

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

ADAM MICHAEL JUDD and
MEGAN JOHNSON JUDD,

Case No. 6:11-bk-04093-ABB
Chapter 13

Debtors.

ORDER

This matter came before the Court on the Second Amended Plan (Doc. No. 38) filed by the Debtors Adam Michael Judd and Megan Johnson Judd and the Objection to Confirmation (Doc. No. 26) filed by the Chapter 13 Trustee Laurie K. Weatherford. An evidentiary hearing was held on October 11, 2011 at which the Trustee and counsel for the Debtors appeared. Confirmation of the Second Amended Plan is due to be denied.¹ The Court makes the following findings and conclusions after reviewing the pleadings, hearing live argument, and being otherwise fully advised in the premises.

Real Property

The Debtors filed the above-captioned Chapter 13 case on March 24, 2011. They jointly own real property located at 2903 Timberlake Drive, Orlando, Florida 32806 (“Timberlake Drive”) and two condominium units, Units 101 and 412, located in the Sandpiper Towers Condominium at 205 Highway A1A, Satellite Beach, Florida. The Debtors are experienced in residential real estate matters. They have been employed as property appraisers for ten years with Metropolis Appraisal Services in Orlando, Florida.

¹ An Order was entered on October 18, 2011 (Doc. No. 62) confirming the Debtors’ Second Amended Plan. The Order was entered in error and is due to be vacated.

Timberlake Drive is the Debtors' principal residence and is encumbered by first- and second-priority mortgages held by CitiMortgage. The Debtors claim Timberlake Drive as fully exempt homestead property in Schedule C.² The condominiums are investment properties and are encumbered by first- and second-priority mortgages. Unit 101 is encumbered by a first-priority mortgage held by ASC, a/k/a Wells Fargo ("ASC"), and a second-priority mortgaged held by Citibank. Unit 412 is encumbered by a first-priority mortgage held by Chase Home Finance, LLC ("Chase") and a second-priority mortgage held by Wachovia.

The Debtors list the following values and secured claims in Schedules A and D:

- (i) Timberlake Drive valued at \$175,000.00 and encumbered by CitiMortgage's first-priority lien in the amount of \$222,907.00 and its second-priority lien in the amount of \$156,879.00.
- (ii) Unit 101 valued at \$90,000.00 and encumbered by ASC's lien in the amount of \$87,474.00 and Citibank's lien in the amount of \$92,766.00.
- (iii) Unit 412 valued at \$120,000.00 and encumbered by Chase's first-priority lien in the amount of \$240,330.00 and Wachovia's second-priority mortgage in the amount of \$24,966.00.

Debtors' Previous Case

The Debtors filed a previous bankruptcy case, a Chapter 7 case, on February 6, 2009 captioned *In re Adam Michael Judd and Megan Johnson Judd*, Case No. 6:09-bk-01284-ABB. The Debtors listed Timberlake Drive as their homestead and Units 101 and 412 as investment properties in Schedule A. They listed CitiMortgage, ASC, Citibank, Chase, and Wachovia as secured creditors in Schedule D.

² Doc. No. 11, p. 37.

The Chapter 7 Trustee declared their case a no asset case. They received a Chapter 7 discharge pursuant to 11 U.S.C. Section 727(a) on June 7, 2009 and the Chapter 7 case was closed on August 11, 2009.

Chapter 13 Plans

The Debtors presented a Plan (Doc. No. 14) in their pending Chapter 13 case, with a 60-month term, in which they proposed to: (i) modify CitiMortgage's first-priority lien on the Timberlake Drive Property through mortgage modification by paying 31% of their gross income (or \$1,674.00 per month) and to strip off CitiMortgage's second-priority lien; (ii) cramdown ASC's first-priority lien pursuant to 11 U.S.C. Section 506 to the value of Unit 101 (\$87,474.00), pay the secured claim of \$87,474.00 through monthly payments of \$1,698.41 with interest at the rate of 5.0% per annum, and strip off Citibank's second-priority lien; and (iii) surrender Unit 412 to Chase and Wachovia in full satisfaction of the secured creditors' claims. No pro rata distribution percentage is disclosed for the Debtors' general unsecured creditors.

The Court issued a Notice of Ineligibility to Receive a Chapter 13 Discharge on April 11, 2011 (Doc. No. 17) advising the Debtors they are not eligible to receive a discharge pursuant to 11 U.S.C. Section 1328(f). The Debtors received a Chapter 7 discharge in their previous bankruptcy case, which was filed within four years of the Petition Date of the Chapter 13 case and Section 1328(f) bars them from obtaining a discharge in their Chapter 13 case. The Trustee objected to the Plan on the basis the Debtors are ineligible for a discharge pursuant to 11 U.S.C. Section 1328(f).

The Debtors filed an Amended Chapter 13 Plan (Doc. No. 29) in which they amend the proposed treatment of ASC and CitiBank's claims: (i) they propose to

cramdown ASC's first-priority lien pursuant to 11 U.S.C. Section 506 to the value of Unit 101 (\$87,474.00) and pay the secured claim of \$87,474.00 through monthly payments of \$316.00; and (ii) value Citibank's second-priority lien at \$92,766.00 and pay Citibank \$230.00 per month. No pro rata distribution percentage is disclosed for the Debtors' general unsecured creditors.

The Debtors filed a Second Amended Plan (Doc. No. 38) in which they amended the treatment of the second-priority claims of CitiMortgage and CitiBank. The Debtors propose to pay CitiMortgage and CitiBank each \$1.00 in full satisfaction of their secured claims. The Debtors amended the payment terms of ASC's secured claim to \$316.00 per month for the first month of the plan period and \$306.47 for the remaining 59 months. They contend ASC has a secured arrearage claim in the amount of \$616.00, which the Debtors will pay over thirty months at \$21.00 per month. They contend ASC has a secured gap payment claim of \$306.00 which they will pay over thirty months at \$10.00 per month.

The Debtors' Amended Plans are confusing and do not present clear proposals of how the secured creditors are to be treated, nor do they address the Debtors' inability to receive a discharge pursuant to 11 U.S.C. Section 1328(f). This Court has held in numerous decisions a debtor requires a Chapter 13 discharge to carry out an intended strip off or cramdown of a mortgage lien. Where a debtor is ineligible to receive a discharge in a Chapter 13, any modifications to the creditor's rights are not permanent and have no binding effect once the plan ends. In re Lilly, 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007).

The Debtors' subsequent filings provide more clarity as to the Debtors' intentions regarding their secured creditors. The Debtors filed, in conjunction with their Second Amended Plan, proofs of claim on behalf of CitiMortgage and CitiBank (Doc. Nos. 39, 40) and Motions to strip off their secured claims (Doc. Nos. 47, 48). The claims bar date in this case was July 27, 2011. No claim was filed by CitiBank regarding the second-priority mortgage on Unit 101 and no claim was filed by CitiMortgage for the second-priority mortgage on Timberlake Drive.³ The Debtors, on August 24, 2011, filed: (i) secured Claim No. 5-1 on behalf of CitiMortgage in the amount of \$1.00 relating to the second-priority mortgage; and (ii) secured Claim No. 6-1 on behalf of CitiBank in the amount of \$1.00 relating to the second-priority mortgage.⁴

The Debtors in their Motions to Strip seek to strip the second-priority liens of CitiMortgage and CitiBank on Timberlake Drive and Unit 101. The Trustee objected to these Motions on the basis the Debtors are not entitled to a discharge pursuant to Section 1328(f) and cannot modify or strip off these mortgages (Doc. Nos. 49, 50, 51). A hearing was held on the Motions to Strip on October 11, 2011. CitiMortgage and CitiBank did not appear at the hearing and have not filed responses to the Plans, the Motions to Strip, or Claim Nos. 5-1 and 6-1. Debtor's counsel informed the Court CitiMortgage and CitiBank do not oppose or consent to the Debtors' proposed treatment of their second mortgages. The Court entered Orders on October 18, 2011 denying the Motions to Strip (Doc. Nos. 59, 60, 61).

³ No claim was filed by any entity or party regarding the first-priority mortgage of Chase on Unit 412.

⁴ It appears the Debtors may have incorrectly named the creditors in Claim Nos. 5-1 and 6-1. They named CitiBank as the second-priority lienholder of Timberlake Drive, which is inconsistent with their Schedules in which *CitiMortgage* holds the second-priority mortgage. They named CitiMortgage, as the second-priority lienholder of Unit 101, which is inconsistent with their Schedules in which *CitiBank* holds the second-priority mortgage.

Analysis

The Debtors are attempting to circumvent the discharge prohibition of 11 U.S.C. Section 1328(f) and the anti-modification provision of 11 U.S.C. Section 1322(b) through their filing of Claim Nos. 5-1 and 6-1. The Debtors, by filing these claims, are attempting to value the secured second-priority mortgage claims of CitiMortgage and CitiBank for Timberlake Drive and Unit 101 at \$1.00. Such treatment, if allowed, would constitute a *de facto* cramdown or strip-off of these liens in violation of 11 U.S.C. Sections 1322(b), 1325(a)(5), and 1328(f). Timberlake Drive is the Debtor's principal residence and Section 1322(b) bars the Debtors from attempting to modify, through cramdown or strip-off, any liens encumbering the property.

The Debtors' *in personam* liability for the promissory note debts underlying the mortgages of CitiMortgage, CitiBank, ASC, Chase, and Wachovia was discharged in the Debtors' Chapter 7 case, but the mortgage liens survived. Johnson v. Home State Bank, 501 U.S. 78, 111 (1991). Those surviving liens held by CitiMortgage, CitiBank, ASC, Chase, and Wachovia constitute claims that are enforceable against property of the Debtors and cannot be disallowed pursuant to 11 U.S.C. Section 502(b)(1). Id.; In re Quiros-Amy, 456 B.R. 140, 147 (Bankr. S.D. Fla. 2011); In re Gerardin, 447 B.R. 342, 347 (Bankr. S.D. Fla. 2011) (en banc). The creditors' mortgage liens are enforceable against the Debtors' real property pursuant to Florida law and constitute allowed claims. In re Gerardin, 447 B.R. at 347. "The very nature of a Chapter 20 case renders it impossible for the junior lienholders to have anything other than an 'allowed secured claim' against the bankruptcy estate" In re Quiros-Amy, 456 B.R. at 147.

Those allowed claims have value and must be treated in the alternative manners prescribed by 11 U.S.C. Section 132(a)(5). Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885, 893 (10th Cir. BAP 2010); In re Gerardin, 447 B.R. at 347. A creditor holding an allowed secured claim, unless it has accepted the plan or the collateral is surrendered, retains its lien until the debt is paid or the lien is otherwise extinguished pursuant to nonbankruptcy law or the debtor receives a discharge pursuant to Section 1328(f). 11 U.S.C. § 1325(a)(5)(B).

Section 348(f), as enacted by BAPCPA, provides additional clarity that a discharge is fundamental to the modification of a secured claim. Section 348(f)(1) sets forth a lien modification is ineffective upon conversion of a Chapter 13 case to Chapter 7. Attempts to strip off and cramdown in a Chapter 20 no-discharge situation not only violate the plain language of the Bankruptcy Code, but violate Congress' clear intent in enacting BAPCPA.

The Debtors cannot modify the mortgage liens of CitiMortgage and CitiBank, without a Chapter 13 discharge. In re Gerardin, 447 B.R. at 349. “Allowing a strip off of a junior lien without a discharge or payment of the debt would result in a ‘de facto discharge, a benefit to which the Debtors herein are not entitled.’” Id. at 350. Put another way, allowing a debtor to file a Chapter 7, discharge all dischargeable debts and then file a Chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the lien in the Chapter 7 itself.

Paying CitiMortgage and CitiBank \$1.00 for their junior mortgage claims does not constitute payment pursuant to 11 U.S.C. Section 1325(a)(5). The Debtors' Schedules and Motions to Strip reveal the surviving mortgage liens have value—value

that is substantially greater than \$1.00. The Debtors set forth in the Schedule D and their Motion to Value CitiBank has a second-priority mortgage claim of \$92,766.00 on Unit 101 and CitiMortgage has a second priority mortgage claim of \$156,879.00 on Timberlake Drive.

The relief the Debtors seek in their Second Amended Plan is not authorized by the Bankruptcy Code and is contrary to the fundamentals of bankruptcy law. CitiMortgage and CitiBank hold allowed secured claims pursuant to 11 U.S.C. Section 502 which must be treated in accordance with 11 U.S.C. Section 1325(a). CitiMortgage holds an allowed secured claim of \$156,879.00 for its second-priority mortgage lien on Timberlake Drive and CitiBank holds an allowed secured claim of \$92,766.00 for its second-priority mortgage lien on Unit 101. The Debtors are prohibited from modifying these allowed claims pursuant to 11 U.S.C. Sections 1325(a) and 1328(f).

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Order entered on October 18, 2011 (Doc. No. 62) confirming the Debtors' Second Amended Plan is hereby **VACATED**; and it is further

ORDERED, ADJUDGED and DECREED that confirmation of the Debtors' Second Amended Plan (Doc. No. 38) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that CitiMortgage holds an allowed secured claim of \$156,879.00 for its second-priority mortgage on Timberlake Drive and Claim No. 6-1 shall be amended by the Debtors within seven (7) days of the entry of this Order to reflect such ruling; and it is further

ORDERED, ADJUDGED and DECREED that CitiBank holds an allowed secured claim of \$92,766.00 for its second-priority mortgage claim on Unit 101 and Claim No. 5-1 shall be amended by the Debtors within seven (7) days of the entry of this Order to reflect such ruling; and it is further

ORDERED, ADJUDGED and DECREED that a status conference on this case shall be held on January 4, 2012 at 10:00 a.m.

Dated this 1st day of December, 2011.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge