

Filed 5/23/2001
8:50 a.m.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:)	Case No. 00-63903
)	
NORMA JEAN BRENT,)	Chapter 13
)	
Debtor.)	Judge Russ Kendig
)	
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NORMA JEAN BRENT,)	
)	
Movant,)	
)	
v.)	ORDER
)	
RONALD LINZY,)	
)	
Respondent.)	
)	

This matter is before the court on Debtor's Motion to Avoid Lien filed by Norma Jean Brent (hereinafter "Debtor") and the objection filed by creditor Ronald Linzy (hereinafter "Linzy"). On March 28, 2001, the Court held a hearing on the matter. At the conclusion of the hearing, the Court took the matter under advisement.

Debtor's petition was filed on November 15, 2000. Thereafter, on November 20, 2000, notice of the § 341 meeting, which included filing deadlines, was served on Linzy, the objecting creditor herein, and Wilbur Flippin, Linzy's counsel. The notice provided the following dates: § 341 meeting date of January 8, 2001; proof of claim date of April 9, 2001; objection to exemption date of thirty days after the conclusion of the meeting of creditors; a confirmation date of February 14, 2001, and a requirement that all objections to confirmation be served on the Trustee and Debtor's counsel at least five days prior to the confirmation hearing.

Debtor filed the Motion to Avoid Lien on January 13, 2001, complete with the required twenty day time frame for objections. Linzy's objection, titled "Notice and Objection to Debtor's Motion to Avoid Lien and Request for Hearing," was timely filed. The body of that pleading contained language objecting to avoidance of Linzy's judgment lien and the exemptions claimed by Debtor.

Debtor's petition included an exemption of \$5,000 in her residence. The schedules identified first and second mortgages on the property totaling \$109,602, and valued the property at \$100,000. Linzy was listed as a judgment lien creditor holding an unsecured claim in the

amount of \$61,108. The Chapter 13 plan was confirmed by an order entered February 14, 2001. The plan treats Linzy as an unsecured creditor and provides payment to unsecured creditors of approximately ten percent.

The March 28 hearing involved Debtor's request to avoid the lien of Linzy. Linzy obtained a judgment in state court and a judgment lien was recorded on September 29, 2000. The Debtor argues that the lien impairs her exemption and is therefore avoidable under 11 U.S.C. § 522(f). Linzy responds by suggesting that the Debtor is not entitled to the exemptions claimed. In addition, the issue also arose as to whether the objection filed by Linzy should be treated as an objection to confirmation.

The first issue to be addressed is whether the objection filed by Linzy was an objection to confirmation. It was not. There is an effort by courts to elevate substance over form in order to focus on the merits of a pleading. *See, e.g., Vaughn v. Aboukhater (In re Aboukhater)*, 165 B.R. 904 (B.A.P. 9th 1994); *In re Little*, 220 B.R. 13 (Bankr. N.J. 1998); *Wentworth v. Warren (In re Warren)*, 20 B.R. 900 (Bankr. Maine 1982). In this instance, however, the objection cannot be construed as an objection to confirmation. Objections to confirmation are "predicated on failure of the plan or the procedures employed prior to confirmation to conform to the requirements of chapter 13." S. Rep. No. 95-989, at 142 (1978). The objection filed by Linzy does not reference any failures in plan requirements or improper procedures. In fact, it never mentions the plan. Instead, the objection directly responds to the avoidance motion and the exemptions claimed by the debtor. The substance of the objection does not provide a basis for treating it as an objection to confirmation. The order confirming the plan stands and Linzy is bound by the terms of the plan. *See* 11 U.S.C. § 1327.

Also mentioned at the hearing was an alleged failure to provide Linzy with notice of confirmation so that he could object. Appropriate notice was provided through service of the notice of § 341 meeting. This notice contained several important dates, including notice of when confirmation would be held and when objections thereto were due. As stated above, both Linzy and his counsel are included on the certificate of service, thereby creating a presumption of proper service upon them. *See, e.g., In re Buckman*, 105 B.R. 25 (B.A.P. 9th Cir. 1989); *Federal Deposit Ins. Corp. v. Brenesell (In re Brenesell)*, 109 B.R. 412 (Bankr. Haw. 1989) (citing C. Wright & A. Miller, Federal Practice and Procedure, para. 1150). In light of the presumption of proper service, we find that Linzy and his counsel had notice of the confirmation hearing and objection period.

At hearing, the Linzy argued that Debtor, prior to bankruptcy, intentionally oversecured her property in order to prevent Linzy's lien from attaching to the property. Linzy requested a hearing so that Norma Brent could be called to respond to his allegations. The Court finds that these arguments go to the good faith of the Debtor's plan. *These allegations should have been raised in an objection to confirmation.* In the absence of objection, the confirmation operates as *res judicata* on the issue of good faith. *See, e.g., In re Sanders*, 243 B.R. 326 (N.D. Ohio 2000); *In re Talbot*, 124 F.3d 1209 (10th Cir. 1997).

Remaining, then, is the debtor's motion to avoid the lien. Reviewing the schedules, we find that Debtor claimed a \$5,000 exemption in her residence. The home is valued at \$100,000, with first and second mortgages totaling in excess of \$109,000. Linzy also recorded a judgment lien on the property in September 2000. Debtor seeks to avoid this lien as either impairing an exemption, pursuant to 11 U.S.C. § 522(f), or as a preference under § 547. Creditor Linzy objected to the exemptions claimed.

Since 11 U.S.C. § 522(f) is premised on the existence of an exemption, it is necessary to determine whether Debtor is entitled to the exemption claimed. This matter was not addressed at hearing, so Linzy is entitled to present his arguments before the court. However, the Court notes that this appears to be a question of law, specifically whether debtor is entitled to a \$5,000 exemption in her residence.

In conclusion, the court finds that the objection filed on February 6, 2001 is responsive to the motion to avoid the judgment lien and not an objection to confirmation. The confirmation order therefore binds the creditor to the terms contained in the plan. With regard to the motion to avoid the lien, it is ordered that:

1. Creditor shall file a brief by June 11, 2001.
2. Debtor shall file a responsive pleading by June 18, 2001.

If the issues raised demonstrate a need for further evidence, an evidentiary hearing will be scheduled.

So ordered.



RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

Copies of the within Order were mailed on this ___th day of May, 2001 to:

Thomas J. Budd, II
Attorney for Debtor
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Wilbur Flippin
Attorney for Creditor Ronald Linzy
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Toby L. Rosen
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Deputy Clerk