

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

CHARLET M. HARMON

Case No. 96-20834-MDM

Chapter 13

MEMORANDUM DECISION ON DISPOSITION OF NORWEST BANK'S LIEN ON
DEBTOR'S VEHICLE AND DISCHARGEABILITY OF UNSECURED CLAIM

INTRODUCTION

The debtor filed a motion for finding of contempt against Norwest Bank for violating the permanent injunction under 11 U.S.C. § 524(a)(2) by continuing collection activities with respect to a prepetition discharged debt. The debtor also sought an order quashing the Bank's claim. Norwest Bank opposed the motion and claimed that it never received notice of the debtor's bankruptcy. After a evidentiary hearing on April 27, 1998, the court concluded that Norwest Bank did not have actual knowledge of the bankruptcy in order to file a timely proof of claim. *See 4/27/98 Court Minutes.* Since efforts to recover its collateral took place after the discharge, when the Bank believed it retained a valid lien, the debtor's motion for contempt against Norwest Bank was denied.

The remaining issue is whether the creditor retains the lien on the vehicle after discharge and whether the debtor is liable for the unsecured portion of the claim. The parties were given an opportunity to brief the issue and the court received a letter brief from Norwest Bank on June 8, 1998. For the reasons set forth below, the lien on the vehicle survives the debtor's discharge and the unsecured claim of Norwest Bank is not discharged.

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FACTS

The debtor filed a chapter 13 petition on February 5, 1996. The debtor testified at a hearing before this court on April 27, 1998, that the main reason for her filing was to repay the obligation to Norwest Bank, which had a security interest on her car. Before the petition was filed, the debtor provided her attorney, William Green, with the names and addresses of her creditors. She also gave him her Norwest Bank coupon book, which included the post office box where car payments were to be sent.

Nevertheless, the wrong address for the Bank was in the schedules and on the mailing matrix. Norwest Financial, instead of Norwest Bank, was listed on the debtor's schedules at P.O. Box 10443, Des Moines, Iowa, for two secured claims: \$19,700.00 for a 1995 Subaru Legacy and \$1,000.00 for a stereo (Schedule D; Mailing Matrix). The correct address for Norwest Bank is P.O. Box 10355, Des Moines, Iowa. Both Norwest Bank and Norwest Financial are subsidiaries of Norwest Holding Corporation, but the two subsidiaries have separate computer systems and, more importantly, separate mailing addresses (Testimony of Greg Honnald, Bankruptcy Specialist for Norwest Bank, 4/27/98).

Norwest Financial received notice of the debtor's bankruptcy and filed two secured claims, one for \$787.00 and the other for \$1,253.93. The collateral for the first is household goods and the second is unspecified, but the debtor did not object to these claims. Norwest Bank, the actual lienholder on the Suburu, never received notice and thus did not file a claim. A payroll order was issued, the debtor attended the § 341 meeting of creditors, the date for filing claims passed, the plan was confirmed, and the case proceeded. The debtor then moved to Iowa,

completed 100% payment of filed claims under the plan, and the chapter 13 discharge was issued on October 30, 1997.

The debtor testified that she only received one telephone call from Norwest during the pendency of her case. She told the representative that she had filed a bankruptcy case, and she provided the name and telephone number of her attorney. The debtor first became aware that Norwest had not been paid through the plan when she contacted them to have the title released in November 1997. By then, the chapter 13 discharged had been issued. The debtor acknowledged that she had not paid enough funds into the plan to pay for the car.

Mr. Honnald's file indicated that two letters and a notice of default regarding her account with Norwest Bank were sent to the debtor's Milwaukee address. Since the debtor did not respond to the letters or cure the default, the account was referred to collection attorneys. The debtor then sent a letter to those attorneys informing them of the bankruptcy after the time to file unsecured claims had passed. The file was returned to the Bank, and the account was charged off.

The remaining issues are whether the Bank retains the lien on the vehicle and whether the debtor is liable for the unsecured portion of the claim. The parties were given an opportunity to brief the issue and the court received a letter brief from Norwest Bank on June 8, 1998. The debtor did not file a brief.

DISCUSSION

If a secured creditor neither files a claim nor releases its lien, the security is preserved notwithstanding the bankruptcy of the debtor. *Dewsnup v. Timm*, 502 U.S. 410, 418, 112 S.Ct. 773 (1992); *See also Matter of Penrod*, 50 F.3d 459, 461 (7th Cir. 1995) (holding that secured

creditor need not file a claim in bankruptcy proceeding to preserve its lien); *Matter of Tarnow*, 749 F.2d 464, 465 (7th Cir. 1984) (holding that a creditor with a loan secured by a lien on the assets of the debtor is allowed to ignore the bankruptcy proceedings and look to the lien for satisfaction of the debt). Congress codified this principle in 11 U.S.C. § 506(d) “to make clear that the failure of the secured creditor to file a proof of claim is not a basis for avoiding the lien of the secured creditor.” S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983). Section 506(d) provides that:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –

...

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d)(2). Accordingly, Norwest Bank’s failure to file a proof of claim is not a basis for this court to extinguish its lien.

Additionally, the application of § 506(d)(2) does not unfairly prejudice the debtor’s fresh start in this case because she had the ability to file such a claim on the Bank’s behalf in order to avoid the lien under § 506(a) and (d). *See* Fed. R. Bankr. P. 3004. She did not do so.

A secured creditor’s lien may be extinguished even if it did not file a proof of claim if the creditor participated in the reorganization and the reorganization plan provided for the claim. *See Penrod*, 50 F.3d at 463. Here, the trustee disbursed no funds to Norwest Bank. Ms. Harmon admitted that she did not pay enough into the plan to pay for the car. Norwest Bank certainly did not participate in the reorganization. Thus, Norwest Bank’s lien passed through the bankruptcy unaffected.

Whether or not the debtor is liable for the unsecured portion of Norwest Bank's claim is another issue. The creditor's reliance on § 523(a)(3) is unavailing because Harmon received a discharge under chapter 13, which does not include § 523(a)(3) in its list of nondischargeable debts. *See* 11 U.S.C. § 1328(a). Provisions for a hardship chapter 13 discharge do not apply. A discharge under § 1328(a) discharges only the "debts provided for by the plan or disallowed under section 502." That an obligation has been provided for in a chapter 13 plan is "commonly understood to mean that a plan 'makes a provision' for, 'deals with,' or even 'refers to' a claim." *Rake v. Wade*, 508 U.S. 464, 474, 113 S.Ct. 2187, 2193 (1993). A claim cannot be considered to have been provided for by the plan if a creditor does not receive proper notice of the proceedings, regardless of the wording of the plan or the listing of the creditor in the schedules. *See In re Hairopoulos*, 118 F.3d 1240, 1244 (8th Cir. 1997); *see also In re Greenburgh*, 151 B.R. 709, 716 (Bankr. E.D. Pa. 1993) (holding that "an omitted creditor, who receives no notice of any significant events in a Chapter 13 case, will not have the debt owed to that creditor discharged"); *In re Cash*, 51 B.R. 927, 929 (Bankr. N.D. Ala. 1985) (noting that "it would be a strained construction to view the plan as providing for a debt owed to a creditor, when the debtor omits the debt and creditor from the Chapter 13 statement"). Without notice, the debt to Norwest Bank was not provided for in the plan.

Constitutional implications arise when a creditor fails to receive adequate notice of the bankruptcy proceedings. *See Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("the discharge of a claim without reasonable notice ... is violative of the fifth amendment"); *In re Martinez*, 51 B.R. 944, 947 (Bankr. D. Colo. 1985) ("Inasmuch as ... Chapter 13 proceedings are subject to the Due Process Clause ... creditors must be notified of all vital

steps ... in order to afford them an opportunity to protect their interests.”). “Reasonable notice” is defined by the Supreme Court as “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950).

The debt was listed on the debtor’s bankruptcy schedules, but the creditor did not receive notice in time to file a timely proof of claim. *See, e.g., Matter of Faden*, 96 F.3d 792 (5th Cir. 1996) (notice mailed to parent company did not provide notice reasonably calculated under circumstances as required by due process); *In re Fauchier*, 71 B.R. 212 (BAP 9th Cir. 1987) (noting that if creditor proves that an address is incorrect, the debtor must justify the inaccuracy in preparing the schedules). The incorrect address on the schedules and mailing matrix was the mistake of the debtor and/or her attorney, and not in any way a result of the creditor’s actions. Thus, the debtor breached her duty to the bank to provide notice of the chapter 13 filing and claims bar date. *See In re Interstate Cigar Co.*, 150 B.R. 305, 309 (Bankr. E.D.N.Y. 1993).

In sum, any “notice” given to Norwest Bank was insufficient to satisfy due process and fundamental fairness. Other unsecured creditors received 100% of their filed claims, but the Bank had no similar opportunity. Therefore, the unsecured claim was not “provided for” by the plan and thus, not discharged under § 1328(a).

CONCLUSION

For the reasons discussed above, the lien on the vehicle survives the debtor's discharge, and the unsecured claim of Norwest Bank is not discharged.

Dated at Milwaukee, Wisconsin, July 31, 1998.

BY THE COURT

_____/s/_____
Honorable Margaret Dee McGarity
United States Bankruptcy Judge

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ORDER

For the reasons set forth in the court's memorandum opinion entered on this date, IT IS ORDERED, the lien on the debtor's 1995 Subaru Legacy is not avoided, and the unsecured claim of Norwest Bank is not discharged.

Dated at Milwaukee, Wisconsin, July 31, 1998.

BY THE COURT

_____/s/_____
Honorable Margaret Dee McGarity
United States Bankruptcy Judge

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