

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
)  
PATRICK D. MYERS, ) CASE NO. 03-34418 HCD  
) CHAPTER 13  
DEBTOR. )

Appearances:

Debra Voltz-Miller, Esq., attorney for debtor, 108 North Main Street, Suite 423, South Bend, Indiana 46601;

Robert Konopinski, Esq., attorney for Bank One, NA, 205 West Jefferson Boulevard, Suite 605, South Bend, Indiana 46601;

Jennifer R. Fitzwater, Esq., attorney for Bank One, NA, Wood Tuohy Gleason Mercer & Herrin, 111 Monument Circle, Suite 3400, P.O. Box, 44942, Indianapolis, Indiana 46244-0942; and

Thomas E. Panowicz, Esq., attorney for Chapter 13 Trustee, P.O. Box 11550, South Bend, Indiana 46634-0550.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 9, 2004.

Before the court is the Motion to Permit Sale of Real Estate Free of Liens, filed by the debtor Patrick D. Myers (“debtor”) on June 3, 2004, and the Objection to Motion to Permit Sale of Real Estate Free of Liens, filed by the mortgage holder Bank One, NA (“the bank”) on June 23, 2004.<sup>1</sup> Hearing on the matter was held on July 22, 2004. For the reasons that follow, the court grants the debtor’s Motion and overrules the bank’s Objection.

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<sup>1</sup> On June 21, 2004, the court received a letter on this matter from Jill Johnson Myers, the former spouse of the debtor, in which she stated: “While I do not object to selling the property, I am requesting the proceeds be used to pay the child support for his children.” R. 222. The court finds that this personal correspondence, by its own terms, is not an objection to the motion to sell before the court. The court also notes that, on November 10, 2003, it granted the stay motion of Ms. Myers, represented by counsel, and issued its Order Lifting Automatic Stay of Proceedings “as to matters relating to child custody, parenting and child support, including higher education expense coverage.” R. 119.

### 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)(N) 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

The property at issue is the debtor's lot on East Calvert Street, South Bend, Indiana. A fire had destroyed the nonresidential real estate on the lot prior to the debtor's filing of his chapter 13 petition, and only the land remains. The debtor's Third Amended Plan, which was confirmed on May 27, 2004, provided that the mortgage lender, Bank One, would receive insurance proceeds in the amount of \$26,000.00 in "full satisfaction of its mortgage."<sup>2</sup> See R. 175 at 9. Although the bank had filed an Objection to Third Amended Chapter 13 Plan,

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<sup>2</sup> The provision at issue in the Third Amended Plan, filed April 2, 2004, states in full:

The property located at 923 Calvert Street, South Bend, IN, was destroyed by fire. Bank One, the mortgage lender shall be paid the insurance proceeds totaling \$26,000 as full satisfaction of its mortgage from proceeds received from the insurance company. The insurance monies earmarked for demolition of the remaining structure in the sum of \$4,250.00 shall be used for that property. Any excess insurance proceeds that may be available after payment of the mortgage shall be turned over to the Trustee for distribution under this plan. . . . In the event that post-confirmation sales of any of the parcels of real estate are in the best interests of creditors and the court approves such sale, the net proceeds after payment of mortgages securing the property, real estate taxes secured by the property, costs of sale, and payment of capital gains tax attributable to the property will be turned over to the Trustee for distribution under this plan. Debtor intends to place for sale . . . the vacant lot located at 923 Calvert Street. When a property is sold, the debtor shall be entitled to file a motion for post-confirmation modification of this plan to provide for a reduction in monthly payment consistent with the provisions of this plan.

*see* R. 197, and to the debtor's earlier plans, its objections did not include any challenge to this provision of the plan.

On June 3, 2004, the debtor sought the court's permission to sell the land, and the court held a hearing on the motion. The debtor stated that the determined value of the property was \$2,500 and that he had received an offer from a neighbor to purchase the property for that amount. He asked to sell the property free of liens and encumbrances and to turn over the proceeds to the Trustee for appropriate distribution. The bank objected to the motion on the ground that, after application of the insurance proceeds, it still was owed \$6,211.78 under the mortgage. It did not object to the sale of the property but insisted that the proceeds be distributed to the bank in satisfaction of its mortgage lien rather than to the Trustee on behalf of the unsecured creditors. Counsel for the Trustee noted that the debtor's chapter 13 plan was fully funded to pay all creditors; he concluded that, if funds remained, the bank would be paid the unsecured portion of its claim. The court then took the matter under advisement.

#### Discussion

The court is asked to determine whether the debtor may sell his East Calvert Street property for \$2,500 and, if so, whether the proceeds from the sale should be turned over to the bank or to the Trustee. The court notes that, although the bank objected to the debtor's Motion to Sell, it in fact does not object to the sale itself but only to the disposition of the proceeds of that sale.

Two provisions in the debtor's chapter 13 plan are central to the court's determination. The first term establishes the bank's interest in the property and entitlement to payment for it: "Bank One, the mortgage lender[,] shall be paid the insurance proceeds totaling \$26,000 as full satisfaction of its mortgage from proceeds received from the insurance company." The second provision sets forth the debtor's intention to sell the property after confirmation if it is in the best interests of creditors and is approved by the court. In that event, the plan states, "the net proceeds . . . will be turned over to the Trustee for distribution under this plan." Because the bank did not raise an objection to those terms of the plan, the court finds that the provisions memorialize an agreement between the parties concerning the disposition of the East Calvert Street property.

The debtor's chapter 13 plan was confirmed on May 27, 2004. A confirmed chapter 13 plan is binding on all parties, *see* 11 U.S.C.A. § 1327(a), and its terms "are not subject to collateral attack." *Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000); *see also In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000) (stating that "a confirmed plan acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors"). Concerning all issues that could have been raised pertaining to the plan, a confirmation order is entitled to res judicata effect. *See Adair*, 230 F.3d at 895.

The court finds that the bank's objection to the debtor's motion to sell the property is an impermissible collateral attack on two terms of the confirmed chapter 13 plan: It challenges the plan's provisions that the insurance payment of \$26,000 fully satisfies the mortgage and that, after a post-confirmation sale of the property, the net proceeds would be turned over to the Trustee for distribution. However, the bank's failure to object to those terms in the plan before confirmation defeats its present objection. *See In re Harvey*, 213 F.3d at 322 (stating that interested creditors are expected to review the terms of a proposed plan and to object if the terms are unacceptable, vague or ambiguous; concluding that the creditor's failure to lodge a proper objection was "a fundamental defect" in the creditor's case). In this case, the bank held a mortgage on property that was destroyed by fire; only a vacant lot remained. The debtor's plan provided that the insurance payment would constitute "full satisfaction of its mortgage." The bank, by not objecting to the plan's clearly stated valuation of the collateral before confirmation, consented to a reduction in its interest in the property to the insurance value of the property after the fire.<sup>3</sup> *See In re Feher*, 202 B.R. 966, 970-71 (Bankr. S.D. Ill. 1996) ("Since property insurance serves as a substitute for the insured collateral, [the creditor's] insurable interest in the [property] and

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<sup>3</sup> The bank asserted at the hearing that a real estate mortgage may not be avoided simply by reference to it in a debtor's plan. However, in a recent decision the Ninth Circuit Court of Appeals addressed this claim and rejected it. It held that "lien stripping on debts secured by real property that is not the debtor's primary residence is permissible in Chapter 13, even after *Nobelman* [*v. American Sav. Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L.Ed.2d 228 (1993)]." *Enewally v. Washington Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1172 (9th Cir. 2004); *see also Bank One v. Flowers*, 183 B.R. 509, 514 (N.D. Ill. 1995) (concluding that lien stripping is permissible when the collateral is not the debtor's residence). In this case, the insurance proceeds were substituted for the destroyed collateral and, under the confirmed plan, the creditor was limited to that payment. *See Ford Motor Credit Co. v. Stevens (In re Stevens)*, 130 F.3d 1027, 1031 (11th Cir. 1997); *In re Feher*, 202 B.R. 966, 970-72 (Bankr. S.D. Ill. 1996). Therefore, Bank One's lien is defined by the insurance amount and is void to the extent it claims to secure an amount in excess of the value established by the insurance proceeds.

its interest in the proceeds cannot exceed this amount, so long as the debtors perform under the plan.”). The court therefore finds that the bank’s lien interest in the property has been paid in full through the insurance proceeds payment under the confirmed plan. It further finds that, in light of the bank’s failure to object to the plan’s clear and concise term that it intended to sell the land and to turn over the net proceeds to the Trustee, the bank cannot complain now about that provision.

The court has examined the debtor’s motion to sell the East Calvert Street property. It finds that the debtor is authorized, under 11 U.S.C. § 363(b) and (f), to sell property of the estate free and clear of any interest. *See Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 548 (7th Cir. 2003). The court finds that neither the bank nor the Trustee took issue with any aspect of the sale, including the appraised value of the property and the debtor’s judgment in requesting the sale. Moreover, the court determines that the sale of the property is in the best interests of the creditors, for it will maximize creditor recovery and rehabilitate the debtor. *See id.* Accordingly, the court approves the sale of the property, at a price of \$2,500, and affirms the provision in the debtor’s confirmed plan that the net proceeds are to be turned over to the Trustee for distribution to the unsecured creditors, one of which may be the bank.

#### Conclusion

For the reasons stated above, the court grants the Debtor’s Motion to Permit Sale of Real Estate Free of Liens and overrules the Objection to Motion to Permit Sale of Real Estate Free of Liens filed by Bank One, NA.

SO ORDERED.

Handwritten signature of Harry C. Dees, Jr. in black ink, with the initials "JSOI" written in the bottom right corner of the signature.

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HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT