

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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3 ENTERED Oct. 3, 2011
4 FILED
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6 **OCT 3 2011**
7 CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 In re) Case No. 10-03092-JM13
12)
12 VILMA NIOKO,) ORDER ON TRUSTEE'S
13) OBJECTION TO CONFIRMATION
13 Debtor.)
14 _____)

15 This is another Chapter 20 case where, after obtaining a
16 Chapter 7 discharge in July, 2009, debtor thereafter filed a
17 Chapter 13 in which debtor sought to strip off a junior lien on
18 the primary residence. Since the Court took this matter under
19 submission, the Court rendered its decision in In re Victorio,
20 ___ B.R. ___, 2011 WL 2746054 (Bankr. S.D. CA 2011). That
21 decision addresses many of the issues raised by both debtor
22 and the Chapter 13 trustee. The Court acknowledges that
23 those issues remain in dispute among courts considering them.
24 In re Tran, 431 B.R. 230 (Bankr. N.D. GA 2010); In re Okosisi,
25 451 B.R. 90 (Bankr. N. Nev. 2011); In re Fissette, ___ B.R. ___,
26 2011 WL 3795138 (9th Cir. Bap 2011).

1 Debtor received her Chapter 7 discharge on or about
2 July 8, 2009. Then, on February 26, 2010 she filed the instant
3 Chapter 13 case. In her Schedules she identified a first and
4 second trust deed against her home, the latter listed as wholly
5 unsecured. Debtor also stated that there were no unsecured
6 claims. Debtor filed her proposed plan, ostensibly to cure
7 arrears on the first trust deed, and to strip off the junior
8 lien. The plan proposed no payments to any unsecured creditors,
9 including the purportedly wholly unsecured junior lien.

10 The Chapter 13 trustee objected to confirmation of debtor's
11 plan, raising multiple objections, including that debtor was
12 ineligible for a Chapter 13 discharge. In the meantime, debtor
13 filed a motion to avoid the junior lien on her residence.
14 Ultimately, the lien avoidance motion was granted without
15 opposition. As the case approached hearing on the trustee's
16 objection to confirmation, the trustee reminded debtor and her
17 counsel of multiple issues that needed resolution, including
18 modification of the plan. Debtor did file an amended plan, and
19 revised certain other documents. The trustee then revised his
20 objection to confirmation. The first ground was that because
21 debtor was not eligible for a discharge, she should not be
22 permitted to obtain a lien avoidance through her plan. Second,
23 the trustee argued that the plan was proposed in bad faith
24 because it provided no payment to unsecured creditors, including
25 the junior lienholder. Because the senior lienholder had not
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1 filed a proof of claim for the purported arrears, debtor's plan
2 would take about eight months to complete.

3 Following hearing on the trustee's objection, the Court
4 invited the parties to submit supplemental arguments in writing,
5 which they did. The trustee reiterated his two main points, that
6 confirmation should be denied unless debtor was eligible for a
7 chapter 13 discharge since debtor sought lien avoidance; and that
8 the plan was proposed in bad faith because it provided no payment
9 to any unsecured creditor, including the avoided lien of the
10 junior lienholder, even though the ruling on the lien strip
11 provided the creditor would have an unsecured claim.

12 As the Court explained in Victorio, a debtor does not
13 have to be eligible for a Chapter 13 discharge in order to
14 seek the benefit of lien avoidance under 11 U.S.C. § 506(a) and
15 § 1322(b)(2). The issue, instead, is whether the plan is
16 proposed in good faith. In re Burnett, 427 B.R. 517 (Bankr.
17 S.D. CA 2010). Since the matter was briefed by the parties
18 and thereafter was taken under submission, it appears the senior
19 lienholder filed a proof of claim, asserting arrears of
20 \$8,299.30. The parties have not addressed what impact, if any,
21 that proof of claim might have on the confirmability of debtor's
22 proposed plan. They should have that opportunity.

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1 Accordingly, counsel for debtor shall have until October 31,
2 2011 to file and serve debtor's analysis of the impact of the
3 late-filed proof of claim, and of the Victorio decision. The
4 chapter 13 trustee shall have until November 14, 2011 in which
5 to file any response to the debtor's argument. Thereafter, the
6 matter will be taken under submission.

7 IT IS SO ORDERED.

8 DATED: OCT - 3 2011

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