

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
STEVEN DONALD WEST and) CASE NO. 12-22606 jpk
LORRAINE ELIZABETH WEST,) Chapter 13
Debtor.)

ORDER CONCERNING ISSUE TO BE ADDRESSED AS STATUS CONFERENCE
CONCERNING TREATMENT OF THE LIEN/SECURITY INTEREST OF FIFTH THIRD BANK

On January 7, 2013, a status conference was held concerning confirmation of the record No. 27 amended plan filed on November 21, 2012. That conference was attended by Andrew J. Kopko as counsel for the debtors and by Amy Godshalk as counsel for the Chapter 13 Trustee. The parties discussed with the court the amended plan's treatment of a mortgage held by Fifth Third Bank with respect to the debtor's residence. Schedule D filed by the debtors in this case designates this mortgage interest as a second mortgage, and no proof of claim has been filed by Fifth Third Bank with respect to this interest. The plan does not provide in any manner for a security interest of Fifth Third Bank. Attorney Kopko stated that it was originally the debtors' intent to seek to "strip" the second mortgage of Fifth Third Bank on the theory that the value of the subject property is less than the combined amounts of liens for real property taxes and the first mortgage, but that an appraisal of the property apparently established that the property's value was greater than the amount which would allow for the second mortgage to be stripped. Attorney Kopko expressed the intent of the plan to merely allow the second mortgage to pass through the bankruptcy unaffected and remain on the property after completion of the plan, even after discharge.¹ The court tentatively stated its conclusion that this proposed treatment of the mortgage interest of Fifth Third Bank might be allowed under the provisions of Chapter 13 of the Bankruptcy Code.

¹The underlying personal liability secured by the second mortgage has been discharged in a prior Chapter 7 proceeding.

The treatment of the second mortgage of Fifth Third Bank requires further consideration. The amended plan makes no specific statement as to the treatment of the second mortgage, and thus Fifth Third Bank has not been provided with any notice of the debtors' intention as to the treatment of the second mortgage by the plan. Allowable treatment of secured claims under a Chapter 13 plan is provided by 11 U.S.C. § 1325(a)(5), a provision which is predicated on there being an "allowed secured claim" – a phrase which may reference the concept of "allowance" in 11 U.S.C. § 502(a) with respect to a claim filed as secured. The concept of "stripping" is not actually predicated on 11 U.S.C. § 1325(a)(5), but rather on 11 U.S.C. § 1322(b)(2) which prevents modification [subject to 11 U.S.C. § 1322(b)(5)] of a security interest secured only by a debtor's principal residence. 11 U.S.C. § 1322(b)(2) is not predicated upon an "allowed secured claim," but only on a "secured claim", which Fifth Third Bank possesses. It may be that if Fifth Third's second mortgage cannot be "stripped", the only options available to the debtors may be to either cure an arrearage and maintain current payments, or to fully satisfy the amount of the debt subject to that lien during the term of the Chapter 13 plan. ²

It is clear that the amended plan in its present form cannot be confirmed to effectuate the debtors' stated intent with respect to the second mortgage of Fifth Third Bank: not mentioning this treatment in any manner in the amended plan does not give that creditor any notice whatsoever as to the proposed treatment of its security interest. More importantly, even if a second amended plan were to be filed which specified this treatment, the court is not certain that such a plan could be confirmed under applicable provisions of the Bankruptcy Code.

IT IS ORDERED that the foregoing matters will be addressed at the status conference

²Another interesting issue in the circumstances of this case arises from the fact that the underlying personal liability secured by the second mortgage has been discharged. That discharge did not affect Fifth Third Bank's lien, and that lien passed through unaffected by the debtors' Chapter 7 case. The interesting issue is the amount/value of the surviving lien given the discharge of personal liability.

scheduled for **March 11, 2013, at 3:00 P.M.** The debtors' counsel is directed to not file an amended plan prior to the hearing.

Dated at Hammond, Indiana on January 29, 2013.

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

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee