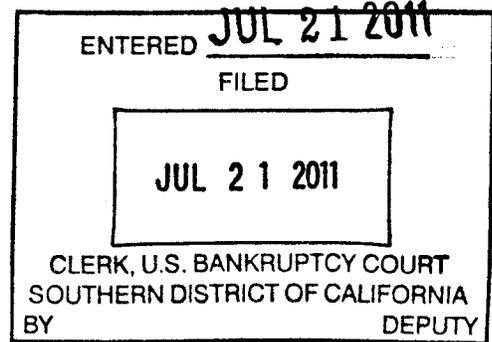


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re) Case No. 08-13558-PB13
12)
12 JOSEPH HART and) ORDER ON DEBTORS' MOTION
13 MARY HART,) TO AMEND CONFIRMATION ORDER
14)
14 Debtors.)

15 This case is a legal caricature of a "Comedy of Errors" of
16 Shakespearean proportions, primarily on the part of the parties,
17 as well as the Bankruptcy Court.

18 This case was filed on December 31, 2008. Contemporaneously
19 with the petition, debtors filed their proposed plan, which
20 called for payments of \$245 per month to the Chapter 13 trustee,
21 most of which would go to their car creditor. The plan called
22 for no payment to unsecured creditors, exclusion of EMC Mortgage
23 on its lien on their primary residence, and provided in paragraph
24 19 that "Debtors will file a motion for valuation of real estate
25 and avoidance of unsecured junior trust deeds."

26 ///

1 Chrysler Financial promptly filed and noticed for hearing
2 its objection to confirmation because of debtors' proposed
3 treatment of the car debt which, while important in itself is
4 not relevant to what later happened. About two weeks later, the
5 Chapter 13 trustee filed his objection to confirmation, arguing
6 debtors had disposable income, and that they needed to obtain a
7 lien strip order. While awaiting hearing on the objections, the
8 debtors filed their motion to strip off junior liens held by
9 Countrywide and San Diego County Credit Union.

10 At the time of these events, the Bankruptcy Court for this
11 district used consolidated Chapter 13 calendars rather than
12 individual calendars involving the judge originally assigned on
13 filing. One consolidated calendar was devoted to law and motion
14 matters, including lien strips, and that calendar was assigned to
15 a single judge for months at a time. The calendar was set and
16 called one day each week. The other consolidated calendar was
17 the confirmation calendar, hearing objections to confirmation.
18 It, too, was set and heard one day each week, but unlike the law
19 and motion calendar, the confirmation calendar rotated each week
20 among the remaining three judges not then assigned to the law
21 and motion calendar.

22 On March 11, 2009 one judge heard the objections to
23 confirmation and continued the hearings to a date after the
24 scheduled lien strip hearing, which was on the calendar of
25 another judge scheduled to hear the confirmation calendar on
26 that date. Meanwhile, at the lien strip hearing, counsel for

1 debtors agreed the moving papers needed to be re-served.
2 A colloquy followed concerning both a fee request and, more
3 importantly, the issue of whether 11 U.S.C. § 506(d) was a form
4 of lien-stripping relief available to a debtor in a Chapter 13
5 case. The judge set out on the record the judge's thinking
6 concerning the role of 11 U.S.C. 1322(b), specifically applicable
7 to Chapter 13 cases, coupled with the impact of the Supreme
8 Court's decision in Dewsnup v. Timm, 502 U.S. 410 (1992).
9 Dewsnup declared § 506(d) unavailable to Chapter 7 debtors, and
10 because 11 U.S.C. § 103 makes the provisions of Chapter 5
11 applicable to cases under Chapters 7, 11, 12 and 13 -- but
12 Dewsnup says § 506(d) is not applicable to Chapter 7 cases
13 -- then it is similarly not available in Chapter 13 cases,
14 either. The judge went on to explain, however, that there is a
15 lien-stripping mechanism available for Chapter 13 cases embodied
16 in 11 U.S.C. § 1322(b). The lien strip motion was continued to
17 allow renoticing and, because of schedule conflicts, was set
18 before yet another judge. Thereafter, the confirmation hearings
19 were continued to the same date and time, as well.

20 At the continued hearings, the exchange was very short. The
21 Court (this judge) stated that service seemed proper, the lien
22 strips appeared supported, so:

23 Under those circumstances, it would
24 appear that subject to confirmation of the
25 plan and language in the order that provides
26 for the lien strip upon successful completion
of the plan and resulting discharge for the
moment -- that's the, since we had that
colloquy yesterday.

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. . .
But at this point in time, at least that's the language, just presumptively, I'll require that the liens should be stripped in accordance with that.

The trustee then withdrew his remaining objection to confirmation of the plan based on a pre-confirmation modification submitted by debtors.

Therein lies at least the early part of the deficiencies that ensued. There was no briefing on any of the issues surrounding § 506, or § 1322, or Dewsnup, nor even any oral argument. Nor did the court provide any findings of fact (other than the value of the property and amount of the senior debt) or conclusions of law. Neither the debtors nor the trustee asked for any.

A week later, debtors' counsel submitted a proposed form of order on the third trust deed lien strip which included in paragraph 6 the following language:

Upon completion of the Plan and Debtors' discharge, the debt to Creditor secured by the Third Trust Deed shall be deemed fully satisfied

That order was signed and entered on May 6, 2009.

On the same date, and even though debtors had received unchanged the order they themselves submitted, they filed a notice of appeal. Subsequently, debtors submitted their Statement of Issues, which were:

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1 1) Did the Bankruptcy Court error [sic] in
2 denying lien avoidance under 11 USC 506(d)?

3 2) Does 11 USC 1322(b)(2) independently
4 provide for lien avoidance irrespective of
5 11 USC 506(d)?

6 3) Did the Bankruptcy Court error [sic] by
7 requiring discharge as a prerequisite to lien
8 avoidance, and where obtaining discharge is
9 impossible pursuant to 11 USC 1328 (f)(1)?

10 Reviewing the foregoing illustrates the problems that can
11 result from moving hearings from one judge to another. The judge
12 who granted the lien strips and confirmation never discussed
13 issue 1 with debtors' counsel during the hearing, nor was it
14 briefed by either side. Moreover, on April 17, 2009 -- before
15 the April 28 lien strip and confirmation hearing before this
16 Court -- debtors filed a pleading setting out its disagreement
17 with one judge's view of § 506(d) and § 1322(b)(2), and stated:

18 Doan Law Firm hereby temporarily amends all
19 such pending motions in this District,
20 including in this case, to request solely the
21 presumptive fees of \$450.00 and that lien
22 stripping relief take place solely under
23 1322(b)(2) [Emphasis added.]

24 Debtors' counsel made clear in that pleading that it would pursue
25 an appeal in a case called Schweizer, but was withdrawing the
26 argument in this case. It was not an issue before this Court,
and should never have been an issue on appeal since it was never
at issue before this Court. A different judge, at an earlier
hearing, had discussed issue 2 with debtors' counsel, but that
judge was not involved when the matters came before this judge,
who granted the lien strips and confirmation.

1 Issue 2 was similarly not the subject of any ruling by this
2 Court on April 28, 2009. To the contrary, as already discussed,
3 debtors had formally withdrawn any § 506(d) argument by amending
4 their moving papers on April 17 to request "that lien stripping
5 relief take place solely under 1322(b)(2)". Having withdrawn any
6 argument concerning § 506(d), it is difficult to understand how
7 debtors could thereafter assert either issue 1 or 2 on appeal
8 when this Court was never presented any opportunity to rule on
9 either one. Moreover, debtors were granted the very relief they
10 sought in their April 17 amendment, that is, lien strips pursuant
11 to § 1322(b)(2), just as they requested. It is not at all clear
12 how debtors might think that ruling was in any way appealable,
13 either.

14 Issue 3 is worded in an ambiguous way in that it can be read
15 to say this Court required debtors to be eligible for a discharge
16 in order to seek a lien strip, rather than the language that was
17 approved in the May 6, 2009 lien strip order. Moreover, the last
18 phrase of issue 3, concerning not being able to obtain a
19 discharge under § 1328(f) had not been discussed by the court or
20 the parties, much less that it was an element of any decision the
21 court made. Indeed, it was not until June 1, 2009 that the
22 trustee first filed a motion for determination that debtors were
23 not eligible for a Chapter 13 discharge. It had not been part
24 of any objection to confirmation prior to that point in time.
25 Debtors did promptly file a non-opposition to the trustee's
26 motion.

1 Debtors, through counsel, subsequently submitted a proposed
2 Confirmation Order which stated, in relevant parts:

3 7. Upon completion of the Plan and discharge
4 of the Debtors, the debts to Countrywide and
5 SDCCU secured by the Second Trust Deed and
6 Third Trust Deed respectively shall be deemed
7 fully satisfied and Countrywide and SDCCU
8 shall take all steps necessary and
9 appropriate to reconvey and release the
10 Second Trust Deed and Third Trust Deed,
11 respectively, against the Home.

12 8. Debtors reserve the right to bring a
13 motion to modify the confirmation order
14 should Debtors prevail on appeal.

15 This Court apologizes to the District Court for the almost
16 non-existent record on the lien strip order from which the appeal
17 was taken. As noted, this Court granted the lien strip, and this
18 Court required language regarding the resulting discharge, which
19 debtors did submit. However, this Court only made findings on
20 the amount of senior debt, value of the residence, and service of
21 process. Debtors got the lien strips they asked for, and with no
22 record on the specified issues it is hard to determine how they
23 had an appealable case or controversy. Their request for lien
24 strips was granted, not denied. The order they submitted, and
25 then appealed from was signed and entered. It is particularly
26 disappointing that neither party asked the District Court on
appeal to remand the matter so they could develop a record and
obtain findings and conclusions on each of the issues debtors
wanted to pursue on appeal. This Court would have been most
willing to aid the District Court in any way feasible. In the
absence of the parties doing so, the District Court was left on

1 its own to try to figure out what, if any, record there was, and
2 ran into the problem of consolidated calendars heard by different
3 judges, most of which was not before this Court on April 28, 2009
4 when the lien strips and confirmation objection were heard.

5 Regardless of all that, the District Court did take and
6 rule on the debtors' appeal, and reversed and remanded. That
7 decision is the law of the case, and this Court recognizes it
8 as such. It is of no particular moment in light of the District
9 Court's ruling, but this Court has held that a debtor need not
10 be eligible for a discharge in order to file a Chapter 13 and
11 to seek a lien strip. In re Burnett, 427 B.R. 519 (2010);
12 In re Casey, 428 B.R. 519 (2010). Of no moment to the instant
13 case precisely because the District Court decision is the law
14 of the case, it is noted in passing that there is growing
15 recognition that 11 U.S.C. § 506(d) is not a stand-alone lien
16 strip mechanism in Chapter 13 cases. In re Hill, 440 B.R. 176,
17 180-81 (Bankr. S.D. CA 2010); In re Fenn, 428 B.R. 494, 501
18 (Bankr. N.D. IL 2010); In re Victorio, ___ B.R. ___, 2011 WL
19 2746054 (Bankr. S.D. CA 2011).

20 On July 23, 2010 Debtors filed a "Motion to Amend
21 Confirmation Order To Comply With Outcome of Appeal Order". In
22 their motion, they recognize that they appealed the "Order
23 Granting the Motion for Valuation" because it required "a
24 discharge for the Order to be effective." They did not appeal
25 the Confirmation Order entered on June 16, 2009, more than a
26 month after the appeal was filed. Yet they seek to amend the

1 unappealed Confirmation Order, not the appealed lien strip order.
2 The District Court's Order would clearly support amendment of the
3 lien strip order, which debtors did appeal, although there is
4 some question about the viability of such an amendment to the
5 lien strip order in the face of the unappealed Confirmation Order
6 which has required a discharge since June, 2009. It is true, as
7 already noted, that debtors' submitted Confirmation Order claimed
8 to "reserve the right" to seek amendment of the Confirmation
9 Order if they prevailed on appeal. But it is also true debtors
10 never appealed the Confirmation Order, and the matter before the
11 District Court on appeal was only the lien strip order. The
12 Supreme Court had occasion to discuss the significance of a
13 confirmation order in a Chapter 13 case in United Student Aid
14 Funds, Inc. v. Espinosa, ___ U.S. ___, 130 S.Ct. 1367 (2010).

15 Aside from the procedural problem of trying to amend the
16 unappealed Confirmation Order based on the appeal of the lien
17 strip order, as already noted there is no record whatsoever
18 concerning the impact, if any, of debtors' ineligibility for a
19 Chapter 13 discharge on whether debtor can seek a lien strip.
20 Also as already noted, this Court has held on multiple occasions
21 that a debtor ineligible for a Chapter 13 discharge is not
22 precluded from both filing a Chapter 13 and seeking a lien strip.
23 The issue is what such a debtor receives at the completion of
24 such a case if the debt is partially (or wholly) unpaid and no
25 discharge is available. That issue was never before this Court
26 in this case, much less before the District Court on appeal.

1 This Court has, however, much more recently addressed that issue
2 in In re Victorio, ___ B.R. ___, 2011 WL 2746054 (2011).

3 For all the foregoing reasons, the instant motion of the
4 debtors to amend the Confirmation Order, as distinct from the
5 lien strip order, is denied.

6 IT IS SO ORDERED.

7 DATED: JUL 21 2011

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10 PETER W. BOWIE, Chief Judge
11 United States Bankruptcy Court
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