

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

In re:

HOWARD B. SMITH ,

Case No. 6:12-bk-02333-ABB

Chapter 13

Debtor.

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**MEMORANDUM OPINION AND ORDER**

This matter came before the Court on the Debtor's Motion to Strip Lien of David P. Zaslavsky (Doc. No. 18) . An evidentiary hearing was held on September 6, 2012. The parties have submitted post-hearing briefs pursuant to the Court's directive.

The Motion to Strip is due to be granted. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

**FINDINGS OF FACT**

The White Eagle Lounge is a bar situated on U.S. 1 in Flagler County, Florida. It serves food and beverages, including alcoholic beverages. On Thursday through Saturday nights, it offers live music. On Friday nights, it hosts a steak night. The White Eagle is a significant rally location during the annual motorcycle events of Bike Week and Biketoberfest. The business has seven employees.

There are three parcels of land involved with the business. The property on which the White Eagle Lounge sits is owned by White Eagle, Inc. ("the White Eagle real estate"). Two other parcels are owned by Debtor and his business partner, Kevin Rosa:

- (1) a vacant lot, and
- (2) 15 Trojan Ave., a lot on which there is a single family home (“the Trojan Ave. property”).

The vacant lot and Trojan Ave. property are used for parking and camping as well as vendor location during Bike Week and Biketoberfest. The vacant lot supports the septic system for the bar. The Trojan Ave. property provides electricity to the vending business for the bar.

Zaslavsky sold his one-half interest in the White Eagle Lounge, including his stock in the corporation, the three parcels of real property, the business’s liquor license, fixtures, and furnishings, to Debtor for the sum of \$1.2 Million in December 2007. Debtor made a \$300,000.00 down payment. He signed two promissory notes, each payable to Zaslavsky for \$450,000.00, a total indebtedness of \$900,000.00. Debtor made interest only payments to Zaslavsky through the Spring of 2010, then ceased paying. The balance on Zaslavsky’s loans to Debtor exceeds \$900,000.00.

Zaslavsky was granted two mortgages, one securing each note. The mortgage Debtor seeks to strip in this case is secured by the vacant lot and 15 Trojan Ave. The other mortgage (not the subject of a motion to strip) is secured by the White Eagle real estate and other assets.

The mortgages held by Zaslavsky are subordinate to a first-priority mortgage on all three parcels and the liquor license held by the estate of Robert Johnson (“the Johnson mortgage”). The White Eagle sale agreement, prepared by Zaslavsky’s counsel and signed by Zaslavsky and Debtor, states:

Seller acknowledges that Seller’s secured interests shall be subordinate to the mortgages and other security interests required by the lender who provides Buyer with the initial purchase money

payment and money to improve the real property and business enterprise for so long as the total sum of such money does not exceed the sum or \$500,000.00. Seller also acknowledges that Buyer intends to refinance the purchase money note and mortgage and that Seller agrees to execute any documents reasonably necessary to satisfy the lender for so long as the total of said refinancing does not exceed \$500,000.00 and that Seller shall remain subordinate.

(Zaslavsky's Exh. 5 at 3 f)) (emphasis added). The mortgage received by Zaslavsky states, in bold capital letters: **THIS IS A PURCHASE MONEY SECOND MORTGAGE**. (Zaslavsky's Exh. 6 at 1). Zaslavsky's testimony he did not know at the time of the closing he was taking a second mortgage subordinate to the Johnson mortgage is not credible.

The Johnson mortgage secures a loan of \$460,000.00. Debtor and the Johnson estate entered into an allocation agreement which states \$215,000.00 of the debt is secured by the vacant lot and 15 Trojan Ave. property together; \$245,000 of the debt is secured by the White Eagle real estate and the liquor license.

Zaslavsky argues his mortgage encumbering the vacant lot and 15 Trojan Ave. cannot be stripped, even if it is subordinate to the Johnson mortgage, because language in the promissory note secured by this mortgage extends his security interests to other assets of the White Eagle.<sup>1</sup> He argues the value of those assets, together with the vacant lot and

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<sup>1</sup> The language cited by Zaslavsky states:

The extension or credit represented by this Note is cross-defaulted and dependent upon full compliance with all provisions of each instrument securing this Note; the Closely Held Securities Pledge Agreement, UCC-1; mortgages on real estate in Flagler County, Florida and all other written agreements, if any, pertaining to the extension of credits which have been or which may later be made between the parties.

Zaslavsky's Exh. 6 at 4.

15 Trojan Ave., exceeds the \$215,000.00 of Johnson mortgage secured by these real properties.

The security for the mortgage Debtor seeks to strip is limited to the vacant lot and 15 Trojan Ave. The documents were drafted by Zaslavsky's lawyer at the time of the sale and are unambiguous. The mortgage identifies only the real property as security. (Zaslavsky's Exh. 6 at 1). The promissory note does not create a security interest in any additional property; it provides default of other agreements will constitute default of this agreement. (Zaslavsky's Exh. 6 at 4). The sale agreement is consistent; it describes two mortgages secured by separate collateral.<sup>2</sup> (Zaslavsky's Exh. 5).

Debtor presented the testimony of a property appraiser regarding the real property values. Zaslavsky did not rebut the appraiser's testimony. The vacant lot is valued at \$36,000.00. The Trojan Ave. property is valued at \$75,000.00. Their combined value (\$111,000.00) is exceeded by the \$215,000.00 security interest the holder of the Johnson mortgage has in these real properties.

## CONCLUSIONS OF LAW

Debtor seeks to strip off Zaslavsky's lien pursuant to 11 U.S.C. Section 506(a).

That Section provides:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be

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<sup>2</sup> "The mortgage and other security agreements shall encumber the White Eagle, Inc., its assets and the shares purchased by Buyer in the sum of \$450,000.00. The 2d parcels – lots 1, 2 & 3 Korcyl described in paragraph 1 shall be encumbered by only a mortgage and such mortgage will be in the sum equal to the remaining balance of the purchase price of \$450,000.00." (Zaslavsky's Exh. 5 at 3 iv)).

determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a). “Section 506(a) defines the secured and unsecured components of debts according to the value of the underlying collateral.” Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357, 1358 (11th Cir. 2000). Where a lien is “wholly unsecured” it is subject to “stripoff” pursuant to 11 U.S.C. Section 506(d). In re Tanner, 217 F.3d at 1360. A wholly unsecured lien claim is void. 11 U.S.C. § 506(d); In re Sadala, 294 B.R. 180, 185 (Bankr. M.D. Fla. 2003).

The combined value of the vacant lot and Trojan Ave. property (\$111,000.00) is exceeded by the \$215,000.00 security interest the holder of the Johnson mortgage has in these real properties. Zaslavsky's subordinate lien is wholly unsecured. 11 U.S.C. § 506(a)(1). No equity exists in the vacant lot and Trojan Ave. property to support Zaslavsky's second-priority lien. The lien attaches to no collateral.

Zaslavsky's lien on the vacant lot and Trojan Ave. property is void and may be stripped off pursuant to 11 U.S.C. Section 506(d). In re Tanner, 217 F.3d at 1360. The extinguishment of the lien is not effective until the Debtor receives a discharge pursuant to 11 U.S.C. Section 1328(f) because a mortgage lien cannot be modified or stripped off without a Chapter 13 discharge. In re Sadala, 294 B.R. at 185; In re Gerardin, 447 B.R. 342, 349 (Bankr. S.D. Fla. 2011) (en banc).

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that Debtor's Motion to Strip the lien of David P. Zaslavsky (Doc. No. 18) is hereby GRANTED and: (i) the vacant lot and Trojan Ave. property have a combined value of \$111,000.00; (ii) the Johnson claim

(Claim No. 4) is allowed as a secured claim in the amount of \$111,000.00; (iii) and the balance of Claim No. 4 is unsecured; and it is further

**ORDERED, ADJUDGED and DECREED** that Zaslavsky's second-priority lien on the vacant lot and Trojan Ave. property is subject to strip-off as void pursuant to 11 U.S.C. Section 506(d). The extinguishment of his lien shall be deferred until the Debtor is granted a discharge pursuant to 11 U.S.C. Section 1328(f), or upon further Court order, in exceptional circumstances; and it is further

**ORDERED, ADJUDGED and DECREED** that Zaslavsky's claim (Claim No. 2) is allowed as an unsecured claim.

Dated this 31st day of January, 2013.

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