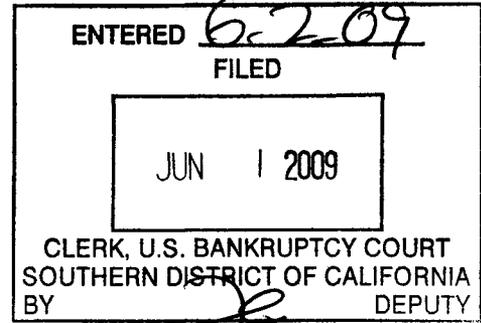


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WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:
Julie Bollerud,

Debtor.

} BK. No. 08-12177-PB13

} MEMORANDUM DECISION

Julie Bollerud seeks an order valuing her residence and determining that the junior lien held by Old Republic Equity Credit, Inc. ("Creditor") is wholly unsecured and, thus, can be modified and stripped under her chapter 13 plan pursuant to 11 U.S.C. § 1322(b)(2).¹ Prior to considering the merits of Ms. Bollerud's valuation and lien modification requests, the Court must determine whether Ms. Bollerud, who is not entitled to receive a chapter 13 discharge, may utilize the provisions of 11 U.S.C. § 1322(b)(2).

¹ Unless otherwise provided, all references herein to code sections shall mean the Bankruptcy Code ("Code"), codified in Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.*

1 scheduled unsecured debt discharged in the Second Bankruptcy, including deficiency claims
2 on account of secured debt, was less than \$165,000.00.

3
4 On November 26, 2008, Debtor filed the current chapter 13 case (the "Third
5 Bankruptcy"). In the Third Bankruptcy Debtor's schedules:

6
7 a. valued her residence at the time of filing at \$376,326.00;

8
9 b. scheduled the Wachovia Claim at \$523,101.00; and

10
11 c. again scheduled Creditor as wholly unsecured with a claim in the
12 amount of \$80,799.00.

13
14 On January 5, 2009, the chapter 13 Trustee filed a motion under section 1328(f)(1)
15 requesting an order determining that the Debtor was not entitled to a discharge as a result of
16 her discharge in the Second Bankruptcy. The Debtor did not oppose this motion, and an
17 order thereon was entered on January 27, 2009 (the "Section 1328(f) Order").

18
19 Debtor filed her chapter 13 plan (the "Plan") on November 26, 2008. Paragraph 19
20 of the Plan advises that Debtor intends to "strip" the lien held by Creditor. Consistent
21 therewith, the Debtor filed her Motion to: (1) Determine Value of Real Property; (2) Avoid
22 Trust Deed Lien, etc. (the "Lien Strip Motion") on January 31, 2009. The Plan also
23 provides for payment over time of substantial arrearage on the Wachovia Claim.

24
25 Creditor did not object to the Plan and did not file any opposition to the Lien Strip
26 Motion.

1 The Chapter 13 Trustee, however, filed documents arguing that a debtor must be
2 entitled to a discharge in order to utilize section 1322(b)(2) to strip a lien.

4 DISCUSSION

5
6 11 U.S.C. § 1322(b)(2) provides that a chapter 13 plan may: "modify the rights of
7 holders of secured claims, **other than a claim secured only by a security interest in real**
8 **property that is the debtor's principal residence, . . .**" (emphasis added). In this case
9 there is no dispute that Creditor holds a second trust deed against Debtor's principal
10 residence.

11
12 Notwithstanding, a chapter 13 plan may utilize section 1322(b)(2) to modify and
13 "strip" a junior lien from a principal residence where the Court, pursuant to a value
14 determination under section 506(a), determines that the value of the residence is less than
15 the amount owed to senior lienholders, and that the junior creditor's lien, thus, is wholly
16 unsecured. *See, Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir.
17 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (9th Cir. BAP 1997). In this case,
18 the undisputed evidence establishes that Creditor is a wholly unsecured creditor.

19 20 1. Debtor Is Entitled To File Her Chapter 13 Case And To Confirm A 21 Chapter 13 Plan.

22
23 Debtor's receipt of a discharge in the Second Bankruptcy precludes any discharge in
24 this case. 11 U.S.C. § 1328(f). Debtor, acknowledging this fact, acquiesced to the entry of
25 the Section 1328(f) Order. The Debtor's inability to obtain a discharge, however, does not
26 bar the filing of her chapter 13 case. *See, Johnson v. Home St. Bank*, 501 U.S. 78, 87
27 (1991); *In re Bateman*, 515 F.3d 272, 281 (4th Cir. 2008). And the prior discharge of
28 Debtor's personal liability to Creditor does not limit Debtor's ability to include the Creditor's

1 *in rem* claim in her chapter 13 Plan. *Johnson*, 501 U.S. at 81-87. Thus, in cases involving
2 prior discharge, a chapter 13 plan may be confirmed if it otherwise meets the confirmation
3 requirements of section 1325. *Johnson*, 501 U.S. at 87-88; *In re Sanders*, 368 B.R. 634,
4 640 (Bankr. E.D. Mich. 2007).

5
6 **2. Section 1322 Allows A Lien Strip In This Case And Does Not Expressly**
7 **Require A Discharge.**

8
9 Section 1322 sets forth provisions that a chapter 13 plan must include as well as
10 those that it may include. Section 1322 does not state that a discharge is required in order to
11 obtain the benefits of its permissive provisions, including the ability to modify an obligation
12 under section 1322(b)(2).

13
14 Other provisions of the Code make clear that a section 1322(b)(2) modification is
15 subject to set aside where a chapter 13 plan is not completed. *See*, 11 U.S.C. § 348(f)(1)(C)
16 (lien avoidance set aside upon conversion) and 11 U.S.C. § 349(b)(3) (property of the estate
17 revested as of case commencement upon dismissal.) Neither section 348 nor 349 apply,
18 however, when a plan is completed and a case closes and concludes without a discharge.
19 Further, there is no provision analogous to these sections that reinstates modified liens if a
20 discharge is not available. Thus, the Court can find no express Code provision supporting
21 the assertion that a section 1322(b)(2) modification does not survive plan completion and
22 case closure notwithstanding the absence of a discharge. Having so concluded, however,
23 the Court must still determine whether a plan containing a lien strip in a non-discharge case
24 is confirmable.

1 **3. Section 1325 Sets Forth The Standards That A Chapter 13 Plan Must**
2 **Meet And Does Not Require Discharge Prior To A Lien Strip In This Case.**

3
4 Section 1325 provides that the Court shall confirm a chapter 13 plan if it complies
5 with the requirements set forth therein. Thus, the Court must review each provision of
6 section 1325 to determine whether a debtor's plan is capable of confirmation. This analysis
7 may be especially crucial in a non-discharge case, and so the Court carefully fulfills its
8 independent obligation to make this inquiry. *See, Johnson*, 501 U.S. at 87-88 (protection is
9 provided in no discharge case as confirmation possible only if plan meets relevant
10 section 1325 requirements).

11
12 In this case, the only argument that the Plan is non-confirmable arises from its
13 inclusion of a 1322(b)(2) lien strip provision where a discharge is not available. While
14 section 1325 has numerous requirements, not all are directly applicable to this analysis. As
15 a result, the Court limits its review to the sections listed below where the Court concludes
16 that analysis directly relevant to the lien strip issues is appropriate.

17
18 **a. Section 1325(a)(5) – If Applicable – Does Not Bar Confirmation In**
19 **This Case.**

20
21 Section 1325(a)(5), expressly refers to discharge, and provides as follows:

22
23 [W]ith respect to each allowed secured claim provided for by the plan –

24 (A) the holder of such claim has accepted the plan;

25 (B)(i) the plan provides that –

26 (I) the holder of such claim retain the lien securing such claim until the
27 earlier of –

28 (aa) the payment of the underlying debt determined under non-
bankruptcy law; or

 (bb) discharge under section 1328; and

1 (II) if the case under this chapter is dismissed or converted without
2 completion of the plan, such lien shall also be retained by such holder
3 to the extent recognized by applicable nonbankruptcy law; and
4 (ii) the value, as of the effective date of the plan, of property to be distributed
5 under the plan on account of such claim is not less than the allowed amount of
6 such claim; . . .

7 Thus, section 1325 suggests that when secured claims are considered the lienholder,
8 notwithstanding anything set forth in section 1322, must retain the lien until the earlier of
9 payment in full or discharge unless the lienholder accepts the plan or the debtor surrenders
10 the property at issue.

11 In the absence of other order, liens on real property pass through bankruptcy
12 unaffected by the Debtor's discharge. *See, Dewsnup v. Timm*, 502 U.S. 410, 418 (1992). As
13 a result, notwithstanding the prior chapter 7 case discharge, Creditor retained its lien and the
14 ability to foreclose thereon and to collect its claim to the extent possible from its collateral.
15 However, Debtor's personal liability, *i.e.* Creditor's ability to compel the payment of any
16 deficiency judgment, was extinguished. *See*, 11 U.S.C. § 524(a)(1) and (2); *Johnson*,
17 501 U.S. at 82-84. Thus, Creditor is arguably a secured creditor in that it continues to hold a
18 lien.

19
20 Notwithstanding, section 1325(a)(5) fails to bar confirmation in this case for two
21 reasons. First, the analysis in *Lam* and *Zimmer* raises issues. As Creditor is not a holder of
22 a secured claim for section 1322(b)(2) lien strip purposes, one must question whether its
23 claim can properly be considered a secured claim entitled to section 1325(a)(5) protection.
24 Here, however, the Court need not resolve this issue as section 1325(a)(5), if applicable,
25 does not bar confirmation in this case as section 1325(a)(5)(A) is satisfied. Creditor has not
26 objected to the Plan or the Lien Strip Motion. Thus, consent can be inferred by this Court
27 and section 1325(a)(5) deemed satisfied. *Andrews v. Coheit (In re Andrews)*, 49 F.3d 1404,
28

1 1409 (9th Cir. 1995) (where the holder of a secured claim fails to object this translates into
2 acceptance of the plan.) Thus, section 1325(a)(5), if applicable, has been satisfied.

3
4 **b. Section 1325(b) Is Satisfied.**

5
6 Section 1325(b) is applicable where either a trustee or unsecured creditor objects to
7 chapter 13 plan confirmation. It requires, in the alternative, that an unsecured claim receive
8 a distribution equal to the amount of the claim or that a debtor devote all projected
9 disposable income during the plan term to payments to unsecured creditors. Here, both
10 requirements are met.

11
12 If the Court concludes that the claim at issue is not a secured claim for
13 section 1325(a)(5) purposes, it is logical to assume that section 1325(b)(1)(A) applies. In
14 this case, however, the claim is not a typical unsecured claim given the prior discharge.
15 Indeed, the claim appears to be neither clearly secured for purposes of section 1325(a)(5)
16 nor clearly unsecured for purposes of section 1325(b).² The exact categorization of the
17 claim, or if this claim is entitled to either categorization given its "in rem" character,
18 however, is not a consideration that bars confirmation. Section 1325(b), if applicable,
19 provides that a creditor must be paid the full amount of its claim. Here, the Creditor holds
20 only an *in rem* claim, the *in rem* claim is valueless, and, thus, no payment is required in
21 order to satisfy section 1325(b)(1)(A).

22 Further, the Plan also is confirmable as it complies with section 1325(b)(1)(B).
23 There is no dispute that Debtor lacks projected disposable income from which to pay
24 unsecured creditors and that a zero percent Plan is confirmable in this case.

25
26
27 ² Can a wholly unsecured *in rem* claim be neither a secured nor unsecured claim for section 1325
28 purposes? The Court finds it possible, and notes that if such is the case the only protection available
to such a creditor falls outside of sections 1325(a)(5) and 1325(b).

1 c. **Considerations Of Good Faith Do Not Bar Confirmation.**

2
3 In order for a plan to be confirmed it also must be proposed in good faith (*see*,
4 11 U.S.C. § 1325(a)(3)) and the case must be filed in good faith (*see*, 11 U.S.C.
5 § 1325(a)(7)). Good faith is a flexible concept requiring a case by case determination.
6 *Villanueva v. Dowell (In re Villanueva)*, 274 B.R. 836, 841 (9th Cir. BAP 2002). In this
7 case, there was no evidence of bad faith. In reaching this determination, the Court focused
8 on the following:

9
10 i. *Creditor was wholly unsecured in both cases.* The evidence
11 establishes that the Creditor was wholly unsecured on the date of the Second Bankruptcy.
12 Debtor listed the value of her residence at that time as \$420,000.00 and the amount owed on
13 the Wachovia Claim and on account of property taxes exceeded this amount. Bad faith may
14 be suggested where a debtor "rides the market" seeking a lien strip not available at the time
15 of the prior filing, however, such a consideration does not arise in this case;

16
17 ii. *Debtor did not use serial filings to discharge debt in amounts in*
18 *excess of the limitations of section 109(e).* Bad faith may be found where the debtor would
19 not qualify for chapter 13 relief at the time of its prior filing. The goal of the statutory limits
20 on discharge of debt in 11 U.S.C. § 109(e) is to limit the amount of debt that can be
21 discharged absent the protections set forth in chapter 11. H.R. Rep. No. 595, 95th Cong.,
22 1st Sess. 320 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News, pp. 5963, 6277.
23 In this case, the evidence indicates that the total amount of debt to be discharged in the
24 Second Bankruptcy and the Third Bankruptcy, including unsecured deficiency debt, is still
25 less than that allowed by section 109(e). Once again, bad faith is not suggested.

26
27 iii. *Debtor did not use serial filings to avoid payment to unsecured*
28 *creditors.* A review of the schedules in both cases indicates that a zero percent plan in a

1 chapter 13 case would have been appropriate if the Second Bankruptcy were filed as a
2 chapter 13 case. Simply put, no creditor would have received greater payment if Debtor
3 initially filed under chapter 13; and
4

5 iv. *Debtor has an appropriate need for the Third Bankruptcy other*
6 *than to achieve a lien strip.* Finally, and perhaps most importantly, this is not a case filed
7 solely for the purpose of lien stripping. The Debtor had at the time of the Second
8 Bankruptcy and has today significant unpaid arrearage in connection with the Wachovia
9 Claim. In the absence of a payment plan under a chapter 13 plan, the Debtor may lose her
10 home. The Court, thus, finds a highly appropriate reason for filing of the Third Bankruptcy
11 that is separate and distinct from the desired lien strip.
12

13 In short, based on this record, the Court can find no evidence of bad faith under the
14 facts of this case and, as a result, holds that sections 1325(a)(3) and (6) are not a bar to
15 confirmation.
16

17 **d. Section 1325(a)(1) Is Not A Bar To Confirmation.**
18

19 Finally, the Court must consider section 1325(a)(1) which provides that a chapter 13
20 plan must otherwise comply with the Bankruptcy Code. The Bankruptcy Code contains no
21 provision expressly requiring discharge in connection with a section 1322(b)(2) lien strip.
22 Conversely, the Bankruptcy Code expressly provides for claim modification in
23 section 1322(b)(2). Thus, this Court cannot find, based on this record, that
24 section 1325(a)(1) bars confirmation of the Plan as no Code provision expressly prohibits a
25 lien strip where a discharge is not available.
26
27
28

1 e. **Contrary Case Law On This Issue Is Distinguishable.**

2
3 Cases finding that discharge is required in connection with utilization of
4 section 1322(b)(2) rely on long-standing principals that a discharge is generally required in
5 order to terminate a lien, that liens ride through bankruptcy notwithstanding discharge, and
6 that liens modified under section 1322(b)(2) are unwound upon dismissal or conversion. *In*
7 *re Jarvis*, 2008 Bankr. LEXIS * 13-14 (Bankr. C.D. Ill. 2007). While this reasoning may
8 carry the day in a case where a creditor objects to the plan, it cannot be controlling in a
9 situation where a creditor fails to in any way oppose the proposed plan treatment.

10
11 In this case, the Plan with its lien strip proposal was properly served on Creditor.
12 Notwithstanding this fact, Creditor failed to oppose Plan confirmation. Similarly, the Lien
13 Strip Motion referenced in the Plan and required to effectuate the Plan treatment was
14 properly served on Creditor. Once again, Creditor failed to oppose. A creditor who voices
15 no opposition is deemed to have consented to the plan. *Andrews*, 49 F.3d at 1409. Given
16 this deemed consent, given the absence of unequivocal Code provision barring this result,
17 and given Debtor's utilization of a Code provision not expressly requiring discharge, this
18 Court finds the analysis of *Jarvis* unpersuasive as applied to the facts of this case.³ The
19 Court agrees, however, that Plan completion must occur before reconveyance of the Trust
20 Deed.

21
22 Further, the analysis in *Jarvis* is not without answer. In *In re Picht*, 396 B.R. 76
23 (Bankr. D. Kan. 2008), the bankruptcy court analyzed related issues and determined that
24 discharge was not required prior to a lien strip. The *Picht* Court analyzed the availability of

25
26 ³ Similarly, a confirmed plan binds the creditor who received proper notice, but failed to object
27 even if it contains treatment contrary to the express terms of the Bankruptcy Code. *See, Espinosa v.*
28 *United Student Aid Funds, Inc.*, 545 F.3d 1113 (9th Cir. 2008). In this case, unlike *Espinosa*, the
Plan does not contain a provision that is clearly and expressly contrary to the clear language of the
Bankruptcy Code. The Court need not determine what position it would take in the event that a
creditor does not consent to a plan.

1 a section 1322(b)(2) lien strip in a non-discharge case involving an undersecured claim.⁴
2 The involved bank alleged that sections 1325(a)(5) and 1328(f) barred the lien strip because
3 a discharge was unavailable. The *Picht* Court found these arguments unavailing. It noted
4 that section 1325(a)(5)(B) requires retention of lien until the underlying debt – as
5 determined under non-bankruptcy law – is paid in full or discharged under section 1328, but
6 also requires lien retention upon dismissal or conversion **without completion of the plan.**
7 *Id.* (emphasis added). The *Picht* Court found it significant that plan completion – not
8 discharge – is the trigger. The *Picht* decision, thus, supports the conclusion that where the
9 *in rem* creditor receives an appropriate payment – albeit zero as in this case – the lien strip is
10 final upon plan completion notwithstanding the unavailability of a discharge. *Picht*,
11 396 B.R. at 81. The Court finds the *Picht* analysis compelling, but stops short of finding
12 that it would carry the day in a case involving creditor opposition as opposed to deemed or
13 actual Creditor consent.

14
15 **4. Debtor's Plan May Not Affect Creditor's *In Rem* Claim As To Any**
16 **Interest Of Her Husband As A Joint Tenant.**

17
18 There are some limitations on the Court's ruling. In particular, the Court requires that
19 any lien strip order in this case must be limited to the *in rem* interest of the Debtor. In this
20 case the Debtor either owns the property at issue free and clear (see proof of claim of
21 Wachovia and deed of trust attached thereto) or holds the property as a joint tenant with her
22 husband, See Schedule A. In either case, it is both appropriate and possible to bifurcate the
23 effect of the lien strip. The Debtor's order must be clear in this regard.

24
25
26
27 ⁴ The *Picht* Court found that section 1322(b)(2) did not bar a lien strip on the Debtor's residence
28 because the loan was initially secured by personal property collateral in addition to the lien on the
residence.

1 **5. Notice To Creditor At Plan Completion Is Appropriate.**

2
3 Similarly, while the Court will not require discharge, it will require that the Debtor
4 take steps to advise the Creditor that it is required to reconvey its Deed of Trust as a result
5 of Plan completion. While the Plan appropriately will treat the Creditor's claim as wholly
6 unsecured, reconveyance is not appropriate until such time as the Debtor has completed all
7 Plan payments. *See*, 11 U.S.C. §§ 348 and 349. In a case involving discharge, the debtor's
8 "resultant" discharge after completion of payments signals to a creditor that reconveyance is
9 appropriate. In this case, no such discharge will issue. As a result, upon completion of
10 payments, the Debtor must make an *ex parte* request to this Court for an order requiring
11 reconveyance of the Deed of Trust at issue. This order must then be served on the Creditor.
12 In this manner, the Court can be certain that Creditor is not subject to claims of contempt
13 where it had no opportunity to properly perform.

14
15 **6. Having Concluded That An Inability To Obtain A Discharge Is Not A**
16 **Bar, The Court Will Grant The Lien Strip Motion.**

17
18 Debtor properly served the Lien Strip Motion and all related documents, serving the
19 Creditor at two addresses including that of its registered agent. Notwithstanding proper
20 service, Creditor failed to timely respond and oppose. The Motion provides clear and
21 appropriate notice that failure to oppose will result in valuation of the real property at issue
22 ("Property") at \$340,000.00 and the loss of Creditor's lien as a result thereof. The Motion is
23 supported by adequate evidence.

24
25 Thus, the Court will allow the Lien Strip Motion, value the Property at \$340,000.00,
26 determine that Creditor's claim is entirely unsecured under 11 U.S.C. § 506(a) given the
27 value of Property and the amount of liens senior to Creditor's lien secured thereby, and,
28

1 accordingly, avoid Creditor's lien under 11 U.S.C. § 1322(b)(2) contingent on entry of a
2 confirmation order so providing and completion of Debtor's chapter 13 Plan.

3
4 The Court will allow fees in the presumptively reasonable amount of \$450.00 plus
5 the associated costs, subject to proof. Debtor's counsel also may seek additional fees
6 through fee application as this case is "atypical" within the meaning of *In re Eliapo*, 468
7 F.3d 592 (9th Cir. 2006).

8
9 **CONCLUSION**

10
11 Consistent with this Memorandum Decision, the Debtor is to submit an order on this
12 Lien Strip Motion within ten (10) days and to submit an order finalizing the confirmation
13 process promptly after entry of the same. Any fee application must be filed on or before
14 July 1, 2009.

15
16 DATED: June 1, 2009

17 
18 LAURA S. TAYLOR, JUDGE
19 United States Bankruptcy Court
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