

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

In re:

KEVIN A. ROSA,

Case No. 6:10-bk-07799-ABB

Chapter 13

Debtor.

ORDER

This matter came before the Court on the: (i) Debtor's Motion to Strip Lien of Geralyn Foster Rosa, a/k/a Geralyn Foster ("Ms. Foster") (Doc. No. 37); (ii) Ms. Foster's Objection and Supplemental Objection thereto (Doc. Nos. 42, 79); and (iii) Ms. Foster's Objection to Claim No. 27-1 (Doc. No. 98). Evidentiary hearings were held on February 1, 2011, August 30, 2011, and December 6, 2011 at which the Debtor, Ms. Foster, their respective counsel, and the Chapter 13 Trustee Laurie K. Weatherford appeared.

Ms. Foster's Objections are due to be overruled and the Debtor's Motion to Strip Ms. Foster's Lien is due to be granted for the reasons set forth herein. The Court makes the following findings and conclusions after reviewing the pleadings and exhibits, hearing live testimony and argument, and being otherwise fully advised in the premises.

Background

Ms. Foster is the Debtor's former spouse. The Debtor, in connection with the parties' divorce, granted Ms. Foster a lien on seven parcels of vacant land he owns in Flagler County, Florida. The land is encumbered by a mortgage held by two individuals, Mr. and Mrs. Akialis, who loaned the Debtor funds for a business enterprise. The relations between the Debtor and Ms. Foster since the divorce have been acrimonious.

The Debtor filed for Chapter 13 protection on May 6, 2010 (“Petition Date”) and listed Ms. Foster as a creditor in his schedules. The Debtor, within days of the Petition Date, filed a Plan asserting Ms. Foster’s lien is wholly unsecured and proposing to strip off the lien from the property. He filed an Amended Plan in October 2010 with the same proposed treatment of Ms. Foster’s lien. Ms. Foster received notice of the bankruptcy case shortly after the Petition Date and was served with the Plans; she did not raise any objection to the filing of the case or the Plans in 2010. Her involvement in this case was minimal for more than a year until she filed her first offensive pleading in *August 2011*.¹

Ms. Foster, on August 29, 2011—long after the Debtor had presented his original Plan and two Amended Plans, and just one day prior to the confirmation hearing on the Second Amended Plan—filed a motion to dismiss or convert this case pursuant to Section 109(e) of the Bankruptcy Code asserting the Debtor’s unsecured debts on the Petition Date exceeded the statutory unsecured debt limitation. While the Bankruptcy Code does not set forth a deadline for raising Section 109(e) matters, a Section 109(e) objection is a threshold matter that must be addressed early on in a case. Ms. Foster, despite her knowledge of and involvement in the case (she appeared at the confirmation hearing on February 1, 2011 and cross-examined the Debtor’s witnesses), waited more than a year and a half after this case had been instituted to object to the Debtor’s ability to file a Chapter 13 case.

Ms. Foster filed objections to confirmation and to the Akialis mortgage claim. The claims bar date passed in September 2010; Ms. Foster has not filed a proof of claim.

¹ Ms. Foster’s first filing in this case was a Motion for a Rule 2004 Examination of the Debtor filed on July 21, 2010 (Doc. No. 18). She made no further filing until October 1, 2010 when she filed her Objection to the Motion to Strip (Doc. No. 42).

Ms. Foster has not sought permission to file an untimely claim. She informed the Court she does not intend to file a claim, yet she continues to participate in the case.²

Ms. Foster's actions are intended to prevent the Debtor from obtaining a Chapter 13 discharge. She does not want the Chapter 13 case to proceed and she wants the case converted to Chapter 7 or dismissed. The Debtor, if the case is converted to Chapter 7, cannot seek to strip off or modify Ms. Foster's lien and the underlying note debt would be nondischargeable pursuant to 11 U.S.C. Section 523(a)(5) or Section 523(a)(15), if such debt constitutes a domestic support obligation or a debt incurred in the course of the parties' divorce. Ms. Foster's lien rights will not be subject to modification and the note debt will not be discharged if the case is dismissed.

The Debtor has impeded the smooth progression of his Chapter 13 case. The Debtor, as set forth in his original Plan, intended early in his case to strip Ms. Foster's lien, yet he did not file the Motion to Strip until September 3, 2010, nor did he file a proof of claim on her behalf as he did with the Akialis mortgage.

The adjudication of the secured status of Ms. Foster's lien is a cornerstone issue in this case and it turns upon the validity, priority, and amount of the Akialis mortgage.³ The Debtor was not forthcoming with information regarding the Akialis mortgage and no

² A secured creditor is not required to file a proof of claim, but if there is a question as to whether the underlying collateral will satisfy the lien, or if an unsecured deficiency claim may arise, a proof of claim is necessary. Universal Am. Mortg. Co. v. Bateman (In re Bateman), 331 F.3d 821, 827 (11th Cir. 2003); In re George, 426 B.R. 895, 901 (Bankr. M.D. Fla. 2010).

³ The determination of the secured status of a claim, typically a mortgage claim, is a cornerstone issue in a Chapter 13 case. The structuring and confirmation of the plan turns upon such determination. A debtor is expected to file any motions to determine the secured status of claims early in his case, otherwise the confirmation process cannot proceed. If a plan proposes to cramdown or strip off a secured claim, the Trustee, at the Section 341 meeting of creditors, reminds the debtor and debtor's counsel motions to value need to be filed as soon as the secured creditor files a claim. The Chapter 13 Trustee routinely seeks the disgorgement or denial of attorney's fees where the debtor's counsel failed to timely file motions to value.

documents supporting that mortgage were presented until *August 2011* at the continued evidentiary hearing on confirmation and the Motion to Strip. The Akialis mortgage documents should have been presented early in the case in connection with the Motion to Strip and as supporting documents for a timely filed proof of claim. No claim was timely filed for the Akialis mortgage and no mortgage documents were presented by the Debtor at the first evidentiary hearing on the Motion to Strip on February 1, 2011.

The claims bar date of September 22, 2010 passed without claims being filed for the Akialis and Foster lien claims. The Debtor could have filed claims on behalf of these creditors pursuant to Federal Rule of Bankruptcy Procedure 3004. The Debtor did not file a claim on behalf of Ms. Foster. He filed a claim on behalf of Mr. and Mrs. Akialas, but did so in August 2011—almost a year after the claims bar date had passed. Ms. Foster objects to that claim as untimely and unsupported. Properly filed proofs of claim for these creditors would have facilitated the progression of this case. The actions of the Debtor and Ms. Foster have impeded the Court’s ability to adjudicate the issues in this case.

Debtor’s Real Property

The Debtor owns homestead and investment properties which are encumbered by various mortgages: (i) residential real property located at 334 N. 12th Street Flagler Beach, Florida 32186, which is designated as homestead property in Schedule C; and (ii) a group of seven vacant lots in Flagler County, Florida located at Trojan Road and CR 325 (collectively, the “Korona Property”) and more particularly described as:

Lots one (1) thru seven (7), Block 2, Korona Heights Subdivision, A Subdivision according to the Plat or Map thereof described in Plat Book 3, at page(s) 15 and 16, of the public records of Flagler County, Florida.

The Korona Property is zoned R-1, single family residential property. It is adjacent to a commercial property located at 3533 U.S. Highway 1 known as the White Eagle Lounge. The Debtor has a 50% ownership interest in the entity White Eagle Lounge, Inc., which owns the bar. The Korona Property is used by the White Eagle Lounge for additional parking and special events, such as “Bike Week.”

The Korona Property is encumbered by a lien in the amount of \$41,612.00 held by Michael J. Akialis and Isadora M. Akialis (collectively, “Mr. and Mrs. Akialis”). The lien arises from a Mortgage Deed executed by the Debtor on July 31, 2007 in favor of Mr. and Mrs. Akialis, which secures a Mortgage Note in the principal amount of \$41,200.00 executed by the Debtor on July 31, 2007 in favor of Mr. and Mrs. Akialis.⁴ The Mortgage Note term is twenty-three months with interest only payments. Interest accrues at the rate of 12% per annum and a balloon payment of \$41,612.00 due on August 1, 2009. The Mortgage Deed was recorded in the Official Record Books of Flagler County, Florida on August 7, 2007 at Book 1604, Page 396.⁵

The Korona Property is encumbered by a lien in the amount of approximately \$250,000.00 held by Ms. Foster pursuant to a Mortgage Deed executed by the Debtor on November 21, 2006 in favor of Ms. Foster.⁶ The Mortgage Deed secures a Promissory Note in the principal amount of \$250,000.00 executed by the Debtor on November 21, 2006 by the Debtor in favor of Ms. Foster.⁷ The Promissory Note and Mortgage Deed were executed pursuant to a mediation agreement between the Debtor and Ms. Foster in

⁴ Doc. No. 101, Debtor’s Ex. 1.

⁵ Id.

⁶ Id. Debtor’s Ex. 2.

⁷ Id.

connection with their divorce. Ms. Foster's Mortgage Deed was recorded in the Official Record Books of Flagler County, Florida on July 3, 2008 at Book 1669, Page 1862.⁸

Claim Objection

The Debtor filed a secured proof of claim in the amount of \$41,612.00, Claim No. 27-1 (Doc. No. 99), on behalf of Mr. and Mrs. Akialis pursuant to Federal Rule of Bankruptcy Procedure 3004 on August 31, 2011. Ms. Foster objects to Claim No. 27-1 on the grounds: (i) it was filed eleven months after the claims bar date; (ii) the Debtor is not indebted to Mr. and Mrs. Akialis; and (iii) any mortgage held by Mr. and Mrs. Akialis is junior to Ms. Foster's mortgage. Her pleading contains no specific facts in support of her objections and consists of conclusory statements.

Ms. Foster's Objection has not been set for hearing, but the issues raised in the pleading have been fully litigated. The Court conducted an evidentiary hearing on the Motion to Strip and confirmation of the Debtor's Second Amended Plan on February 1, 2011 at which Ms. Foster's counsel appeared. Her counsel examined Mr. Akialis extensively regarding his mortgage lien.⁹ Mr. Akialis testified as to the origination and purpose of the mortgage loan, subsequent loans made to the Debtor, and payments received. Mr. Akialis testified the original loan was for \$41,200.00, interest only payments were made on that loan, the loan has not been satisfied, and the principal balance of \$41,200.00 remains due and owing.¹⁰

⁸ Id.

⁹ Feb. 1, 2011 Hr'g Tr. pp. 10-13.

¹⁰ Ms. Foster questioned whether any debt is due and owing to Mr. and Mrs. Akialis as a result of the Debtor's payment of \$40,000.00 to them. Ms. Foster's counsel examined Mr. Akialis regarding this issue and Mr. Akialis explained he made two subsequent loans to the Debtor for \$40,000.00 and \$25,000.00. The Debtor made interest only payments on the original mortgage loan for \$41,200.00 and the Debtor's \$40,000.00 payment was applied to the subsequent loans. No principal payments were made on the original \$41,200.00 loan and this loan remains unsatisfied. Feb. 1, 2011 Hr'g Tr. pp. 10-12.

Mr. Akialis' testimony was unrebutted. His testimony is consistent with the terms of the Mortgage Note and Mortgage Deed. Ms. Foster had ample opportunity between the February 1, 2011 hearing and the filing of her Objection to conduct discovery. She did not conduct discovery regarding the Akialis lien. She presented no facts or law in support of her Objection. She established no basis for an objection to the Akialis mortgage or Claim No. 27-1. Her Objection is due to be overruled.

The balance due and owing on the Akialis mortgage is \$41,200.00 pursuant to Mr. Akialis' unrebutted testimony and the Mortgage Note and Mortgage Deed. The Akialis Mortgage constitutes a first-priority mortgage pursuant to the perfection of the mortgage lien by recordation on August 7, 2007 and the Foster Mortgage constitutes a second-priority mortgage pursuant to the perfection of the lien by recordation on July 3, 2008. FLA. STAT. § 695.01(1). The Akialis Mortgage is enforceable against Ms. Foster, who is a subsequent purchaser for valuable consideration with notice of the Akialis encumbrance on the Property. Id.

Property Valuation

The Debtor values the Korona Property at \$30,000.00 in his Schedules and Motion to Strip. The Debtor presented Julie Krupa as his appraiser at the February 1, 2011 evidentiary hearing. She conducted an appraisal of the Korona Property and testified it has a value of \$18,500.00.¹¹ She explained the Property's residential status and proximity to the White Eagle Lounge negatively impacts the value of the Property. The White Eagle Lounge generates substantial traffic and noise. It is unlikely it could be developed as residential property. She was cross-examined by Ms. Foster's counsel. Ms. Foster did not present any competing valuation evidence at the February 1, 2011 hearing.

¹¹ Feb. 1, 2011 Hr'g Tr. pp. 21-22; Doc. No. 67 (Land Appraisal Reports).

The evidentiary hearing was continued due to the Debtor's health issues. The continued evidentiary hearing was held on August 30, 2011 at which Ms. Foster and her counsel appeared. Ms. Foster did not present an appraiser. The sole valuation evidence she presented were printouts of the Flagler County Property Appraiser's value information.¹² The Flagler County Property Appraiser listed values of \$50,000.00 for Lots 1 through 5 and \$20,000.00 for Lots 6 and 7, for a combined value of \$70,000.00 in 2011. The Debtor, after the August 30, 2011 hearing, filed the 2011 Flagler County Property Appraiser's tax assessment as supplemental evidence of value (Doc. No. 107).

Ms. Krupa did not establish the Korona Property has a value of \$18,500.00. She did not fully and adequately explain the methodology and assumptions she employed in support of her valuation conclusion. Ms. Foster had ample opportunity to prepare for the valuation hearings and present evidence supporting her positions. She did not present competing expert testimony; she presented only the Flagler County Appraiser's valuation. Ms. Foster and the Debtor rely upon the Flagler County Appraiser's valuations. Those valuations are entitled to some weight.

The Court has a responsibility to evaluate the evidence before it and to adjudicate the valuation issue, which is central to this Chapter 13 case. The Korona Property is unique and appears to have significant development impediments. The future allowed development of the Korona Property is unknown. The real estate market in which the Korona Property is situated is depressed and it is uncertain whether the market has reached a bottom point. The value of the Korona Property is \$38,000.00 based upon the testimony and documentary evidence presented, the facts and the circumstances of the property, and its surrounding environs.

¹² Ms. Foster's Ex. 8.

11 U.S.C. Section 506

The Debtor seeks to strip off Ms. Foster’s lien pursuant to 11 U.S.C. Section 506(a). The valuation of a secured claim is governed by 11 U.S.C. Section 506(a) which 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 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 value of the Korona Property is \$38,000.00. The Akialis lien is partially secured given the Korona Property’s value is less than the debt balance of \$41,200.00. Ms. Foster’s lien is wholly unsecured. 11 U.S.C. § 506(a)(1). No equity exists in the Korona Property to support Ms. Foster’s second-priority lien—the lien attaches to no collateral.

Ms. Foster’s lien 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 Ms. Foster’s 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 Ms. Foster's Objection to Claim No. 27-1 and Objection to the Debtor's Motion to Value (Doc. Nos. 42, 79, 98) are hereby **OVERRULED**; and it is further

ORDERED, ADJUDGED and DECREED that Debtor's Motion to Strip the lien of Ms. Foster (Doc. No. 37) is hereby **GRANTED** and: (i) the Korona Property has a value of \$38,000.00; (ii) Mr. and Mrs. Akialis have an allowed secured claim in the amount of \$38,000.00; (iii) and the balance of Claim No. 27-1 is unsecured; and it is further

ORDERED, ADJUDGED and DECREED that Ms. Foster's second-priority lien is subject to strip-off as void pursuant to 11 U.S.C. Section 506(d). The extinguishment of her 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.

Dated this 15th day of December, 2011.

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