

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

In Re:

In Proceedings Under Chapter 13

FELIX WRIGHT,

Case No.: 05-93656

Debtor.

CHIEF JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

This matter before the Court is an Evidentiary Hearing regarding Felix Wright's (the "Debtor") Motion to Value Collateral (Judgment Lien) of Mahmoud El-Khatib ("Mr. El-Khatib"); and Mr. El-Khatib's Objection to the Debtor's Motion . 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. Upon 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:

BACKGROUND

On October 14, 2005 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 13 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (the "Court"). On the Petition Date the Debtor owned real property located at 2698 Wakefield Land, Westlake, Ohio (the "Property"). At the time of the filing there the following mortgages and liens were assessed against the Property:

County Treasurer -	\$20,000.00
First Merit (1 st Mortgage) -	\$100,000.00

American General (2 nd Mortgage) -	\$98,000.00
Elaine Divjak (Judgment Lien) -	\$50,000.00 ¹
Mahmoud El-Khatib (“ <u>Mr. El-Khatib</u> ”) (Judgment Lien) -	\$49,628.00

On November 23, 2005 the Debtor filed a Chapter 13 plan of reorganization (the “Plan”). The Debtor filed a modified Plan on January 11, 2006 and an order confirming the Plan was entered on February 21, 2006. The Debtor’s modified Plan provided in paragraph four (4) that that secured creditors claim will be secured to the extent the value of the corresponding collateral as indicated below. Mr. El-Khatib’s claim was valued at \$0.00 (zero dollars).

On February 23, 2006 the Debtor filed a Motion to Value Collateral (Judgment Lien) of Mahmoud El-Khatib (the “Motion”). On March 16, 2006 (the “Objection”) Mr. El-Khatib filed an objection to the Motion. This Court held a hearing on the Motion on March 30, 2006 at which time an Evidentiary Hearing was scheduled for May 11, 2006 at 1:30 p.m. The Evidentiary Hearing was held and the parties informed the Court that they would rely on the previous submissions to the Court, which included the Motion, the Objection, the Debtor’s Pre-Trial Statement, the Debtor’s Exhibits 1-4, Mr. El-Khatib’s Trial Brief and Exhibits A, B1 – B9.

Pre-petition, on February 23, 2005 Mr. El-Khatib obtained a judgment against the Debtor in the Cuyahoga County Court of Common Pleas in the amount of \$20,900 plus interest at a rate of 20% per annum from July 1, 1998, plus cost of action. Mr. El-Khatib filed the judgment on March 14, 2005.

¹ On the Petition Date the Judgment Lien of Elaine Divjak (“Ms. Divjak”) was scheduled by the Debtor, on Schedule D, in the amount of \$50,000.00. Subsequently, through the resolution of various objections filed by Ms. Divjak, by an agreed order the judgment lien was reduced to \$34,500 with 10.00% of annual post-petition interest.

MOVANT'S CONTENTION

The Debtor contends that the fair market value of the Property is \$250,000 as set forth in the Debtor's Schedule D and the September 2005 appraisal. The Debtor states that there are a total of \$268,000.00² of liens excluding Mr. El-Khatib's claim (including Mr. El-Khatib's claim the total amount of assessed claims is \$317,628.00). Therefore, given the value of the Property and the amount of liens, there exists insufficient equity in the Property to secure the judgment lien of Mr. El-Khatib. The Debtor contends that the judgment lien of Mr. El-Khatib impairs the exemption entitlement of the Debtor. Therefore, Mr. El-Khatib judgment lien claim should be valued at \$0.00 and Mr. El-Khatib should be ordered to release his judgment lien against the Debtor's Property.

Additionally, the Debtor's Plan was confirmed, without objection from Mr. El-Khatib, on February 21, 2006. Elaine Divjak, another judgment lien creditor, filed an objection to the confirmation of the Debtor's Plan; the objection was resolved and based on the \$250,000.00 Property value Ms. Divjak will be paid \$34,500.00 plus 10% interest. The resolution of Ms. Divjak objection left no equity to pay the claim of Mr. El-Khatib.

The Debtor contends that pursuant to 11 U.S.C. §1327 the language of the Debtor's plan is absolute upon confirmation; the Debtor states that the language of Section 1327 of the Bankruptcy Code was set forth in paragraph nine (9) of the Plan giving all affected and parties-in-interest notice of the effect of confirmation. Therefore, Mr. El-Khatib cannot dispute the terms of the Plan, which provided for a zero valuation of his lien. The Debtor states that the Motion was simply a way to provide the Cuyahoga

² This amount \$268,000.00 does not take into account the revised judgment lien amount of Ms. Divjak in the amount of \$34,500.00, but the scheduled amount of \$50,000.00.

County Court of Common Pleas with an appropriate record to remove the lien of Mr. El-Khatib from the Property.

OPPONENT'S CONTENTIONS

Mr. El-Khatib contends that he has a judgment lien against the Property, as of the Petition Date, in the amount of \$51,472.37 at 20% per annum. Mr. El-Khatib states that pursuant to an appraisal, dated August 4, 2005 the true fair market value of the Property is \$265,000.00, not the \$250,000.00 value that the Debtor claims. Therefore, based upon the August 4, 2005 appraisal, sufficient valuation equity in the amount of \$12,500.00 remains in the Property to pay part of the judgment lien of Mr. El-Khatib.

DISCUSSION

11 U.S.C. 1327. Effect of confirmation

(a) 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.

Section 1327 of the Bankruptcy Code, in effect, requires that an order of confirmation be given *res judicata* effect as to those issues that were decided, or could have been decided, at the time of confirmation. One of the legal consequences of confirmation of a Chapter 13 plan is that all creditors are bound by its terms, regardless of whether the claim of a creditor is provided for, or whether the creditor has accepted, rejected or objected to the plan. In re Sanders, 243 B.R. 326 (Bankr.N.D.Ohio 2000). See also In re Thaxton, 335 B.R. 372 (Bankr.N.D.Ohio 2005). In the Sanders matter, this Court determined that a timely filed proof of claim does not trump a Chapter 13 plan's treatment of a claim, where due process was given to the affected claimant but no

objections to the plan was filed by the claimant. Id. at 327. This Court held that a creditor is bound by the terms of the plan. Id. at 331. The *res judicata* effect of a confirmed plan is precluded when a creditor's due process rights are violated; "provisions of a confirmed Chapter 13 plan are not binding on creditors to the extent that the confirmation order violates a creditor's due process rights." In re Thaxton, 335 B.R. at 374, citing In re Harris, 293 B.R. 438, 441 (Bankr.N.D.Ohio 2003); In re Ruehle, 412 F.3d 679, 684-85 (6th Cir.2005). "Due process requires that a creditor receive notice that is reasonably calculated, under all circumstances to apprise the creditor that its rights may be altered." Id., citing Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In the current case before the Court Mr. El-Khatib does not dispute, in his Objection, that he was given notice of the Debtor's originally proposed Plan, modified Plan and/or all of the accompanying motions to confirm. Within the Plan the Debtor in paragraph four (4) listed Mr. El-Khatib's claim and valued the claim at \$0.00 and indicated that Mr. El-Khatib would receive nothing as a claimant against the estate of the Debtor. Mr. El-Khatib disputes the Debtor's valuation of the Property stating that the correct value is \$265,000.00, \$15,000.00 higher than the Debtor's stated value of \$250,000.00. Mr. El-Khatib's valuation is based on an August 2005 appraisal. The Debtor captured his stated value in Schedule D that was filed with the Court and also a September 2005 appraisal that was submitted as an exhibit for this Evidentiary Hearing.

In spite of the valuation contention between the parties, Section 1327 of the Bankruptcy Code and the Sixth Circuit Court of Appeals are very clear that the confirmation of a Chapter 13 plan binds all creditors by its terms, regardless of whether

the claim of a creditor is provided for, or whether the creditor has accepted, rejected or objected to the plan absent a showing of a violation the creditor's due process rights. See In re Ruehle, 412 F.3d 679, 684-85 (6th Cir.2005); In re Thaxton, 335 B.R. 372 (Bankr.N.D.Ohio 2005); In re Sanders, 243 B.R. 326 (Bankr.N.D.Ohio 2000). The Evidentiary Hearing record is void of any allegations by Mr. El-Khatib of notice and/or due process defects as they related to the Debtor's Chapter 13 Plan. Although, had Mr. El-Khatib objected to the Debtor's pre-confirmation valuation of his judgment lien claim in the Plan, there would have been a valid dispute pre-confirmation that could have been resolved by this Court. Because Mr. El-Khatib failed to take any action to protect his rights he cannot be heard to complain after the Court has granted finality to both the Debtor and his creditors by confirming the Debtor's Chapter 13 Plan.

Mr. El-Khatib's due process rights were observed when he was noticed by the Debtor regarding the Debtor's Schedule D and Debtor's Plan; both outlined the Debtor's valuation of the Property and Debtor's proposed treatment of his judgment lien claim.

CONCLUSION

Accordingly, the Debtor's Motion is well-premised and is hereby Granted. Mr. El-Khatib's objection is Overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

**Dated, this 16th day of
May, 2006**

/s/ Randolph Baxter
RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OHIO
EASTERN DIVISION

IN RE: IN PROCEEDINGS UNDER CHAPTER 13
FELIX WRIGHT CASE NO. 05-93656
Debtor(s). CHIEF JUDGE RANDOLPH BAXTER

JUDGMENT

At Cleveland, in said District, on this 16th day of May, 2006.
A Memorandum Of Opinion And Order having been rendered by this Court in this matter,
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the
Debtor's Motion is well-premised and is hereby Granted. Mahmoud El-Khatib's
objection is Overruled. Each party is to bear its respective costs.
IT IS SO ORDERED.

/s/ Randolph Baxter
RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT