

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
)  
ARTHUR LEE PRICKETT and ) CASE NO. 01-60080 JPK  
BEATRICE ANNETTE PRICKETT, ) Chapter 13  
)  
Debtors. )  
\*\*\*\*\*  
ARTHUR LEE PRICKETT and )  
BEATRICE ANNETTE PRICKETT, )  
)  
Plaintiffs, )  
)  
v. ) ADVERSARY NO. 03-6273  
)  
DES CAPITAL, LLC, et al., )  
)  
Defendants. )

JUDGMENT

This adversary proceeding was commenced by a complaint filed on October 14, 2003 by Arthur Lee Prickett and Beatrice Annette Prickett, who are the debtors in a presently pending Chapter 13 case, Case Number 01-60080. The specifically designated defendants are Des Capital, LLC; Coast-Plymouth Tax Lien Capital, LLC; Saul and Co., as Custodian; Treasurer, Lake County, Indiana; Option One Mortgage Corp.; and The Money Store. In addition, the complaint generally designated additional defendants as "all successors, assigns, and all other persons claiming any right, title or interest in the within described real estate, by, through or under them [the specifically designated defendants] or any person or entity, the names of all whom are unknown to the Plaintiffs".

Summons for the specifically designated defendants were issued on October 14, 2003. The Court issued an order on January 7, 2004 which noted that no return of service had at that time been filed with respect to service on any designated defendant. On January 12, 2004, an Affidavit of Service was filed which stated that summons, together with a copy of the complaint,

had been served on each of the designated defendants by first class mailing effected on October 14, 2003. On February 12, 2004, the plaintiffs' counsel filed a form of proposed default judgment, in which was included an Affidavit Concerning Military Service. The Court issued an order on February 19, 2004 in response, which noted deficiencies in the return of service. These deficiencies were corrected by the Amended Affidavit of Service filed on February 23, 2004.

By its orders of April 21, 2004 and May 21, 2004, the Court set out matters which required resolution before the Court could address the plaintiffs' entitlement to a default judgment. As a result of hearings before the Court, the Court and plaintiffs' counsel determined that due to the nature of the issues before the Court, the adversary proceeding might be most efficaciously resolved if a designated defendant having an interest in the proceedings in relation to the tax sale of the plaintiffs' property would appear in the action and engage in a dialogue with the Court and the plaintiffs' counsel. Pursuant to the Court's direction, a Notice of Hearing was served on each of the designated defendants [Docket Record Entry No. 15], together with a copy of the Motion for Entry of Default filed on July 13, 2004 – as evidenced by Affidavit of Service filed on July 13, 2004. This mailing did not generate a response from any of the designated defendants.

To attempt one last time to obtain the defendants' involvement, by Order entered on July 16, 2004, documenting a hearing held on July 8, 2004, the Court directed the plaintiffs' counsel to file a written notice of application for judgment in the manner provided by B.R. 7055/ Fed. R. Civ. Pro. 55(b)(2), and to serve that notice upon all of the designated defendants by certified mail. The Affidavit of Service filed on August 18, 2004 evidences that all of the designated defendants received the required notice documents, with the exception of Des Capital, LLC, with respect to which the mailing was returned by the Postal Service with the designation that the mailing had been refused.

A telephonic status conference was conducted on September 14, 2004 with the plaintiffs' counsel to determine the nature of further proceedings in this case in light of the fact that no designated defendant had appeared in the case in response to all of the Court's and counsel's efforts to get them to do so. Attorney Tokarski reported at that conference that none of the designated defendants had communicated with him in any manner in response to this litigation.

The Court took the plaintiffs' motion for default judgment under advisement following the September 14<sup>th</sup> conference.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157, and N.D.Ind.L.R. 200.1(a) of the Rules of the United States District Court for the Northern District of Indiana. This adversary proceeding is a core proceeding within the meaning of one or more subsections of 28 U.S.C. § 157(b)(2), particularly §157(b)(2)(B) and (K).

This Judgment is now issued as the final judgment in this adversary proceeding.

#### Standards for Review of Motions for Default Judgment

The basic procedural provision with respect to judgment by default is provided by Fed.R.Civ.Pro. 55(b)(2), made applicable to adversary proceedings by B.R. 7055. That provision in pertinent part states:

(b) Judgment. Judgment by default may be entered as follows:

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor: . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper . . .

The fact that a plaintiff is entitled to an entry of default does not entitle the plaintiff to the entry

of judgment by default. As explained in *In Re Sanchez*, 277 B.R. 904, 907 (Bankr. N.D. Ill. 2002) in the context of review of a motion for default judgment under 11 U.S.C. §523(a), which stated principles the Court deems fully applicable to the review of a motion for default judgment in any other context as well :

Rule 7055(b)(2) Fed.R.Bankr.P. governs default judgments entered by a bankruptcy court. A movant is not entitled to default judgment as a matter of right even though the debtor is in default under Rule 55(a) [Fed.R.Bankr.P. 7055(a)]. *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir.2001). Panels in this Circuit have eschewed traditional notions disfavoring default judgments. *Stafford v. Mesnik*, 63 F.3d 1445, 1450 (7th Cir.1995); *Profile Gear Corp. v. Foundry Allied Industries, Inc.*, 937 F.2d 351, 354 (7th Cir.1991); *Matter of State Exchange Finance Co.*, 896 F.2d 1104, 1106 (7th Cir.1990). However, in the bankruptcy context, where a debtor has a presumptive right to a discharge, default judgment motions should not be granted unless the movant shows that its debt is nondischargeable as a matter of law. *Valley Oak Credit Union v. Villegas*, 132 B.R. 742, 746 (9th Cir. BAP 1991) (court must determine whether plaintiff is entitled to judgment); *In re McArthur*, 258 B.R. 741, 746 (Bankr.W.D.Ark.2001) (noting that bankruptcy courts have taken a conservative approach and sometimes refrain from granting default judgment motions which deprive debtor of discharge).

Thus, the issue here is whether Plaintiff has shown at least *prima facie* facts meeting the legal requirements to except a debt from discharge under § 523(a)(2)(A).

As explained by the Bankruptcy Appellate Panel of the Ninth Circuit in *Valley Oak Credit Union v. Villegas*, 132 B.R. 742, 746 (9th Cir. BAP 1991):

The court has wide discretion in determining whether to enter a default judgment under Rule 55. See generally 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure Civil 2d* § 2685 (1983). Similarly, a trial court has broad discretion as to the nature of the hearing that it will hold pursuant to Rule 55(b)(2) in determining whether to enter a default judgment. This language of the rule itself confirms the discretion of the trial court to hold such hearings "as it deems necessary and proper." Fed.R.Civ.P. 55(b). This provides the trial court with discretion to require, at a hearing under Rule 55(b)(2), some proof of the facts that are necessary to a valid cause of action or to determine liability. See *Peerless Industries, Inc. v. Herrin Illinois Café, Inc.*, 593 F.Supp. 1339, 1341 (E.D.Mo.1984), *aff'd without opinion* 774 F.2d 1172 (8th

Cir.1985); Wright, Miller and Kane, at § 2688.

In establishing the basic facts of record upon which the Court is to review a motion for default judgment, the United States Court of Appeals for the Seventh Circuit follows the rule that “upon default, the well-pleaded allegations of a complaint relating to liability are taken as true, [but] allegations in a complaint relating to the amount of damages suffered ordinarily are not,” *US v. Di Mucci*, 879 F.2d 1488, 1497 (7<sup>th</sup> Cir. 1989); *Dundee Cement Company v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319, 1323 (7<sup>th</sup> Cir. 1983); *Merrill Lynch Mortgage Corp. v. Narayan*, 908 F.2d 246, 253 (7<sup>th</sup> Cir. 1990).

In this case, the Court has conducted hearings pursuant to B.R. 7055/ Fed. R. Civ. P. 55(b)(2) in order to obtain documentation and facts necessary to determine the nature and extent of the relief to which the plaintiffs may be entitled. Documents apart from those filed of record on the case docket were provided by the plaintiffs’ counsel at the hearings held on July 8, 2004.

Factual Record

The joint Chapter 13 bankruptcy case of Arthur Lee Prickett and Beatrice Annette Prickett was commenced by the filing of a petition on January 9, 2001.

Paragraph 4a of the Statement of Financial Affairs, also filed on January 9, 2001, states the following with respect to suits or administrative proceedings to which the plaintiffs were parties within one year immediately preceding the filing of their Chapter 13 case:

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION
Coast-Plymouth Tax Lien Capital, LLC v. Arthur & Beatrice Prickett 45D100011CP00037	Quiet Title Action	Lake Superior Court Room No. Six Crown Point, IN	Pending

The Statement of Financial Affairs has never been amended.

Schedule A of the schedules, also filed on January 9, 2001, states that the plaintiffs have a fee simple interest, as tenants by the entireties, in real estate located at 1941 Maryland

Street, Gary, Indiana. Schedule C, also filed on January 9, 2001, states no exemptions.

Schedule D, designating the plaintiffs' secured creditors, states that Option Mortgage Corp. has a first mortgage incurred in 1996, with an outstanding indebtedness stated to be \$24,000.00; and that The Money Store has a second mortgage, incurred in 1997, with an outstanding stated indebtedness of \$22,000.00.

Schedule E – designating creditors deemed to have unsecured priority claims – designates the creditor "Coast Plymouth Tax Lien Capital" as having a claim for "Tax Sale Purchases" in the amount of "0.00" and with the amount entitled to priority stated to be "0.00".

The Treasurer of Lake County is also designated as a creditor in Schedule E, stated to have a claim incurred for "Real Estate Taxes – Tax Sales" in the total claim amount of \$4,000.00.

Schedule J, also filed on January 9, 2001, states that the plaintiffs have no separate monthly payment for rent or home mortgage apart from the payment to be made through the Chapter 13 Trustee under their plan; in the portion of Schedule J which provides for designation of real property tax, a "✓" is placed on the line for "No" in response to the question as to whether real estate taxes are included in a home mortgage payment or rent.

The plaintiffs filed their Chapter 13 plan on January 9, 2001. Subparagraph (a) of the plan states that full payment in deferred cash payments shall be made to claims entitled to priority under 11 U.S.C. § 507, including a claim designated as that of the Lake County, Indiana Treasurer for which the plan provides payment as follows: "\$300.00/month for 10 months *then* \$500.00 month after mortgage (handwritten line drawn through) tax arrearages have been paid". Subparagraph (b) of the plan provides for payment of \$312.00 per month by the Trustee to Option One Mortgage with respect to current mortgage payments, and a payment of \$100.00 per month to that creditor for an arrearage designated in the amount of \$624.00.

Subparagraph (b) also designates that the Trustee is to pay \$372.00 per month to The Money Store, and in addition \$100.00 per month with respect to an arrearage designated in the

amount of \$744.00. Subparagraph (c) provides for a 100% dividend to allowed unsecured creditors.

On January 19, 2001, as evidenced by the Certificate of Mailing filed on that date, a copy of the EPI Form B91/N13 "Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines", together with a copy of the plaintiffs' plan as filed on January 9, 2001, was provided to creditors and parties-in-interest as designated in the matrix of creditors filed by the plaintiffs. Included in this mailing was "Coast Plymouth Tax Lien Capital, c/o Griffin et al., 4000 E. Southport Rd., #150, Indianapolis, Indiana 46237"; "Treasurer Lake County, 11 E. 4<sup>th</sup> Ave., Gary, Indiana 46401"; "Option One Mortgage Corp., 3 Ada, Irvine, CA 92618-2304"; and "The Money Store, P.O. Box 130028, Sacramento, CA 95853-3028". The Notice stated that the deadline for filing proofs of claim was May 16, 2001 for non-governmental creditors, and was July 9, 2001 for governmental creditors. The notice stated the following with respect to the filing of objections to confirmation of the plan:

Objections to confirmation are to be filed with the clerk of the court within fifteen (15) days after the first meeting of creditors is actually held and completed, with copies thereof served upon the trustee and debtor's attorney (both noted above). If objections are filed, all parties will be notified of the time and place. For hearing on objections, in which event the trustee, debtor and debtor's attorney must be present. In the absence of objections, the court may enter an order confirming the plan, the terms of which will bind the creditors.

By the Court's order of March 19, 2001, notice was provided concerning confirmation of the debtor's Chapter 13 plan. Pursuant to the customary procedures of the Court, distribution of this order was made to the plaintiffs, the attorney for the plaintiffs, the Chapter 13 Trustee and the U.S. Trustee; creditors were not provided with this notice.

The plaintiffs' Chapter 13 plan was confirmed by order of the Court dated April 18, 2001. No request for review or rescission of this order has ever been filed by a party-in-interest.

On September 24, 2001, the plaintiffs' attorney filed his "Attorney's Review of Claim",

which certified that after the bar date for filing claims, he had personally "reviewed the claims filed herein and either [has] no objections to the claims as filed, or [has] filed, at this time, the appropriate objections to those claims I find objectionable". No objection was filed to any claim.

On February 7, 2001, Option One Mortgage Corp. filed its proof of claim as a secured creditor, stating a total claim of \$23,979.27 as of the date of the plaintiffs' petition, including an arrearage of \$1,966.40. On March 6, 2001, a creditor designated as "Saul & Company" filed a secured claim, stating its indebtedness as follows: "\$10,417.37 over a 60 month plan", and stating that the amount of the claim on date of the filing of the petition was "\$9,487.78 as of 1/9/2001". Section 1 of the claim designated its basis as a claim for Taxes. A creditor designated as "HomEq/The Money Store" filed a claim on June 26, 2001 for a total indebtedness as of the date of the petition of \$20,395.80, including an arrearage of \$2,487.44; this claim was filed as a secured claim.

The payment records of the Chapter 13 Trustee disclose that as of September 16, 2004, the following amounts have been paid to the following creditors, with the balances remaining under the plan stated by the Trustee to be as noted below:

1. Saul & Co. as custodian had received total payments of \$7,095.58, with a balance shown to be paid of \$3,321.00.
2. HomEq/The Money Store had been paid a total of \$16,368.00 with respect to current mortgage payments [with prospective current mortgage payments to be made continuously by the Chapter 13 Trustee under the plan], and the amount of \$1,689.90 with respect to its arrearage claim, with the amount of \$797.00 remaining to be paid on that claim.
3. A creditor designated as "Litton Loan" (apparently the assignee of Option One Mortgage Corp.), had been paid a total of \$13,728.00 with respect to current mortgage payments [with remaining current mortgage payments under the plan to be continuously paid by the Trustee], and the amount of \$1,339.37 with respect to its mortgage arrearage claim, with a

balance stated on that claim of \$627.00.

4. The Trustee's payment records, and the Court's claims register, establish that the Treasurer of Lake County never filed a claim in this case. As a result, no payments have been made by the Chapter 13 Trustee to that creditor.

As of September 16, 2004, the Trustee's payment records indicated that the total receipts from the plaintiffs had been in the amount of \$43,915.48, all of which had been disbursed; and that additional contributions by the plaintiffs to the Chapter 13 Trustee of \$23,083.06 were needed to complete the plan.

Documentation submitted by the plaintiffs's counsel at hearings held pursuant to B.R. 7055/Fed. R. Civ. Pro. 55(b)(2) establishes the following:

a. A Tax Sale Certificate, No. 4505724, in the amount of \$5,000.00 was issued on September 25, 1998 with respect to property located at 1941 Maryland, Gary, Indiana, to the successful purchaser of that property at a tax sale conducted on September 23, 1998, that purchaser being designated as: "Saul & Co. as custodian (Ajax Financial, First Union National Bank, 123 South Broad St., Philadelphia, PA 19109".

b. On January 13, 2000, an order was entered in cause number 45C01-9809-M1-02192 in the Circuit Court of Lake County, Indiana with respect to property described as key number 25-43-0202-0037, which directed the Auditor of Lake County, Indiana to issue a tax deed for that property to Coast-Plymouth Tax Lien Capital, L.L.C.

c. A tax deed was issued to Coast-Plymouth Tax Lien Capital, LLC on June 30, 2000 by the Auditor of Lake County, Indiana, with respect to property commonly described as 1941 Maryland Street, Gary, Indiana.

Thus, in contrast to the circumstances as they were understood by the plaintiffs' bankruptcy counsel for the purposes of preparation of the Schedules and Statement of Financial Affairs as filed on January 9, 2001, the actual factual circumstance as of the filing of

this Chapter 13 case was that a tax sale had been conducted; a tax sale certificate had been issued; the redemption period provided by Indiana law for the plaintiffs to redeem the property from the tax sale had expired; the tax sale purchaser had surrendered the tax sale certificate to officials of Lake County, Indiana; the tax sale purchaser had initiated an action in the Lake Circuit Court for approval of the tax sale; the tax sale had been approved by the court and an order entered directing the Auditor of Lake County to issue a tax deed to the purchaser; and a tax deed had been issued to that purchaser.

The plaintiffs then commenced this adversary proceeding to seek to sort out the status of title to their residence, and the manner in which their plan, and the payment of claims filed in this case, affected their interest in that property.

#### Legal Analysis

This adversary proceeding presents to the Court a unique and extraordinary set of factual circumstances, in the context of juxtaposing those circumstances against applicable law. The bottom line is that there is no definitive provision of either the Bankruptcy Code or of the law of the State of Indiana which directly resolves the issues which the plaintiffs have raised in this adversary proceeding. This case must be resolved by the application of procedural principles, rather than by the application of principles of substantive real property tax law.

First, it is clear that under the provisions of Indiana statutory law concerning real property tax sales, both the plaintiffs' interest in the subject real estate and that of the mortgagees Option One Mortgage Corp. and The Money Store, ceased to exist prior to the filing of the plaintiffs' Chapter 13 case.

The record establishes that a tax sale was held with respect to the real property, at which a purchaser submitted a bid which was accepted and was paid. I.C. 6-1.1-24-9 [as in effect with respect to the subject tax sale prior to the amendment of that statute in 2001] states that immediately after a bid is paid, "the county auditor shall deliver a certificate of sale to the

purchaser . . ." Subparagraph (b) of that statute, as in effect with respect to proceedings in this case, states:

(b) When a certificate of sale is issued under this section, the purchaser acquires a lien against the real property for the entire amount that he paid. The lien of the purchaser is superior to all liens against the real property which exist at the time the certificate is issued.

A period of redemption is then allowed by Indiana law for either an owner, or an entity having a significant interest in the property, to pay the required redemption amount to the tax certificate holder in order to redeem the property from the certificate holder's interest. It is significant to note that once the tax sale certificate is issued, the real party in interest with respect to the debt for past-due taxes for which the tax sale was held is not the county taxing authority; rather, it is the holder of the tax sale certificate who paid those delinquent taxes by bid to the county. In this case, it is undisputed that the tax sale certificate was not redeemed from the certificate holder by either the plaintiffs, or by either of their mortgagees.<sup>1</sup>

When property is not timely redeemed from a tax sale, the certificate holder may proceed to obtain a "tax deed" to the subject real property. I.C. 6-1.1-25-4.6, as in effect with respect to procedures pertinent to this case, provided for the filing of a verified petition in a court having proper jurisdiction "asking the court to direct the county auditor to issue a tax deed if the real property is not redeemed from the sale". In the circumstances of this case, this procedure was implemented by the filing of cause number 45C01-9809-M1-02192 in the Lake Circuit Court. If the court then makes certain findings with respect to the notices required by law with respect to the tax sale, the expiration of the redemption period without redemption by an interested party, and the petitioning tax certificate holder's compliance with applicable law, the court is then to "enter an order directing the county auditor . . . to issue to the purchaser or

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<sup>1</sup> The redemption period is provided by I.C. 6-1.1-25-4.

the purchaser's assignee a tax deed . . ."; I.C. 6-1.1-25-4.6(b). The effect of the issuance of this tax deed is provided by I.C. 6-1.1-25-4.6(g), which states:

(g) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances created or suffered before or after the tax sale except those liens granting priority under federal law, and the lien of the state or a political subdivision for taxes and special assessments that accrue subsequent to the sale. However, the estate is subject to all easements, covenants, declarations, and other deed restrictions and laws governing land use, including all zoning restrictions and liens and encumbrances created or suffered by the purchaser at the tax sale. The deed is prima facie evidence of:

- (1) the regularity of the sale of the real property described in the deed;
- (2) the regularity of all proper proceedings; and
- (3) valid title in fee simple in the grantee of the deed.

The record in this case establishes that all of the procedures required by applicable Indiana law were followed by the party/parties involved in the purchase of the property from the tax sale, and that a tax deed was issued to the purchaser or its assignee pursuant to order of the proper Indiana court. Thus, as of the date of the filing of this Chapter 13 case, the tax sale purchaser was vested with an estate in fee simple absolute with respect to the subject real estate, a title which was free and clear of the plaintiffs' interests and of the mortgage lien interests of both The Money Store and of Option One Mortgage Corp. But for the convoluted nature of the factual circumstances created by the tax sale purchaser's filing of a secured claim in this case, the Court would have no alternative but to hold that the plaintiffs' and the mortgagees' interests in the property had been terminated, and that this effect provided by Indiana law could not be undone in this case; see, *In the matter of Tynan*, 773 F.2d 177 (7<sup>th</sup> Cir. 1985); *In re Murray*, 276 B.R. 869 (Bankr. N.D.Ill. 2002). However, the factual circumstances in this case do not allow for a resolution based upon a direct application of Indiana law.

First, it is clear that there is nothing in the plaintiffs' plan which eviscerates the effect of

the tax sale procedure on both the plaintiffs' interests in the subject real estate, and upon the mortgage interests of The Money Store and Option One Mortgage Corp. The plan itself provides nothing with respect to treatment of any interest of the tax sale purchaser, and instead provides for payment of a real property tax delinquency to the Lake County Treasurer.<sup>2</sup> This is thus not a case where there is any issue as to the binding effect, pursuant to 11 U.S.C. § 1327(a), of a confirmed Chapter 13 plan on a creditor provided for by the plan; *C.f., In re Commings*, 297 B.R. 701 (Bankr. N.D.Ill. 2003).

This case implicates other legal principles. The relevant facts are the following:

1. Coast-Plymouth Tax Lien Capital, LLC was the fee simple owner of the real property located at 1941 Maryland Street, Gary, Indiana, on the date that the plaintiffs filed their Chapter 13 bankruptcy case.

2. On the date of filing of this Chapter 13 case, neither The Money Store nor Option One Mortgage Corp. held a mortgage lien with respect to the subject real estate.

3. Coast-Plymouth Tax Lien Capital, LLC received proper notice of the initiation of this bankruptcy case, and of the opportunity it had to file a proof of claim in this case.

4. Saul & Co. filed a claim on March 6, 2001, apparently as agent for Coast-Plymouth Tax Lien Capital, asserting a secured claim in the amount of \$9487.78 as of January 9, 2001 (\$10,417.37 over the 60 month term of the plan). The claim was designated to be for "Taxes", was stated to be secured by "RealEstate" (sic.), and stated the date of 9/28/1998<sup>3</sup> as being

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<sup>2</sup> As established at hearings before the Court, this was based upon the information received by the plaintiffs' counsel at the time of his filing of this case from the plaintiffs themselves that the tax sale proceedings had not been concluded, and thus upon the mistaken assumption that the creditor with respect to delinquent real property taxes was the Lake County, Indiana taxing authority, rather than the tax sale purchaser. This erroneous information of course cannot undo the effect provided by state law with respect to the tax sale proceedings.

<sup>3</sup> This date corresponds closely to the date of issuance of the tax sale certificate on September 25, 1998.

relevant to the debt. In box 3, which provides that the date of obtaining of a court judgment is to be designated, the creditor stated "n/a". This claim was deemed to be prima facie valid pursuant to 11 U.S.C. § 502(a), and its validity became sealed when neither the plaintiffs nor the Chapter 13 Trustee filed any objection to it.

5. Option One Mortgage Corp. and The Money Store both filed secured claims in this case, asserting their entitlement to current mortgage payments as provided for by the plaintiffs' confirmed Chapter 13 plan, and their entitlement to the payment of their respective mortgage arrearages, also as provided for by the plaintiffs' confirmed Chapter 13 plan.

6. No objections were filed to the claims of Saul & Co., The Money Store, or Option One Mortgage Corp., and the Trustee therefore allowed such claims and made payments on those claims as allowed claims under the plaintiffs' confirmed Chapter 13 plan.

The facts of this case present a circumstance in which the plaintiffs had no property interest in their residence as of the date they filed their case, and in which their two "mortgagees" had no further lien interest in that property as of the date of the filing of their case. Yet, Coast-Plymouth Tax Lien Capital through its agent Saul and Co., chose to voluntarily file a secured claim in this case, rather than to assert its fee simple ownership interest against both the plaintiffs and the plaintiffs' mortgagees. As a result, the plaintiffs' Chapter 13 case has proceeded on the premise that the plaintiffs remain the fee simple owners of the real estate and the interests of The Money Store and of Option One Mortgage Corp. as mortgage lienholders remain intact. Coast-Plymouth Tax Lien Capital has chosen to assert only a lien interest in the subject property, apparently in order to recover the investment value of the tax sale purchase made several years ago. This asserted lien interest essentially parallels the treatment accorded to creditors by the plaintiffs' Chapter 13 plan. This interest is also in consonance with the interest held by the tax sale purchaser after the Tax Sale Certificate had been issued, but before the issuance of the tax deed.

This case therefore focuses on the voluntary action of Coast-Plymouth Tax Lien Capital, and its agent Saul & Company as Custodian, with respect to the assertion of interests in the subject real property. As outlined above, nothing in the plaintiffs' confirmed plan binds Coast-Plymouth Tax Lien Capital to its terms. However, Coast-Plymouth Tax Lien Capital received a copy of the plan, and the clear implication of the plan is that the plaintiffs retained title to the property, subject to mortgages of The Money Store and of Option One Mortgage Corp. In response to that plan, Coast-Plymouth Tax Lien Capital, through its agent Saul & Company chose to assert an interest as a secured creditor in the property, in direct contravention of the true property interest it had as a result of the Indiana tax sale procedures.

Every effort has been made by both the Court and the plaintiffs' counsel at the direction of the Court, to achieve some involvement by Coast-Plymouth Tax Lien Capital and/or its assignee(s)/agent(s) in this adversary proceeding – all to no avail. Notices of the issues involved in this adversary proceeding, and of the Court's perceived need to involve Coast-Plymouth Tax Lien Capital and its assignee(s)/agent(s) in those issues, have been provided several times to every entity which can be identified as having an interest in the tax sale procedures on behalf of Coast-Plymouth Tax Lien Capital from title evidence obtained by the plaintiffs' counsel– no response has ever been received of record in this Court, or by the plaintiffs' counsel independently of the record, from any of these entities.

As outlined above, applicable Indiana law provided Coast-Plymouth Tax Lien Capital with a lien in the subject real estate to secure the redemption value of the tax sale certificate issued to it. It is obvious that Coast-Plymouth Tax Lien Capital recognized its rights under applicable Indiana law to obtain a fee simple interest in the subject real estate: the proceeding initiated by that creditor in case number 45C01-9809-M1-02192 in the Lake Circuit Court amply evidences the creditor's recognition of its rights under Indiana law. Despite the knowledge of its rights and the exercise of its rights, Coast-Plymouth Tax Lien Capital **chose** to assert a secured

claim interest with respect to the subject property, rather than an ownership interest. Faced with a proposed Chapter 13 plan which clearly was premised upon the plaintiffs' retention of title to the subject real estate, and the retention of mortgage lien interests by their two mortgagees, Coast-Plymouth Tax Lien Capital chose to assert a claim as a secured creditor. While under the *Rooker-Feldman Doctrine* [See, *Zurich American Ins. Co. v. Superior Court for the State of California*, 326 F.3d 816, 821 (7<sup>th</sup> Cir. 2003)], the Court cannot eviscerate the effect of a binding state court decision, by recognizing the choice made by Coast-Plymouth Tax Lien Capital and/or its assignee/agent subsequent to the entry of that judgment, the Court is doing nothing more than honoring the position asserted by a creditor, and the relinquishment of known rights by that creditor. The state court judgment is not implicated.

Coast-Plymouth Tax Lien Capital had a choice in this case. It could have asserted its ownership interest in the subject real estate and the evisceration of the mortgagees' lien interests in the subject real estate in response to the plaintiffs' plan. It chose instead to assert an interest as a secured claimant, an interest to which it was entitled prior to the issuance of a tax deed pursuant to I.C. 6-1.1-24-9(b).

In the context of proceedings in relation to confirmation of the plaintiffs' plan and the assertion of claims against the plaintiffs, the Court holds that Coast-Plymouth Tax Lien Capital has made an election of remedies which would preclude the assertion of other than a lien interest in the subject real estate in a subsequent proceeding in relation to the plaintiffs' Chapter 13 case. As stated in *Cahoon v. Cummings, Ind.*, 734 N.E.2d 535, 542 (2000):

The election of remedies doctrine requires that a party who has two co-existing but inconsistent remedies and elects to pursue one remedy to a conclusion may not sue on the other remedy. *Hoover v. Hearth & Home Design Ctr., Inc.*, 654 N.E.2d 744, 745 (Ind.1995). The doctrine ordinarily applies only when a party has elected to pursue one remedy to its conclusion and then attempts to pursue a subsequent claim on a second inconsistent theory. *See Parke v. First Nat'l Bank*, 571 N.E.2d 1317, 1319 (Ind.Ct.App.1991).

Admittedly, the creditor has not yet pursued a claim subsequent to the assertion of the lien interest in this case. However, the filing and allowance of, and receipt and retention of disbursements under the plaintiffs' Chapter 13 plan with respect to, the creditor's proof of claim is the conclusion of the process regarding the assertion of the lien interest in this case. Having chosen to be treated as a secured creditor under the provisions of the plaintiffs' plan in this case, Coast-Plymouth Tax Lien Capital, and its assignee(s), would now be precluded under the doctrine of election of remedies from asserting an ownership interest in the subject real estate in a subsequent proceeding – if the plaintiffs complete their plan in accordance with its terms.

This result is also dictated by the principle of waiver. In legal parlance, "waiver" is the intentional relinquishment of a known right; *Home Indemnity Co. of New York v. Allen*, 190 F.2d 490, 491 (7<sup>th</sup> Cir. 1951). Coast-Plymouth Tax Lien Capital proceeded in the Indiana state courts in accordance with its rights to obtain title to the subject property, and it is thus clear that this creditor was cognizant of its legal rights under applicable Indiana law. Despite that knowledge, the creditor chose to assert a lien interest in the subject property, thereby waiving its claims to a fee ownership interest which would eviscerate the interests of the plaintiffs and of the mortgage lien holders.

Identical reasoning applies to the interests of Coast-Plymouth Tax Lien Capital *vis-a-vis* the interests of the plaintiffs' mortgagees in the subject real estate. Having asserted a lien interest, Coast-Plymouth Tax Lien Capital cannot later claim that the mortgage liens have been removed from the property. In like manner, by their assertions in this adversary proceeding and by the terms of their confirmed plan, the plaintiffs are now precluded from any assertion that the two mortgage liens do not continue to attach to the real estate in the same manner as would have occurred had the tax sale proceedings never taken place; See, 11 U.S.C. §1327(a).

The rights and interests of the plaintiffs as Chapter 13 plaintiffs revolve around their ability to complete the terms of their confirmed plan and to obtain a discharge under the

provisions of 11 U.S.C. § 1328. All of the ramifications of the filing of a secured claim by Coast-Plymouth Tax Lien Capital and/or its assignee/agent determined by this decision are dependent upon the plaintiffs' completion of their Chapter 13 plan and their obtaining a discharge pursuant to 11 U.S.C. § 1328. If the case is dismissed or converted prior to the entry of an order of discharge pursuant to § 1328, then the interests of Coast-Plymouth Tax Lien Capital and/or its assignee/agent, and of the plaintiffs and of The Money Store and of Option Mortgage Corp. [and its assignee(s)] will revert to the control of applicable Indiana law, a result required by the Bankruptcy Code both in the event of either conversion [11 U.S.C. §348(f)(1)(A)]<sup>4</sup> or dismissal [11 U.S.C. §349(b)(3)]. In either instance, the plaintiffs will have no interest in the subject real estate, and the mortgage lien interests of Option One Mortgage Corp. and of The Money Store will have been removed from the subject property.

Based upon the foregoing, the Court finds that the plaintiffs are entitled to the entry of judgment as follows with respect to the designated defendants.

IT IS ORDERED that the Clerk shall enter default pursuant to B.R. 7055/Rule 55(b)(2) of the Federal Rules of Civil Procedure against Des Capital, LLC; Coast-Plymouth Tax Lien Capital, LLC; Saul and Co., as Custodian; Treasurer, Lake County, Indiana; Option One Mortgage Corp.; and The Money Store.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the plaintiffs complete their plan in such a manner as to entitle them to a discharge pursuant to 11 U.S.C. § 1328, then the interests of Coast-Plymouth Tax Lien Capital and/or its assignee(s)/agent(s) -- including any interests of Des Capital, LLC; Coast-Plymouth Tax Lien Capital, LLC; Saul and Co., as Custodian -- will be deemed to have been satisfied, and that Coast-Plymouth Tax Lien Capital and/or its assignee/agent shall be required to convey, by quit-claim deed, its interests in the

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<sup>4</sup> In the event of conversion, the petition date is the date of filing of the Chapter 13 case, and on that date the plaintiffs had no ownership interest in the subject real estate.

property located at 1941 Maryland Street, Gary, Indiana to the plaintiffs, or to their successors or assigns.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to B.R. 9070/Rule 70 of the Federal Rules of Civil Procedure, upon the entry of an order of discharge of the plaintiffs pursuant to 11 U.S.C. § 1328 in Case Number 01-60080, the Court will include in that order a judgment divesting the title of Coast-Plymouth Tax Lien Capital and/or its assignee(s)/agent(s) with respect to the real property commonly described as 1941 Maryland Street, Gary, Indiana, and vesting title to that property in the plaintiffs.<sup>5</sup>

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon successful completion of the plaintiffs' Chapter 13 plan in Case Number 01-60080 and their obtaining of a discharge pursuant to 11 U.S.C. § 1328, the mortgage lien interests of Option One Mortgage Corp. [and its assignee(s)] and of The Money Store shall remain as mortgage liens on the real estate located at 1941 Maryland Street, Gary, Indiana, and those creditors shall be entitled to assert their rights and interests with respect to the subject real estate as provided by the applicable agreements between them and the plaintiffs, and as otherwise provided by applicable law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the interests of the Treasurer of Lake County with respect to all real property taxes imposed upon the subject real property, with the sole exception of those taxes subject to the tax sale proceedings designated above in this Judgment, are unaffected by this Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs shall file/record a *lis pendens* notice pursuant to the provisions of Rule 63.1 of the Indiana Rules of

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<sup>5</sup> It is the responsibility of plaintiffs' counsel upon application for discharge pursuant to 11 U.S.C. § 1328 to call to the Court's attention the necessity of including the conveyance pursuant to B.R. 9070/Rule 70 of the Federal Rules of Civil Procedure in the order of discharge.

Trail Procedure to provide notice to the world of their interests in the subject real property as determined by this judgment.

Dated at Hammond, Indiana on January 4, 2005.

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

Distribution:  
Plaintiffs, Plaintiffs' Counsel  
Des Capital, LLC  
Coast-Plymouth Tax Lien Capital, LLC  
Saul and Co., as Custodian  
Treasurer, Lake County, Indiana  
Option One Mortgage Corp  
The Money Store  
Chapter 13 Trustee  
U.S. Trustee