

The document below is hereby signed.

Signed: September 28, 2009.



S. Martin Teel, Jr.
S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re)	
)	
JONATHAN I. SWIATKOWSKI and)	Case No. 09-00168
ALANNA D. SWIATKOWSKI,)	(Chapter 13)
)	Not for Publication in
Debtors.)	West's Bankruptcy Reporter

MEMORANDUM DECISION AND ORDER RE DEBTORS' MOTION
FOR VALUATION OF SECURITY AND TO AVOID SECURED CLAIM

The debtors have filed a motion for valuation of security and to avoid secured claim, by which the debtors seek a determination that, pursuant to 11 U.S.C. § 506 and Fed. R. Bankr. P. 3012, Wachovia Bank NA, and/or Specialized Loan Servicing, LLC ("Wachovia") has an unsecured claim in the amount of \$68,322.87 and that Wachovia's alleged second trust lien on debtor's residential real property will be avoided upon completion of debtor's chapter 13 plan. Although the court can determine the value of the debtor's real property under 11 U.S.C. § 506 pursuant to a Rule 3012 motion, in order to establish that Wachovia's lien is subject to strip off, the court must also determine the value and relative priority of the Lehman Brothers' lien vis-à-vis Wachovia's lien, an adjudication that must be

sought by way of an adversary proceeding. Accordingly, the court will deny the motion without prejudice to the debtors' filing of an adversary proceeding to determine the value and relative priority of other liens attaching to the property.

By their motion, the debtors seek to "strip off" Wachovia's lien.¹ The debtors contend that Wachovia's claim is wholly unsecured because Lehman Brothers holds a first deed of trust subject to a payoff balance of \$365,319.00, an amount that exceeds the alleged \$360,000.00 value of the property. As such, the debtors contend that there is no remaining equity in the property to secure Wachovia's junior lien, which in turn means that the debtor is entitled to strip Wachovia's lien and treat Wachovia's claim as a general unsecured claim.

Courts are in general agreement that § 1322(b)(2) does not bar a chapter 13 debtor from stripping off a wholly unsecured lien on the debtor's residential real property. See *In re Mann*, 249 B.R. 831, 833-35, 840 (B.A.P. 1st Cir. 2000) (discussing *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993), and agreeing

¹ As explained in *In re Mann*, 249 B.R. 831, 832 n.1 (B.A.P. 1st Cir. 2000), "[t]he term 'strip off' is colloquially used when, there being no collateral value for a mortgage, the entire lien is proposed to be avoided. The term 'strip down' is used when, there being insufficient collateral value for a mortgage, the lien is proposed to be reduced to the value of the collateral. *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36, 37 n.2 (9th Cir. B.A.P. 1997), appeal dismissed, 192 F.3d 1309 (9th Cir. 1999); *In re Woodhouse*, 172 B.R. 1, 1 n.1 Bankr. D.R.I. 1994). Neither term is found in the Bankruptcy Code."

with the Third and Fifth Circuit Courts of Appeals, the Ninth Circuit Bankruptcy Appellate Panel, and several bankruptcy and district courts making up the majority view at that time, that, notwithstanding the Court's holding in *Nobelman*, chapter 13 debtors may avoid wholly unsecured liens on residential real property); *Waters v. The Money Store (In re Waters)*, 276 B.R. 879 (Bankr. N.D. Ill. 2002); *Scott v. Countrywide Home Loans (In re Scott)*, 376 B.R. 285, 291 (Bankr. D. Idaho 2007); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *In re Lam*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). There remains some disagreement, however, surrounding the procedural requirements for achieving this result. Some courts hold that a debtor seeking to void a lien based solely on the lack of equity in the subject property is not required to file an adversary proceeding because such a proceeding is not one to "determine the validity, priority, or extent of a lien or other interest in property" See *In re King*, 290 B.R. 641, 648 (Bankr. C.D. Ill. 2003) (voiding of a lien for lack of collateral value pursuant to § 506 is outside the scope of Rule 7001(2) if the debtor is not challenging the existence or legitimacy of the lien, and there is no dispute as to relative priorities). Likewise, many courts permit the debtor to seek strip off through the chapter 13 plan confirmation process, see *In re King*, 290

B.R. 641 (Bankr. C.D. Ill. 2003) (strip off through chapter 13 plan confirmation process permissible provided that the plan includes specific terms that give adequate notice of the proposed strip off); *In re Scott*, 376 B.R. at 291, citing *In re Millspaugh*, 302 B.R. 90 (Bankr. D. Idaho 2003) (lien can be stripped through plan confirmation process and an adversary proceeding is not required), although some courts reject this approach as lacking adequate due process protection for potentially affected creditors. *Stewart v. JP Morgan Chase Bank (In re Stewart)*, 408 B.R. 215 (Bankr. N.D. Ind. 2009); *In re Forrest*, 2009 WL 2971081 (Bankr. N.D. Ill. Sept. 16, 2009).

In the instant case, Wachovia has not responded to the debtors' motion and has taken no position with respect to the amount and relative priority of Lehman Brothers' alleged first priority lien. Absent a stipulation from Wachovia in that regard, however, the court cannot find that the debtors are entitled to strip off Wachovia's lien without first making a determination as to the amount and relative priority of the Lehman Brothers lien. Such a finding goes beyond mere valuation of the collateral and renders this a proceeding to "determine the validity, priority, or extent of a lien or other interest in property" Although Wachovia has not responded to the motion, and we are thus uncertain whether Wachovia intends to challenge the debtors' representations regarding the Lehman

Brothers lien, the debtors ought not be permitted to obtain a determination of the amount and relative priority of liens by default in the main case when the adjudication of such an issue ordinarily requires the filing of an adversary proceeding. It is thus

ORDERED that the debtor's motion is DENIED without prejudice to the filing of an adversary proceeding.

[Signed and dated above.]

Copies to: Debtors; Debtor's attorney; Chapter 13 Trustee.