IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:	**IN PROCEEDINGS UNDER CHAPTER 13**
OPHELIA BELL,	**CASE NO.: 02-13564**
Debtor.	**JUDGE RANDOLPH BAXTER**

MEMORANDUM OF OPINION AND ORDER

Ophelia Bell (Debtor) renews her objection to the arrearage portion of a proof of claim filed by Wells Fargo Minnesota, N.A., as Trustee (Wells Fargo)[1] in the amount of $17,948.56. Wells Fargo timely responded to the objection. The Court acquires core matter jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 157(a) and (b), 28 U.S.C. § 1334, and General Order Number 84 of this District. Following a duly-noticed hearing, the following findings and conclusions are made:

Debtor filed for relief under Chapter 13 proceedings on April 5, 2002. On that same date, Debtor filed her proposed Chapter 13 plan, which was ultimately confirmed. Following confirmation of the plan, Debtor filed her first objection to Wells Fargo's arrearage claim. After a duly-noticed hearing, this Court overruled Debtor's objection on the grounds that applicable law did not support post confirmation objections to claims.

On August 23, 2004, Debtor renewed her post confirmation objection to Wells Fargo's arrearage claim of $17,948.56. Debtor valued Wells Fargo's arrearage claim in the amount of $6,540.00. Wells Fargo, again, timely responded. Debtor acknowledged that this Court previously

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[1]Wells Fargo's total proof of claim amount was $71,165.55, of which $17,948.56 comprised the arrearage amount.

denied her objection to the same claim on July 7, 2003 on the grounds that applicable law did not support post-confirmation objections to claims. Debtor, however, urges the Court to reconsider its ruling on her objection based on a subsequent ruling issued by the Sixth Circuit Bankruptcy Appellate Panel. That decision allowed a debtor's post-confirmation objection to a claim. *See Morton v. Morton*, 298 B.R. 301 (6th Cir. B.A.P. 2003). For the reasons below, Debtor's renewed objection is not sustainable.

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The Court must determine whether the Bank's secured proof of claim trumps a contrary provision in a Chapter 13 debtor's confirmed plan.

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Herein, Debtor argues that the $17,948.56 arrearage amount contained in Wells Fargo's proof of claim appears to be excessive and should be in the amount of $6,540.00[2] only. Wells Fargo opposes Debtor's objection on the grounds that: (1) the Debtor failed to object to its proof of claim pursuant to Bankruptcy Rule 3001(f) and § 502(a) prior to plan confirmation; (2) Section 1327(a) binds the Debtor to the amount of the properly filed proof of claim; and (3) § 1322(b)(2) prevents the Debtor from "stripping down" its mortgage arrears, which is secured by the Debtor's principal residence.[3]

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[2]Debtor's initial objection states that the mortgage arrears should be in the amount of $13,461.32.

[3]Procedurally, the Debtor did not seek an appeal within the allotted ten (10) days provided by Rule 8002, nor did she seek to stay proceedings pending appeal of this Court's prior Order denying her earlier objection to the same claim. Further, the Debtor failed to seek reconsideration of the Court's prior Order under any procedural rule, such as Rule 9023 (motion to be filed within ten days),

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Section § 501 of the Bankruptcy Code [11 U.S.C. § 501] and Rule 3002, Fed. R. Bankr. P. address the filing of proofs of claims. Section 502(a) of the Code provides that a properly filed proof of claim is allowed unless a party in interest objects. [11 U.S.C. § 502(a)]. Neither the Bankruptcy Code nor Rules provide a time frame for filing objections to claims in a Chapter 13 case. *In re Bateman*, 331 F.3d 821, 828 (11th Cir. 2003). However, once a plan is confirmed, the parties' rights generally become fixed by the terms of the plan, whether or not an objection has been filed. *See* 11 U.S.C. § 1327(a). Therefore, during the pre-confirmation period the parties should be given every allowable opportunity under the Code to determine their rights by filing an objection to claim or objection to plan confirmation. Based on *Morton*, *supra*,
an objection may be considered timely when made post-confirmation.

Generally, the holder of a secured claim is entitled to protection under the Bankruptcy Code to the extent of the collateral's value securing the claim. 11 U.S.C. § 506(a). Section 1322(b)(2), which provides that a plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, specially prohibits any modification of a homestead mortgagee's rights in the Chapter 13 plan. Because of the protection afforded to mortgagees by § 1322(b)(2), the protected security interest is not compromised even if the interest is undersecured by the value of the property. *Nobelman v. Am. Savs. Bank*, 508 U.S. 324, 329, 113 S.Ct. 2106, 2110, 124 L.Ed.2d 228 (1993). Even if the residential mortgage is

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9024(b) (motion to be filed within a reasonable time or within a one year period), or Rule 3008 after the *Morton* decision was rendered on September 12, 2003.

undersecured, the Bankruptcy Code is clear that a proponent of a plan is prohibited from reducing the mortgagee's secured claim.

The Debtor valued her personal residence at $54,800.00 in Schedule A. Wells Fargo's mortgage was valued on Schedule D at $53,535.92. There is no dispute that Wells Fargo's security interest is fully secured. The provisions of § 1322(b)(2) apply in this case.

Often a debtor will be in default under the mortgage prior to filing a Chapter 13 petition, resulting in a mortgagee's secured claim for arrearage. *In re Bateman*, 331 F.3d at 826, n.5. Under § 1322(b)(5), the debtor can cure such arrears of a mortgage without improperly modifying the secured creditor's rights in violation of § 1322(b)(2). *Id.* at 826 *citing In re Hoggle*, 12 F.3d 1008, 1010 n. 3 (11th Cir.1994) (holding that a confirmed plan can be modified to cure prepetition or post-petition defaults, so long as it meets the requirements of § 1322(b)(5)). In *Nobleman*, the Supreme Court opined:

> The combined effect of §§ 1322(b)(2) and (5) is to split the treatment of a mortgagee's secured claim within the plan--one secured claim for the mortgage going forward and one secured claim for the arrearage--but it does not compromise the amount of the aggregate secured claim or the rights of the secured creditor to recover the arrearage.

Nobelman, 508 U.S. at 331-32, 113 S.Ct. at 2111. In turn, § 1322(b)(5)[4] does not allow a debtor to

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[4]Section 1322 provides, in part:

> (b) Subject to subsections (a) and (c) of this section, the plan may--
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;....

11 U.S.C. § 1325(b)(5).

ignore the prohibition embodied in § 1322(b)(2).

Section 1327(a) of the Code provides that the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan. 11 U.S.C. § 1327(a). Generally, creditors are bound by the terms of a confirmed plan, unless the plan is abandoned by the debtor. *In re Pearson*, 214 B.R. 156, 160 (Bankr. N. D. Ohio 1997). In this case, Debtor provided for an arrearage amount of $6,540.00 in her confirmed plan. This amount differs substantially from Wells Fargo's secured proof of claim.

On first blush, the statutory interplay between § § 1322(b)(2) and 1327(a) and (c), presents a rather perplexing result for a secured claimant. Ultimately, however, the combined effect preserves both the letter and spirit of the Bankruptcy Code. Section 1322(b)(2) protects a secured mortgagee's interest by disallowing any strip-down efforts by a debtor mortgagor where the mortgagee's security interest lies solely in the debtor's personal residence. Section 1327(a) provides that the debtor and each creditor affected by a confirmed plan are bound by the express terms of such plan---even creditors who may or may not have objected to the plan. The affected non-objecting creditors include secured or unsecured creditors, although secured creditors are not required to file proofs of claim. *In re Bateman*, 331 F.3d at 827.

Lastly, § 1327(c) provides that upon confirmation property of the estate that vests in the debtor pursuant to § 1327(b) is free and clear of any claim or interest of any creditor provided for by the plan. Together, the apparent sense of finality expressed by §§ 1327(a) and (c) seems to diminish the interest of a secured party. Notedly, however, the "free and clear" clause of § 1327(c) only applies to

property provided for in the plan or in the order confirming the plan. Herein, the confirmation order provides, in pertinent part:

> 6. The plan complies with all applicable requirements of section 1325 of the Bankruptcy Code.

The decretal paragraph of the subject confirmation order provides:

> 3. Secured creditors shall retain their liens....

Additionally, the Debtor's plan provides:

> A holder of a secured claim shall retain the lien securing such claim until the amount for which the claim is allowed as secured is paid in full, pursuant to 11 U.S.C. § 1325(a)(5)(B)(i) and 1327(a).

The record does not reflect where the Debtor has properly attempted to extinguish or modify the Bank's lien. As noted in *Cen-Pen Corp*, liens without modification or disallowance, generally pass through the bankruptcy process unaffected. Thusly, if a debtor, as herein, has not moved to set aside a lien, § 1327(c) does not affect the lien adversely. *Cen-Pen Corp v. Hanlon*, 58 F.3d 89 (4th Cir. 1995); *In re Thomas*, 883 F.2d 991, 998 (11th Cir. 1989), cert. denied, 497 U.S. 1007, 110 S.Ct. 3245, 111 L.Ed.2d 756 (1990)(Section 1327 does not operate to extinguish a lien on property passing through bankruptcy for which no proof of claim is filed; section 1327 does not expand rights in property which the bankruptcy estate acquired pursuant to § 541 of the Code).

Thusly, despite the language embodied in § 1327(a), the Code clearly provides that a secured creditor's lien, whose security interest is solely in the debtor's personal residence, survives a contrary plan confirmation provision. 11 U.S.C. § 1322(b)(2); *In re Bateman*, 331 F.3d at 826 (*citing In re Simmons*, 765 F.2d at 559). Furthermore, the Code and the Rules do not envision the use of a plan provision to substitute for the commencement of a contested matter by the proper filing of an objection

to a proof of claim under § 502 of the Code. *Id*.

The Debtor's confirmed plan should have satisfied the requirements of § 1325(a)[5]. However, neither subsection of § 1325(a) was satisfied by the Debtor's confirmed plan. Notwithstanding the binding effect of § 1327(a), an unsatisfied secured mortgage lien upon a debtor's personal residence survives a contrary plan provision. Debtor has provided no authority to defeat the applicability of § 1322(b)(2) and the weight of the aforementioned case law. Nor has she provided authority to support a finding that § 1327(a) trumps § 1322(b)(2).

Therefore, if a lien on a mortgage survives the § 1327 *res judicata* effect of a confirmed plan, then so must the attendant arrearage claim provided for in the plan. *See In re Hobdy*, 130 B.R. 318, 322 (9th Cir. B.A.P. 1991) (holding, in an identical fact situation, that the general terms of § 1327(a) could not override the specific effect of § 502(a) claim provision; therefore, the confirmed plan was "fatally defective" and could not reduce the arrearage claim).

The court in *Hobdy* interpreted § 1327(a) to bind the parties to the distribution amount under the plan, but not the amount of the claim determined by § 502(a). *Id.* at 322. Further, that court held, the debtor could not satisfy the lien until the entire claim amount was paid, whether pursuant to the plan or otherwise. *Id.* The concurrence relied, in part, on the language of § 1322(b)(10) which, by

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[5]Section 1325 provides in relevant part:
(a) Except as provided in subsection (b), the court shall confirm a plan if--
(5) with respect to each allowed secured claim provided for by the plan--
(A) the holder of such claim has accepted the plan;
(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
(C) the debtor surrenders the property securing such claim to such holder;....

11 U.S.C. § 1325(a)(5).

implication, prohibits the confirmation of a plan inconsistent with Title 11--one such inconsistency being "for a plan to effectively determine the amount of a secured claim," a result inconsistent with § 502(a) and Rule 3007. *Id.* at 322. *Hobdy* concluded that a proof of claim pursuant to § 502(a) controlled the amount of the creditor's allowed claim, even if the plan amount differed, but held that the plan could not reduce an arrearage claim.

The facts herein compel an identical result. Wells Fargo's arrearage claim, which is secured by the debtor's personal residence, is unaffected by the disputed plan provision and survives the bankruptcy unimpaired. *See e.g. Johnson v. Home State Bank,* 501 U.S. 78, 111 S.Ct. 2150, 2153-54, 115 L.Ed.2d 66 (1991); *Cen-Pen Corp. v. Hanson,* 58 F.3d at 92 (unless avoided, "liens pass through bankruptcy unaffected"); *In re Vankell*, 311 B.R. 205, 212 (Bankr. E. D. Tenn. 2004).

Accordingly, the plan provision providing for an arrearage amount of $6,333.00 is *res judicata* as to the amount of the arrearage claim to be paid through the plan pursuant to § 1327(a). Wells Fargo's security interest, however, is not diminished as it can pursue any arrearage deficiency outside the plan, pursuant to § 1322(b)(2). Thusly, the Debtor's objection to Wells Fargo's arrearage amount in its proof of claim is hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter

Dated, this 24 day of November, 2004

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT