, Inc. | * | |
| 7620 Belair Road | * | |
| Baltimore, MD 21236 | * | |
| SERVE ON: Resident Agent | * | |
| The Corporation Trust, Inc. | * | |
| 351 W. Camden Street | * | |
| Baltimore, MD 21201 | * | |
| | * | |
| Respondent | * | |
| | * | |
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**NOTICE OF DEBTOR'S MOTION TO AVOID LIEN PURSUANT TO 11 U.S.C. §522(f) AND HEARING THEREON**

A motion has been filed on behalf of Stephanie Ann Ivey, debtor, to avoid a lien held by Lendmark Financial Services, Inc. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion avoiding the lien, or if you want the court to consider your views on the motion, then by **October 4, 2010**, you or your lawyer must file a written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy of the response to:

Marc R. Kivitz, Esquire
Suite 1330
201 N. Charles Street
Baltimore, MD 21201

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

 

The hearing is scheduled for **Monday, October 25, 2010, at 2:30 p.m. in Courtroom 1B**, United States Bankruptcy Court, First Floor, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

IF YOU OR YOUR LAWYER DO NOT FILE AND SERVE A TIMELY RESPONSE TO THE MOTION, THE COURT MAY FIND THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

09/01/10
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for
Stephanie Ann Ivey, debtor/movant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of September, 2010, copies of the notice and motion to avoid lien were served pursuant to Federal Bankruptcy Rule 7004 by first class mail, postage prepaid upon:

Gerard R. Vetter, Esquire
Assistant U.S. Trustee
Suite 2650, 101 W. Lombard Street
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
300 E. Joppa Road
Towson, MD 21286-3020

Lendmark Financial Services, Inc.
Fradkin & Weber, P.A.
200 East Joppa Road, Suite 301
Towson, MD 21286

Lendmark Financial Services, Inc.
The Corporation Trust, Inc., Res. Agent
351 W. Camden Street
Baltimore, MD 21201

Stephanie Ann Ivey
927 Argonne Avenue
Baltimore, MD 21218

Lendmark Financial Services, Inc.
7620 Belair Road
Baltimore, MD 21236

/s/ Marc R. Kivitz
Marc R. Kivitz

motions:1ivey LENDMARK notice

 

**3. 11 U.S.C. § 547(f) (recovery of preferential transfers).**

**11 U.S.C. § 547(f) (recovery of preferential transfers).**

**A. Statutory Definition. 11 U.S.C. § 547(b)**

A trustee may avoid a transfer of an interest in property if the transfer is:

a. by a debtor to or for the benefit of a creditor
b. for an antecedent debt (a debt is in arrears) owed prior to the transfer
c. made while the debtor is insolvent [which under 11 U.S.C. § 547(f) is presumed for the 90 day period immediately preceding a case]
d. and a transfer occurs, such as the obtaining of a lien, within 90 days (1 year if the creditor is an insider) prior to the petition date (excluding the date of the filing of the petition)
e. and the transfer enables the creditor to receive more as a result of the lien than would have otherwise been obtained through a Chapter 7 distribution on an unsecured claim, then

11 U.S.C. § 547. Although the statute states "trustee", a debtor-in-possession in a Chapter 11 case may also exercise these avoidance rights, as may a Chapter 7 debtor under 11 U.S.C. §§ 522(g) and (h) should the Chapter 7 trustee abandon his right of action and if the transfer at issue is involuntary. The transfer may NOT be avoidable by a Chapter 13 debtor as preferential transfer. *Colandrea v. Colandrea (In re Colandrea)*, 17 B.R. 568, 583 (Bankr. D. Md. 1982)("No other provision of Chapter 13 either expressly or impliedly vests powers of a trustee in the Debtor. Accordingly, aside from the Debtor's avoidance powers otherwise provided for, a Chapter 13 Debtor has no standing to exercise the avoidance powers of a trustee. ... See, *In re Cox*, 10 B.R. 268 (Bankr. D. Md. 1981).") But a Chapter 13 **trustee** may bring such an action. *Colandrea* was cited in *In re Smoot*, 237 B.R. 875 (Bankr. D. Md. 1999), and *In re Reese*, 194 B.R. 782 (Bankr. D. Md. 1996). If the Chapter 13 case is subsequently converted to Chapter 7, then the Chapter 7 trustee (11 U.S.C. § 547(a)), and derivatively, the Chapter 7 debtor (11 U.S.C. §§ 522(g) and (h)), may avoid the judicial lien.

**B. Avoidance of JUDICIAL LIEN as Preferential Transfer.**

11 U.S.C. §§ 547 (b) and (c) – if exercised by trustee in Chapter 7, lien is voided entirely.
But, if derivatively exercised by debtor under 11 U.S.C. §§ 522 (g) and (h), then analysis is same as under and a portion of the lien would remain.

One of the limitations on the recovery of preferential transfers has been modified. Section 547(c)(2) had previously required both elements to be proven to prohibit recovery, however, under BAPCPA the payment may not be recovered if either the transfer (A) was in the ordinary course of the financial affairs of the debtor and the transferee OR (B) made according to ordinary business terms. This modification gives additional protection to the recipient of the alleged preferential transfer. 11 U.S.C. § 547(c)(2) (2005).

BAPCPA also further limits the right of recovery by a debtor derivative of the rights of a trustee. Section 547(a)(8) requires that the transfers total at least $600.00 for a debtor to recover them in a case filed by an individual debtor whose debts are primarily consumer debts (pursuant to the authority granted in 11 U.S.C. §§ 522(g) and (h) if the trustee declines to pursue the transfer and

 

the transfer is not a voluntary payment by the debtor). BAPCPA adds Section 547(a)(9) which provides that in a case filed by a debtor – including partnership and corporate debtors by the absence of the word "individual" -- whose debts are NOT primarily consumer debts, the transfers must total at least $5,000.00, affording protection to creditors that received payments totaling a lesser sum within the preference period.

BAPCPA adds additional limitations on recoveries protecting creditors from suit to the extent that the payments sought to be recovered were part of an alternative repayment schedule created by an approved nonprofit budget and credit counseling agency. 11 U.S.C. §.547(h).

C. **Avoidance of Mortgages as Preferential Transfers.**

In *Schubert v. Citi Mortgage, Inc., et. al. (In re Schubert),* 437 B.R. 787 (Bankr. D. Md. 2010), the facts were:

1. In August of 2004, the Debtors refinanced the mortgage loan on the primary residence with a company that later merged with CitiMortgage, who became the owner of the loan. ("Loan One").
2. In April of 2005, the Debtors took a home equity line of credit with CitiBank, and the home equity loan was recorded in the land records on May 3, 2005.
3. On February 27, 2006, the Debtors modified the home equity line of credit and increased the principal amount borrowed. The modification agreement was recorded in the land records on April 4, 2006. ("Loan Two").
4. On February 11, 2008, the Debtors refinanced Loan One with CitiMortgage. CitiMortgage filed a Certificate of Satisfaction in the land records on March 20, 2008. CitiMortgage did not record the new deed of trust in the land record until April 11, 2008. ("Refinance Loan").
5. On June 9, 2008 the Debtors filed their Chapter 7 bankruptcy case.
6. The Debtors filed their bankruptcy case 119 days after they signed the promissory note for Refinance Loan and 59 days after the recordation of the deed of trust related to Refinance Loan.
7. The Chapter 7 Trustee sold the house at issue, and held $165,789.63 of proceeds in trust pending resolution of his request to avoid the lien related to the Refinance Loan, which would cause Loan Two to be the sole secured creditor and allow the remaining funds to be distributed pro-rata to other creditors.

**Arguments**:

1. The Court held that the recordation of the Refinance Loan was a preference as defined by Section 547(b) and therefore was an avoidable transfer.
2. CitiMortgage argued that notwithstanding the Trustee's ability to avoid the transfer under Section 547(b), the doctrine of equitable subrogation should be applied and therefore the money held in escrow by the Trustee should be paid to it as though it were a secured creditor.
3. The Trustee argued that equitable subrogation was inapplicable because:
   A. Equitable subrogation is not available where the refinancing party is the same party that held the original deed of trust.
   B. The prior lien was released before the deed of trust for the Refinance Loan was recorded.

 

C. There was no evidence that CitiMortgage intended to keep first lien position.

**Applicable Statutes and Legal Principals**

1. Preferential Transfers

11 U.S.C. 547(b):

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

2. Equitable Subrogation

A. Definition:

"So soon as a surety pays the debt of a principal debtor, equity subrogates him to the place of the creditor giving him every right, lien, and security to which the creditor could have resorted for the payment of his debt." *Schubert,* 437 B.R. at 792; *quoting Wallace v. Jones*, 110 Md. 143, 72 A. 769, 769-70 (1909).

B. Factors:

1. Payment must have been made by the subrogee to protect its own interest
2. Payment must be voluntary
3. The Debt paid must have been one for which the subrogee was not primarily liable
4. The entire debt must have been paid
5. Subrogation must not work to cause an injustice to others. *Schubert,* 437 B.R. at 792-3; c*iting* Am.Jur.2d, Subrogation § 5 (2001)

C. Purpose:

"…equitable subrogation was intended to bridge the gap when negligence or mistake of the party seeking subrogation prevents their rights from being otherwise asserted." *Schubert,* 437 B.R. at 793.

**Holding**

1. The Court ruled that notwithstanding the fact that the Trustee could avoid the recordation of the Refinance Loan, Citibank would nonetheless be equitably

 

subrogated as though it held first lien position and was therefore entitled to a distribution of the proceeds accordingly.

2. Equitable subrogation is available regardless of whether the refinancing party is the same as the original note holder.
   A. The Trustee argued that case citations consistently hold that the equitable subrogation doctrine applies in instances where one pays the mortgage of "another" and therefore it is inapplicable to "self purchases."
   B. The Court held that the cases cited by the Trustee were all cases where two (2) separate parties were involved, but none specifically addressed the issue of "self purchase." Therefore they were "not addressing the issue in the same framework." *Quoting Schubert*, 437 B.R. at 794.
   C. The Court further held that reading the doctrine broadly and inclusive was more consistent with the ideas of justice and fairness for which the doctrine is based.
3. Equitable subrogation takes place at the time the second lender pays the first lien, and so long as there is no prejudice to other parties with interest in the property, it should apply.
   A. The Trustee argued that equitable subrogation should not be permitted because of the gap in time between the release of Loan One and the recordation of the Refinance Loan. In essence the Trustee argued that because Loan One was already released, CitiMortgage could no longer step into its own shoes when the Refinance Loan was recorded.
   B. The Court looked to *Taylor v. Furnace Assocs., Inc., et al (In re Taylor)*, 2008 WL 4225761 (Bankr. D. Md.), which held that under Maryland law, equitable subrogation occurs at the time of payment, not recordation.
   C. The Court further looked at the case of *Rinn v. First Union National Bank of Maryland*, 176 B.R. 401 (D. Md. 1995), which holds that when determining applicability of equitable subrogation, a Court should focus on the intent of the parties at the time of the transaction, and whether defects in subsequent performance was detrimental to any other parties with rights in the subject property.
3. The Court held that it was clear that the Refinance Loan was intended to substitute for Loan One, notwithstanding non-compliance with typical procedure.
   A. The Trustee argued that if CitiMortgage did indeed want the Refinance Loan to be a modification or assignment of Loan One, it would have done so by using Maryland Code provisions for assignment or modification, rather than releasing the lien and recording a new one. It was argued that this was true because equitable subrogation cannot be applied if a third party perfects a security interest in the collateral before the refinancing lender perfects its lien.
   B. The Court held only gross negligence can nullify equitable subrogation where there has been no prejudice to third parties.
   C. The Court further held that the analysis of the facts of the case lead to the conclusion that equitable subrogation is proper. Loan Two was aware of Loan One when it granted its loan, and therefore it cannot claim prejudice.

 

**544(b) Strong Arm Clause**: In *Green v. HSBC, et. al.*, 474 B.R. 790 (Bankr. D.Md. 2012) facts were:

1. On December 21, 2005 the Debtor entered into a secured loan with IndyMac Bank, F.S.B. and the loan was recorded in the land records on February 1, 2006.
2. The Debtor also signed a secondary promissory note with IndyMac, which was also recorded in the land records on February 1, 2006.
3. On June 4, 2008 the Debtor entered into a loan with First Horizon Home Loans for the purpose of refinancing his two loans with IndyMac. The funds were disbursed to IndyMac on its first deed of trust, but were not disbursed to the second loan. Also, First Horizon filed a certificate of satisfaction in the land records only related to the first lien.
4. First Horizon's deed of trust was never recorded.
5. Indymac's deed of trust remained unreleased and the loan was subsequently transferred to HSBC.
6. On August 5, 2010 First Horizon filed a Complaint against the Debtor and HSBC in the District Court of Maryland seeking a declaration that its lien is *nunc pro tunc* a valid and enforceable lien under the theory of equitable mortgage and equitable subrogation. ("State Court Action.")
7. On September 7, 2010 the Debtor filed his Chapter 13 bankruptcy case and filed an adversary proceeding against HSBC to determine secured status. The Debtor further requested that HSBC's second deed of trust be avoided under Section 506 based on it being a wholly unsecured second deed of trust. In order to effectuate the lien strip, it was necessary to have First Horizon's lien (now owned by Chase) deemed to be the first deed of trust.
8. On December 16, 2010 the Debtor and HSBC entered into a Consent Order resolving the Adversary Proceeding. Under the Consent Order, HSBC conceded that First Horizon's lien exceeded the value of the property, and therefore its lien was avoidable under Section 506.
9. On July 18, 2011 the Debtor filed a Motion to Vacate the Consent Order, arguing that because First Horizon/Chase's lien was never perfected, HSBC was the first lien holder and that no junior liens existed. Therefore, a lien strip under Section 506 was improper.
10. On July 20, 2011 Chase filed a Motion to Intervene and subsequently filed a cross-claim against HSBC seeking a declaration that First Horizon's lien held first position against the property or, alternatively, that First Horizon's lien was equitably subrogated to first position based on its payment and release of IndyMac's previously owned first deed of trust.

**Arguments**

1. Chase argued that it was entitled to be equitable subrogated to assert the rights of the first lienholder pursuant to First Horizon's refinance loan and the subsequent assignment of First Horizon's rights to Chase.
2. Trustee and Debtor argued that the Trustee's "strong arm" powers under 11 U.S.C. § 544(a)(3) permitted the Trustee to be treated as a bona fide purchaser for value without notice of Chase's equitable lien and therefore, equitable subrogation was inapplicable.

 

3. Chase argued that 11 U.S.C. § 544(a)(3) was negated by the State Court Action, which provided constructive notice of the assertion of a valid lien.
4. The Trustee and Debtor argued that even if the State Court Action acted as a *lis pendens*, it was an avoidable preference under 11 U.S.C. 547.
5. Therefore, "(t)he ultimate issue (was) whether the *lis pendens* is an avoidable preference under § 547 and, if so, what is the effect of avoidance on Chase's equitable subrogation." *Quoting* Green at 794.

**Applicable Statutes and Legal Principals**

1. *Lis Pendens*
   A. Provides constructive notice of a lawsuit to determine issues of title.
   B. Rationale:

   [T]he law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. *Quoting Green v. HSBC* at 796; *citing* J. Pomeroy, A Treatise on Equity Jurisprudence, § 632 (5th ed. Symons 1941), pp. 727-28.

2. Trustee "Strong Arm Powers" under 11 U.S.C. § 544(a)(3)

   11 U.S.C. § 544(a)(3):

   (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

   (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

3. Equitable Subrogation
   A. Definition:

   "So soon as a surety pays the debt of a principal debtor, equity subrogates him to the place of the creditor giving him every right, lien, and security to which the creditor could have resorted for the payment of his debt." *Schubert*, 437 B.R. at 792; *quoting Wallace v. Jones*, 110 Md. 143, 72 A. 769, 769-70 (1909).

   B. Factors:
      1. Payment must have been made by the subrogee to protect its own interest
      2. Payment must be voluntary

 

3. The Debt paid must have been one for which the subrogee was not primarily liable
4. The entire debt must have been paid
5. Subrogation must not work to cause an injustice to others. *Schubert,* 437 B.R. at 792-3; c*iting* Am.Jur.2d, Subrogation § 5 (2001)

C. Purpose:

"…equitable subrogation was intended to bridge the gap when negligence or mistake of the party seeking subrogation prevents their rights from being otherwise asserted." Schubert at 793.

4. Preferential Transfers

11 U.S.C. 547(b):

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

**Holding**

1. Equitably subrogation applies because the funds paid by First Horizon were intended to be used, and indeed were used for the purpose of eliminating an encumbrance and obtaining a substitute security interest, and this was the intention of all parties to the transaction.
   A. Of note, the settlement sheet and certificate of satisfaction showed an intention for timely recordation of the First Horizon lien.
2. "Strong arm" power of Trustee under 11 U.S.C. 544(a)(3) did not negate equitable subrogation.
   A. In simple terms, Section 544(a)(3) permits the Trustee to step into the shoes of a hypothetical bona fide purchaser.
   B. The Debtor and Trustee opined that a bona fide purchaser would have been able to purchase the property without the encumbrance of the First Horizon/Chase loan and therefore the equitable subrogation was avoidable.
   C. The Court held that the filing of the State Court Action acted as a *lis pendens* on the property and that under Maryland law, a *lis pendens* acts as constructive notice to potential bona fide purchasers.

 

D. Therefore, even if the Trustee would be able to step into the shoes of a hypothetical bona fide purchaser, that bona fide purchaser would have had constructive notice of the First Horizon/Chase lien and, as such, would not have been able to obtain clear title.

3. The fact that the State Court Action was filed during the preference period is irrelevant to constructive notice and therefore equitable subrogation applies.

A. The Debtor and Trustee argued that because the *lis pendens* was created during the preference period, it was avoidable under Section 547(b). Once avoided under Section 547(b), the equitable subrogation claim can be avoided under Section 544 (a)(3).

B. In plain English, the Debtor and Trustee argued that they could blow up the *lis pendens* and once the *lis pendens* was gone, the Trustee had the power to avoid the transaction based on the ability to step into the shoes of a hypothetical bona fide purchaser.

C. The Court disagreed on the basis that the *lis pendens* was about notice and that knowledge of the issues of the *lis pendens* could not be erased. In doing so, the Court partially relied on Schubert for the proposition that the avoidance of a deed recorded during the preference period could not reinvigorate the Trustee's powers under Section 544.

A Chapter 7 trustee cannot avoid an equitable lien against tenants by entirety property under 11 U.S.C. § 544(a)(1) or (a)(3) when only one spouse is a debtor. *Nesse, Trustee v. GMAC Mortgage, LLC (In re Barnes)***,** 2012 WL 1378449 (Bankr. D.Md. 2012)(Case No. 10-163062; Adv. 11-00290)(Catliota, J.). Debtor and spouse on April 28, 2006, granted deed of trust to MortgageIT, Inc., which was duly recorded. On January 19, 2007, debtor alone signed $582,000.00 promissory note in favor of Homecomings Financial, LLC, assigned to GMAC, secured by deed of trust signed by both debtor and his wife, which for some unknown reason was not recorded in land records, which proceeds were intended to and did in fact satisfy the indebtedness to MortgageIT, Inc. GMAC filed motion for relief from stay which was granted by consent. The case was administered as a "no asset" case, the debtor was discharged and the case was closed.

GMAC, presumably having discovered DOT was not recorded, moved to re-open Ch 7 case and for limited modification of the discharge injunction to allow it to secure its interest in State Court against the real property. Trustee opposed contending entitlement to sell. Trustee commenced adversary proceeding against non-debtor spouse to sell free and clear; settled by allowance of sale with non-debtor spouse receiving one-half of proceeds and debtor's half used to pay debts.

Trustee, acknowledging subrogation under *Rinn v. First Union Nat. Bank of Maryland*, 76 B.R. 401, 408 (D. Md. 1995) also brought adversary proceeding that she had the powers of a judicial lien creditor under 11 U.S.C. § 544(a)(1) or the rights of a bona fide purchaser without knowledge of the unrecorded DOT under 11 U.S.C. § 544(a)(3) to avoid an equitable lien under an unrecorded deed of trust against real property owned by a debtor and his non-filing spouse contending entitlement to sell for all creditors.. GMAC Mortgage, LLC, counterclaimed contending that under the doctrine of equitable subrogation it was entitled to enforce its equitable lien because the proceeds of its loan were used to pay a prior loan by the debtor that was secured by a duly recorded deed of trust.

 

Issue: Can a trustee avoid an equitable lien against tenants by entirety property when only one co-owner spouse is a debtor?

Held: A Chapter 7 trustee cannot exercise strongarm powers under 11 U.S.C. § 544(a)(1) or (a)(3) to avoid a transfer of tenant by entirety property where only one spouse is in bankruptcy.

Rationale: A trustee stands in the shoes of the debtor and succeeds as a judgment lien creditor only to the debtor's interest in property. If a judgment lien creditor would prevail, the trustee would prevail. The trustee has the right to avoid transfers that would be avoidable by a creditor that extends credit to the debtor and obtains a judicial lien. But a creditor of only one spouse cannot obtain a lien on entireties property, and consequently there is no avoidance under § 544(a)(1).

Similarly § 544(a)(3) allows a trustee to avoid an interest avoidable by a bona fide purchaser from the debtor. But there cannot be a bona fide purchaser of real property from one spouse where the property is held in tenancy by the entireties. The non-debtor's consent to the sale of the realty does not result in the trustee standing in the shoes of a bona fide purchaser capable of defeating GMAC's equitable lien because, while the trustee has rights without regard to any knowledge, the non-debtor's consent is not free from the knowledge of GMAC's equitable lien.

**Applicable Statutes and Legal Principals**

1. Trustee "Strong Arm Powers" under 11 U.S.C. § 544(a)(1)

   (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

   (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

2. Trustee "Strong Arm Powers" under 11 U.S.C. § 544(a)(3)

   11 U.S.C. § 544(a)(3):

   (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

   (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

3. Equitable Subrogation

   E. Definition:

   "So soon as a surety pays the debt of a principal debtor, equity subrogates him to the place of the creditor giving him every right, lien, and security to which the creditor could have resorted for the payment of his debt."

 

*Schubert* at 792; *quoting Wallace v. Jones*, 110 Md. 143, 72 A. 769, 769-70 (1909).

D. Factors:
   1. Payment must have been made by the subrogee to protect its own interest
   2. Payment must be voluntary
   3. The Debt paid must have been one for which the subrogee was not primarily liable
   4. The entire debt must have been paid
   5. Subrogation must not work to cause an injustice to others. *Schubert,* 437 B.R. at 792-3; c*iting* Am.Jur.2d, Subrogation § 5 (2001).

E. Purpose:
"…equitable subrogation was intended to bridge the gap when negligence or mistake of the party seeking subrogation prevents their rights from being otherwise asserted." Schubert at 793.

4. Tenants by the Entireties
   A. "A tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship…" Black's Law Dictionary, p. 950 (8th ed.), 1999.
   B. In Maryland, creditors of only one spouse cannot reach property that is held as tenants by the entireties for the satisfaction of their claim. *Sumy v, Schlossberg*, 777 F.2d 921, 924-5 (4th Cir. 1985).

**Holding**

1. Equitable lien existed pursuant to equitable subrogation principals. Uncontested by the parties.
2. The Court held that property held at tenants by the entireties is shielded from individual creditors and cannot be taken to satisfy individual debts of a husband and wife. *Diamond v. Diamond*, 467 A.2d 510, 513 (Md. 1983).
3. Because the property was held as tenants by the entireties, a "creditor who extends credit to the debtor," as described in Section 544(a)(1) could not obtain a judicial lien against the property. Therefore, the Trustee could not avoid GMAC's equitable lien.
4. Similarly, because the Debtor could not have sold his interest in the property to a bona fide purchaser because it was held as tenants by the entirety. Therefore Section 544(a)(3) was not applicable.
5. Consent of non-debtor spouse was irrelevant because under Maryland law, a bona fide purchaser of real property takes that property subject to known equities. Thus, because the Trustee knew of the equitable lien, she can only take it subject to said equitable lien, regardless of consent of the owners.

**D. Preferential transfers involving personal property.**

**1. Avoidance of Liens Perfected More than 30 Days After Possession of Personal Property**:

 

On September 1, 2016, Mr. X buys a new (or used) car from the Car Dealership, executes a security agreement and/or a promissory note granting a security interest against the vehicle for the purchase price (less any down payment) and drives off the lot with the car.

On October 2, 2016 -- that is more than 30 days after the execution of the security agreement, car dealership delivers to MVA the required paperwork and records the lien against the vehicle at MVA (and typically has a time-stamped transmittal sheet from MVA) which lien is eventually noted against the title that is issued.

On November 8, 2016 -- that is less than 90 days after Car Dealership has delivered documentation to MVA, Mr. X voluntarily files (or is involuntarily thrown into) a bankruptcy case. (If a Chapter 7 case is filed by or against Mr. X, the Chapter 7 trustee has the powers discussed below. If Mr. X files a voluntary Chapter 13 case, he does not have the avoidance powers discussed below, but if the bankruptcy case is at any time later converted to a Chapter 7 case, regardless of how long that may take, then the Chapter 7 trustee does have these avoiding powers discussed below).

The Chapter 7 trustee under 11 U.S.C. § 547(b) may avoid and cancel the security interest granted to the Car Dealership as a preferential transfer -- which security interest may have already been assigned to a financing company (with or without recourse back to the Car Dealership) -- that is, a transfer (the grant of the security interest) by the debtor to the Car Dealership for its benefit which occurred within the 90-day period prior to the bankruptcy on an antecedent debt already owed by Mr. X at the time of the recordation of the lien.

Secured creditors had contended that State statutes permitting the relation back to the date of the execution of the security agreement if the lien were recorded within 30 days from the date of the delivery of the vehicle would prevail against the trustee's avoidance powers. Section 547(c)(3)(B), 11 U.S.C., the so-called "enabling loan exception" to the trustee's avoiding powers protects the security interest from avoidance only if the security interest is "perfected on or before 30 days after the debtor receives possession of the property." In *Fidelity Financial Services, Inc. v. Fink*, 522 U.S. 211, 118 S.Ct. 651, 139 L.Ed.2d 571, 38 C.B.C.2d 1155 (1998)(prior version of the Code provided for 20 days but was amended to 30 by BAPCPA), the Supreme Court held that the trustee's timeframe for avoidance is not governed by state rules permitting relation back. *Id*., 38 C.B.C.2d at 1159. The Supreme Court held that a creditor may protect its security interest from avoidance and "may invoke the enabling loan exception of §547(c)(3)(B) only by acting to perfect its security interest within [30] days after the debtor takes possession of its property." *Id*. at 1161.

Where the collateral is a motor vehicle, as distinguished from residential real property, the lien may also be bifurcated and stripped down to the equity remaining in the collateral after the credit for, and application of, the amount of superior liens against the collateral, but, again, only in Chapter 13 cases. *See e.g.*, *Canelos v. Mignini (In re Canelos)*, 216 B.R. 159 (Bankr. D. Md. 1997)(Schneider, J.), amending 212 B.R. 249 (Bankr. D. Md. 1997)(Schneider, J.)(real property in a Chapter 7 case) and holding that (1) an exemption that was allowed without objection may be challenged as to amount by lienholder in defense of motion to avoid lien; (2) debtor-wife could not avoid lien on property in which she held no ownership interest; (3) extent

 

to which lien impaired debtor-husband's exemption was $8,755.58; (4) debtors were required to file complaint to avoid and recover preferential transfer, and could not do so by motion.

Similarly, if the lien is secured by other collateral -- a lien on corporate machinery also secured by an indemnity deed of trust against the individual debtor/guarantor's residential real property, such that the lien is NOT solely secured by the debtor's principal residence, then stripdown is permitted. Example: Real property valued at $100,000 with a first mortgage of $90,000 and an IDOT of $200,000 which is also secured by corporate assets, then the IDOT may be bifurcated into a $10,000 secured debt ($100,000 - $90,000 = $10,000) payable through or outside the Chapter 13 plan with the $190,000 ($200,000 - $10,000 = $190,000) treated as unsecured [so long as the debtor remains under the $307,675 unsecured debt limit of Chapter 13].

**2. Possible Results**:

If the lien is avoided, then there could be several possible results:

a. the trustee could recover and sell the assets with the proceeds retained by the trustee (presumably less any exemption claimed by the debtor) and distributed to creditors. (The creditor whose lien is avoided could file a claim to share in these proceeds, but they would no longer have a lien against the asset);

b. Alternatively, the trustee -- who is not required to sell the asset once the security interest is canceled -- could obtain a judgment against the creditor for the value of the asset at the time of the transfer, that is its value at the time of the grant of the security interest (which for a car is presumably the value at which the car was sold, but for real property the valuation would require some expert opinion (or an appraisal at the time of the loan), but subsequent depreciation in value of the vehicle would NOT affect the amount of the judgment which could be obtained;

c. The avoided security interest could be preserved for the benefit of the trustee under 11 U.S.C. § 551 in which event the trustee would hold the lien resulting in the debtor having no interest in making any payment to the creditor and without the lien the creditor could not foreclose or repossess; and

d. All payments which the debtor might have made to the creditor within the 90 day period could also be recovered (although a defense of the ordinary course of business should be successful to retain these payments).

It therefore becomes important to ensure that the security interests are properly recorded no later than 30 days after the debtor receives possession of the proceeds of a mortgage loan or acquisition of a vehicle.

**3.** In *Humphrey v. Herridge (In re Humphrey)*, 165 B.R. 578 (Bankr. D. Md. 1993)(Schneider, J.), the debtors filed a complaint to avoid a judgment as a preference through standing under § 522(h) seeking to avoid a $194,647.68 judgment in its entirety, but the lien was only reduced by the amount of the exemption to which the debtor could have claimed -- $11,000.00 under CJ §§ 11-504(b)(5) and (f) (then the amount of the maximum exemption was $22,000.00 for two debtors/owners) -- irrespective of the amount of the exemption actually claimed.

**4. Recovery of Voluntary Payments –recoverable only by trustee.**

 

In *Crichton v. Wheeling National Bank (In Re Meredith Manor, Inc.),* 902 F.2d 257 (4th Cir. 1990), William Crichton, trustee in bankruptcy, appealed from the District Court's order vacating the judgment of the bankruptcy court, and the Fourth Circuit affirmed the District Court's application of a different method of calculating the amount of the debtors' loan repayments which may be recovered as preferences under 11 U.S.C. § 547(c). The debtors obtained a $ 200,000 running line of credit from Wheeling National Bank and pledged as collateral accounts receivable and contracts. The debtors filed Chapter 7 and the trustee urged the adoption of a rule which would net each preference against only those subsequent advances to the debtor made prior to the next preference.

The series of advances by the Bank and payments by the debtors was:

| DATE | ADVANCES TO DEBTORS | PAYMENTS TO BANK |
|---|---|---|
| 9/11/85 | | $ 30,444.82 |
| 9/12/85 | | 75,000.00 |
| 10/04/85 | $ 10,000.00 | |
| 10/06/85 | 10,348.08 | |
| 10/11/85 | 1,500.00 | |
| 10/18/85 | 6,000.00 | 9,000.00 |
| 10/21/85 | 11,000.00 | |
| 10/25/85 | 2,000.00 | |
| 10/28/85 | | 6,000.00 |
| 10/29/85 | 4,600.00 | |
| 10/30/85 | 4,699.00 | |
| 11/05/85 | 18,461.80 | |
| 11/07/85 | 11,664.05 | |
| 11/09/85 | 1,965.00 | |
| 11/13/85 | 1,404.89 | |
| 11/14/85 | 5,651.51 | |
| 11/15/85 | | 1,214.79 |
| 11/18/85 | 660.00 | |
| | $ 89,954.33 | $ 121,569.61 |

The Bankruptcy Court had ruled that:

(1) The initial $ 30,444.82 payment is fully recoverable by the trustee because it was not immediately followed by the giving of any "new value";

(2) The next preference payment, $ 75,000, exceeded the next four advances by $53,151.92 and that this excess was recoverable;

(3) Each of the next two payments, $9,000 and $6,000, was exceeded by the immediately following advancements; therefore, the full amount of the preferences was protected from the trustee's avoidance powers;

(4) The final payment by the debtor, $1,214.79, was followed by a smaller advance of $660.00. The trustee could therefore avoid the difference, $554.79. To summarize, the bankruptcy court found that $84,153.53 [30,444.82 + 53,151.92 + 554.79] was avoidable and thus recoverable by the trustee. The Bank was entitled to retain the remaining $37,508.08 [$121,659.61 - $ 84,153.53 = $37,508.08].

On appeal, the district court opted for the variation of the net result rule formulated in *In re Thomas W. Garland, Inc.*, 19 B.R. 920 (Bankr. E.D.Mo. 1982) which method looks at the 90-day preference period and calculates the difference between the total preferences and the total

 

advances, provided that each advance is used to offset only prior (although not necessarily immediately prior) preferences. Unlike the theory employed by the Bankruptcy Court, *Garland* permits preferences to be carried forward until exhausted by subsequent advances. In other words, the creditor is allowed to apply the giving of "new value" against the immediately preceding preference as well as against all prior preferences. Using the "net result" method, the payment/advances schedule calculated that preferences exceeded advancements by $31,705.28 [$121,659.61 - $89,954.33 = $31,705.28], and this amount was found to be recoverable by the trustee under § 547(b).

D. **Time Frame for Commencement of Lien Stripping Action as a Preferential Transfer.** The lien may be avoided by the commencement of an adversary proceeding or pursuant to Maryland's Local Rules, by motion, F.R.B.P. 7001(2), in a Chapter 7. 11, or 13 case, which action must be commenced within two (2) years from date of the appointment of the trustee. 11 U.S.C. § 546(a)(1). Reopening of a closed case revives the limitations period on commencing an avoidance action. *Schroeder v. First Union National Bank of Virginia (In re Schroeder),* 173 B.R. 93 (Bankr. D. Md. 1994)(Keir, J.), *affirmed, First Union National Bank of Virginia v. Schroeder,* 182 B.R. 723, 725 (D. Md. 1995)(Motz, J.).

In *Schroeder*, a case filed on September 1, 1991, and decided on October 5, 1994, and therefore the Bankruptcy Amendments which became effective for cases filed after October 24, 1994, were inapplicable to the Court's decision, Judge Keir agreed that the amount by which the creditor's judicial lien could be reduced and avoided was not limited to the amount of the claimed exemption, but was limited to the amount which the debtors could claim, $11,000.00 under ACM, CJ §§ 11-504(b)(4), (5), and (f). 173 B.R. at 97. In *Schroeder*, the debtors had $1,000.00 in equity and were entitled to claim up to $11,000.00 as an exemption; the creditor's liens totaled $177,376.10. *Id*. Although an appeal was taken by First Union on the premise that the Bankruptcy Court had avoided its judgment lien in its entirety, the District Court similarly held that the lien could be avoided to the extent of $11,000.00, the maximum permissible exemption irrespective of the debtors' actual equity in the property. *First Union National Bank of Virginia v. Schroeder*, 182 B.R. 723, 725 (D. Md. 1995)(Motz, J.). *Schroeder* deals with whether a § 547 preference avoidance, not a § 522(f) avoidance, which was time-barred by § 546. It was a closed but reopened case but filed within 2 years, and Judge Keir held that the closing and reopening did not result in § 546's closing provision barring the avoidance claim.

In *In re Opperman*, 943 F.2d 441 (4th Cir. 1991), the debtors had $2,462.66 in equity, the judgment lien was in the amount of $3,721.74, and under North Carolina law the debtor was entitled to a claim of $7,500.00 in exemption. In *Opperman*, the operable exemption was sufficient to cover the entire judgment; the amount of the lien was less than the amount of the allowable exemption. *Contra, Schroeder*, where the amount of the lien exceeded the amount of the allowable exemption by over $150,000. In *Opperman*, despite the $2,462.66 equity, the entire amount of the $3,721.74 judgment lien was avoided, holding that the amount of the avoidance is not limited to the amount of the equity in the property. *Schroeder*, 173 B.R. at 97.

While § 546 applies to § 547, and thus arguably to § 522(h), there is no deadline to file under § 522(f). *In re Bowshier*, 389 B.R. 542 (Bankr. S.D.Ohio, 2008); *Peterson v. Thorp Credit and Thrift Co.*, 26 B.R. 942 (Bankr. D. Minn. 1983). *Ludvigsen v, Osborne (In re Ludvigsen),*

 

2015 WL 3733193 (B.A.P. 1st Cir. 2015)(Debtor appealed from bankruptcy court's order denying motion to reopen Chapter 7 case pursuant to § 350(b) to avoid judicial liens, and the order denying reconsideration; Appellate Panel reversed and remanded for proceedings consistent with its opinion). *See also, Wilding v. CitiFinancial Consumer Financial Services, Inc. (In re Wilding)*, 475 F.3d 428 (1st Cir. 2007)(Chapter 7 debtor reopened case and filed motion to avoid previously unscheduled judicial lien that had been recorded against his residence. Creditor objected, asserting that its lien could not be avoided because it already had been satisfied. The United States Bankruptcy Court for the District of Rhode Island denied debtor's motion, and debtor appealed. The Bankruptcy Appellate Panel, 332 B.R. 487, affirmed, and debtor appealed. The First Circuit Court of held that the Bankruptcy Code permits a debtor to avoid a judicial lien if the lien existed at the filing of the bankruptcy petition but was satisfied after the case was closed and before the debtor filed a motion to avoid, and vacated and remanded the case).

However, the authority is split, such that if a bankruptcy case were closed and no action were taken during the pendency of that case to challenge the extent, validity, or priority of the lien, upon the filing of a motion to reopen the closed bankruptcy case for the purpose of filing a lien avoidance action, laches could be successfully argued by the creditor to prevent the case from being reopened. *See, e.g., In re Bianucci*, 4 F.3d 526 (7th Cir. 1993)(Chapter 7 debtors sought to reopen case to avoid lien two years after case had been closed. The Bankruptcy Court denied request to reopen, and debtors appealed. The United States District Court for the Central District of Illinois affirmed, and debtors appealed. The Court of Appeals, held that delay in bringing motion coupled with expenses creditor incurred to enforce lien precluded reopening of case). *But see, contra, ITT Financial Services v. Ricks (In re Ricks)*, 89 B.R. 73(B.A.P. 9th Cir. 1988)(Debtor moved to reopen Chapter 7 case and to avoid lien. The United States Bankruptcy Court for the Southern District of California, granted motion, and appeal was taken. The Bankruptcy Appellate Panel affirmed, holding that creditor's independent action to execute on lien did not result in sufficient prejudice to bar reopening of case to avoid lien).

**4. 11 U.S.C. § 502(d) (unreleased recoverable transfers).**

A. Section 502(d) provides "Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or is the transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

An entity is not permitted to maintain a claim, and thus should not be able to receive any distribution from any bankruptcy estate if that creditor has received a transfer that is avoidable and recoverable unless that creditor has paid the amount or turned over any such property that it received. Thus, if a creditor has obtained a preferential transfer, in a Chapter 13 case (other Chapters, too) the debtor may object to the creditor's claim as secured and the creditor's claim shall be disallowed unless the creditor relinquishes its preferential lien.

B. A lien may still be rendered unenforceable if the creditor desires to maintain an allowable claim and receive a distribution in a case even under the foregoing facts, where an

 

involuntary judicial lien may not be entirely avoidable by a Chapter 7 debtor employing under 11 U.S.C. § 522(h) -- the derivative avoidance powers of a Chapter 7 trustee under 11 U.S.C. § 547(b), OR where a Chapter 13 debtor cannot avoid a preferential transfer, *Colandrea v. Colandrea (In re Colandrea)*, 17 B.R. 568, 583 (Bankr. D. Md. 1982), where a creditor that has received a preferential transfer and the lien obtained has not been released or the property transferred or seized not returned, a creditor in such a position may not maintain an allowable claim.

C. Legal analysis. A Chapter 13 debtor cannot avoid a preferential transfer, *Colandrea v. Colandrea (In re Colandrea)*, 17 B.R. 568, 583 (Bankr. D. Md. 1982), however a creditor that has received a preferential or other recoverable transfer that has not released the lien or returned the property transferred may not maintain an allowable claim. But see, *In re Smoot*, 237 B.R. 875 (Bankr. D. Md. 1999) where the Court reasoned that the avoidance powers of a Chapter 13 debtor are limited to avoiding transfers that impair debtor's exemptions, and then only if the trustee does not attempt to do so. The Court further reasoned that in order for the debtor to have standing to avoid a transfer as a preference, in the exercise of his/her limited avoidance powers, the Chapter 13 debtor must establish the following: (1) that the debtor could have exempted the property that is the subject of the of the alleged preference, (2) that the transfer would have been avoidable by the trustee, (3) that the trustee has not attempted to avoid the transfer, (4) that the transfer was not a voluntary transfer of property by the debtor, and (5) that the property was not concealed by the debtor. In *Smoot*, the Court found that the Chapter 13 debtor did have standing to avoid a judgment creditor's wage garnishments with the 90-day preference period, as transfers avoidable by the trustee which served to impair the debtor's exemption rights.

Pursuant to *Smoot*, so long as the debtor can satisfy the five-prong test enunciated by the late Judge Mannes, the debtor may recover a non-consensual, involuntary preferential transfer. As examples of such actions, see Pages 117, 129, and 133, *supra*.

**5. 11 U.S.C. § 548(a) (fraudulent conveyances).**

A. 11 U.S.C. § 548(a) provides as follows:

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to *871 hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a).

 

B. Where a creditor obtains a lien and there is no contemporaneous equivalent exchange of value, the lien may be avoided as a fraudulent conveyance, which determination is made by a preponderance of evidence standard, *In re Goldschein*, 241 B.R. 370, 378, 43 C.B.C.2d 271 (Bankr. D. Md. 1999)( Keir, J.)(*Grogan v. Garner* preponderance standard applies to § 548 fraudulent transfer action), but a debtor has no standing to bring the action where the recovery is for his benefit and not for the benefit of the estate. In *Goldschein*, the Chapter 7 trustee brought an adversary proceeding to avoid, as fraudulent transfer, mortgages and security interest which the debtor had granted to benefit a plan less than one year pre-petition. The Bankruptcy Court in voiding the mortgage lien held that the security interest which debtor had granted to a benefit plan in his shares of capital stock of a cooperative apartment was in nature of fraudulent transfer, which the debtor had made with actual fraudulent intent, that the anti-alienation provision in the plan protected debtor-beneficiary's interest in legitimate plan assets, but did not preclude the trustee from avoiding the debtor's fraudulent transfers to the benefit plan, and that the benefit plan, as the initial recipient of fraudulently transferred property, could not assert "good faith transferee for value" defense.

In *Wellman v. Wellman*, 933 F.2d 215, 24 C.B.C.2d 1853 (4th Cir.), *cert den*., 502 U.S. 925, 112 S.Ct. 339, 116 L.Ed.2d 279 (1991), a Chapter 11 debtor-in-possession brought action to avoid a fraudulent transfer of stock and the Court of Appeals held that debtor, who had given creditors nonrecourse notes payable only out of net recovery or settlement of the instant suit, lacked standing to avoid the allegedly fraudulent transfer, in that any recovery would not be for benefit of estate.

The valuation standard is not a rigid mathematic formula, but depends upon the facts of the case, important factors in which are the market value and whether the transaction was arms-length. *In re Morris Communications NC, Inc*., 914 F.2d 458, 23 C.B.C.2d 1456 (4th Cir. 1990)(valuation of stock at time of transfer).

Fact Pattern: Debtor grants a mortgage or deed of trust against property for $100,000 which total is comprised of a loan of $80,000 for which there is a promissory note and a $20,000 fee for the making of the loan, for which there is no specific written agreement, then the transfer of the lien to the creditor of $100,000 would not have been for a reasonably equivalent exchange of consideration to the debtor, which only received $80,000, rendering the lien avoidable as a fraudulent conveyance if the mortgage is recorded within TWO YEARS prior to the date of the filing of the petition. 11 U.S.C. § 548(a)(1).

**6. 11 U.S.C. § 545 (statutory liens).**

A. A lien arising solely by statute, such as a landlord's distraint for rent and lien against furnishings or a garageman’s lien for repairs, lien may be avoided. Real property tax liens relate back to a time prior to the debtor's bankruptcy filing, even those that are not assessed or due until later. *Maryland National Bank v. Mayor and City Council of Baltimore (In re Maryland Glass Corporation)*, 723 F.2d 1138, 1142-43, 9 C.B.C.2d 1114 (4th Cir. 1983) which expresses the minority opinion. *Contra*, s*ee, Marakoff v. City of Lockport*, 916 F.2d 890, 893-94, 23 C.B.C.2d 1566 (3rd Cir. 1990) as cited in *Robert L. Baer, Trustee v. Board of County Commissioners of Johnson County (In re Prairie Mining Inc.)* 194 B.R. 248, 35 C.B.C.2d 943 (Bankr. D. Kan. 1996). *Maryland National Bank* held that the imposition of a property tax by the

 

State of Maryland pursuant to its taxing statutes was the last step required to perfect the State's longstanding interest in real property located within its jurisdiction. On that basis, the *Maryland* court allowed a local government to attach a super-priority tax lien to real property after the debtor/property-owner filed its petition in bankruptcy. The court reasoned that the local government had a pre-petition "interest" in property which it merely perfected post-petition under 11 U.S.C. § 546(b). In *Makoroff,* the Third Circuit held that a post-petition recordation of city and county's tax liens violated automatic stay concluding that under § 546(a), the perfection of a purchase-money security interest under U.C.C. § 9-301(2) would defeat a hypothetical judicial lien creditor on the date of the petition in bankruptcy and that the automatic stay under § 362(b)(3) does not forbid the creditor from taking steps to perfect a purchase-money security interest after the petition is filed. Such a *perfection* of a lien is not considered the *creation* of a lien.

Other restrictions on avoidance and recovery result from limitation of impairment under Md.Annot. Code, CJ § 11-507, which provides that:

> Exemptions not to impair certain liens.
> The provisions of this subtitle relative to exemption do not impair:
> (1) Vendor's purchase money lien on land;
> (2) Mechanic's lien;
> (3) Tax lien;
> (4) Mortgage; deed of trust; or other security interest/.

CJ § 11-507 (2016).

B. No personal liability in Chapter 13 for post-discharge fees which are dischargeable but remain *in rem* obligation of the realty; but relief from stay granted against non-estate debtor assets. *In re Khan,* 504 B.R. 409 (Bankr. D. Md. Jan, 7, 2014)(Case No. 11-32248-PM)(Mannes, J.). Carrollan Gardens Condominium Association filed a motion for relief from the automatic stay to pursue collection of unpaid post-petition condominium fees against a Chapter 13 debtor. Court granted relief as to non-estate assets – property of the debtor – which excluded post-confirmation earnings which are property of the estate under 11 U.S.C. § 1306(a)(2) but which issue was not raised in the case. Thus, the condo association cannot garnish wages, bank accounts, property, etc. "*In re Reynard*, 250 B.R. 241, 244 (BC Va. 2000); *In re Zamora*, 2012 WL 4501680 (BC W.D. Tex. 2012); *cf. In re Schechter*, 2012 WL 3555414 (BC E.D. Va. 2012)(Collection activities must be limited to property of the debtors, not property of the estate, but all post-confirmation earnings are property of the estate under 11 U.S.C. §1306(a)(2))," The Court held that "[u]ntil the discharge is entered, Debtor is stuck for the payment of these fees" noting that "[t]his holding differs from that of *In re Spencer*, 457 B.R. 601, 605 (E.D. Mich. 2011)…." which held post-petition debts nondischargeable.

Court further held that (i) pre-petition claim for condo fees was discharged; (ii) the Court noted that following *Rosenfeld* and amendments to the Bankruptcy Code, personal liability continues after discharge on condominium fees in Chapter 7, but not in Chapter 13.because post-discharge 11 U.S.C. § 523(a)(16) does NOT impose a personal liability upon the debtor for continued payment of condominium fees because § 523 (a)(16) is not included among the non-

 

dischargeable debts listed in 11 U.S.C. § 1328(a); and (iii) the condominium charges will continue to be an *in rem* obligation of the realty because they run with the land under *In re Rosenfeld* and under the Maryland Contract Lien Act.

The Court further noted that the debtor could have proposed a plan that included the transfer of condo unit to the condo association under 11 U.S.C. § 1328(b)(8) in satisfaction of creditor's secured debt. Upon confirmation, a plan can vest property of the estate in any entity; plan could have vested the unit in the association or in the mortgagee, citing by comparison *In re Bryant*, 323 B.R. 635 (Bankr. E.D. Pa. 2005). In *Bryant*, debtor in 1994 filed a Chapter 13 case and a plan providing "[h]olders of allowed secured claims shall retain the liens securing such claims and shall be paid as follows: "Bal Paid in Full $41,471.59–HUD Loan Management: 1341 E. Mt. Pleasant Ave. The Debtor intends to RETAIN" confirmed without objection and on the following day, creditor filed a secured claim for $67,736.17 with arrearages of $41,471.59 -- the exact amount contemplated to be paid under the Plan, which upon completion debtor was discharged. Five years later, with no payment in the interim, creditor commenced foreclosure and Bryant filed a new Chapter 13 case in which secured creditor filed a proof of claim for $44,224.69 to which the debtor objected that the POC was barred by the prior discharge or because the claim in the 1994 case was untimely or claimant failed to meet its ultimate burden to sustain its claim except for escrow advances. The *Bryant* Court held that a creditor with timely and unambiguous notice that its claim will be compromised and discharged may not ignore the confirmation process and fail to object notwithstanding that there either is no bar date for filing a claim or the time for filing a claim has yet to expire concluding that confirmation bars the creditor's later-filed claim under principles of *res judicata*.

**VI. Implications for Chapter 13?**

A. 11 U.S.C. §§ 506(a) and (d) subject to 11 U.S.C. § 1325(b)(2):

11 U.S.C. § 1322(b)(2) states:

> (b) Subject to subsections (a) and (c) of this section, a plan may –
>
> > (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence….

The implications of the holding in *Caulkett* – that a debtor may not stripdown a consensually granted security interest secured solely by residential real property – is already prohibited by statute applicable only in Chapter 13 cases – 11 U.S.C. § 1322(b)(2) – which prohibits the modification of any term of a security interest where residential real property is the secured creditor's only collateral. But unlike Chapter 7, *Caulkett* does not prohibit in Chapter 13 the stripoff of a wholly unsecured consensually granted security interest – mortgage or deed of trust or indemnity deed of trust – where residential real property is the sole collateral; 11 U.S.C. §§506(a) and (d) can be applied in Chapter 13 so as to stripoff such security interests. See. Pages 58 - 83, *supra*.

B . 11 U.S.C. § 1322(b)(2) and "hanging paragraph" after § 1325(b)(9):

 

With respect to personal property, however, in particular, motor vehicles, Chapter 13 has an additional prohibitive statute: the unnumbered, so-called "hanging paragraph" that follows 11 U.S.C. § 1325(b)(9). The hanging paragraph reads as follows:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910–day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1–year period preceding that filing.

11 U.S.C. § 1325(a)(9)(*).

If the Purchase Money Security Interest was granted MORE than 910 days (two and one-half years) pre-petition, then the debtor CAN (i) REDUCE the amount of the lien balance down to the market value of the vehicle, and (ii) REDUCE THE INTERSTST RATE and (iii) EXTEND THE TERM OF REPAYMENT. In Chapter 13, Section 506 will NOT be applicable to a vehicle debt incurred less than 910 days of petition. See: :"Hanging paragraph" following § 1325(a)(9). In order to reduce a purchase money lien against a vehicle down to the value of the vehicle, the vehicle must have been purchased at least two and one-half (2 ½) years prior to the petition date. However, although this statute limits the reduction of the secured claim – the principal amount to be repaid in Chapter 13, there are always three (3) aspects to any such action to modify the amount of the secured payment under a plan: principal amount, term of years, and interest rate – and this statute addresses only the first of these three aspects. Accordingly, it appears that even under BAPCPA, a debtor may revise the terms of a car loan to be repaid over the life of a three- or up to five-year plan, thus reducing the monthly payment on the same principal amount at the same interest rate as contractually agreed if the vehicle were purchased less than 910 days pre-petition.

Moreover, the interest rate at which the secured claim may be repaid also remains subject to the revisory powers of the Bankruptcy Court. The Code, even under BAPCPA, provides in 11 U.S.C. § 1325(a)(5)(B)(ii):

> The court shall confirm a plan if ...
> (5) with respect to each allowed secured claim provided for by the plan –
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, **as of the effective date of the plan**, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim. In *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787, 51 C.B.C.2d 642 (2004).

If the purchase money lien was granted more than 910 days pre-petition against the motor vehicle, then the motion, notice and order that was filed in the Randy Groves Chapter 13 case would be applicable:

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Randy W. Groves. | * | CASE NO. 08-22773 JS |
| Alecia D. Groves | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |
| * * * * * * | * | * * * * * * * |
| | * | |
| Randy W. Groves | * | |
| 302 Coldstream Close | * | |
| Westminster, MD 21158 | * | |
| | * | |
| Debtor/Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Capital One Auto Finance, Inc. | * | |
| P. O. Box 255605 | * | |
| Sacramento, CA 95865 | * | |
| SERVE ON: Resident Agent | * | |
| CSC-Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street, Suite 1660 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * | * * * * * * * |

**MOTION TO DETERMINE SECURED STATUS OF CLAIM AND TO MODIFY RATE OF INTEREST OF LIEN HELD BY CAPITAL ONE AUTO FINANCE, INC.**

Randy W. Groves, debtor, by his attorney, Marc R. Kivitz, pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2) and Rules 3012, 4003(d) and 9014 of the Federal Rules of Bankruptcy Procedure hereby institutes this action against Capital One Auto Finance, Inc., respondent, for the determination of the secured status of the respondent's claim against the debtor's 2003

 

Hummer Utility Luxury 4WD VIN 5GRN23U03H100579, and to modify the rate of interest payable to the respondent, and as grounds therefore respectfully represents that:

1. On October 2, 2008, Randy Wayne Groves ("debtor") filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C., commencing in this Court Case No. 08-22773 JS

2. This Court has jurisdiction over this motion to determine secured status pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a) and (d), 522(f)(1)(B), and 1322(b)(2), and Rules 3012, 4003(d) and 9014 of the F.R.Bank.Proc.

3. Capital One Auto Finance, Inc. ("Capital" or "respondent") is a lending institution, is engaged in the business of financing the purchase of motor vehicles to the consuming public, and does business within the State of Maryland.

4. At the time of the filing of the bankruptcy case, the debtor owned and still owns a 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579 ("the vehicle"). A copy of the Notice of Security Interest filing evidencing the lien held by Capital against the vehicle is attached hereto as Exhibit A and is incorporated herein by reference.

5. The debtor purchased the vehicle on or about January 17, 2006, more than 910 days prior to the filing of the debtor's Chapter 13 case, by executing a Retail Installment Sale Contract Simple Interest Charge through which the debtor financed the amount of $35,242.50 ("the contract"), which contract is attached hereto as Exhibit B and is incorporated herein by reference.

6. The debtor listed the secured debt owed to the respondent as $22,863.06 on his Schedule D filed in this Chapter 13 case.

7. The debtor under the contract (Exhibit B) granted to Capital a lien and security interest against the vehicle which is reflected on the Notice of Security Interest Filing (Exhibit A).

 

8. The vehicle has a replacement and market value of $7,455.00 as shown on the Kelley Blue Book analysis attached hereto as Exhibit C and incorporated herein by reference.

9. The debtor contends that to the extent that the secured claim of Capital exceeds the replacement value of the vehicle that the claim of Capital is unsecured:

$22,863.06 balance due on secured debt
- $ 7,455.00 value of the vehicle collateral
$15,408.06 debt exceeding value of vehicle collateral

The debtor contends the secured claim held by Capital is in the amount of $7,455.00, the replacement and market value of the vehicle, and the respondent has an unsecured claim for $15,408.06 as the balance of the debt of $22,863.06 in excess of the replacement value ($22,863.06 - $7,455.00 = $15,408.06).

10. The balance allegedly owed to the respondent under the contract is being financed at an annual rate of interest of eleven and ninety-five hundredths percent (11.95%) which is shown on the contract (Exhibit B).

11. The debtor believes that the national financial market's prime rate of interest is five percent (5.00%) *per annum* as shown on Exhibit D attached hereto and incorporated herein by reference, and that this rate is a reasonable rate of interest for the debtor's acquisition of the vehicle and a fair market rate of return to the respondent for the vehicle in the present market in the absence of any other relief awarded to the debtor. *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787, 51 C.B.C.2d 642 (2004). At five percent *per annum* the $7,455.00 value of the vehicle would be payable to the respondent in equal monthly installments each in the amount of $140.10 over a sixty (60) month term, and would be beneficial to the debtor and his creditors as compared to the contractual payment of $786.90.

 

WHEREFORE, Randy W. Groves, debtor, respectfully requests that this Honorable Court:

1. Determine that pursuant to §§ 506 and 1322(b) of the Bankruptcy Code, 11 U.S.C., and Bankruptcy Rule 3012 that the respondent's lien against the debtor's 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579 is in the amount of $7,455.00, the replacement value and market value of the vehicle; and

2. Determine the applicable rate of interest payable on the allowed secured claim of $7,455.00 held by the respondent to be in the amount of five percent (5.00%) *per annum*; and

3. Enter an Order modifying the secured claim of Capital One Auto Finance, Inc., and permitting the modified lien to be paid in the amount of the replacement value of its collateral in the amount of $7,455.00 at five percent (5.00%) *per annum* annual interest over a term of sixty (60) months in equal monthly installments each in the amount of $140.10 commencing thirty (30) days following the entry of an Order confirming the debtor's plan; and

4. Determine that pursuant to §§ 506 and 1322(b) of the Bankruptcy Code, 11 U.S.C., and Bankruptcy Rule 3012 that the respondent's lien against the debtor's 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579 is unsecured to the extent that it exceeds the replacement value of the debtor's vehicle and is to be treated as a general unsecured non-priority claim under the debtor's plan of reorganization, however, in the event that the respondent (or any assignee) shall obtain possession of the vehicle then such event shall be in full satisfaction of the respondent's claim pursuant to the last unnumbered paragraph of 11 U.S.C. § 1325(a) and the respondent shall not be entitled to any claim on account of any deficiency upon the sale of the vehicle; and

5. Award to the debtor such other and further relief as is just and proper.

 

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
EMAIL: mkivitz@aol.com
Attorney for debtor/movant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of October, 2008, a copy of the foregoing motion to determine extent of secured lien was served electronically or by first class mail, postage prepaid, to:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

Capital One Auto Finance, Inc.
SERVE ON: Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street
Suite 1660
Baltimore, MD 21202

Capital One Auto Finance, Inc.
P. O. Box 93016
Long Beach, CA 90809

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:1groves Cap One Hummer

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Randy W. Groves. | * | CASE NO. 08-22773 JS |
| Alecia D. Groves | * | Chapter 13 |
| | * | |
| Debtors | * | |
| | * | |
| * * * * * * | * * * * * * * | |
| | * | |
| Randy W. Groves | * | |
| 302 Coldstream Close | * | |
| Westminster, MD 21158 | * | |
| | * | |
| Debtor/Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Capital One Auto Finance, Inc. | * | |
| P. O. Box 255605 | * | |
| Sacramento, CA 95865 | * | |
| SERVE ON: Resident Agent | * | |
| CSC-Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street, Suite 1660 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * * * * * * * | |

 

**ORDER DETERMINING STATUS OF CLAIM AND MODIFYING RATE OF INTEREST ON SECURED CLAIM OF CAPITAL ONE AUTO FINANCE, INC.**

Upon consideration of the motion of Randy W. Groves, debtor, for the determination of the status of the claim held by Capital One Auto Finance, Inc., respondent, against the debtor's 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579 and for the modification of the interest rate payable to the respondent; and good cause having been shown, it is therefore by the United States Bankruptcy Court for the District of Maryland

ORDERED that the motion of Randy W. Groves, debtor, to determine the status of the claim held by Capital One Auto Finance, Inc., respondent, against the debtor's 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579, and the modification of the interest rate payable to the respondent, be, and the same is hereby, granted; and be it further

ORDERED that the secured claim held by Capital One Auto Finance, Inc., respondent, be, and the same is hereby, determined to be Seven Thousand Four Hundred Fifty-five Dollars ($7,455.00), the replacement and market value of the 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579; and be it further

ORDERED that the secured claim in the amount of $7,455.00 held by Capital One Auto Finance, Inc., respondent, against the 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579, as determined by the preceding decretal paragraphs, be, and the same shall be, paid at five percent (5.00%) annual interest over a term of sixty (60) months in equal monthly installments each in the amount of $140.10 commencing thirty (30) days following the entry of an Order confirming the debtor's plan; and be it further

ORDERED that any payments made post-petition to Capital One Auto Finance, Inc., respondent, but prior to the entry of this Order, shall be applied to the direct reduction of the

 

principal balance of $7,455.00 and shall shorten the term of this restructured secured obligation; and be it further

ORDERED that in the event that the respondent (or any assignee) shall obtain possession of the vehicle then such event shall be in full satisfaction of the respondent's claim pursuant to the last unnumbered paragraph of 11 U.S.C. § 1325(a) and the respondent shall not be entitled to any claim on account of any deficiency upon the sale of the vehicle.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

Ellen Cosby, Esquire
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

Capital One Auto Finance, Inc.
P. O. Box 255605
Sacramento, CA 95865

Capital One Auto Finance, Inc.
SERVE ON: Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street
Suite 1660
Baltimore, MD 21202

Randy W. Groves
302 Coldstream Close
Westminster, MD 21158

motions:1groves Cap One Hummer order

**END OF ORDER**

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| IN RE: | * |
| | * |
| Randy W. Groves. | * CASE NO. 08-22773 JS |
| Alecia D. Groves | * Chapter 13 |
| | * |
| Debtors | * |
| | * |
| * * * * * * | * * * * * * * |
| | * |
| Randy W. Groves | * |
| 302 Coldstream Close | * |
| Westminster, MD 21158 | * |
| | * |
| Debtor/Movant | * |
| | * |
| v. | * |
| | * |
| Capital One Auto Finance, Inc. | * |
| P. O. Box 255605 | * |
| Sacramento, CA 95865 | * |
| SERVE ON: Resident Agent | * |
| CSC-Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |
| * * * * * * | * * * * * * * |

**NOTICE OF MOTION TO DETERMINE SECURED STATUS OF CLAIM AND MODIFY RATE OF INTEREST, OF LIEN HELD BY CAPITAL ONE AUTO FINANCE, INC.**
**AND NOTICE OF HEARING THEREON**

Randy W. Groves, debtor, has filed papers with the Court seeking modification of the lien held by Capital One Auto Finance, Inc., respondent, against the debtor's 2003 Hummer Utility Luxury 4WD VIN 5GRN23U03H100579 pursuant to 11 U.S.C. §§ 506(a) and 1322(b) and Rule 3012 of the Federal Rules of Bankruptcy Procedure, to extend the contract term and to modify and reduce the interest rate charged. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion avoiding the lien, or if you want the court to consider your views on the motion, then by **November 6, 2008**, you or your lawyer must file a

written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy of the response to:

Marc R. Kivitz, Esquire
Suite 1330
201 N. Charles Street
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above. The hearing is scheduled for **Friday, December 5, 2008, at 10:00 a.m. in Courtroom 9C**, United States Bankruptcy Court, 101 West Lombard Street, Baltimore, MD 21201.

IF YOU OR YOUR LAWYER DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

10/06/08
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 N. Charles Street
Baltimore, Maryland 21201
(410) 625-2300
Facsimile: (410) 576-0140
EMAIL: mkivitz@aol.com
Attorney for debtor/movant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of October, 2008, a copy of this notice was served electronically or by first class mail, postage prepaid upon:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

Capital One Auto Finance, Inc.
SERVE ON: Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street
Suite 1660
Baltimore, MD 21202

Capital One Auto Finance, Inc.
P. O. Box 255605
Sacramento, CA 95865

/s/ Marc R. Kivitz
Marc R. Kivitz

motions:1groves Cap One Hummer notice

 

 

If the purchase money lien was granted ***less than*** 910 days pre-petition against the motor vehicle, then the motion, notice and order that was filed in the Stephanie Ann Ivey Chapter 13 case would be applicable:

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Stephanie Ann Ivey | * | CASE NO. 10-30069-DK |
| | * | Chapter 13 |
| Debtor | * | |
| | * | |
| * * * * * * * * * * * * * | | |
| | * | |
| Stephanie Ann Ivey | * | |
| 927 Argonne Drive | * | |
| Baltimore, MD 21218 | * | |
| | * | |
| Debtor/Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Credit Acceptance Corp. | * | |
| 25505 W. 12 Mile Road | * | |
| Suite 3000 | * | |
| Southfield, MI 48034 | * | |
| SERVE ON: Resident Agent | * | |
| CSC-Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street, Suite 1660 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * * * * * * * * | | |

**MOTION TO DETERMINE SECURED STATUS OF CLAIM BY REDUCTION OF INTEREST RATE AND EXTENSION OF TERM OF CONTRACT FOR LIEN HELD BY CREDIT ACCEPTANCE CORP.**

Stephanie Ann Ivey, debtor, by her attorney, Marc R. Kivitz, pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2) and Rules 3012, 4003(d) and 9014 of the Federal Rules of Bankruptcy Procedure hereby files this motion against Credit Acceptance Corp., respondent, for the determination of the secured status of the respondent's claim against the debtor's 2000 Pontiac Grand Am VIN 1G2NW52E4YM709078 by the extension of the term of the contract to sixty (60) months and the reduction of the interest rate for the lien secured by this vehicle and the

 

consequent reduction in the amount of the monthly payment, and as grounds therefore respectfully represents that:

1. On August 31, 2010, Stephanie Ann Ivey (“debtor”) filed a Voluntary Petition for Reorganization under Chapter 13of the Bankruptcy Code commencing a case in this court Case No. 10-30069-DK.

2. This Court has jurisdiction over this amended motion to determine secured status pursuant to 28 U.S.C. §§ 1334(b), 157(b)(2)(A), (B), (K), (O), 11 U.S.C. §§ 506(a) and (d), and 1322(b)(2), and Rules 3012, 4003(d) and 9014 of the F.R.Bank.Proc.

3. Credit Acceptance Corp., ("Credit" or “respondent”) is a lending institution, is engaged in the business of financing the purchase of motor vehicles to the consuming public, and does business within the State of Maryland.

4. At the time of the filing of the bankruptcy case, the debtor owned, still owns, and listed on Schedule B-25 her interest in a 2000 Pontiac Grand Am VIN 1G2NW52E4YM-709078 ("the vehicle"). A copy of the title to the vehicle is attached as Exhibit A and is incorporated herein by reference.

5. The debtor purchased the vehicle on or about October 8, 2008, by executing a Maryland Retail Installment Contract with Sir Michaels Auto Sales, and initially financed the amount of $8,603.94 (“the contract”), which contract was assigned to the respondent, and which contract is attached hereto as Exhibit B and is incorporated herein by reference.

6. The respondent at the time of the filing of the reorganization case held a claim secured by the vehicle in the amount of $4,292.53 under the contract which was to be repaid at an annual interest rate of 18.99% as set forth on the contract and as shown by the respondent’s proof of claim, a copy of which proof of claim is attached hereto as Exhibit C and is incorporated herein

 

by reference. The debtor avers that the national prime rate of interest is 3.25% as of the filing of her reorganization case and this motion as shown by Exhibit D which is incorporated herein by reference.

7. The debtor under the contract granted to the respondent a lien and security interest against the vehicle which is reflected on the title (Exhibit A).

8. The debtor believes and therefore avers that the vehicle has a replacement and market value of $2,000.00, the value listed by the debtor on Schedule B-25.

9. The debtor avers that the first payment under the contract came due on November 12, 2008, and that at the time of the filing of the reorganization case there were thirteen (13) monthly payments remaining due on the 39-month contract.

10. The debtor avers that the contract presently requires a monthly payment in the amount of $297.34. The debtor contends that the contract and the lien secured by the vehicle may be modified and extended to a new term of sixty (60) months such that the balance of $4,000.00 at an annual rate of interest of 4.25% -- one percent (1.00% higher than the national prime rate of interest to address any risk of loss which the respondent might experience -- over a sixty (60) month term would be payable to the respondent in equal monthly installments each in the amount of $79.26 with the first such payment beginning on November 1, 2010, and continuing on the first day of each month for the next succeeding fifty-nine (59) months.

WHEREFORE, Stephanie Ann Ivey, debtor, respectfully requests that this Honorable Court:

1. Determine that pursuant to §§ 506(a) and 1322(b)(2) of the Bankruptcy Code, 11 U.S.C., and Bankruptcy Rule 3012 that the respondent's lien against the debtor's 2000 Pontiac Grand Am VIN 1G2NW52E4YM709078 is in the amount of $4,292.53, the balance owed on the

 

vehicle and modifying the interest rate payable to the respondent to an annual interest rate of four and one-quarter percent (4.25%); and

2. Determine that the respondent's secured claim in the principal amount of $4,292.53 against the debtor's 2000 Pontiac Grand Am VIN 1G2NW52E4YM709078 shall be paid at an annual interest rate of four and one-quarter percent (4.25%) over a term of sixty (60) months in equal monthly installments each in the amount of $79.26 commencing thirty (30) days following the entry of an Order; and

3. Award to the debtor such other and further relief as is just and proper.

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330
201 North Charles Street
Baltimore, MD 21201
(410) 625-2300
Facsimile: (410) 576-0140
Email: mkivitz@aol.com
Attorney for Stephanie Ann Ivey, debtor/movant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of September, 2010, a copy of the foregoing motion to determine extent of secured lien was served electronically or by first class mail, postage prepaid, to:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

Credit Acceptance Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Credit Acceptance Corp.
ATTN: Laura Hall, Bankruptcy Coordinator
25505 W. 12 Mile Road
Suite 3000
Southfield, MI 48034

Stephanie Ann Ivey

 

927 Argonne Drive
Baltimore, MD 21218

/s/ Marc R. Kivitz
Marc R. Kivitz

Motions:1ivey Credit Acceptance2

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Stephanie Ann Ivey | * | CASE NO. 10-30069-DK |
| | * | Chapter 13 |
| Debtor | * | |
| | * | |

* * * * * * * * * * * * *

| | |
|---|---|
| | * |
| Stephanie Ann Ivey | * |
| 927 Argonne Drive | * |
| Baltimore, MD 21218 | * |
| | * |
| Debtor/Movant | * |
| | * |
| v. | * |
| | * |
| Credit Acceptance Corp. | * |
| 25505 W. 12 Mile Road | * |
| Suite 3000 | * |
| Southfield, MI 48034 | * |
| SERVE ON: Resident Agent | * |
| CSC-Lawyers Incorporating Service Co. | * |
| 7 St. Paul Street, Suite 1660 | * |
| Baltimore, MD 21202 | * |
| | * |
| Respondent | * |
| | * |

* * * * * * * * * * * * *

**NOTICE OF MOTION TO DETERMINE SECURED STATUS OF CLAIM AND MODIFY RATE OF INTEREST, OF LIEN HELD BY CREDIT ACCEPTANCE CORP.**
**AND NOTICE OF HEARING THEREON**

Stephanie Ann Ivey, debtor, has filed a motion with the Court seeking modification of the lien held by Credit Acceptance Corp., respondent, against the debtor's 2000 Pontiac Grand Am pursuant to 11 U.S.C. §§ 506(a) and 1322(b) and Rule 3012 of the Federal Rules of Bankruptcy Procedure, through an extension of the term of the contract and a reduction of the interest rate. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to grant the motion avoiding the lien, or if you want the court to consider your views on the motion, then by **October 12, 2010**, you or your lawyer must file a

 

written response with the Clerk of the Bankruptcy Court explaining your position and mail a copy of the response to:

Marc R. Kivitz, Esquire
Suite 1330
201 N. Charles Street
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

If you mail, rather than deliver, your response to the Clerk of the Bankruptcy Court for filing, you must mail it early enough so that the court will receive it by the date stated above.

The hearing is scheduled for **Monday, November 8, 2010, at 2:30 p.m. in Courtroom 1B**, United States Bankruptcy Court, First Floor, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

IF YOU OR YOUR LAWYER DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

09/07/10
Date

/s/ Marc R. Kivitz
Marc R. Kivitz
Trial Bar No. 02878
Suite 1330, 201 N. Charles Street
Baltimore, Maryland 21201
(410) 625-2300
Facsimile (410) 576-0140
Email: mkivitz@aol.com
Attorney for debtor/movant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of September, 2010, a copy of this amended notice was served electronically or by first class mail, postage prepaid upon:

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

Ms. Ellen W. Cosby
Chapter 13 Trustee
P.O. Box 20016
Baltimore, MD 21284-0016

Credit Acceptance Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street, Suite 1660
Baltimore, MD 21202

Credit Acceptance Corp.
ATTN: Laura Hall, Bankruptcy Coordinator
25505 W. 12 Mile Road
Suite 3000
Southfield, MI 48034

Stephanie Ann Ivey
927 Argonne Drive
Baltimore, MD 21218

/s/ Marc R. Kivitz
Marc R. Kivitz

motions:1ivey Credit Accept notice2

 

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| IN RE: | * | |
| | * | |
| Stephanie Ann Ivey | * | CASE NO. |
| | * | Chapter 13 |
| Debtor | * | |
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| * * * * * * | * * * * * * * | |
| | * | |
| Stephanie Ann Ivey | * | |
| | * | |
| Debtor/Movant | * | |
| | * | |
| v. | * | |
| | * | |
| Credit Acceptance Corp. | * | |
| 22505 W. 12 Mile Road | * | |
| Suite 3000 | * | |
| Southfield, MI 48234 | * | |
| SERVE ON: Resident Agent | * | |
| CSC-Lawyers Incorporating Service Co. | * | |
| 7 St. Paul Street, Suite 1660 | * | |
| Baltimore, MD 21202 | * | |
| | * | |
| Respondent | * | |
| | * | |
| * * * * * * | * * * * * * * | |

**ORDER DETERMINING STATUS OF CLAIM AND MODIFYING RATE OF INTEREST ON SECURED CLAIM**
**CREDIT ACCEPTANCE CORP.**

 

Upon consideration of the motion of Stephanie Ann Ivey, debtor, for the determination of the status of the claim held by Credit Acceptance Corp., respondent, against the debtor's 2000 Pontiac Grand Am and for the modification of the interest rate payable to the respondent; and good cause having been shown, it is therefore by the United States Bankruptcy Court for the District of Maryland

ORDERED that the motion of Stephanie Ann Ivey, debtor, to determine the status of the claim held by Credit Acceptance Corp., respondent, against the debtor's 2000 Pontiac Grand Am, and the modification of the interest rate payable to the respondent, be, and the same is hereby, granted; and be it further

ORDERED that the secured claim held by Credit Acceptance Corp., respondent, against the debtor's 2000 Pontiac Grand Am in the amount of $4,000.00, be, and the same shall be, paid at four and one-quarter percent (4.25%) annual interest over a term of sixty (60) months in equal monthly installments each in the amount of $79.26 commencing thirty (30) days following the entry of an Order confirming the debtor's plan; and be it further

ORDERED that any payments made post-petition to Credit Acceptance Corp. respondent, but prior to the entry of this Order, shall be applied to the direct reduction of the principal balance of $4,000.00 and shall shorten the term of this restructured secured obligation.

cc: Marc R. Kivitz, Esquire
Suite 1330
201 North Charles Street
Baltimore, MD 21201

Mark A. Neal, Esquire
Assistant U.S. Trustee
Suite 2625, 101 W. Lombard St.
Baltimore, MD 21201

Credit Acceptance Corp.
22505 W. 12 Mile Road
Suite 3000
Southfield, MI 48234

 

Credit Acceptance Corp.
c/o Resident Agent
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street
Suite 1660
Baltimore, MD 21202

Credit Acceptance Corp.
21301 Civic Center Drive
Southfield, MI 48076

Stephanie Ann Ivey
927 Argonne Drive
Baltimore, MD 21218

Motion:1ivey CreditAcceptance order

**END OF ORDER**

 

C. ***Manufacturing the Plan***. Even if the Purchase Money lien were granted LESS than 910 days pre-petition, even in a Chapter 13 case, the Purchase Money Security Interest CAN STILL BE AFFECTED by (i) a REDUCTION OF THE INTERSTST RATE and/or (ii) AN EXTENSION OF THE TERM OF REPAYMENT.

*See, e.g., In re Ivey*, Chapter 13 Case NO. 10-30069-DK where the vehicle was purchased on or about October 8, 2008, and the Chapter 13 case was filed August 31, 2010, LESS than 910 days later; debtor filed a motion to reduce the interest rate and to extend the remaining term of the contract to the full 5-year term of her Chapter 13 case; by modifying these two terms – interest rate and term of years, even without being able to strip down the value of the collateral -- because under the "handing paragraph" following 1325(b)(9), § 506(a) and (d) are not applicable to purchase money liens created less than 910 days pre-petition – the debtor was able to reduce the car payment from the contractual $297.34 down to $79.26 !!!

*See also, e.g., Cyril Bell, Sr., and Michelle Bell*, Chapter 13, Case NO. 16-13011-RAG, where the debtors' Schedules I and J reflected disposable monthly income of $13.74 but the debtors needed considerably more funds with which to repay $14,098.46 in arrearages to their first residential mortgage lien holder, Nationstar Mortgage LLC, so…

(i) pursuant to §§ 506(a) and (d) we stripped off the wholly unsecured second residential mortgage held by Bank of America (Pages 68 - 82, *supra*); and

(ii) pursuant to §§ 506(a) and (d) we stripped off the wholly unsecured second security interest on their vehicle held by Mariner Finance LLC (Pages 26 - 35, *supra*); and

(iii) pursuant to §§ 506(a) and (d) and 1325(b)(9) we stripped down to the value of the vehicle and reduced the interest rate and extended the term of the first security interest on their vehicle held by Hyundai Motor Finance, Inc. (Pages 38 - 49, *supra*); and

(iv) filed an Objection to the allegation made in the proof of claim filed by Wells Fargo Financial Bank contending that it held a perfected security interest against the debtors' tub and shower stall arguing *inter alia* that no security interest had been granted and that if granted it was not properly perfected as the alleged collateral had become fixtures to the debtors' realty and no lien had been filed in the land records as required by *I n re Reese*, 194 B.R. 782, 789 (Bankr. D.Md. 1996)(Mannes, C.J., and Keir, J.) (Pages 7 - 17, *supra*).

By taking these steps, negating some and reducing other contractual monthly payments, we generated $750.00 in monthly disposable income sufficient to propose a confirmable Plan.

The interest rate at which the secured claim may be repaid is subject to the revisory powers of the Bankruptcy Court. The Code, even under BAPCPA, provides in 11 U.S.C. § 1325(a)(5)(B)(ii):

The court shall confirm a plan if ...

(5) with respect to each allowed secured claim provided for by the plan –

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, **as of the effective date of the plan**, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

 

**VII. Implications for Chapter 11?**

A. 11 U.S.C. §§ 506(a) and (d) subject to 11 U.S.C. § § 1123(b)(5):

11 U.S.C. § 1123(b)(5) states:

> (b) Subject to subsection (a) of this section, a plan may –
>
> (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence….

Similar to the restriction in § 1322(b)(2) in Chapter 13, Section 1123(b)(5) in Chapter 11 imposes the same limitation: a debtor may not stripdown a consensually granted security interest secured solely by residential real property – in fact no modification of any term of such a security interest is permitted under the Bankruptcy Code.

B. No 910-day provision. In Chapter 11, unlike Chapter 13, there is no 910-day time restriction regarding the cramdown of a purchase money security interest against personal property. Accordingly, irrespective of the time relationship between the date of the recordation of the purchase money financing security interest against the article of personal property and the date of the filing of the Chapter 11 case, Section 506 may be applied to reduce the balance on the lien down to the market value of the collateral, as well as also reduce the interest to the *Till* rate of interest, and/or extend the term of repayment so as to lower the debtor's monthly payment.

N.B. that any contested matter that seeks to reduce the lien balance to the market value of the car will also put "into play" the applicable interest rate. For example, if the purchase money financing were at 1.00% and at the time of the filing of the Chapter 11 case the value of the car was $3,000.00 but the loan balance was $10,000.00 and the contested matter was filed to reduce the $10,000.00 lien down to the $3,000.00 value, the debtor WOULD NOT be able to maintain the contractual 1.00% interest rate, but rather the *Till* rate of interest – market rate plus an additional 1.00% to 3.00% to address depreciation's reduction in value – would be applied. Consequently, the calculation must be performed as to whether the application of the *Till* rate of interest to the lower market value produces a lower payment.

C. Section 1111(b) election. Unlike Chapter 13, in Chapter 11 secured creditors may elect to have their claim treated as fully secured and waive the right to vote a ballot as an unsecured or undersecured creditor. Section 1111(b) regarding this election by secured creditors states:

Section 506(a) provides in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

 

The conventional wisdom both pre- and post-*Dewsnup* has been to interpret this section as follows:

> Under the Bankruptcy Code, a creditor that has an allowed claim on collateral with a value *less* than the amount owed on that claim holds two claims: a secured claim equal to the value of the collateral, and an unsecured claim for the excess of the claim over the value of the collateral. 11 U.S.C. § 506 (a); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239, 109 S.Ct. 1026, 1029, 103 L.Ed.2d 290 (1989)

*In re Dever*, 164 B.R. 132 (Bankr. C.D. Cal. 1994) Chapter 11 debtors filed a complaint to determine secured status of Internal Revenue Service's (IRS) tax lien. IRS moved for summary judgment, contending that debtors could not avoid lien on property retained by debtors, arguing that *Dewsnup* should be extended to apply to reorganization cases – a position expressly reserved by the Supreme Court. The Bankruptcy Court held that lien stripping is permissible in Chapter 11and that Chapter 11 debtors may strip down liens on real property under a Chapter 11 plan. Chapter 11 contemplates stripping down of liens to the value of collateral as of effective date of a plan, unless the creditor elects to be treated as a fully secured. 11 U.S.C. §§ 506(d), 1111(b).

> Section 1111(b)(2) gives an undersecured, nonrecourse lender some ability to control its destiny in a Chapter 11 case because it allows the creditor to elect to be treated as fully secured, "notwithstanding Section 506(a) of this title," thereby preventing a "cash out" under Section 1129.

*Dever*, 164 B.R. 141 – 42. Neither Chapter 7, Chapter 12, nor Chapter 13 have a comparable provision.

As to timing of the scecured creditor's election to be treated as fully secured, Bankruptcy Rule 3014, which provides:

> An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

Thus, secured creditors in Chapter 11 may thwart reduction of their liens through a timely election to be treated as fully secured.

 