

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

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In Re:

EDWARD RANDLEMAN
PATRICIA RANDLEMAN

Debtors.

In Proceedings Under Chapter 11

Case No.: 03-16340

CHIEF JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the motion of Edward and Patricia Randleman (the “Debtors”) to avoid the lien of Resurgent Capital Services LP, fka Alegis Group, LP (“Resurgent”). Resurgent has filed an objection to the Debtors’ motion.

The Court acquires core matter jurisdiction over this proceeding under 28 U.S.C. § 157(b) and General Order No. 84 of this District. Upon an examination of the parties’ respective briefs and supporting documentation, and after conducting a hearing on the matter, the following findings of fact and conclusions of law are hereby rendered:

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The Debtors own real estate valued at \$99,800.00. The real estate is encumbered by a first mortgage lien held by Altegra Mortgage (formerly National City Mortgage) in the amount of \$99,616.00. Citifinancial granted a note and second mortgage on the Debtor’s real estate on September 30, 2000, in the original amount of \$19,143.50 (the “Citifinancial Note”). The Citifinancial Note and second mortgage were assigned to Sherman Acquisition, and is now held by Resurgent.

The real estate was also encumbered by a judgment lien obtained by FirstMerit Bank on

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July 12, 2001 in the amount of \$7,772.18. This judgment lien was avoided by this Court's prior order on November 21, 2005.

The Debtors filed for protection under Chapter 13 of the Bankruptcy Code on May 15, 2003. Their Chapter 13 Plan (the "Plan") was confirmed on September 3, 2003. The Plan does not provide for payment on Resurgent's mortgage. Resurgent did not object to the confirmation of the Plan. The Debtors have claimed a homestead exemption on the real estate in the amount of \$10,000.00 pursuant to Ohio Revised Code § 2329.66(A)(1)(a), since the real estate is the Debtors' principle residence.

Sherman Acquisition filed a proof of claim on October 28, 2004. The Debtors objected to the claim on the grounds that Sherman Acquisition failed to attach proof of their security interest, and because the proof of claim was not timely filed. On December 30, 2004, the Court sustained the Debtors' objection on the grounds that no response had been filed by any interested party.

The Debtors now seek to avoid the lien, which is now held by Resurgent, arguing that the second mortgage has no economic value. Resurgent objects, asserting that it was not properly served process of the Debtors' objection to its claim, or to the motion to avoid its lien. Resurgent also notes that pursuant to FED. R. BANKR. P. 7001(2), the Debtors' motion should have been brought as an adversary proceeding. Alternatively, Resurgent argues that under Ohio law, the Citifinancial Note enjoys a priority status to the Debtors' exemption claim. Resurgent argues that since the value of the real estate is higher than the amount of Altegra's first mortgage lien, its lien attaches to equity and therefore cannot be modified or avoided under 11 U.S.C. § 506(a).

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Resurgent first argues that the Debtors' motion should be denied on the grounds of improper service of process, as required by FED. R. BANKR. P. 7004(b), which states, in pertinent part:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

FED. R. BANKR. P. 7004(b)(3). The Certificate of Service attached to the Debtors' motion shows that it was sent by certified U.S. Mail to:

Resurgent Capital Services, L.P.
P.O. Box 10826
Greenville, S.C. 29603-0826

Therefore, it is undisputed that it was not sent to the attention of an officer or other authorized agent, as required by Rule 7004(b)(3). "In order to assure that the party being served is apprised of the pendency of an action, valid service requires more than to address the document to a post office box." *In re Villar*, 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004); *In re Lenox Healthcare, Inc.*, 319 B.R. 819, 821-22 (Bankr. D. Del. 2005) ("Because 'nationwide service of process by first class mail is a rare privilege which should not be abused or taken lightly,' courts have required strict compliance with Rule 7004(b)(3). Courts vary on the specificity required: some courts require that it be addressed to a person by name, while others require that it be addressed by title. However, merely addressing it to a post office box is not sufficient."); *Addison v. Gibson Equipment Co., Inc.* (*In re Pittman Mechanical Contractors, Inc.*), 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously."); *In re Artesian*

defendant agrees to waive service, the summons continues to function as the sine qua non directing an individual or entity to participate in a civil action or for[e]go procedural or substantive rights.”).

Therefore, because the Debtors failed to effectuate proper service of process upon Resurgent, the Debtor’s motion is denied. *In re Maloni*, 282 B.R. 727, 731 (B.A.P. 1st Cir.2002) (citations omitted) (“Failure to effect service as provided by Rule 7004(b)(3) will render service of process insufficient, and will deprive the bankruptcy court of personal jurisdiction over the defendant corporation. If the court does not have personal jurisdiction, any order or judgment entered by the court is void for lack of personal jurisdiction.”). It is unnecessary for the Court to examine the substantive merits of the motion at this time.

Accordingly, the Debtors’ motion to avoid mortgage lien is hereby denied without prejudice. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 8th day of
February, 2006.


RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY
COURT