

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE)	CASE NO. 99-53690	
)		
TED MICHAEL PAPP)	CHAPTER 13	
)		
DEBTOR(S))	JUDGE	MARILYN
SHEA-STONUM			

**ORDER RE: "CREDITOR DANIEL J. SMITH'S
OBJECTION TO CHAPTER 13 AMENDED PLAN"**

This matter came before the Court on an objection to the confirmation of debtor's proposed, amended chapter 13 plan, filed by Daniel Smith ("Smith") on March 29, 2000 (the "Objection"). Debtor did not file a response to the Objection. The Court held a hearing on the matter on April 20, 2000. Appearing at the hearing were Howard Rabb, counsel for Smith, and Alan Belkin, counsel for debtor. During the hearing, counsel indicated to the Court that there were no issues of fact in dispute and that the Objection could be resolved on the pleadings. Debtor then requested additional time in which to file a response to the Objection.

On April 21, 2000, the Court entered a scheduling order (the "Scheduling Order") whereby it granted debtor additional time in which to file a response and also provided Smith with time in which to file a reply to debtor's response. The Scheduling Order also required debtor and Smith to jointly file a list of all facts which were not disputed in the case and which could be the subject of stipulation. After those filing deadlines had passed,

THIS OPINION IS NOT INTENDED FOR PUBLICATION

the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (L) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

BACKGROUND FACTS

On December 2, 1999, debtor filed a chapter 13 bankruptcy petition and a proposed chapter 13 plan. On Schedule D - Creditors Holding Secured Claims, debtor listed Ohio Savings Bank as holding a \$24,500.00 claim secured by a first mortgage on debtor's residence¹ and Smith as holding a \$25,618.25 judgment lien, also secured by debtor's residence.² On that same Schedule D debtor lists the fair market value of his residence at \$50,000.00.³ In his first proposed plan, debtor indicated that he would pay

¹ On December 15, 1999, Ohio Savings Bank filed a proof of claim in debtor's bankruptcy. Through that proof of claim, Ohio Savings Bank indicates that it holds a \$12,759.98 claim that is secured by a first mortgage on debtor's residence. Despite the obvious discrepancy between what Ohio Savings Bank, through its proof of claim, states that it is owed by debtor and what debtor, through his Schedule D, states that he owes to Ohio Savings Bank, no amendment to Schedule D has ever been filed.

² On Schedule D - Creditors Holding Secured Claims, debtor does not properly set forth which of his assets act to secure Smith's judgment lien. Nor does Smith attach to his proof of claim any documents to evidence what property of the debtor is encumbered by his judgment lien. However, based upon the contention in debtor's response to the Objection that debtor's attempt to obtain a mortgage on his primary residence was blocked by Smith's judgment lien, it appears that Smith's judgment is secured by a lien on debtor's residence.

³ To date, Smith has not objected to debtor's valuation of his residence. Nor has Smith objected to debtor's claim that Ohio Savings Bank's first mortgage on debtor's residence

totals

\$24,500.00 *See* footnote 1, *supra*.

THIS OPINION IS NOT INTENDED FOR PUBLICATION

Smith 100% of his allowed, secured claim through monthly payments of \$430.00 each. Debtor listed the duration of his plan at 60 months and did not provide for the payment of any interest on account of Smith's secured claim.

On January 11, 2000, Smith filed a proof of claim in debtor's bankruptcy. Through that proof of claim, Smith indicates that debtor owes him \$36,954.07, plus interest from and after December 14, 1999. Smith classifies his entire claim as secured.⁴ On February 14, 2000, Smith filed an objection to the confirmation of debtor's proposed chapter 13 plan on the basis that, although the plan provided that debtor would pay 100% of Smith's claim, the scheduled payments to Smith were insufficient to pay his claim in full.

On March 2, 2000, debtor filed a "Motion to Modify Plan." Through his modified plan, debtor still listed the value of Smith's claim at \$25,618.25 but proposed to increase the monthly plan payments to Smith from \$430.00 per month to \$530.00 per month. Debtor's amended plan still proposed that Smith would not receive any interest on account of his secured claim.

On March 29, 2000, Smith filed the Objection on the same basis advanced in his objection to debtor's originally proposed chapter 13 plan. Additionally, Smith objected to confirmation on the basis that debtor failed to provide that Smith would receive post-petition interest on his secured claim.

DISCUSSION

⁴ To date, and despite the parties' obvious disagreement as to the amount of Smith's claim, debtor has not filed an objection to Smith's proof of claim. *See* 11 U.S.C. §502(a), Fed. R. Bankr. P. 3001(f). Nor has either party filed an appropriate pleading seeking that the Court determine the amount of Smith's claim. *See* 11 U.S.C. §502(b), Fed. R. Bankr. P. 3007.

THIS OPINION IS NOT INTENDED FOR PUBLICATION

Pursuant to the Scheduling Order, debtor filed a response to the Objection and Smith filed a reply to that response. The parties failed, however, to file a list of stipulations. Without the benefit of a list of undisputed facts, the Court can only look to the parties' pleadings and the other documents of record in this case to determine what facts, if any, the parties agree upon. Unfortunately the parties' pleadings are replete with facts that are disputed and unsubstantiated, yet material to the outcome of this matter.

In his response to the Objection (which did not include a verified statement), debtor contends that Smith should be estopped from collecting any post-petition interest on his claim:

Debtor . . . attempted to obtain a mortgage to resolve this claim. This mortgage was blocked by a judgment lien obtained by . . . Smith Smith refused to remove the judgment lien thereby preventing [debtor] from obtaining the needed mortgage.

This is precisely the type of case where the conduct of the creditor estops him from collecting post petition interest. Absent post petition interest Papp's plan properly provides for Smith and that plan should be confirmed.

See Debtor's Response to the Objection at pg. 1 [docket #28]. Apart from these conclusory statements that Smith's alleged refusal to remove his judgment lien should estop him from collecting post-petition interest on his claim, debtor's response to the Objection completely fails to discuss or explain whether Smith is even entitled to collect post-petition interest on that claim (i.e., whether the information on Schedule D, which characterizes Smith's claim as undersecured, is correct or whether the information in Smith's proof of claim, which characterizes Smith's claim as fully or oversecured, is correct). Even if this Court were to assume that Smith is entitled to post-petition interest on his claim, debtor has wholly failed to support the factual allegations underlying his claim for estoppel.

THIS OPINION IS NOT INTENDED FOR PUBLICATION

In his reply to debtor's response, Smith merely recites statutory and case authority that stand for the proposition that an oversecured creditor is entitled to post-petition interest on his claim. Missing from Smith's pleading, however, is a discussion of the fact that on the face of debtor's Schedule D, Smith holds an *undersecured* claim that would not entitle him to receive any post-petition interest. *See* 11 U.S.C. §506(a) and (b). Nor has either party addressed the possible application of 11 U.S.C. §522(f) to this case.⁵

Perhaps Smith and debtor have agreed, for purposes of resolving this dispute, that Smith's claim should be treated as oversecured. Perhaps the balance of Ohio Savings Bank's mortgage on debtor's residence is as listed in the bank's proof of claim (*see* footnote 1) and not as listed in debtor's Schedule D, thus resulting in enough equity in debtor's residence that Smith's claim (whether as valued by debtor or as valued by Smith) would be oversecured. Or, perhaps, the value of debtor's residence is more than the \$50,000.00 listed in debtor's bankruptcy petition. Without the benefit of stipulations, the Court is left only with the disputed, contradictory and unsubstantiated facts raised by the parties' pleadings and the documents on file in this case.

CONCLUSION

Based upon the foregoing, the Court finds that the Objection cannot be sustained. The Court also finds that debtor's proposed, amended chapter 13 plan is not confirmable as drafted. **THEREFORE, IT IS HEREBY ORDERED:**

1. That the Objection is overruled, without prejudice;
 2. That debtor's proposed, amended chapter 13 plan shall not be confirmed;
- and

⁵ To date, debtor has not claimed a homestead exemption. *See* Schedule C - Property Claimed as Exempt; Ohio Revised Code §2329.66(A)(1)(b).

THIS OPINION IS NOT INTENDED FOR PUBLICATION

3. That by not later than **June 19, 2000**, debtor shall amend his Schedule D - Creditors Holding Secured Claims, to reflect that current balance due and owing to Ohio Savings Bank regarding the mortgage on his primary residence, as well as any other Schedules that do not reflect accurate information.

MARILYN SHEA-STONUM

Bankruptcy Judge

DATED: 6/8/00