UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION


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| In re: | ) | Case No. 13-16272 |
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| IOANNELLA BENEDETTA IAFFALDANO, | ) | Chapter 13 |
| | ) | |
| Debtor. | ) | Chief Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **MEMORANDUM OF OPINION**[1] |
| | ) | **AND ORDER** |

The condominium unit that the debtor Ioannella Iaffaldano owns and lives in at Wagar Plaza Condominiums is encumbered by two certificates of lien in favor of Wagar Plaza Condominium Unit Owners Association, Inc. (the Association). The debtor's plan proposes to strip the liens and treat the Association's claim as a general unsecured claim. The Association argues in opposition that it must be treated as a secured creditor. The parties submitted this dispute for decision on stipulated facts.[2] For the reasons stated below, the Association's objection to the plan is overruled.

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core

[1] This opinion is not intended for publication.

[2] The debtor owns a second unit at Wagar Plaza Condominiums and she proposes to treat the Association's lien on that unit in the same manner; the Association objects to that as well. While the stipulations and briefs address issues related to both units, at the last hearing counsel asked the court to decide only the issue regarding the residence. They intend to settle the dispute about the second unit following that decision.

proceeding under 28 U.S.C. § 157(b)(2)(K) and (L) and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011).

## STIPULATED FACTS[3]

The debtor filed this case as a chapter 7. After receiving her discharge, she converted the case to one under chapter 13.

The debtor owns and lives at the condominium unit described as Unit 12 of the Wagar Plaza Condominiums located at 20996 Detroit Road, Rocky River, Ohio (Unit 12). Unit 12 has a fair market value of $102,100.00 and is encumbered by a valid, perfected first lien held by Charter One, NA, which mortgage secures a debt in the amount of $118,947.00. Unit 12 is also encumbered by two later-filed certificates of lien in favor of the Association. The Association recorded its first lien in the amount of $1,085.00 plus interest and the second lien in the amount of $16,334.00 plus interest. The Association had a pending state court complaint to foreclose on its liens when the debtor filed her bankruptcy case.

The debtor's proposed plan and modified plan include this special provision:

> Voiding of statutory liens. The statutory liens of Wagar Plaza Condominium Owners Association will be voided pursuant to 11 U.S.C. § 506(d) in their entirety and the resulting claims treated as general unsecured claims in accordance with Article 7 of the plan.[4]

Under Article 7, unsecured creditors are to be paid the greater of 1% or a pro-rata share of $826.01. The debtor's property is to revest in the debtor upon confirmation.

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[3] *See* docket 89. This opinion omits stipulated facts that relate to the debtor's second unit.

[4] Docket 25 and 60.

## DISCUSSION

Under Bankruptcy Code § 1322(b)(2), a chapter 13 plan may modify the rights of holders of unsecured claims as well as "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[.]" 11 U.S.C. § 1322(b)(2). The issue of whether a claim is secured is resolved by looking to Bankruptcy Code § 506(a). *Lane v. Western Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002). The question under that section is whether the lienholder's interest in the collateral has economic value. If a lien has no value, the claim is properly classified as unsecured and the claim holder's rights are subject to modification under § 1322(b)(2) regardless of whether the collateral is the debtor's residence.[5] *Id.* at 669.

The stipulations establish that Unit 12 is worth less than the debt owed to the first mortgage holder, leaving no equity to support the Association's liens. Without that value, the Association's claim is properly treated as an unsecured claim and it may be modified under § 1322(b)(2).

The Association makes these arguments to try to reach a different result:[6]

1. The claim falls within the anti-modification language of § 1322(b)(2) because *In re Lane* does not apply.

2. Public policy makes it unfair for a debtor to avoid paying condominium fees.

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[5] In the *Cain* opinion, the BAP concluded that a debtor's ability to strip a lien in a chapter 13 case is not conditioned on her eligibility for a discharge. *In re Cain*, 513 B.R. 316 (B.A.P. 6th Cir. 2014).

[6] The Association's arguments are set forth in its objections and brief. *See* docket 32, 51, 66, and 85.

3. Bankruptcy Code § 506(d) cannot be used to avoid the liens.

4. These are statutory liens that cannot be avoided under § 522(f).

Each will be discussed in turn, although none is persuasive.

1. *Does the claim fall within the anti-modification language of § 1322(b)(2)?*

To come within this provision, the liens must, among other things, be secured by a "security interest" in real property. The Bankruptcy Code defines a security interest as one created by agreement. *See* 11 U.S.C. § 101(51). The liens at issue were created by statute, not by agreement, which takes them outside of the definition of security interests. *See* OHIO REV. CODE § 5311.18. *See also In re Lopez*, 512 B.R. 663, 670 (Bankr. D. Colo. 2014) (noting that "[a] condominium association lien is generally recognized as a statutory lien"). As such, they are not protected by § 1322.

Even if they did come within this provision, *In re Lane* establishes that the liens are avoidable because there is no value in the property to support them. The Association argues that *Lane* does not apply because it involved a second mortgage rather than a condominium lien. This is an accurate description of the liens in the two cases, but the Association does not provide a reasoned argument for why this should make a difference. To the contrary, *Lane* states that a claim is unsecured where there is no value to support the lien, exactly the situation here.

2. *Does public policy require a different result?*

The Association argues that its liens cannot be stripped because that would be inconsistent with public policy. The policy consideration identified is that it would be unfair to permit a debtor to use the Bankruptcy Code to avoid paying the assessments that gave rise to the liens because the remaining members of the condominium association will have to make up the

difference. This argument is not persuasive. First, it is true of every debt discharged in bankruptcy that the economic burden of the unpaid debt ultimately falls on others who do pay their debts. Second, Congress provided special treatment for condominium associations when it intended to do so. *See* 11 U.S.C. § 523(a)(16) (making certain fees and assessments due to a condominium association nondischargeable). While there may be sound policy arguments for providing special treatment for condominium association liens, Congress did not provide such treatment, and the court must apply the Code as it is written.

3. *Can Bankruptcy Code § 506(d) be used to avoid these liens?*

Bankruptcy Code § 506(d) states in part that a lien against property is void "[t]o the extent that [the] lien secures a claim against the debtor that is not an allowed secured claim."). The Association argues that *Dewsnup v. Timm*, 502 U.S. 410 (1992) bars the debtor from using that section to avoid the liens. In a nutshell, *Dewsnup* held that a chapter 7 debtor cannot use § 506(d) to strip down a lien to the value of its collateral. The dispute as to whether § 506(d) can be used in a chapter 13 case to strip off a lien is reflected in the case law. *See Pees v. DAN Joint Venture II (In re Claar)*, 368 B.R. 670, 677 (Bankr. S.D. Ohio 2007) (noting the division and collecting cases on the issue).

There is no need to resolve this issue because confirming the debtor's plan will lead to the same result as using § 506(d) to strip the liens. As one leading treatise explains:

> *Dewsnup* focused on the voiding of liens under § 506(d) in Chapter 7 cases. Chapter 13 accomplishes its limiting effect on liens by valuation under § 506(a), modification under § 1322(b)(2), lien retention under § 1325(a)(5) and vesting free and clear under § 1327(b) and (c). Chapter 13 debtors need not void the unsecured portion of an unsecured claim holder's lien under § 506(d); rather, a debtor retires the lienholder's entitlement to the present value of

> its allowed secured claim by payments through the plan, and the property vesting in the debtor at confirmation is only subject to a lien to that extent.

Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th Edition, § 231.1, at ¶ 32, Sec. Rev. June 15, 2004; *see also In re Claar*, 368 B.R. at 678 ("The legal consequence of DAN's status as a wholly unsecured mortgage holder – the strip-off and elimination of its Second Mortgage – is effected by the plan confirmation process (and the operative effect of §§ 506(a), 1322(b), 1325(a) and 1327 (b) and (c)), rather than by operation of § 506(d)[.]")

In this case, the terms of § 506(a) and § 1322(b)(2) combine to value the Association's secured claim at zero and modify its lien rights. The Association, as an unsecured creditor, will not retain its liens under § 1325(a)(5). And upon confirmation the property will vest in the debtor free and clear of any Association claim. 11 U.S.C. § 1327(b) and (c). Plan confirmation will, therefore, limit the lien rights without relying on § 506(d).

4. *Are these statutory liens that cannot be avoided under § 522(f)?*

The Association argues that its liens are statutory and cannot be avoided under 11 U.S.C. § 522(f) as judicial liens. *See for example, King v. Cherrywood Residents Assoc., Inc. (In re King)*, 208 B.R. 376 (Bankr. D. Md. 1997) (holding that a condominium lien was not a judicial lien and, therefore, could not be avoided under § 522(f)). This argument is irrelevant because the debtor is not seeking to avoid the liens under § 522(f).

## CONCLUSION

For the reasons stated, the Association's objection to confirmation and objection to the motion to modify are overruled as to Unit 12. The adjourned hearing on plan confirmation will be held on **February 24, 2015 at 10:00 a.m.**

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge