

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
BILLY GENE ANTHONY and ) CASE NO. 07-33275 HCD  
KIMBERLY ELAINE ANTHONY, ) CHAPTER 13  
 )  
DEBTORS. )

Appearances:

Brad A. Wooley, Esq., attorney for debtors, 103 E. Broadway, Monticello, Indiana 47960;

Debra L. Miller, Chapter 13 Trustee, P.O. Box 11550, South Bend, Indiana 46634; and

Scott Fandre, Esq., and Carl A. Greci, Esq., attorneys for creditor Ocwen Loan Service, LLC, Baker & Daniels LLP, 202 South Michigan Street, Suite 1400, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 31, 2009.

Before the court are two objections to the Confirmation of the Debtors' First Amended Chapter 13 Plan, filed by the Chapter 13 Trustee Debra L. Miller ("Trustee") and by the creditor Ocwen Loan Servicing, LLC ("Ocwen"). Briefs were filed by the parties, and the court took the matter under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(L) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

## Background

### *A. Procedural History.*

The debtors filed their first chapter 13 bankruptcy case on August 1, 2003. (Case No. 03-34359.) Ocwen filed a timely claim therein, asserting an interest secured by the mortgage on the debtors' residence in Medaryville, Indiana. On August 29, 2006, the chapter 13 Trustee filed a complaint to avoid Ocwen's mortgage under 11 U.S.C. § 544 on the ground that the mortgage was not recorded. (Adv. Proc. 06-3085.) On July 27, 2007, the court dismissed the Trustee's complaint as a matter of law because it was brought outside the two-year statute of limitations of 11 U.S.C. § 546. The debtors' chapter 13 case was dismissed on December 14, 2007, for payment delinquency and inadequate funding.

On December 18, 2007, the debtors filed a second petition under chapter 13 – and that filing commenced the case presently before the court. The 341 Notice informed the debtors' creditors of the filing and of the deadline for filing non-governmental claims, April 22, 2008. Ocwen filed its claim one month after the bar date, on May 23, 2008.<sup>1</sup> The court approved the debtors' motion to continue the automatic stay but denied confirmation of the debtors' initial chapter 13 plan.

The debtors filed an Amended Chapter 13 Plan ("the Plan") on April 29, 2008. That Plan is now before the court. It states that the debtors will pay to the Trustee \$1,141 per month for 60 months, beginning on January 18, 2008. Paragraph 4 of the Plan lists the disbursements to be made by the Trustee from the payments received under the Plan. That list includes payments to secured creditors; Ocwen is not included among the secured creditors. Instead, Ocwen is named in paragraph 10 of the Plan:

10. UNPERFECTED LIENS. That, because the creditors listed below FAILED TO PERFECT their liens, and, because Indiana Law and 7th Circuit decisions cause unperfected liens to be void and the claim to be unsecured, UNITED STATES vs. ROTHERHAM, 836 F.2d 359, at 364-65 (7th Cir. 1988), and, MATTER OF KEIDEL, 613 F.2d 172, at 173 (7th Cir. 1980), all of the lien holders given below are hereby notified that, upon confirmation, their entire lien shall be voided pursuant to Indiana Law and 11 U.S.C. Section 544(a) and said creditors shall not have a secured claim against the estate, but instead, shall only have a general unsecured claim which must be timely filed to be allowed:

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<sup>1</sup> Ocwen's Proof of Claim (Claim No. 16) reports a \$84,913.25 claim secured by the debtors' real estate.

LIEN HOLDER: Ocwen Federal Bank/The Bank of New York as Successor-in-Interest to JP Morgan Chase Bank, N.A., as Trustee, Successor-in-Interest to Bank One, N.A., As Trustee of the Amortizing Residential Collateral Trust, 2002-BC1

ACCOUNT NUMBER: [number listed here]

FACTUAL REASON LIEN IS UNPERFECTED: Creditor failed to record it's [sic] mortgage at the office of the Pulaski County, Indiana Recorder's Office as required by Indiana law. As a direct result of the said failure to record the mortgage, Debtors are entitled to have the real [estate] described below free and clear of any liens held by creditor. Pursuant to 11 U.S.C. § 544, the unrecorded mortgage, unrecorded Note and whatever lien is being held by creditor shall be ordered void upon confirmation of the plan.

The legal description of the real estate is as follows: [here, legal description of residence in Medaryville, Indiana is given]

R. 32, p. 3, ¶ 10. The subsequent paragraph states: "Title to the Debtor's property shall revert in debtor upon completion of payments under the plan." *Id.* ¶ 11.

*B. The Parties' Objections to the Plan*

The Trustee objected to the Plan. In order to comply with 11 U.S.C. § 1325(a) and (b), she contended, the debtors were required to submit tax returns and to add to the Plan a provision that the general unsecured claims will be paid at least \$49,750. *See* R. 38. Ocwen also filed an objection to the Plan, based upon the Plan's refusal to treat Ocwen as a secured creditor. *See* R. 36. At the confirmation hearing held on June 26, 2008, the debtors advised the court that an adversary proceeding would be filed within 15 days. The court directed briefs to be filed concerning Ocwen's objection to confirmation.

Central to Ocwen's argument is this court's judgment in Adversary Proceeding No. 06-3085 dismissing, on statute of limitations grounds, the Trustee's complaint to avoid Ocwen's mortgage. That ruling was issued in an adversary case in the debtors' prior chapter 13 bankruptcy case. It is Ocwen's position that "Ocwen is entitled to its continued enforcement of the judgment [of dismissal under § 546] in Debtors' subsequent bankruptcy," the case now before the court. Ocwen raises three basic arguments in favor of that position. First, because § 349(b)(2) does not vacate a judgment entered under § 546, the court's judgment remains and must be enforced in this second chapter 13 bankruptcy, as it was in the first one.

Second, because this court's dismissal of the Trustee's avoidance complaint was a final judgment on the merits, *res judicata* bars the debtors' attempt to avoid Ocwen's mortgage in this subsequent bankruptcy case. Third, Ocwen asserts that it has acted in good faith and that it would be inequitable to allow avoidance now, when the parties had litigated the issue fully in the previous bankruptcy.

The debtors and the Trustee respond, challenging each of Ocwen's contentions. They insist that both the dismissal of the Trustee's complaint in Adversary Proceeding No. 06-3085 and the dismissal of the debtors' bankruptcy case under § 349 returned the debtors and Ocwen to their pre-petition positions and re-established their rights to what they were when the petition was filed. In their view, Ocwen now holds whatever right it originally had in the debtors' real estate. In response to Ocwen's second argument, the debtors and Trustee assert that the requirements of *res judicata* are absent: The parties are not identical; there is a different bankruptcy estate from which the avoidance cause of action now arises; and there was no final judgment on the merits of the ultimate issue, whether Ocwen has a properly recorded mortgage. With respect to Ocwen's third argument, the Trustee and debtors contend that nothing in § 546 provides that the limitations period applies to subsequent cases. The earlier chapter 13 case was dismissed, not converted, and this case has commenced with new filing dates and a new estate. Thus there is no bar to refiling an avoidance action, they insist. The debtors raise one other contention: They claim that Ocwen neither owns nor clearly has an assignment of the mortgage or promissory note in this case, and therefore it lacks standing to prosecute its Objection. Ocwen, in reply, insists that it is the current holder of the note and is entitled to enforce it. It also defends its position by addressing the arguments raised by the Trustee and debtors. After the briefing period ended, the court took the matter under advisement.

#### DISCUSSION

It is the duty of a bankruptcy court to determine that a chapter 13 plan comports with the appropriate Bankruptcy Code provisions. A court is required to confirm a debtor's proposed plan that meets the criteria of 11 U.S.C. § 1325(a) unless a bankruptcy trustee or holder of an allowed unsecured claim objects.<sup>2</sup> *See Petro v. Mishler*, 276 F.3d 375, 377 (7th Cir. 2002). Once an objection is raised, however, "then the court may not approve the plan unless" the criteria of subsection (b) are met. 11 U.S.C. § 1325(b). "The provisions of 11 U.S.C. § 1325 ensure that a Chapter 13 plan . . . will be properly scrutinized by the bankruptcy court before the plan is confirmed, mitigating the danger of abuse." *In re Smith*, 286 F.3d 461, 466 (7th Cir. 2002) (quoting *In re Young*, 237 F.3d 1168, 1174 (10th Cir. 2001)).

Two objections to confirmation were raised. The Trustee raised objections arising from § 1325(a) and (b). *See* R. 38. The Trustee stated that the debtors were required to submit copies of their 2007 state tax returns and to include in the Plan a provision for general unsecured claims payments of at least \$49,750. These objections challenge the Plan's compliance with § 1325(a)(4) and (a)(9). The Debtors offered no response to the Trustee's objections. For that reason alone, the Debtors' Plan cannot be confirmed.

Ocwen's objection raised no challenge to the compliance of the debtors' Plan under § 1325. It did not argue, for example, that the Plan did not comply with other provisions of chapter 13 or was not proposed in good faith, or that the debtor would not be able to make all the payments. *See* § 1325(a)(1), (3), and (6). In fact, Ocwen never made reference to § 1325 in any way. When the objector to a plan takes no step to object under § 1325(a) or (b), that objection fails. *See Petro*, 276 F.3d at 378.

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<sup>2</sup> The statute provides that, "[i]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan," the court may not approve the plan unless specific conditions are met. 11 U.S.C. § 1325(b). The debtors' First Amended Chapter 13 Plan treats Ocwen as the holder of an unsecured claim; Ocwen therefore objects as the "holder of an allowed unsecured claim." Without a challenge to Ocwen's ability to object to confirmation of the Plan, the court accepts Ocwen's status as objector of the Plan.

Ocwen also declined to challenge directly the Plan's designation of its claim as an unperfected lien. Nevertheless, Ocwen's objection, at its core, is an attempt to protect its claimed secured status. The court, fulfilling its obligation to scrutinize the Plan, turns to the provision that invalidates and avoids Ocwen's lien on the debtors' real property by providing for it as an unsecured claim. In their Plan, the debtors actually present a legal argument, with citations, to justify their position that Ocwen's lien is unsecured. Paragraph 10 of the Plan then notifies Ocwen that, "upon confirmation, their entire lien shall be voided pursuant to Indiana Law and 11 U.S.C. Section 544(a) and said creditors shall not have a secured claim against the estate, but instead, shall have only a general unsecured claim which must be timely filed to be allowed."

The court finds that the debtors' means of invalidating Ocwen's secured claim through this provision in their Plan is procedurally incorrect under the Federal Rules of Bankruptcy Procedure. The debtors' Plan provision bypasses Rule 7001(2), which provides that "a proceeding to determine the validity, priority, or extent of a lien" is an adversary proceeding. Under that rule, therefore, an adversary proceeding, and not a proposal in a plan, is the correct and required method for invalidating a lien. Bankruptcy rules bind the procedures of bankruptcy courts. *See In re Dorner*, 343 F.3d 910, 914 (7th Cir. 2003) ("Federal rules of bankruptcy procedure have the force of statutes."); *see also SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin)*, 530 F.3d 230, 238 (3d Cir. 2008) (holding that Rule 7001(2) "is mandatory and establishes a right to specific process that must be afforded").

In *Mansaray-Ruffin*, the Third Circuit provides an insightful analysis of a debtor's attempt to obtain relief from a mortgage debt by reclassifying the mortgage from secured to unsecured in the chapter 13 plan. The circuit court, affirming the rulings of the bankruptcy and district courts, held that a chapter 13 debtor could not invalidate the lien on her property by treating it as an unsecured claim in her plan; she was required to initiate an adversary proceeding. In that case, unlike the one now before this court, the mortgage

