

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
)  
BRADLEY M. STEWART, ) CASE NO. 05-65503 JPK  
) Chapter 13  
) Debtor. )  
\*\*\*\*\*  
BRADLEY M. STEWART, )  
) Plaintiff, )  
) v. ) ADVERSARY NO. 08-2109  
) JP MORGAN CHASE BANK AS )  
) TRUSTEE FOR HOMECOMING )  
) FINANCIAL NETWORK, INC. and )  
) PAUL R. CHAEL, )  
) Defendants. )  
\*\*\*\*\*  
BRADLEY M. STEWART, )  
) Plaintiff, )  
) v. ) ADVERSARY NO. 08-2110  
) HSBC MORTGAGE SERVICES ) (consolidated into adversary proceeding  
) and PAUL R. CHAEL, ) number 08-2109)  
) Defendants. )

JUDGMENT

Adversary proceeding number 08-2109 was initiated by a complaint filed on September 30, 2008 against the designated defendant JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and Paul R. Chael, as Trustee of the debtor's/plaintiff's Chapter 13 case (case number 05-65503). Adversary proceeding number 08-2110 was also initiated by complaint filed on September 30, 2008, against designated defendants HSBC Mortgage Services and the Chapter 13 Trustee Paul R. Chael. By order entered on April 20, 2009 in adversary proceeding number 08-2109, adversary proceeding numbers 08-2109 and 08-2110 were consolidated into adversary proceeding number 08-2109.

Service of process has been effected upon all defendants in the consolidated adversary proceeding. Pursuant to the court's order entered on July 1, 2009, the Plaintiff's Motion for Default Judgment was filed on July 28, 2009. Having reviewed the record, the court finds that

the plaintiff is entitled to judgment by default against all defendants pursuant to Fed.R.Bankr.P. 7055/Fed.R.Civ.P. 55(b)(2).

The Chapter 13 plan filed by Bradley M. Stewart in case number 05-65503 on October 7, 2005 provided, in paragraph 9, the following:

9. LIEN AVOIDANCE/LIEN CRAM DOWN

The following liens shall be avoided pursuant to 11 U.S.C. § 522(f), or other applicable sections of the Bankruptcy Code:

<u>Creditor</u>	<u>Amount of lien</u>	<u>Description of Property</u>
Homecoming	\$26,942.00	Second Mortgage/Residence* <sup>1</sup>
HSBC	\$21,928.00	Third Mortgage/Residence* <sup>2</sup>

<sup>1</sup>Claims will be avoided pursuant to 11 U.S.C. § 1322(b)(2) and allowed as general unsecured claims

<sup>2</sup>Claims will be avoided pursuant to 11 U.S.C. § 1322(b)(2) and allowed as general unsecured claims

This plan was confirmed on December 21, 2005. Quite properly, the debtor initiated an adversary proceeding to effectuate the “strip down” of mortgages provided for by the foregoing provision. In doing so, the plaintiff apparently has relied upon judicial decisions under 11 U.S.C. § 1322(b)(2) which have determined that the protection with respect to modification of security interests under that provision is predicated upon the holder of a security interest having an “allowed secured claim” under 11 U.S.C. § 506(a). These decisions hold that if the amount of the debt subject to allowed secured claims having priority over the security interest of a creditor in residential property equal or exceed the value of the property, then the security interests of the subordinate creditor may be avoided completely (“stripped off”). The court finds that the debtor’s plan invokes this principle, and that the actions asserted against the defendants in the consolidated adversary proceeding results in a determination that the defendants JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and HSBC Mortgage Services do not have secured claims with respect to the debtor’s residence. As a result, the debtor’s plan is not required to provide for those security interests pursuant to

11 U.S.C. § 1322(b)(2)/§ 1322(b)(5)/§ 1325(a)(5), and upon successful completion of the debtor's plan and receipt by the debtor of discharge pursuant to 11 U.S.C. § 1328(a), the security interests held by JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and by HSBC Mortgage Services will have been fully and effectively avoided. As a result, upon the debtor's obtaining a discharge pursuant to 11 U.S.C. § 1328(a), any indebtedness owed by the debtors to JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and to HSBC Mortgage Services will be discharged, and any security interests held by either of those entities – i.e., the mortgages with respect to the debtor's indebtedness to those entities – will be void and of no effect.

The path to arrive at the foregoing determination is not as straight as the debtor may have contemplated. The "first" mortgage upon which the debtor relies – a mortgage originally given to First Horizon Home Loan Corporation – was executed on August 13, 2001, and was recorded on August 21, 2001 prior to 10:00 a.m. The "second" mortgage in the sequence was given to JPMorgan Chase Bank, was executed on August 18, 2001 and was recorded sometime after 10:00 a.m. on August 21, 2001. The "third" mortgage was given to National City Mortgage, and was recorded on September 11, 2001. Thus we have the interesting circumstance in which two mortgages were recorded on the same date, although one was recorded in advance of the other. Following the intuitive priority of recording dogma of "first in time, first in right", one might assume that the mortgage granted to First Horizon Loan Corporation would have priority over that granted to JPMorgan Chase Bank. However, the "first in time, first in right" doctrine does not apply in Indiana with respect to mortgages recorded on the same date. Rather, when mortgages are recorded on the same date, priority is determined by the date of execution of a mortgage, and the time of recording on a particular date does not establish priorities; *Gibson v. Keyes*, Ind., 14 N.E. 591 (1887); *Wood v. Lordier*, Ind., 18 N.E. 34 (1888). As a result, because the mortgage to First Horizon Home Loan Corporation (subject to

the claim of Wachovia Mortgage Corporation) was executed in advance of the mortgage provided to JPMorgan Chase Bank, the latter has priority over the former, and the indebtedness secured by that mortgage is taken into account in the computation required by the plaintiff's theory of security interest avoidance under 11 U.S.C. § 1322(b)(2)/11 U.S.C. § 506(a).<sup>1</sup>

IT IS ORDERED, ADJUDGED AND DECREED that upon successful completion of the debtor's Chapter 13 plan in case number 05-65503 and upon the debtor's obtaining of a discharge pursuant to 11 U.S.C. § 1328(a) in that case, the following will result:

1. All *in personam* indebtedness owed by the debtor to JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and to HSBC Mortgage Services shall be discharged.
2. Any security interest, mortgage, or other lien held by JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and by HSBC Mortgage Services with respect to the real property located at 114 Elm Street, Lowell, Indiana shall be void.
3. Upon request by the debtor, JPMorgan Chase Bank as Trustee for Homecoming Financial Network, Inc. and HSBC Mortgage Services shall take all necessary action to terminate their respective mortgage or other lien interests in the property located at 114 Elm Street, Lowell, Indiana, and to remove those mortgage interests/liens as encumbrances with respect to that property.

Dated at Hammond, Indiana on August 21, 2009.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger, Judge  
United States Bankruptcy Court

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<sup>1</sup> The court would not expect any litigant in this court to realize that the foregoing rule exists. In a circumstance in which documents effecting liens are recorded on the same date, some states do accord priority to the lien being recorded first, and that would be the intuitive result in a "race notice" recording state such as Indiana. However, Indiana is different, as hoary cases of the Indiana Supreme Court have established.

Distribution:

Attorney for Plaintiff

JPMorgan Chase Bank, c/o Teresa Dearing, Attorney for Creditor, 155 E. Market Street, Suite 605, Indianapolis, IN 46220

JPMorgan Chase Bank, CT Corporation System, c/o Highest Ranking Officer, Michael J, Kozlak, 251 E. Ohio Street, Suite 1100, Indianapolis, IN 46204

HSBC Mortgage Services, Inc., c/o Registered Agent, CT Corporation System, 251 E. Ohio Street, Suite 1100, Indianapolis, IN 46204

Homecoming Financial Network, Inc., c/o Registered Agent, CT Corporation Systems, 251 E. Ohio Street, Suite 1100, Indianapolis, IN 46204