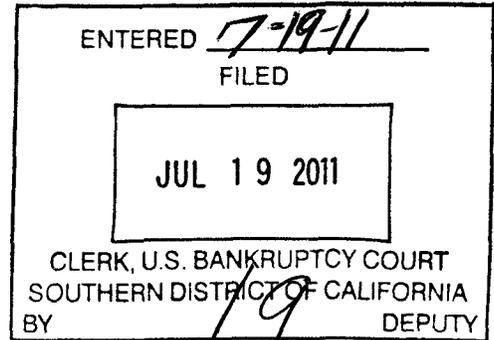


1 WRITTEN DECISION - NOT FOR PUBLICATION



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6 UNITED STATES BANKRUPTCY COURT
7 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 09-17318-LA13
12)
13 MICHAEL K. KELLEY and) ORDER ON TRUSTEE'S
14 ANNE K. KELLEY,) OBJECTION TO CONFIRMATION
15 Debtors.)

16 This is another Chapter 20 case in which the debtors are not
17 eligible for a discharge in this chapter 13 because they received
18 one in 2009 in a preceding Chapter 7.

19 Debtors' original Chapter 13 Plan called for payments to the
20 trustee of \$550 per month, \$450 of which was to go to the senior
21 lienholder on their residence to cure approximately \$27,000 in
22 arrears. The Plan provided for a 5% return to unsecured
23 creditors, although none were listed on either Schedule E or F.
24 Debtors also provided for exclusion of the lienholders on their
25 real property in Oregon. Then, in paragraph 19 of the Plan,
26 debtors provided:

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1 By further motion or adversary, debtors elect
2 to avoid the wholly unsecured second trust
3 deed of Indymac Bank account [____], its
4 heirs, successors and assigns. Said lien
5 shall be voided and any claim amounts due
under a note shall be treated as unsecured in
this plan, and any balance unpaid shall be
discharged upon completion of the terms of
this plan. [Emphasis added.]

6 The Chapter 13 trustee objected to debtors' plan providing for
7 a lien strip when debtors are not eligible for a discharge.

8 Debtors subsequently filed a modified plan, slightly
9 modifying the amount of arrears to the senior lienholder, as
10 well as the installment amount. They also moved the Oregon
11 property from exclusion to reject and return in full
12 satisfaction. Paragraph 19 remained unchanged, even though
13 debtors are not eligible for a discharge. Subsequently, debtors'
14 motion for lien strip was granted without any opposition.
15 However, when debtors submitted a proposed order on the lien
16 strip it was returned because it did not contain language stating
17 it was "contingent upon the entry of discharge". Debtors filed
18 an *ex parte* motion for reconsideration, which was not served on
19 the trustee or the junior lien creditor. A judge of the court
20 reviewed and granted debtors' *ex parte* motion, and signed the
21 lien strip order. The signed order provided, in relevant part:

22 3) Upon entry of a confirmation order
23 consistent with this order and successful
24 completion of the Debtors' Chapter 13 plan
25 and closing of the case, said lien, . . .
26 will be deemed void pursuant to 11 U.S.C.
Section 1322(b)(2). FIRST FEDERAL BANK OF CA
AND/OR INDYMAC BANK, F.S.B., SERVICED BY
ONEWEST BANK, F.S.B., any of its successors
or assigns, shall take all steps necessary

1 and appropriate to release its security
2 interest and remove its lien from the
3 San Diego County Recorder's Office.

3 The trustee reiterated his objection to confirmation, focusing
4 on whether debtors could properly use a lien strip mechanism when
5 they are not eligible for a discharge in this case. At the
6 hearing on the trustee's objection to confirmation, the Court
7 invited further briefing from the parties. That briefing has
8 been provided, and the matter was taken under submission.

9 Debtors' arguments were succinctly stated. They filed this
10 sequential Chapter 13 to save their home from foreclosure by
11 curing the arrears on the senior lien through the plan payments.
12 While they don't mention it directly, avoiding the junior lien
13 on the property would have been important to being able to keep
14 their residence since they owed over \$56,000 to the junior
15 lienholder. They then argue that being eligible for a discharge
16 is not a legal prerequisite to seeking a lien strip. And,
17 finally, they urge that upon completion of the plan the case
18 can be administratively closed without a discharge, without
19 triggering a dismissal that would reinstate the lien pursuant
20 to 11 U.S.C. § 349 (b) (1) (c).

21 The Chapter 13 trustee's arguments are similarly to the
22 point. He argues this case was not filed in good faith where
23 its only purpose is to cure arrears on the senior lien and strip
24 off the junior lien. The trustee argues that a 5% distribution
25 to the only unsecured creditor -- the junior lienholder, is
26 *de minimis* and results in unreasonable delay to the lone

1 unsecured creditor. The trustee also looks to the multi-factor
2 good faith test set out in In re Warren, 89 B.R. 87 (9th Cir. BAP
3 1988), asserting that the Kelleys' plan here is a thinly veiled
4 second Chapter 7, trying to do by Chapter 13 what they were
5 prohibited from doing in Chapter 7 by Dewsnup v. Timm, 502 U.S.
6 410 (1992).

7 The immediate answer in this case is that debtors' plan,
8 as presently framed, cannot be confirmed because paragraph 19
9 says any unpaid balance on the stripped off debt owed Indymac
10 "shall be discharged" But that cannot be, because
11 11 U.S.C. § 1328(f) prohibits a discharge in this case, and this
12 Court has already entered an order on the trustee's unopposed
13 motion holding that the debtors are not eligible for a discharge
14 in this case. Until the proposed plan is amended to correctly
15 state the applicable law, it cannot be confirmed.

16 The longer-range answers are set out in large part in this
17 Court's opinion in In re Victorio, ___ B.R. ___, 2011 WL 2746054
18 (2011). While not addressing every argument raised in the
19 Chapter 20 area, this Court disagrees with the argument that an
20 administrative closing without discharge is an appropriate
21 conclusion to a no-discharge Chapter 13, seeking to evade the
22 restoration of the otherwise avoided lien that Congress intended,
23 as set out in 11 U.S.C. §§ 348, 349. As noted in Victorio, this
24 Court is not persuaded that at the same time that Congress
25 enacted § 1328(f) to limit the previously unlimited availability
26 of discharges in serially filed cases, the Congress also intended

1 to grant a *de facto* discharge of junior lien liability when no
2 discharge is available by statute.

3 For the foregoing reasons, the trustee's objection to
4 confirmation is sustained, without prejudice. Debtors shall have
5 twenty-eight (28) days to file and serve an amended plan. If
6 debtors fail to timely do so, the trustee thereafter may lodge a
7 proposed form of order denying confirmation and dismissing the
8 instant case.

9 IT IS SO ORDERED.

10 DATED: JUL 19 2011

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14 PETER W. BOWIE, Chief Judge
15 United States Bankruptcy Court
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