

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

IN RE:

CASE NO.00-25155-BKC-RBR
CHAPTER 7

LEO TUCKER,

Debtor .
_____ /

ORDER DENYING MOTION BY DEBTOR FOR RECORDABLE ORDER STRIPPING OFF SECOND MORTGAGE IN ACCORDANCE WITH CONFIRMED CHAPTER 13 PLAN

THIS MATTER came before the Court for hearing on February 20, 2003, on the Debtor's Motion for Recordable Order Stripping Off Second Mortgage in Accordance with Confirmed Chapter 13 Plan (C.P. 49). The Court, having reviewed the Motion and Response thereto, having heard argument of counsel and being otherwise duly advised in the premises, **DENIES** the relief sought as set forth hereinafter.

The Debtor owns homestead real estate located at 3131 NW 42 Street, Lauderdale Lakes, FL 33309-4222, which is legally described as follows:

Lot 9, Block 61, ORIOLE ESTATES SECTION 8, a subdivision according to the plat thereof as recorded in Plat Book 65, Page 9, of the Public Records of Broward County, Florida.

The Debtor proposed to "strip off" the second mortgage in the Chapter 13 Plan, which was confirmed by the Court on November 22, 2000 (C.P. 18). The case was converted to a Chapter 7 on January 16, 2003 (C.P. 46). The Debtor now seeks a recordable Order stripping off the second mortgage in the Chapter 7 pursuant to 11 U.S.C. § 506.

Three factors mandate a denial of the relief sought. First, there was invalid service on the holder of the second mortgage in the original plan. Second, there was sufficient equity in the property to secure the second mortgage lien. Lastly, the case was converted from a Chapter 13 to

a Chapter 7 without completion of the Chapter 13 and discharge therein.

IMPROPER SERVICE

Evidence of inadequate service to the second mortgage holder is rampant throughout the court file. Fidelity Federal Bank (“Fidelity”) is the holder of the second mortgage secured by the Debtor’s principal place of residence. In the initial Schedule F, the Debtor listed Fidelity as a creditor holding an unsecured nonpriority line of credit claim in the amount of \$9,993.00 (C.P. 1).

The address the Debtor used to serve Fidelity was:

P.O. Box
Evansville, IN 47732-3396

When a debtor seeks to “strip off” a lien, Bankruptcy Courts require strict compliance with service requirements. See In re Nowling, 279 B.R. 607 (Bkrcty.S.D.Fla., 2002)(junior mortgagee moved to quash service of debtors' Chapter 13 plan and of motion to value security, held that debtors failed to effect proper service of their Chapter 13 plan and of their motion to value real property).

The Debtor failed to properly serve Fidelity. The Chapter 13 Plans were not duly served to the attention of and upon an officer or any other general or managing agent of Fidelity as authorized by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, Administrative Order 99-2 and Chapter 48, Florida Statutes. A review of the file revealed several other discrepancies in the service process:

- a. the Original Plan did not list the second mortgage (C.P. 4);
- b. although the Second Amended Plan did list Fidelity, it failed to provide service to same.
This Plan was confirmed on November 22, 2000 (C.P. 18);
- c. the First Modified Plan included Fidelity, but used the erroneous address for service:
P.O. Box, Evansville, IN 47732-3396 (C.P. 30);

- d. the Second Modified Plan (C.P. 34) was never served on any interested party and lastly;
- e. the Third Modified Plan served Fidelity at the erroneous address: P.O. Box, Evansville, IN 47732-3396 (C.P. 36).

SUFFICIENT EQUITY

According to the Debtor's schedules, the principal residence has a fair market value of \$80,000.00 with a first mortgage by Chase Manhattan Mortgage Corp. in the approximate amount of \$62,000.00, and a second mortgage by Fidelity, in the approximate amount of \$10,000.00. Thus, there is and was sufficient equity in the property to secure Fidelity's perfected junior mortgage lien. Therefore the secured claim on Debtor's principal residence must be either cured, reinstated or satisfied in full during the term of Debtor's Plan. 11 U.S.C. §§ 1322, 1325.

CASE CONVERTED TO CHAPTER 7

The Debtor claims that although the case is a Chapter 7, the valuation of the secured claim applies in the converted case pursuant to 11 U.S.C. §348(f)(1)(B). Lien stripping however, does not survive conversion of a case from Chapter 13 to Chapter 7, and any lien voided pursuant to a Chapter 13 debtor's ability to strip down liens is deemed revived in the event of a conversion. See In re McDonough, 166 B.R. 9 (Bankr.D.Mass. 1994); See also In re Dennis, 31 B.R. 128 (Bankr.M.D.Ga. 1983) (debtor voluntarily converted her Chapter 13 case to Chapter 7 case, and subsequently filed motion to avoid lien on her household furnishings, held that debtor's voluntary conversion to Chapter 7 case could not serve to avoid claim of purchase-money security interest holder in her household goods established in original Chapter 13 case).

Relying on In re Baez, 244 B.R. 480 (Bankr.S.D. Fla. 2000), the Debtor contends that a Chapter 13 debtor may strip off completely unsecured mortgages on homestead property even

though 11 U.S.C. § 1322 (b)(2) prevents alteration of a secured creditor's rights where the collateral is the debtor's homestead.

Baez, however, is distinguishable from the instant case. First, the Debtor in Baez effected proper service on the lien holder. Second, the court in Baez conducted an actual hearing on the matter, where none took place in the instant proceeding. Lastly, the Baez case was not converted to a Chapter 7. Accordingly, Debtor's Motion for Recordable Order Stripping Off Second Mortgage in Accordance with Confirmed Chapter 13 Plan is **DENIED**.

DONE AND ORDERED in the Southern District of Florida on March 7, 2003.

RAYMOND B. RAY, JUDGE
UNITED STATES BANKRUPTCY COURT