

LIEN STRIPPING ISSUES
TBBBA Consumer Luncheon
March 3, 2009

I. Basic Principles and Applicable Case Law

Chapter 7 debtor may not strip down creditor's lien on real property to judicially determine value of collateral. *Dewsnup v. Timm*, 502 U.S. 410, 122 S. Ct. 773, 116 L.Ed.2d 903 (1992).

11 U.S.C. § 1322(b)(2) prohibits the modification of a loan secured only by a security interest in the Debtor's principal residence and prohibits Chapter 13 debtors from bifurcating undersecured homestead mortgagee's claim into secured claim and unsecured claim. *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L.Ed.2d 228 (1993).

Anti-modification provision of section 1322(b)(2) does not apply to wholly unsecured junior mortgagee. The collateral may be bifurcated into its secured and unsecured claim pursuant to section 506, and the unsecured claim may be "stripped off" in its entirety. *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

Short term loans that mature prior to completion of Chapter 13 plan may be bifurcated into secured and unsecured claims. *In re Paschen*, 296 F.3d 1203 (11th Cir. 2002).

Debtor may strip off wholly unsecured junior lienholder by motion, unless the dispute involves determination of validity, priority, or extent of underlying lien. *In re Sadala*, 294 B.R. 180 (Bankr. M.D. Fla. 2003).

Valuations of property in Chapter 13s do not apply if the case is converted to a Chapter 7. 11 U.S.C. § 348(f)(1)(B).

If the Chapter 7 case is dismissed, liens avoided under section 506 are reinstated. 11 U.S.C. § 349(b).

II. Checklist for Filing a Motion to Strip Lien

- do not use negative notice; currently, all motions to strip liens are set for hearing by all Tampa judges
- use the new docket entry "Motion to Strip Lien and for Determination that Claim Is Unsecured"
- include the legal description of the real property that is the subject of the motion
- provide the loan number (formatted as XXXX1234) and recording information of the mortgage lien(s) affected by the Motion
- the Motion must contain sufficient evidence of the property's value, so an appraisal should be attached as an exhibit to the Motion, or the Motion should be verified
- if the lien holder is an insured depository institution, the Motion must be served on an officer via CERTIFIED mail pursuant to Fed. R. Bankr. P. 7004(h)
- if the lien holder is not an insured depository institution, the Motion may be served on an officer via first class mail pursuant to Fed. R. Bankr. P 7004(b)(3)

III. Checklist for Proposed Orders

- use form order
- include the legal description of the real property that is the subject of the motion
- provide recording information of the mortgage lien(s) affected by the Motion
- include the following language: "the mortgage shall be deemed void, and shall be extinguished automatically, without further court order, upon the entry of the Debtor's discharge in this Chapter 13 case; provided, however, that the Court reserves jurisdiction to consider, if appropriate, the avoidance of Mortgage Company's mortgage lien prior to the entry of the Debtor's discharge."

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No. 8:08-bk-00000-AAA
Chapter 13

John Doe,

Debtor.

**MOTION TO DETERMINE
SECURED STATUS OF ABC MORTGAGE COMPANY AND TO STRIP LIEN**

COMES NOW John Doe (the “Debtor”) by and through his undersigned counsel, and files this Motion to Determine Secured Status of ABC Mortgage Company and to Strip Lien pursuant to 11 U.S.C. § 506, and states as follows:

1. The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on February 1, 2009.

2. The Debtor owns real property (the “Real Property”) located at 123 Maple Street, Tampa, Florida, and more particularly described as follows:

LEGAL DESCRIPTION

3. The Real Property is encumbered by two mortgages:

(a) Lucky Mortgage, account number XXXX1234, holds the first mortgage, recorded on April 1, 2002, at Book XXXX, Pages XXXX, Instrument No. XXXX of the official records of Hillsborough County and has filed Claim No. 1 in the amount of \$250,000.00.

(b) ABC Mortgage Company, account number XXXX1234, holds a second mortgage, recorded on April 1, 2002, at Book XXXX, Pages XXXX, Instrument No.

XXXX of the official records of Hillsborough County and has filed Claim No. 2 in the amount of \$75,000.00.

4. Based on the appraisal attached hereto as Exhibit 1, the value of the Real Property is \$200,000.00.

6. Accordingly, ABC Mortgage Company's second mortgage is completely unsecured.

Wherefore, the Debtor respectfully requests that the Court enter an order:

(a) granting the Motion; (b) determining the value of the Real Property to be \$200,000.00, (c) determining that ABC Mortgage Company's claim shall be treated as an unsecured claim; (d) voiding the mortgage lien of ABC Mortgage Company; and (e) granting such other and further relief as the Court deems appropriate.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No.
Chapter 13

Debtor.
_____ /

**ORDER GRANTING DEBTOR'S MOTION TO DETERMINE
SECURED STATUS OF ABC MORTGAGE COMPANY
AND TO STRIP LIEN EFFECTIVE UPON DISCHARGE**

THIS CASE came on for hearing on, of the Debtor's Motion to Determine Secured Status of **ABC Mortgage Company** and to Strip Lien (the "Motion") (Doc. No. **XX**). For the reasons stated orally in open court that shall constitute the decision of the Court, it is hereby

ORDERED:

1. The Motion is **GRANTED**.
2. Claim No. **X** filed by **ABC Mortgage Company** shall be treated as an unsecured claim in this Chapter 13 case.
3. The real property (the "Real Property") that is the subject of the Motion is located at **123 Maple Street, Tampa, Florida**, and more particularly described as follows:

LEGAL DESCRIPTION

4. The mortgage held by **ABC Mortgage Company** recorded on **April 1, 2002**, at **Book XXXX, Pages XXXX, Instrument No. XXXX** of the official records of Hillsborough County, Florida, shall be deemed void, and shall be extinguished automatically, without further court order, upon entry of the Debtor's discharge in this Chapter 13 case; provided, however, that

the Court reserves jurisdiction to consider, if appropriate, the avoidance of ABC Mortgage Company's mortgage lien prior to the entry of the Debtor's discharge.

DONE and ORDERED in Chambers at Tampa, Florida, on _____.

Caryl E. Delano
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No.
Chapter 13

Debtor.
_____ /

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1. The Motion is GRANTED.
2. Claim No. X filed by ABC Mortgage Company shall be treated as an unsecured claim in this Chapter 13 case.
3. The real property (the "Real Property") that is the subject of the Motion is located at 123 Maple Street, Tampa, Florida, and more particularly described as follows:

LEGAL DESCRIPTION

4. The mortgage held by ABC Mortgage Company recorded on April 1, 2002, at Book XXXX, Pages XXXX, Instrument No. XXXX of the official records of Hillsborough County, Florida, shall be deemed void, and shall be extinguished automatically, without further court order, upon entry of the Debtor's discharge in this Chapter 13 case; provided, however, that

the Court reserves jurisdiction to consider, if appropriate, the avoidance of **ABC Mortgage Company's** mortgage lien prior to the entry of the Debtor's discharge.

DONE and ORDERED in Chambers at Tampa, Florida, on _____.

Caryl E. Delano
United States Bankruptcy Judge